No. 05-

In the Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., AND INGERSOLL PICKUP INC.

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, AND COUNTY OF HERKIMER

Respondents.

On Petition for a Writ of Certiorari to United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

EVAN M. TAGER
Counsel of Record
MIRIAM R. NEMETZ
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioners

QUESTION PRESENTED

This Court held in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 386 (1994), that "a so-called flow control ordinance, which require[d] all solid waste to be processed at a designated transfer station before leaving the municipality," discriminated against interstate commerce and was invalid under the Commerce Clause because it "de-priv[ed] competitors, including out-of-state firms, of access to a local market." This case presents two questions, the first of which is the subject of an acknowledged circuit conflict:

1. Whether the virtually *per se* prohibition against "hoard[ing] solid waste" (*id*. at 392) recognized in *Carbone* is inapplicable when the "preferred processing facility" (*ibid*.) is owned by a public entity.

2. Whether a flow-control ordinance that requires delivery of all solid waste to a publicly owned local facility and thus prohibits its exportation imposes so "insubstantial" a burden on interstate commerce that the provision satisfies the Commerce Clause if it serves even a "minimal" local benefit.

RULE 29.6 STATEMENT

None of petitioners has a parent company and no publicly held company owns 10% or more of the stock of any of the petitioners.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners United Haulers Association, Inc., Transfer Systems, Inc., Bliss Enterprises, Inc., Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial Containers, Inc., and Ingersoll Pickup Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals are reported at 261 F.3d 245 ("*United Haulers I*") (App., *infra*, 22a-53a) and 438 F.3d 150 ("*United Haulers II*") (App., *infra*, 1a-21a). The decisions of the United States District Court for the Northern District of New York initially granting summary judgment in favor of plaintiffs (App., *infra*, 103a-117a) and, following remand, granting summary judgment in favor of defendants (App., *infra*, 54a-74a) are unreported. The Report and Recommendation of the United States Magistrate Judge (App., *infra*, 75a-102a) is unreported.

JURISDICTION

The judgment of the Second Circuit was entered on February 16, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 2(d) of Oneida County Board of Legislators Resolution No. 301 provides in relevant part:

> From the time of placement of solid waste and of recyclables at the roadside or other designated area approved by the County, or by the [Oneida-Herkimer Solid Waste Management] Authority pursuant to contract with the County, by a person for collection in accordance herewith, such solid waste and recycla-

> bles shall be delivered to the appropriate facility, entity or person responsible for disposition designated by the County or by the Authority pursuant to contract with the Authority.

Resolution No. 301 is set forth in full at App., *infra*, 118a-130a.

Section 2(c) of Herkimer County Local Law, Introductory No. 1 - 1990, provides in relevant part:

> After placement of garbage and of recyclable materials at the roadside or other designated area approved by the Legislature by a person for collection in accordance herewith, such garbage and recyclable material shall be delivered to the appropriate facility designated by the Legislature, or by the [Oneida-Herkimer Solid Waste Management] Authority pursuant to contract with the County.

Herkimer County Local Law, Introductory No. 1 - 1990, is set forth in full at App., *infra*, 131a-143a.

Article I, Section 8 of the U.S. Constitution provides in relevant part:

> The Congress shall have Power * * * To regulate Commerce * * * among the several States * * *.

STATEMENT

In *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), this Court held invalid under the dormant Commerce Clause a local ordinance that required all municipal solid waste within the town to be delivered to a transfer station that was built by a private company at the town's instigation and that was to be sold to the town for $1 after five years (the time it was expected to take the private entity to recoup its investment). The facts of the present case are virtually identical, except that the facilities designated to receive waste have been owned from day one by a public entity.

The court of appeals concluded that this distinction made a dispositive difference. It held that there can be no discrimination against interstate commerce when the favored business is publicly owned. Accordingly, it ruled that the flow-control laws were not subject to the "virtually *per se* rule of invalidity" applicable to discriminatory regulations (*City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)), but instead should be evaluated under the balancing test outlined in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), which held that an evenhanded regulation "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." Adopting an idiosyncratic understanding of the *Pike* test, the court of appeals then ruled that, because the costs of the flow-control laws "do[] not appear to fall differentially on the shoulders of any identifiable private or governmental entity" (App., *infra*, 16a), they imposed, at most, an "insubstantial" burden on interstate commerce (*id.* at 18a) that was easily outweighed by the ostensible benefits of the provisions.

These holdings threaten to render *Carbone* a dead letter wherever they are followed, because it is a simple matter for municipalities to structure (or restructure) transactions so that they have record title to the preferred facilities. Moreover, because the rulings conflict with decisions of other Circuits, they create uncertainty about the governing law that will interfere with the establishment of long-term arrangements for solid waste management. The question whether *Carbone* can be circumvented by public ownership of the preferred facilities thus is a recurring issue of great significance that warrants this Court's immediate attention.

The pertinent facts are simple and undisputed.

1. *Waste Collection in Oneida and Herkimer Counties.* Oneida and Herkimer Counties are sparsely populated counties in upstate New York. Historically, collection of trash has been a private function in these counties. Most local govern-

ments in Oneida and Herkimer Counties have never assumed responsibility for trash collection, and residents and businesses in most parts of the Counties must contract with private haulers for the removal of their waste. See 2d Cir. II J.A. 201.[1]

2. *The Imposition of Flow Control in Oneida and Herkimer Counties*. In September 1988, at the request of Oneida and Herkimer Counties, the New York State Legislature created the Oneida-Herkimer Solid Waste Management Authority ("the Authority"). App., *infra*, 57a-58a, 78a. In May and December 1989, the Authority entered into contracts with the Counties that required the Authority to purchase, operate, construct, and develop facilities for the processing and/or disposal of solid waste and recyclables generated in the Counties. For their part, the Counties agreed to ensure the delivery of all solid waste generated within their borders to facilities designated by the Authority. *Id*. at 58a, 79a.

In December 1989, Oneida County passed the required flow-control ordinance. The ordinance specifies that all solid waste and recyclables left at curbside must "be delivered to the appropriate facility, entity or person responsible for disposition designated by the County or by the Authority * * *." App., *infra*, 122a. Under the ordinance, any hauler handling waste generated in the County must have a valid permit issued by the County or the Authority (*id*. at 127a) and must deliver all construction debris, green waste, commercial and industrial waste, curbside recyclables, major appliances and tires, household hazardous waste, and infectious waste to designated facilities (*id*. at 122a, 124a-127a). Penalties for noncompliance include permit revocation, fines, and impris-

[1] Citations to the joint appendix filed in the Second Circuit in *United Haulers I* are designated "2d Cir. I J.A. __." Citations to the joint appendix filed in the Second Circuit in *United Haulers II* are designated "2d Cir. II J.A. __."

onment. *Id.* at 129a-130a. Herkimer County enacted an almost identical flow-control ordinance in February 1990. *Id.* at 131a-143a.

The Authority's Solid Waste Plan expressly contemplates "the development of a new long-term landfill site to accommodate the non recyclable portion of the waste stream" of the two Counties. 2d Cir. I J.A. 210. Pending development of its own landfill, however, the Authority needed to construct a local transfer station to store, transfer, and consolidate municipal solid waste. In June 1991, the Authority contracted with a private entity (Empire Sanitary Landfill of Taylor, Pennsylvania ("Empire")) for the design, construction, and operation of a transfer station in Utica, Oneida County, with subsequent disposal of the waste in Empire's landfill in Pennsylvania. App., *infra*, 27a-28a.[2] The contract required the Authority to divert all solid waste generated in the Counties (except recyclables and waste burned at the Authority's incinerator) to the Utica Transfer Station. 2d Cir. I J.A. 278, 290. Consistent with this agreement, the Authority's Rules and Regulations expressly require haulers to "deliver all acceptable solid waste and curbside collected recyclables generated within Oneida and Herkimer Counties to an Authority designated facility." App., *infra*, 28a; 2d Cir. I J.A. 45

When this action commenced in 1995, the Authority had designated five Authority-owned facilities for the processing and/or disposal of solid waste and recyclables generated in the Counties—an incinerator, a recycling center, an ash landfill, a green waste compost facility, and the Utica Transfer

[2] After the agreement with Empire expired in 1998, Waste Management of New York was selected to operate the transfer station. See Dkt. No. 148, Ex. 30. Under that contract, waste is transported to a landfill in Fairport, New York. See *id.* at 2.

Station. 2d Cir. I J.A. 457-458.[3] At that time, the monopolistic tipping fee at the transfer station was $86 per ton. App., *infra*, 107a; 2d Cir. I J.A. 455. As the Second Circuit recognized, "[e]ven the lowest tipping fee charged under the Counties' scheme is higher than the market value for the disposal services the Authority provides." *Id.* at 29a. Indeed, petitioners submitted evidence that, if permitted to do so, they could dispose of waste they collect in Oneida and Herkimer Counties at out-of-state facilities for as little as $26 per ton. 2d Cir. I J.A. 463, 464; see also *id*. at 429-430, 440-441 ($37 per ton to $55 per ton, including transportation); *id*. at 446-447 ($39.20 per ton, including transportation, for construction and demolition waste).

The flow control provisions direct more than 200,000 tons of solid waste per year to the County-designated facilities (2d Cir. II J.A. 202), generating revenues of more than $16 million for the Authority annually. See Dkt. No. 148, Ex. 29, at 3.

3. *The Complaint and the Initial Grant of Summary Judgment to Plaintiffs.* In April 1995, petitioners—six haulers that operated in Oneida and Herkimer Counties and a trade association—filed suit against the Authority and both Counties, alleging that the flow-control ordinances and the Authority's Rules and Regulations (collectively "the flow-control laws") violate the dormant Commerce Clause and that, in enforcing those laws, defendants deprived them of their constitutional rights in violation of 42 U.S.C. § 1983. On March 31, 2000, the district court granted plaintiffs' motion for summary judgment, concluding that the flow-control laws violated the dormant Commerce Clause.

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[3] Subsequently, the Authority designated two additional transfer stations, a stump disposal facility, and a household hazardous waste facility. See Dkt. No. 148, Ex. 29, at 5.

The district court found the unconstitutionality of the flow-control laws to be conclusively established by *Carbone*. It explained:

> These flow control laws are virtually indistinguishable from the laws examined and struck down in both *Carbone* and *SSC Corp. [v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995)]. * * * Courts have considered it almost a foregone conclusion that flow control laws violate the dormant commerce clause. * * * I accordingly conclude that the flow control laws in Oneida and Herkimer counties also violate the dormant commerce clause. The laws are discriminatory and *per se* invalid.

App., *infra*, 111a.

The court rejected defendants' contention that the challenged laws could be distinguished on the ground that they constitute "an inextricable part of a public waste management system for the local management of local waste," stating: "[T]he relevant case law consistently has extracted flow control laws as an improper element of general waste management schemes." *Id*. at 113a. And in response to defendants' argument that "they merely have restructured the private collection market and prohibited haulers from crossing over into the disposal market," the district court explained:

> [T]he flow control laws dictate where the haulers must bring local solid waste and at what price. Although defendants contend repeatedly that their system treats all parties alike with respect to disposal services, what they actually are doing is hoarding all local solid waste for the benefit of a preferred local disposal facility.

Id. at 113a-114a.

Having found the flow-control laws unconstitutional, the district court enjoined their enforcement and referred the

matter to the magistrate judge for determination of damages. *Id*. at 116a. Defendants appealed under 28 U.S.C. § 1292(a)(1).

4. *The First Appeal: United Haulers I.* The Second Circuit reversed. It concluded that "the district court erred in its Commerce Clause analysis by failing to recognize the distinction between private and public ownership of the favored facility" (App., *infra*, 39a) and held that "a municipal flow control law does not discriminate against out-of-state interests in violation of the Commerce Clause when it directs all waste to publicly owned facilities" (*id*. at 40a).

The court professed uncertainty as to whether this Court had accepted or rejected the "public-private distinction" in *Carbone*, stating that the majority's "language can fairly be described as elusive on that point." App., *infra*, 45a. But it found "precedential support" (*id.* at 50a) for such a distinction in the "local processing cases" upon which the Court relied in *Carbone*. Noting that in each case the favored businesses were private entities (*id.* at 45a), it reasoned that "[t]he common thread in the Court's dormant Commerce Clause jurisprudence * * * is that a local law discriminates against interstate commerce when it hoards local resources *in a manner* that favors local business, industry or investment over out-of-state competition" (*id*. at 47a (emphasis in original)). Relying on Justice Souter's dissent in *Carbone*, the court found there to be "sound reason for the Court's consistent, although often unstated, recognition of the distinction between public and private ownership of favored facilities," namely that "'[r]easons other than economic protectionism are * * * more likely to explain the design and effect of an ordinance that favors a public facility.'" *Ibid*. (quoting *Carbone*, 511 U.S. at 421 (Souter, J., dissenting)).

The Second Circuit recognized that other courts had struck down flow-control laws that favored publicly owned waste disposal facilities. App., *infra*, 49a-50a. It rejected

those cases, however, on the ground that "their holdings are not binding * * * and have little persuasive value given that the courts did not directly address the issue we decide today." *Id*. at 50a. As for the one case that did directly address the issue—*Southcentral Pennsylvania Waste Haulers Ass'n v. Bedford-Fulton-Huntington Solid Waste Authority*, 877 F. Supp. 935, 943 (M.D. Pa. 1994)—the court stated: "We * * * respectfully disagree with that decision for the reasons already discussed." *Ibid.*

The Second Circuit accordingly held that the district court erred in applying the strict level of scrutiny applicable to discriminatory legislation and instead should have applied the more lenient balancing test articulated in *Pike*. Although admitting that it was tempted to apply *Pike* itself (and presumably uphold the laws under it), the court satisfied itself with remanding the case to the district court with a very strong hint as to how to rule. See App., *infra*, 52a. The plaintiffs filed a petition for a writ of certiorari, which was denied. 534 U.S. 1082 (2002).

5. *District Court Proceedings on Remand.* Upon remand, the parties conducted discovery and then filed cross-motions for summary judgment. Dkt. Nos. 145, 152, 160. The magistrate judge recommended granting summary judgment in favor of defendants. App., *infra*, 101a-102a.

According to the Report and Recommendation of the magistrate judge, the flow-control laws do not impose ***any*** burden on interstate commerce that is cognizable under the *Pike* test. App., *infra*, 99a. In the view of the magistrate judge, "[t]he critical inquiry" under *Pike* "is whether an out-of-state business is treated less favorably than one similarly situated but within the state." *Id.* at 95a. Because the Counties' flow-control laws treat "a local private trash business * * * no differently * * * than one situated out of state" (*id.* at 96a), the magistrate judge concluded that there was no need to "proceed to the next step of balancing the burdens against

the putative benefits associated with the legislation." *Id.* at 99a.

Over plaintiffs' objections, the district court adopted the Report and Recommendation in its entirety. App., *infra*, 74a. The district court stated:

> [P]laintiffs here have not and cannot identify "**any** in-state commercial interest that is favored, directly or indirectly," by the waste management legislation enacted by defendants at the expense of out-of-state competitors. In the absence of evidence that the flow control laws impacted interstate commerce differently than intrastate commerce, there were no detrimental "effects" to weigh against the putative benefits of the legislation. Thus, it was not error, as plaintiffs contend, for the Magistrate Judge to decline to engage in the second part of the *Pike* balancing test by weighing non-existent burdens against obvious benefits.

Id. at 70a (emphasis in original; citations omitted); see also *id.* at 67a (there could be no violation of the Commerce Clause where there was "no distinction in the treatment of in-state versus out-of-state businesses"). The district court dismissed the complaint, and plaintiffs appealed.

6. *The Second Appeal: United Haulers II.* The Second Circuit affirmed. The court acknowledged that the Authority had "employed its regulatory powers to compel delivery of the waste generated within the Counties to its processing facility." App., *infra*, 12a. The court further recognized that the regulations "impose a type of export barrier on the Counties' unprocessed waste" in that they have "the direct and clearly intended effect of prohibiting articles of commerce generated within the Counties from crossing intrastate and interstate lines." *Id.* at 13a. Thus, the court conceded, the Counties' flow-control laws have "removed the waste generated in Oneida and Herkimer Counties from the national marketplace for waste processing services, a result which tradition-

ally has been thought to implicate a central purpose of the Commerce Clause." *Id.* at 15a.

The court was reluctant, however, to conclude that this trade barrier imposed "a differential burden triggering the need for *Pike* analysis." App., *infra*, at 16a. It explained: "[W]e think the courts have safeguarded the ability of commercial goods to cross state lines primarily as a means to protect the right of businesses to compete on equal footing wherever they choose to operate" *(id.* at 18a) and to enable "states and municipalities to exercise their police powers without undue interference from the laws of neighboring jurisdictions" (*ibid.*). Because the Counties' waste export ban did not, in its view, implicate these concerns, the court found it to be unclear whether the flow-control laws imposed ***any*** cognizable burden on interstate commerce.

The court ultimately declined to decide whether the flow-control laws impose a burden cognizable under *Pike*. App., *infra*, 16a. Instead, it held that any such burden was so "insubstantial" or "slight" (*id.* at 18a) that it would be outweighed by even a "minimal showing of local benefit" (*ibid.*). But the court made clear that, in assessing the "*degree* to which [the provisions] might burden interstate commerce" (*ibid.* (emphasis in original)), it found it "critical" (*ibid.*) that "the purported differential burden does not appear to fall differentially on the shoulders of any identifiable private or governmental entity" (*id.* at 15a-16a). Concluding that the benefits of the flow-control laws "easily clear" the low hurdle it had just established for them, the court held that the provisions satisfy the *Pike* test. *Id.* at 18a.

REASONS FOR GRANTING THE PETITION

In *Carbone*, this Court recognized that flow-control provisions erect overt barriers to interstate trade that implicate the core purposes of the dormant Commerce Clause, and, accordingly, ruled that such measures are subject to the most stringent level of scrutiny. The Second Circuit now has held

that, when public entities hold title to the designated facilities, flow-control provisions are not subject to virtually *per se* invalidation but instead impose such an "insubstantial" burden on interstate commerce that they will be upheld upon even a "minimal" showing of local benefit.

The Second Circuit's ruling that there is a "public facilities" exception to *Carbone* is flatly at odds with a recent decision of the Sixth Circuit, which expressly rejected the reasoning of the decision below and invalidated flow-control regulations exactly like those at issue here. The pointed disagreement between these two courts clearly will not be resolved without this Court's intervention. Unless this Court grants certiorari, moreover, the existing circuit conflict will spread as other courts have the opportunity to address both the flow-control provisions that have already been adopted in the decision's wake and the additional provisions that will surely be adopted if the decision becomes final.

Unless other courts are quick to reject the Second Circuit's position—thus confining this form of flow control to one region—the eagerness of many localities to hoard demand for waste processing services will lead to the "pervasive flow control" that Justice O'Connor feared would "severely impair[]" the interstate market in waste services. At the same time, the constitutionality of these provisions will remain in doubt, threatening to upend the arrangements and expectations of both public and private entities engaged in waste management activities. The prospect that this form of flow control will spread is unfortunate, because the decision below is inconsistent with *Carbone* itself and with other important strands of this Court's dormant Commerce Clause jurisprudence.

The lower court's ruling that the flow-control laws satisfy the *Pike* test is also problematic. Having decided that the flow-control laws should not be invalidated as discriminatory, the court of appeals purported to apply the balancing

analysis applicable to even-handed regulations that incidentally burden interstate commerce. But the court put a heavy thumb on the scale when it evaluated whether the burdens associated with respondents' flow-control laws outweigh the putative local benefits. Although the court acknowledged that the flow-control laws erect a trade barrier that blocks exportation of demand for waste processing services, it deemed that burden "insubstantial" (App., *infra*, 18a) because it "does not appear to fall differentially on the shoulders of any identifiable private or governmental entity" (*id.* at 15a-16a).

The Second Circuit's ruling that *Pike* applies meaningfully only if there is a "differential" burden on out-of-state entities has been adopted by the Fifth Circuit but conflicts with decisions of other circuits and this Court. Because no regulation will ever be invalidated under the *Pike* test where this rule is followed, the decision below merits review.

I. THE SECOND CIRCUIT'S PUBLIC-PRIVATE DISTINCTION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND UNJUSTIFIABLY LIMITS *CARBONE*

A. The Second Circuit's Approach Has Been Rejected By The Sixth Circuit And Is In Tension With Decisions Of Several Other Circuits.

A recent decision of the Sixth Circuit squarely conflicts with the decision below. In *National Solid Waste Management Ass'n v. Daviess County*, 434 F.3d 898 (6th Cir. 2006), the court assessed the constitutionality of a flow-control provision requiring all waste generated within Daviess County, Kentucky, to be deposited at facilities owned by the County. Applying *Carbone*, the court found there to be "little doubt" that the provision "discriminates against interstate commerce." *Id.* at 905. "By forcing [plaintiffs] to use Defendant's disposal and transfer facilities," the court held, "the Ordinance would prohibit these members from using other in-

state and out-of-state facilities" and hence was "facially discriminatory against out-of-state interests." *Ibid.*

The Sixth Circuit expressly "decline[d] to adopt" the "private-public ownership distinction" recognized by the Second Circuit in *United Haulers I*. *Id.* at 909. It noted that it had "already found dormant Commerce Clause violations in cases where the facility was publicly owned." *Id.* at 910.[4] Moreover, it "respectfully disagreed" with the Second Circuit's view that the public-private distinction could be squared with *Carbone.* The court pointed out that this Court's focus in *Carbone* "was on the harm to out-of-state businesses and the local market, as opposed to the benefit conferred to the local provider." *Id.* at 910-911. As the court observed, "this harm would occur regardless of who owned the benefited facility." *Ibid.* The Sixth Circuit further noted that Clarkstown's transfer station was "quite clearly owned in fact by the municipality" (*id.* at 912)—permitting the inference that this Court, in striking down Clarkstown's flow-control ordinance, had "implicitly rejected the public-private distinction." *Ibid.*

Like the Sixth Circuit in cases preceding *Daviess*, the Third and Eighth Circuits have held that flow-control provisions favoring publicly owned facilities are discriminatory. See *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 794, 809-810 (3d Cir. 1995) (two of the three designated facilities in one of two consolidated cases were publicly owned; case remanded for determination of whether process

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[4] See *Huish Detergents, Inc. v. Warren County*, 214 F.3d 707, 715-716 (6th Cir. 2000) (ordinance requiring all waste to be processed at county-owned transfer station discriminated against interstate commerce); *Waste Mgmt., Inc. v. Metropolitan Gov't*, 130 F.3d 731, 733, 736 (6th Cir. 1997) (striking down flow-control ordinance that required all residential waste to be disposed of at publicly owned facility).

of designating facilities was discriminatory); *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701 (3d Cir. 1995) (holding that New Jersey regulations requiring flow control discriminated against interstate commerce, and making no distinction based on whether preferred facility is publicly or privately owned); *Waste Sys. Corp. v. County of Martin*, 985 F.2d 1381, 1383 (8th Cir. 1993) (striking down ordinance that required all waste to be delivered to facility owned by waste district); see also *Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth.*, 814 F. Supp. 1566 (M.D. Ala. 1993) (striking down flow-control ordinance that required all waste to be disposed of at publicly owned facility), aff'd per curiam, 29 F.3d 641 (11th Cir. 1994); *Heier's Trucking, Inc. v. Waupaca County*, 569 N.W.2d 352 (Wis. Ct. App. 1997) (affirming order striking down ordinance that required recyclables to be delivered to County-owned processing facility). Although these decisions "d[o] not directly address the public-private ownership issue raised by *United Haulers*," they carry the "necessary implication * * * that public ownership did not change the dormant Commerce Clause inquiry." *Daviess*, 434 F.3d at 910.[5]

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[5] A federal district court in Mississippi also held that a flow-control ordinance favoring a publicly owned facility was unconstitutional after expressly rejecting the reasoning of *United Haulers I*. See *Nat'l Solid Waste Mgmt. Ass'n. v. Pine Belt Solid Waste Mgmt. Auth.*, 261 F. Supp. 2d 644, 649-650 (S.D. Miss. 2003), rev'd in part, dismissed in part, 389 F.3d 491 (5th Cir. 2004). The Fifth Circuit held that the plaintiffs lacked standing to claim that the ordinance was discriminatory, thus leaving for another day the question whether the ordinance is invalid under *Carbone*. See 389 F.3d at 500. In contrast, a district court in Florida relied on *United Haulers I* as grounds for upholding a flow-control measure favoring public facilities. See *East Coast Recycling, Inc. v. City of Port St. Lucie*, 234 F. Supp. 2d 1259, 1267 (S.D. Fla. 2002).

B. The Decision Below Is Inconsistent With This Court's Commerce Clause Decisions.

1. The decision below conflicts with *Carbone.*

In *Carbone*, this Court rejected the notion that flow control is permissible when the designated facility is publicly owned. The decision below therefore conflicts with *Carbone*.

1. *Carbone* involved an ordinance that required that all solid waste within the defendant town's borders be brought for processing to a particular transfer station designated by the town. The transfer station was constructed by a private entity, which, by agreement with the town, was to operate the facility for five years, whereupon the town was to purchase the facility for $1. 511 U.S. at 387. The town guaranteed that the facility would receive a minimum of 120,000 tons of waste annually and authorized the contractor to charge a tipping fee of $81 per ton, a rate that exceeded the market rate. *Ibid*. "The object of this arrangement was to amortize the cost of the transfer station: The town would finance its new facility with the income generated by the tipping fees." *Ibid*.

This Court held that, because the town's flow-control ordinance "attains this goal by depriving competitors, including out-of-state firms, of access to a local market, * * * the flow control ordinance violates the Commerce Clause." *Id*. at 386. It explained that, in this context, "the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it." *Id*. at 391. "With respect to this stream of commerce, the flow control ordinance discriminates, for it allows only the favored operator to process waste that is within the limits of the town." *Ibid*.

The Court saw the challenged flow-control ordinance as "just one more instance of local processing requirements that we long have held invalid." *Ibid*. It stated:

> The essential vice in laws of this sort is that they bar the import of the processing service. * * * The flow

> control ordinance has the same design and effect. It hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility. * * * The flow control ordinance at issue here squelches competition in the waste-processing service altogether, leaving no room for investment from outside.

Id. at 392. Having found the ordinance to discriminate against interstate commerce, the Court determined that flow control was not the least discriminatory means of achieving any legitimate local interest (*id*. at 392-394) and accordingly held that the ordinance violated the Commerce Clause.

Justice O'Connor concurred in the judgment. In her view, the flow-control ordinance did not discriminate against interstate commerce because "the garbage sorting monopoly is achieved at the expense of all competitors, be they local or nonlocal." *Id*. at 404. She nevertheless concluded that the ordinance failed the *Pike* balancing test. She explained that, in ascertaining the burden on commerce, it is necessary to consider "what effect would arise if not one, but many or every, jurisdiction adopted similar legislation." *Id*. at 406 (internal quotation marks and brackets omitted). She observed that "pervasive flow control would result in the type of balkanization the [Commerce] Clause is primarily intended to prevent." *Ibid*. She therefore concluded that "the burden [the challenged ordinance] imposes on interstate commerce is excessive in relation to [the town's] interest in ensuring a fixed supply of waste to supply its project." *Id*. at 407.

Justice Souter (joined by the Chief Justice and Justice Blackmun) dissented. The dissenters believed that the majority had "underestimate[d] or overlook[ed]" "both analytical and practical differences between this and the earlier [local] processing cases" that "should prevent this case from being decided the same way." *Id*. at 416. Specifically, they argued, ***"the one proprietor * * * favored [by the challenged flow control ordinance] is essentially an agent of the mu-***

nicipal government * * *. Any discrimination worked by [the ordinance] thus fails to produce the sort of entrepreneurial favoritism we have previously defined and condemned as protectionist." *Ibid*. (emphasis added). The dissenters further explained:

> While our previous local processing cases have barred discrimination in markets served by private companies, ***Clarkstown's transfer station is essentially a municipal facility, built and operated under a contract with the municipality and soon to revert entirely to municipal ownership.*** * * * The majority ignores this distinction between public and private enterprise, equating [the ordinance's] "hoard[ing]" of solid waste for the municipal transfer station with the design and effect of ordinances that restrict access to local markets for the benefit of local private firms. * * * Reasons other than economic protectionism are * * * more likely to explain the design and effect of an ordinance that favors a public facility. * * * ***An ordinance that favors a municipal facility, in any event, is one that favors the public sector***, and if we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position, then surely this Court's dormant Commerce Clause jurisprudence must itself see that favoring state-sponsored facilities differs from discriminating among private economic actors, and is much less likely to be protectionist.

Id. at 419-421 (emphasis added; internal quotation marks, citations, and footnote omitted). The dissenters concluded that the ordinance should be upheld because it "conveys a privilege ***on the municipal government alone***, the only market participant that bears responsibility for ensuring that ade-

quate trash processing services continue to be available to Clarkstown residents." *Id*. at 430 (emphasis added).

2. The Second Circuit's assertion that this Court did not already consider and reject the public/private distinction in *Carbone* is untenable. That distinction was the centerpiece of a vigorously argued dissent. Obviously aware of this central contention of the dissent, the Court nonetheless stated that, "having elected to use the open market to earn revenues for ***its*** project, the town may not employ discriminatory regulation to give that project an advantage over rival businesses from out of State." *Id*. at 394 (emphasis added). This Court thus evidently (and, quite correctly, under the circumstances) regarded the fact of ownership as a formality: as the dissent itself contended, for all practical purposes, the transfer station was "essentially a municipal facility" (*id*. at 419), which was to be formally transferred to the town the following year. If the Court had intended its holding to preclude the flow-control ordinance only for the year until the town was to receive record title to the facility, it surely would have said so.

Moreover, the core reasoning of the majority opinion applies fully regardless of the identity of the owner of the preferred facility. As the Court observed:

> The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.

Id. at 390. Local processing laws run afoul of this "central rationale" because "they bar the import of the processing service." *Id*. at 392. Specifically, the challenged flow-control ordinance impermissibly discriminated because "it allow[ed] only the favored operator to process waste that [was] within the limits of the town." *Id*. at 391.

Whether the owner of the preferred facility is a private business or a public entity, a flow-control law, by "allow[ing] only the favored operator to process waste that is within the limits of the town," constitutes "economic protectionism" of that preferred local facility and threatens to result in "retaliatory measures." See *id.*; see also *Daviess*, 434 F.3d at 911 (concerns about "aiding local enterprise at the expense of rival businesses * * * remain regardless of whether the municipality owns the favored business"). Indeed, as discussed further below, if the Second Circuit's public-private distinction is left standing, it is predictable that municipalities around the country will take advantage of the ruling to establish (or revive) their own flow-control laws, with the result being that interstate commerce in the service of waste processing will be dramatically impeded.

2. The decision below is irreconcilable with this Court's renunciation of the use of formalistic distinctions in resolving Commerce Clause challenges.

Under the Second Circuit's decision, the validity of flow control turns almost entirely on the identity of the record title owner of the preferred facility. If legal title to a facility is in the name of a private entity, a law requiring that waste be delivered to that facility is subject to the Court's virtually *per se* rule of invalidity. If legal title to a facility is in the name of a public entity—even if constructed and operated by a private entity—the very same law would be evaluated under the more deferential *Pike* test. The effect of the law on interstate commerce is precisely the same, yet the result couldn't be more different.

The Second Circuit's decision, in short, exalts form over substance. In so doing, it deviates markedly from this Court's modern Commerce Clause jurisprudence, which has steadfastly "eschewed formalism" in favor of "a sensitive, case-by-case analysis of purposes and effects." *West Lynn Cream-*

ery, Inc. v. Healy, 512 U.S. 186, 201 (1994). See also *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 373 (1991) ("[w]e seek to avoid formalism and to rely upon a consistent and rational method of inquiry") (internal quotation marks omitted). For example, during the middle part of the twentieth century, the Court drew a distinction between taxes on the privilege of engaging in interstate commerce and taxes on the privilege of using a state's highways, holding the former unconstitutional and the latter permissible. Later, however, the Court renounced this distinction as "a triumph of formalism over substance" (*Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 281 (1977)) that "allowed the validity of statutes to hinge on 'legal terminology,' 'draftsmanship and phraseology'" (*Quill Corp. v. North Dakota*, 504 U.S. 298, 310 (1992) (quoting *Complete Auto*, 430 U.S. at 281)).

The public-private distinction embraced by the Second Circuit is a throwback to the formalism that this Court has renounced. Review is warranted to bring the Second Circuit back in line with what the Court has determined to be the appropriate focus: "whether the [challenged law] produces a forbidden effect" (*Complete Auto*, 430 U.S. at 288).

3. The decision below is in tension with this Court's "market participant" cases.

This Court's "market participant" doctrine provides that the strictures of the dormant Commerce Clause do not apply when a state or local government "is acting as a market participant, rather than as a market regulator." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984) (plurality op.). This doctrine "is not *carte blanche* to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity." *Id.* at 97. To the contrary, the doctrine "allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The

State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market." *Ibid*.[6]

Here, the market-participant doctrine plainly does not immunize respondents' laws requiring that waste collected by private haulers within the boundaries of Oneida and Herkimer Counties be brought to the Authority's facilities for processing and/or disposal. Indeed, the Second Circuit so recognized. See App., *infra*, 36a. Yet in holding that respondents' ownership of the favored facilities renders the flow-control laws non-discriminatory, the Second Circuit has given state and local governments the very *carte blanche* this Court has denied them under the market-participant doctrine. If the Second Circuit's decision is allowed to stand, state and local governments could be emboldened to enter any number of markets and then use their regulatory powers to favor themselves over their private interstate competitors.

Although such self-dealing would not entirely be immunized from scrutiny under the dormant Commerce Clause, the notion that it need only survive the *Pike* balancing test is in significant tension with the Court's strongly expressed concern that the market-participant doctrine not "swallow[] up the rule that States may not impose substantial burdens on

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[6] It merits mention that, in the case in which the Court first recognized the market-participant doctrine, the Court found it significant that "the commerce affected by the [challenged law] appears to have been created, in whole or in substantial part, by the [overall program of which the challenged law was a part]." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809 n.18 (1976). See also *id.* at 815-816 (Stevens, J., concurring). The present case presents the flip side of this situation: commerce in processing services and recyclables pre-dated respondents' entry into the waste processing business and, by fiat, respondents have arrogated to themselves all of that pre-existing commerce.

interstate commerce even if they act with the permissible state purpose of fostering local industry." *South-Central Timber*, 467 U.S. at 98 (plurality op.).

C. The Issue Presented Is Important And Should Be Resolved Now.

The circuit conflict regarding the constitutionality of flow-control provisions that favor public facilities should be resolved without delay. Since *United Haulers I*, it has been an open question whether other courts would adopt the Second Circuit's reasoning. The Sixth Circuit's decision to reject the Second Circuit's approach has now made it clear that the courts will be divided on this issue until this Court takes up the matter. The Court should do so without delay because having a stable and uniform rule regarding the legality of flow control is essential.

Since *Carbone*, many flow-control provisions have been held unconstitutional.[7] States and local governments across the country, however, nevertheless remain eager to adopt flow control. See Brief Amicus Curiae of the Bristol Resource Recovery Operating Committee, *et al.*, filed in *United Haulers II*, at 2 (group of local governmental entities contend that "flow control is integral to fulfilling" their responsibili-

[7] See, *e.g.*, *U & I Sanitation v. City of Columbus*, 205 F.3d 1063 (8th Cir. 2000); *Ben Oehrleins & Sons & Daughter v. Hennepin County*, 115 F.3d 1372, 1384-1385 (8th Cir. 1997); *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995); *Coastal Carting Ltd. v. Broward County*, 75 F. Supp. 2d 1350 (S.D. Fla. 1999); *Zenith/Kremer Waste Sys., Inc. v. Western Lake Superior Sanitary Dist.*, 1996 WL 612465, at *1-*3, *10 n.13 (D. Minn. July 2, 1996); *Southcentral Pa. Waste Haulers Ass'n*, 877 F. Supp. at 943; *Empire Sanitary Landfill, Inc. v. Commonwealth of Pennsylvania*, 684 A.2d 1047, 1056 (Pa. 1996).

ties for solid waste management).[8] If the decision below stands, therefore, it seems clear that many local governments outside the Sixth Circuit that own (or can assume ownership of) waste processing facilities will impose flow control in the hope that the Second Circuit's approach ultimately will become the law of the land. Indeed, some have already done so. See *id.* at Appendix A (several governmental entities appearing as *amici curiae* in *United Haulers II* state that they have adopted flow control since *United Haulers I* was decided); see also *Pine Belt*, 261 F. Supp. 2d at 649-650 (assessing constitutionality of Mississippi flow-control ordinance adopted following *United Haulers I*). In addition, the local governments that have, in an effort to satisfy *Carbone*, exempted from their flow-control laws waste destined for out-of-state disposal may be emboldened to eliminate the exemptions.[9]

Although ordinances directing waste to publicly owned facilities undoubtedly would become commonplace if this Court denies certiorari, it would remain unsettled whether such arrangements are constitutional. Until this Court addresses the matter, each Circuit will, in turn, have to decide

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[8] As of 1995, at least 39 states and the District of Columbia had authorized localities to impose flow control. See United States Environmental Protection Agency, Report to Congress: *Flow Controls and Municipal Solid Waste* II-1 to II-5 (Mar. 1995)

[9] These provisions generally have been upheld. See, *e.g.*, *IESI AR Corp. v. Northwest Arkansas Regional Solid Waste Mgmt. Dist.*, 433 F.3d 600 (8th Cir. 2006); *On the Green Apartments L.L.C. v. City of Tacoma*, 241 F.3d 1235 (9th Cir. 2001); *Ben Oehrleins*, 115 F.3d at 1385-1387; *Vince Refuse Serv., Inc. v. Clark County Solid Waste Mgmt. Dist.*, 1995 WL 253121 (S.D. Ohio Mar. 7, 1995). But see *Randy's Sanitation, Inc. v. Wright County*, 65 F. Supp. 2d 1017, 1023 (D. Minn. 1999) (intrastate flow-control ordinance unconstitutionally burdened interstate commerce).

whether or not to follow the Second Circuit or the Sixth Circuit, and each decision will only deepen the existing circuit split.[10] In the Second Circuit and in any other jurisdiction that embraces the public-private distinction, public authorities would have no certainty that this Court will not ultimately reject that distinction, putting their entire waste-management schemes in jeopardy. Conversely, in Circuits that reject the public-private distinction and strike down flow-control ordinances under *Carbone*, private businesses would continue to labor under a cloud of uncertainty as to whether, in the end, their contracts will be undermined as a result of a future decision of this Court embracing that distinction. To eliminate this uncertainty and to avoid the unnecessary disruption of public and private expectations, the question presented here should be resolved now.

II. THE SECOND CIRCUIT'S CONSTRUCTION OF *PIKE* CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND OF THIS COURT

A. The Holding That Flow Control To A Government-Owned Facility Imposes Only An "Insubstantial" Burden On Interstate Commerce Conflicts With Decisions Of Other Circuits.

The Second Circuit has repeatedly ruled that a nondiscriminatory regulation need not be put through the *Pike* balancing test unless the putative burden on interstate commerce "is ***qualitatively or quantitatively different from that imposed on intrastate commerce.***" *Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205, 217 (2d Cir. 2004) (citations omitted) (emphasis added). This reading of the *Pike* test was imple-

[10] As noted above, this issue was presented to the Fifth Circuit in *Pine Belt*, but it concluded that the plaintiffs lacked standing to contend that the flow-control provision was discriminatory. See note 5, *supra*.

mented here: although the court ostensibly declined to decide whether respondents' flow-control laws impose a cognizable burden on interstate commerce, it held that any such burden is "insubstantial" or "slight" because it does not fall differentially on any particular out-of-state entity.

The Fifth Circuit has applied the Second Circuit's construction of *Pike* to facts nearly identical to those here. In *National Solid Waste Management Ass'n v. Pine Belt Regional Solid Waste Management Authority*, 389 F.3d 491 (5th Cir. 2004), the court evaluated the constitutionality of flow-control ordinances requiring delivery of waste to facilities owned by the regional waste management authority. The court held that the plaintiffs lacked standing to pursue their claim that the ordinances were facially discriminatory (*id.* at 500), but reached the merits of their claim that the regulation excessively burdened interstate commerce (*id.* at 501). The court held that, because the ordinances did not have a "disparate impact on interstate commerce," they "ha[d] not imposed any incidental burdens on interstate commerce" and therefore passed the *Pike* test. *Id.* at 502 (quoting *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys. Inc.*, 155 F.3d 59, 75 (2d Cir. 1998)).

In contrast to the Second and Fifth Circuits, the Fourth, Eighth, Sixth, and Tenth Circuits have applied *Pike* to invalidate evenhanded state laws that impose burdens on interstate commerce that exceed their benefits—even when those laws do ***not*** impose greater burdens on out-of-state interests.

The most analogous case is *U & I Sanitation v. City of Columbus*, 205 F.3d 1063 (8th Cir. 2000). There, the Eighth Circuit addressed a municipal flow-control ordinance that was otherwise very similar to the respondents' flow-control laws, but did not apply to waste "destined for out-of-state disposal." *Id.* at 1065. For this reason, the court of appeals concluded that the ordinance did "***not*** overtly discriminate against interstate commerce on its face, in its purpose, or

through its effects." *Id*. at 1069 (emphasis added). Although there was no suggestion of any "disparate impact" on out-of-state interests, the Eighth Circuit engaged in the balancing analysis mandated by *Pike* and invalidated the challenged ordinance because "the local interests that it serves do not justify the burden that it imposes upon interstate commerce." *Ibid*. The court found that the ordinance did little to advance local interests and that the municipality had alternative means to accomplish its purposes that would impose less of a burden on interstate commerce. See *id*. at 1069-1072. Particularly given the possibility that other localities might adopt similar flow-control restrictions, the court explained that "the ordinance's interference with interstate commerce is 'clearly excessive' in relation to [its] local benefits." *Id*. at 1072; see also *R & M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731, 735, 736 (8th Cir. 2002) (invalidating challenged law under *Pike*, despite absence of evidence that the law had a "discriminatory effect" or "places out-of-state distributors at a competitive disadvantage," because "there is clearly a burden [on interstate commerce] substantial enough to outweigh the *de minimis* putative local benefit of the law").

The Fourth, Sixth, and Tenth Circuits have used a similar analysis in striking down (or reversing district court judgments upholding) state laws even though those laws did not impose a competitive disadvantage on out-of-state commercial interests. See *PSINet, Inc. v. Chapman*, 362 F.3d 227, 240 (4th Cir. 2004) (even if challenged regulation of Internet were construed to reach only in-state web sites or sites having substantial contact with the regulating state, regulation is invalid under *Pike* "because the burdens it imposes on interstate commerce are excessive in relation to the local benefits it confers") (alternative holding);[11] *McNeilus Truck & Mfg.*,

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[11] See also *Chambers Med. Techs., Inc. v. Bryant*, 52 F.3d 1252, 1261 (4th Cir. 1995) (applying *Pike* test where challenged law

Inc. v. Ohio, 226 F.3d 429, 444 (6th Cir. 2000) (even if statute is deemed to be nondiscriminatory, "the lack of any significant local benefit that does not already exist means that the State * * * could not demonstrate that the benefits of the statute outweigh even an incidental burden on interstate commerce posed by the [challenged law]") (alternative holding); *Blue Circle Cement, Inc. v. Board of County Comm'rs*, 27 F.3d 1499, 1511-1512 (10th Cir. 1994) (agreeing with district court that challenged ordinance "regulates evenhandedly" and "confers no advantages on in-state entities," but reversing and remanding because lower court failed to apply *Pike* test); *A.C.L.U. v. Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999) (striking down non-discriminatory law under *Pike* balancing test) (alternative holding).

The Tenth Circuit, moreover, has ***expressly*** rejected the notion that "the only inquiry is whether the statute imposes a different burden on interstate commerce." *Dorrance v. McCarthy*, 957 F.2d 761, 764 (10th Cir. 1992). As it explained, that "argument is not only circular, but it completely misstates the *Pike* analysis. By definition, a statute that regulates evenhandedly does not impose a different burden on interstate commerce." *Ibid.*

B. The Decision Below Misconstrues The *Pike* Test.

This Court never has indicated that a "differential" burden on out-of-state entities is any part of the *Pike* test. Quite the contrary: the *Pike* balancing of benefit and burden comes into play only when a state rule "regulates ***even-handedly***" and thus has "only incidental" effects on interstate commerce. *Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982) (quoting *Pike*, 397 U.S, at 142) (emphasis added); see also *Brown-Forman Distillers Corp. v. New York State Liquor*

"regulate[d] evenhandedly and ha[d] only incidental effects on interstate commerce").

Auth., 476 U.S. 573, 579 (1986). When a state law ***does*** have a differential impact on in-state and out-of-state entities, it is deemed to have the "practical effect of * * * discriminating" against interstate commerce, and it is subject, ***not*** to the *Pike* test, but to the rule of virtual *per se* invalidity that governs discriminatory state regulations. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 350-351 (1977); see, *e.g.*, *Am. Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 281 (1987) (state tax that has a discriminatory effect will be struck down even if it does "not allocate tax burdens between insiders and outsiders in a manner that is facially discriminatory").

Perhaps the clearest statement of this principle can be found in Justice O'Connor's concurring opinion in *Carbone*. Justice O'Connor concluded that Clarkstown's flow-control ordinance did not discriminate against interstate commerce because it "does not give more favorable treatment to local interests as a group as compared to out-of-state or out-of town economic interests." 511 U.S. at 404. In her view, however, this finding of non-discrimination "[did] not * * * end the Commerce Clause inquiry." *Id.* at 405. As she pointed out, "[e]ven a nondiscriminatory regulation may nonetheless impose an excessive burden on interstate trade when considered in relation to the local benefits conferred." *Ibid.* Undertaking the balancing required under *Pike*, Justice O'Connor concluded that Clarkstown's flow-control ordinance was invalid because the burdens it imposed were excessive in relation to the local interests served by the ordinance. See *ibid.*

Justice O'Connor expressly rejected any notion that the flow-control law satisfied the Commerce Clause merely because it applied equally to in-state and out-of-state businesses, observing that this Court has "long recognized that 'a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to * * * the people of the State enacting such statute.'" *Ibid.* (quoting *Brimmer v. Rebman*, 138 U.S. 78, 83 (1891)).

Even through evenhanded regulation, "'a State consistently with the Commerce Clause cannot put a barrier around its borders to bar out trade from other States and thus bring to naught the great constitutional purpose of the fathers in giving to Congress the power 'To regulate Commerce * * * among the several States.'" *American Trucking Assn's, Inc.*, 483 U.S. at 281 n.12 (quoting *Nippert v. City of Richmond*, 327 U.S. 416, 425-426 (1946)); see also, *e.g.*, *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 445 (1978) (invalidating truck-length regulation because it "impose[s] a substantial burden on the interstate movement of goods"); *Bibb v. Navaho Freight Lines, Inc.*, 359 U.S. 520, 529 (1959) ("state regulations that run afoul of the policy of free trade reflected in the Commerce Clause must * * * bow"); *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 770 (1945) (striking down train-length restriction that "materially restrict[ed] the free flow of commerce across state lines").

Respondents' flow-control laws create just such a "barrier * * * to bar out trade from other States" (*American Trucking Ass'ns, Inc*, 483 U.S. at 281 n.12), yet the court of appeals found the burden on interstate commerce to be "slight" (App., *infra*, 18a). It also failed to consider the impact on the interstate market if other localities were to adopt similar provisions. As Justice O'Connor observed in her concurring opinion in *Carbone*, if that occurs, "the free movement of solid waste in the stream of commerce will be severely impaired. Indeed, pervasive flow control would result in the type of balkanization the [Commerce] Clause is primarily intended to prevent." 511 U.S. at 406. For this reason as well, review is both warranted and necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

EVAN M. TAGER
Counsel of Record
MIRIAM R. NEMETZ
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

APRIL 2006

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2005

(Argued: December 14, 2005 Decided: February 16, 2006)

Docket No. 05-2024-cv

UNITED HAULERS ASSOCIATION, INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., AND INGERSOLL PICKUP, INC.,

Plaintiffs-Appellants,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA AND COUNTY OF HERKIMER, NEW YORK,

Defendants-Appellees.

Before: CALABRESI, KATZMANN, and WESLEY, *Circuit Judges*.

Appeal from a decision of the United States District Court for the Northern District of New York (Norman A. Mordue, *Judge*) finding that the municipal flow control ordinances enacted and implemented by Defendants-Appellees do not impose a differential burden on interstate commerce. The district court therefore found that the ordinances do not violate the dormant Commerce Clause and granted the Defendants-Appellees' cross-motion for summary judgment. We conclude that even if we were to recognize that the ordinances burden interstate commerce, we would find that the

burden imposed is not clearly excessive in relation to the local benefits conferred by the ordinances. We therefore decline to resolve the former question. **AFFIRMED**.

APPEARING FOR PLAINTIFFS-APPELLANTS: MIRIAM R. NEMETZ (Evan M. Tager, *on the brief*), Mayer, Brown, Rowe & Maw LLP, Washington, D.C.

APPEARING FOR DEFENDANTS-APPELLEES: MICHAEL J. CAHILL, Germano & Cahill, P.C., Holbrook, N.Y. (Thomas E. Kelly, Horigan, Horigan, Lombardo & Kelly, P.C., Amsterdam, N.Y.; Richard A. Frye, Frye, Foley & Carbone, Utica, N.Y.; Judy Drabicki, Dexter, N.Y., *on the brief*)

APPEARING FOR AMICUS CURIAE STATE OF NEW YORK: CAITLIN J. HALLIGAN, Solicitor General of the State of New York (Daniel Smirlock, Deputy Solicitor General; Julie M. Loughran, Assistant Solicitor General; and John Sipos, Assistant Attorney General, *on the brief*), for Eliot Spitzer, Attorney General of the State of New York, New York, N.Y.

SUBMITTING BRIEF FOR AMICI CURIAE BRISTOL RESOURCE RECOVERY FACILITY OPERATING COMMITTEE; CAPE MAY COUNTY MUNICIPAL UTILITIES AUTHORITY; COUNTY OF ALLEGANY, NEW YORK; DAVIESS COUNTY, KENTUCKY; COUNTY OF MADISON, NEW YORK; FEDERATION OF NEW YORK STATE SOLID WASTE ASSOCIATIONS; MARION COUNTY, OREGON; MID-MAINE WASTE MANAGEMENT CORPORATION; MONTGOMERY COUNTY, OHIO; MONTGOMERY-OTSEGO-SCHOHARIE SOLID WASTE MANAGEMENT AUTHORITY; NEW YORK CHAPTER OF THE SOLID WASTE ASSOCIATION OF NORTH AMERICA; NEW YORK STATE ASSOCIATION FOR REDUCTION, RE-

USE AND RECYCLING; NEW YORK STATE ASSOCIATION FOR SOLID WASTE MANAGEMENT; PINE BELT REGIONAL SOLID WASTE MANAGEMENT AUTHORITY; REGIONAL WASTE SYSTEMS, INC.; SNOHOMISH COUNTY, WASHINGTON; SOLID WASTE AUTHORITY OF CENTRAL OHIO; SOLID WASTE DISPOSAL AUTHORITY OF THE CITY OF HUNTSVILLE, ALABAMA and the YORK COUNTY SOLID WASTE AND REFUSE AUTHORITY: SCOTT M. DUBOFF, Wright & Talisman, P.C., Washington, D.C. (Robert Michalik, Michalik Bauer Silvia & Ciccarillo, New Britain, CT; Daniel Guiney, County Attorney of Allegany County, Belmont, NY; Allen Holbrook, Robert Kirtley, Bryan R. Reynolds, Sullivan Mountjoy Stainback & Miller, Owensboro, KY; Scott Norris, Assistant Legal Counsel, Marion County Office of Legal Counsel, Salem, OR; Nicholas Nazdo, Jensen Baird Gardner & Henry, Portland, ME; Mathias H. Heck, Jr., Montgomery County Prosecuting Attorney, Dayton, OH; Christine M. Chale, Rappaport, Meyers, Whitbeck, Shaw & Rodenhausen, Hudson, NY; Moran M. Pope, III, Pope & Pope, P.A., Hattiesburg, MS; Janice E. Ellis, Prosecuting Attorney, George B. Marsh, Deputy Prosecuting Attorney, Snohomish County, Everett, WA; Harold J. Anderson, Chief Counsel, Solid Waste Authority of Central Ohio, Grove City, OH; Charles H. Younger, Huntsville, AL; Robert M. Strickler, Griffith, Strickler, Lerman & Solymus, York, PA, of counsel)

KATZMANN, *Circuit Judge*:

In this case, we are called upon to decide whether a nondiscriminatory municipal flow control regulation that does not place non-local firms at a competitive disadvantage, regulate extraterritorially, or conflict with the regulatory requirements of any other jurisdiction nonetheless violates the dormant Commerce Clause. The municipal scheme at issue requires that the garbage generated by local households and

businesses be delivered to facilities which are owned and operated by a public corporation, thereby preventing this trash from being processed at non-local facilities. After processing, the trash is then delivered by a private contractor to a designated landfill site, or is reused or recycled. We decline to decide today whether these flow control ordinances impose a cognizable burden on interstate commerce by prohibiting the export of a locally generated article of commerce because we hold that any such burden would not be clearly excessive in relation to the putative local benefits of the flow control scheme. We conclude, therefore, that the challenged local ordinances do not violate the Commerce Clause. Accordingly, we affirm the judgment of the district court.

I. BACKGROUND

In 1995, Plaintiffs-Appellants United Haulers Association, Inc., Transfer Systems, Inc., Bliss Enterprises, Inc., Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial Containers, Inc. and Ingersoll Pickup, Inc., ("plaintiffs") filed this action pursuant to 42 U.S.C. § 1983 in the Northern District of New York. They claim that ordinances regulating the collection, processing, transfer and disposal of solid waste enacted by the Counties of Oneida and Herkimer violate the dormant aspect of the Commerce Clause and seek injunctive relief barring the enforcement of these ordinances, along with damages and attorneys' fees. Plaintiff United Haulers Association, Inc. is a New York not-for-profit corporation comprised of solid waste management companies. Each of the remaining plaintiffs is a New York business entity that was a member of the United Haulers Association operating in Oneida and Herkimer Counties at the time this suit was filed.

Defendants-Appelles County of Oneida and County of Herkimer (collectively, "the Counties") enacted the challenged ordinances in 1990. These flow control regulations collectively require all solid wastes and recyclables generated

within these adjoining upstate New York counties to be delivered to one of several waste processing facilities owned by Defendant-Appellee Oneida-Herkimer Solid Waste Management Authority ("the Authority"), a municipal corporation).[1] *See* Oneida County Local Law No. 1 of 1990 ("Oneida Law"); Herkimer County Local Law No. l of 1990 ("Herkimer Law"). The Authority charges a per-ton "tipping" fee for receiving this waste that is significantly higher than the fees charged on the open market elsewhere in New York State.

The Counties have not excluded private commercial entities from other segments of the local market for waste disposal services. On the contrary, the flow control ordinances expressly allow any licensed private entity, whether local or non-local, to collect solid wastes from area businesses and households for delivery to the Authority's processing facilities. Oneida Law § 10; Herkimer Law § 10. Private commercial entities also are involved in removing wastes from the Authority's facilities after processing. Pursuant to its statutory powers, *see* N.Y. Pub. Auth. L. § 2049-ee(8), the Authority periodically selects a private hauler through an open bidding process to transport processed wastes and recyclables from the Authority's facilities for delivery elsewhere. The Authority awards this delivery contract to the entity deemed to be "the most responsive and responsible Respondent demonstrating the requisite experience and skill in the necessary technologies, and proposing a plan that provides the most cost-effective method of disposing of solid waste with maximum protection of human health and the environment." Expert Report of Robert N. Stavins ¶ 11. Plaintiffs

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[1] We described the enactment and operation of the flow control ordinances in comprehensive detail in *United Haulers Association Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 261 F.3d 245, 248-51 (2d Cir. 2001), and therefore do not duplicate that effort here.

do not contend that in-state firms have any unfair advantage in this bidding process. However, they do note that the Authority's most recent contract has resulted in the shipment of the Counties' waste to a landfill in New York State, and that the Authority is currently in the process of constructing a landfill site to which all of the Counties' landfill-bound processed wastes will be delivered beginning in 2007. *See* Oneida-Herkimer Solid Waste Management Authority, http://www.ohswa.org/landfill/index.html (last visited Feb. 10, 2006). Plaintiffs assert that both of these developments further burden interstate commerce.

Plaintiffs conceded at oral argument that the Counties could create a public monopoly encompassing the entire waste management process, thereby displacing private firms altogether, without violating the Commerce Clause. *See, e.g.*, *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1293-94 (2d Cir. 1995). They nonetheless assert that, as long as private entities are permitted to collect garbage from customers, they may not be required to deliver that garbage to an in-state facility, whether publicly or privately owned, as this restriction necessarily prevents them from using processing facilities outside the Counties and thus diminishes the interstate trade in waste and waste disposal services.[2]

The Counties' flow control regime already has been the subject of one appeal to this Court. In the first installment, *United Haulers Association Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 261 F.3d 245 (2d Cir. 2001) ("United Haulers 1"), we reviewed the district court's grant

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[2] In *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dept of Natural Res.*, 504 U.S. 353, 359 (1992), the Supreme Court noted that commercial arrangements involving garbage, whether described as "sales of garbage or purchases of transportation and disposal services," constitute commercial transactions in articles of commerce that have an interstate character (quotation marks omitted). We use these descriptions interchangeably throughout.

of summary judgment to the plaintiffs. The district court had found that the Counties' flow control ordinances, like those struck down by the Supreme Court in *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994), discriminate in favor of a single, favored provider, and therefore had examined the ordinances under the heightened standard applied to discriminatory economic regulation. We reversed, holding that because the Counties' flow control ordinances direct solid waste exclusively to facilities owned by the Authority, a public corporation, they do not favor local business interests and therefore are not discriminatory. *United Haulers I*, 261 F.3d at 263. We then remanded the case to the district court for consideration of the ordinances' validity under the more permissive *Pike* balancing test. *See Pike v. Bruce Church, Inc.*, 397 U.S.137, 142 (1970) (stating that "[w]here [a] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."). In doing so, we expressed skepticism about the ultimate merits of plaintiffs' challenge, noting that another panel had stated in dicta that "the local interests that are served by consolidating garbage service in the hands of the town—safety, sanitation, reliable garbage service, cheaper service to residents—would in any event outweigh any arguable burdens placed on interstate commerce." *United Haulers I*, 261 F.3d at 263 (quoting *USA Recycling*, 66 F.3d at 1295).

On remand, the parties conducted extensive discovery and then cross-moved for summary judgment. The district court, aided by the thorough Report and Recommendation of Magistrate Judge David E. Peebles, found that the Counties' flow control ordinances are constitutionally permissible. The district court observed that "the challenged laws do not treat similarly situated in-state and out-of-state business interests differently," and found that they therefore do not impose any

cognizable burden on interstate commerce. Having reached this conclusion, the district court granted the motion for summary judgment jointly filed by the Counties and the Authority without attempting to assess the local benefits that the ordinances create or to weigh these benefits against the burden placed on interstate commerce.

On appeal, plaintiffs concede, as they did below, that the ordinances afford equal treatment to all commercial entities without regard to their location. However, plaintiffs argue that the district court erred in focusing solely on whether the ordinances inflict disparate harm on non-local businesses. They contend that the district court also should have considered whether the ordinances burden interstate commerce by accomplishing directly what the regulatory burdens found suspect by courts in other contexts do indirectly—*i.e.*, prevent goods and services from flowing across internal political boundaries.

In response, the Counties, the Authority, and the State of New York, appearing as *amicus curiae*, reject plaintiffs' contention that the flow control ordinances burden interstate commerce in any cognizable respect, given plaintiffs' concessions that the ordinances do not disparately impact non-local businesses or interfere with the regulatory regimes of other localities or states. In the alternative, they suggest that the environmental and public health benefits attributable to the ordinances far outweigh any incidental burden on interstate commerce that the ordinances might be found to impose.

II. STANDARD OF REVIEW

We review *de novo* a district court's grant of summary judgment in favor of defendants. *Ford v. McGinnis*, 352 F.3d 582, 587 (2d Cir. 2003). In doing so, we focus on whether the district court properly concluded that there was no genuine issue as to any material fact and that the defen-

dants were entitled to judgment as a matter of law, drawing all necessary factual inferences in favor of the plaintiffs. *Id.*

III. DISCUSSION

Plaintiffs' claim fails because even assuming, *arguendo*, that a burden on interstate commerce exists, it is far exceeded by the ordinances' local benefits. That is, even if we were to agree with plaintiffs that the Counties' flow control ordinances impose a cognizable burden on interstate commerce by preventing the waste generated within the Counties from being exported for processing, given the Counties' undoubted power to monopolize the local marketplace in waste disposal services, as well as the Counties' substantial interest in regulating waste disposal, we also would conclude that the Commerce Clause does not require us to invalidate these ordinances.

A.

Where a challenged state or local regulation does not entail "patent discrimination" against interstate commerce, we assess its validity under the *Pike* standard. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Under *Pike*, a challenged regulation will be upheld unless it "places a burden on interstate commerce that is clearly excessive in relation to the putative local benefits." *USA Recycling*, 66 F.3d at 1282 (internal quotation marks omitted). As we have repeatedly emphasized, "[for a state statute to run afoul of the *Pike* standard, the statute, at a minimum, must impose a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce." *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 109 (2d Cir. 2001) ("*NEMA*") (citing, *inter alia*, *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59, 75 (2d Cir. 1998); *Gary D. Peake Excavating Inc. v. Town Rd. of Hancock*, 93 F.3d 68, 75 (2d Cir. 1996); *N. Y. State Trawlers Assn v. Jorling*, 16 F.3d 1303, 1308 (2d Cir. 1994); *USA Recycling*, 66 F.3d at 1287). To this point, we have recognized

three instances in which a non-discriminatory state or local regulation may impose a differential burden on interstate commerce: (1) when the regulation has a disparate impact on any non-local commercial entity; (2) when the statute regulates commercial activity that takes place wholly beyond the state's borders; and (3) when the challenged statute imposes a regulatory requirement inconsistent with those of other states. *See id*. at 109-10.

As noted above, plaintiffs concede that the challenged ordinances do not confer any economic advantage on any private entity. They likewise have not argued that the ordinances—which apply only to waste generated in Oneida and Herkimer Counties conflict in any respect with the regulatory requirements imposed by any other jurisdiction, or that they regulate conduct occurring outside the Counties. Plaintiffs thus, by their own admission, have failed to allege that the Counties' regulations have any effect that we have previously recognized as imposing a differential burden on interstate commerce. If we limited ourselves to this inquiry, as the district court did, and as the Defendants-Appellees and New York State would have us do, we could swiftly affirm the decision of the district court that the flow control ordinances do not burden interstate commerce in any cognizable way.

B.

Undaunted, plaintiffs correctly note we have never held that the above list of recognized differential burdens is a closed set. *See NEMA*, 272 F.3d at 109-10 (stating that "several types of burdens would qualify as disparate to trigger *Pike* balancing," and identifying regulatory conflicts and extraterritorial effect as two of them) (internal quotation marks omitted). *See also Pac. Nw. Venison Prods. v. Smith*, 20 F.3d 1008, 1015 (9th Cir.1994) (noting the set of cognizable burdens on interstate commerce "include[s]" a lack of uniformity in state laws, extraterritorial regulation, and disparate impact on non-local interests). They therefore propose two

novel ways in which the Counties' ordinances might be seen to burden interstate commerce. First, they contend that interstate commerce is differentially burdened when the Authority arranges for the delivery of the Counties' processed wastes to an in-state disposal site. Second, they suggest that the ordinances burden interstate commerce by creating a public monopoly in the processing of locally generated solid waste, thereby prohibiting private entities from exporting unprocessed trash and recyclables to other states. We address these arguments in turn.

1. The Authority's Delivery Contracts

We easily dispose of plaintiffs' claim that the Counties' exclusive contracts with private commercial entities for the removal and disposal of waste processed at the Authority's facilities impose a burden on interstate commerce because "[w]hen the Authority selects an in-state disposal site for its non-recyclable waste, *ipso facto* interstate transportation of that waste stream ceases during the term of the contract." Br. of Pls.-Appellants 28. This argument fails because it ignores the well-established distinction between a state's actions in regulating commercial activity, which are limited by the dormant Commerce Clause, and its actions as a participant in the marketplace, which are not. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) ("Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.") (footnote omitted).

A governmental entity acts as a market regulator when it employs tools in pursuit of compliance that no private actor could wield, such as the threat of civil fines, criminal fines and incarceration. *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 512 (2d Cir. 1995). If, on the other hand, "the state is buying or selling goods as any private economic actor might, then it is engaging in market participation that by definition

falls outside the scope of activity governed by the dormant Commerce Clause." *USA Recycling*, 66 F.3d at 1281 (quotation marks omitted). Moreover, it is well settled that a state may act as a market participant with respect to one portion of a program while operating as a market regulator in implementing another. Accordingly, "[c]ourts must evaluate separately each challenged activity of the state to determine whether it constitutes participation or regulation." *Id*. at 1283.

It is plain that the Authority participates in the marketplace as any other economic actor would when, after having employed its regulatory powers to compel delivery of the waste generated within the Counties to its processing facilities, it contracts with private parties to deliver its processed wastes to landfill sites that meet its requirements. Indeed, plaintiffs' very complaint is that the Counties' ordinances prevent them from doing business with out-of-state firms that would process and dispose of the waste they collect in much the same way that the Authority does. Because the Authority in entering into such contracts does not employ any uniquely governmental power or regulate any part of the market in which it is not a participant, the outcome of its bidding process simply is not a concern of the Commerce Clause. *Smithtown*, 66 F.3d at 514-17 (holding that a municipality may require a hauler with which it contracts to deliver waste to a particular disposal site).

We likewise reject plaintiffs' claim that interstate commerce will be burdened when, upon the completion of a landfill site operated by the Authority, the Authority directs the Counties' wastes to this local site. Unquestionably, a governmental entity may refrain from selling into the marketplace articles of commerce that lawfully have come into its possession. In doing so, it does not regulate commerce, and thus is not limited by the Commerce Clause. Moreover, even if the Authority ultimately hires private haulers to move the waste from one government-owned facility to another, it

would still enter the market as a participant, not a regulator, and therefore would be free to operate in this vein free of limitations imposed by the Commerce Clause. *See id.*

This distinction between market participation and market regulation also brings into sharp relief the real issue raised by this appeal. Since the Commerce Clause does not restrict the Authority's choices about how to dispose of the trash that it has lawfully collected, the question truly presented is whether the Counties in fact act lawfully in using their governmental powers to gain possession of all locally generated solid waste, or whether they violate the Commerce Clause in doing so.

2. The Export Barrier Effect

The Counties' flow control regulations mandate that all commercial and industrial waste collected by either municipal or private haulers "shall be delivered to the appropriate facility." Oneida Law § 6(a); Herkimer Law § 6(a). The same requirement applies to recyclables. Oneida Law § 6(b); Herkimer Law § 6(b). A person or entity who violates these rules may be subjected to civil or criminal penalties. Oneida Law § 12; Herkimer Law § 13. By requiring all locally generated wastes to be processed at the Authority's facilities, these regulations necessarily prevent this waste from being processed elsewhere, and therefore impose a type of export barrier on the Counties' unprocessed wastes. As to this much, the parties agree. They also agree that the regulations restrict all private entities equally, do not threaten to conflict with the regulations of other jurisdictions, and do not regulate extraterritorial conduct. The question is whether this non-discriminatory regulatory scheme nonetheless imposes a cognizable burden on interstate commerce because it has the direct and clearly intended effect of prohibiting articles of commerce generated within the Counties from crossing intrastate and interstate lines. If we are persuaded that it does, we must augment the list of regulatory effects that we have

viewed as imposing a differential burden on interstate commerce.

The federal courts long have recognized that a primary purpose of the Commerce Clause is to prevent the unitary national economic unit envisioned by the Framers from being disrupted by local tax and regulatory barriers to trade. *See, e.g.*, *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935) (declaring that "one state in its dealings with another may not place itself in a position of economic isolation"). This conception has found its most famous expression in the oft-quoted words of Justice Jackson, who explained:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949).

In recognition of this intent, the courts have closely examined state and local regulations that prohibit the import or export of traded goods and thereby disadvantage some commercial entities in their competition with others, subjecting these statutes to exacting scrutiny which few have been able to withstand. *See*, *e.g.*, *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 367-68 (1992) (invalidating Michigan ordinance preventing private landfill owners from accepting unauthorized solid waste that originated outside the county); *City of Philadelphia*, 437 U.S. at 628 (striking down New Jersey statute barring the importa-

tion of most hazardous wastes from other states); *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951) (invalidating local ordinance prohibiting distributors from selling milk labeled as pasteurized unless it had been treated within five miles of Madison's central square); *Pennsylvania v. West Virginia*, 262 U.S. 553, 599-600 (1923) (invalidating West Virginia statute barring export of natural gas until in-state demand had been satisfied); West v. Kansas Natural Gas Co., 221 U. S. 229, 262 (1911) (striking down Oklahoma statute prohibiting export of natural gas). *But see Maine v. Taylor*, 477 U.S. 131,151-52 (1986) (upholding Maine ban on the importation of baitfish that was intended to protect local fisheries from the introduction of parasites and nonnative species).

As we held in *United Haulers I*, and as we reaffirm today, the Counties' flow control ordinances do not discriminate against interstate commerce because no private entity, whether local or non-local, has been disadvantaged vis-a-vis any other by the creation of the Authority's monopoly in waste processing. However, that conclusion does not blind us to the fact that the Counties' flow control ordinances have removed the waste generated in Oneida and Herkimer Counties from the national marketplace for waste processing services, a result which traditionally has been thought to implicate a central purpose of the Commerce Clause. Considered against this historical backdrop, there may be some force to plaintiffs' claim that the narrow class of regulations that explicitly create a prohibitory barrier to commerce for the benefit of a governmental entity operating in an area of traditional governmental concern, even if nondiscriminatory, impose some differential burden on interstate commerce which should be examined under the *Pike* test.

On the other hand, that force is blunted considerably by the absence of any suggestion that these ordinances have any practical effect other than to raise the costs of performing waste collection services within the Counties, and thus the prices paid by local consumers of those services. The pur-

ported differential burden does not appear to fall differentially on the shoulders of any identifiable private or governmental entity; rather, it is alleged to affect differentially the indefinite web of commercial transactions that makes up interstate commerce. But, as we have previously explained, while every state and local regulation imposes costs on merchants who do business there, "[t]he focus of our disparate burden analysis is a state's shifting the costs of regulation to other states. Such circumstances raise the risk that state policymakers will not bear the true political costs of their decisions, because those costs will fall in some measure on the residents of other political jurisdictions." *NEMA*, 272 F.3d at 109 (internal citations omitted). The plaintiffs have not suggested that the Counties' ordinances shift the costs of waste disposal regulation to other jurisdictions by virtue of the fact that they create a regulatory barrier to the export of unprocessed trash. Our precedents in this area would thus appear to counsel against the recognition of the rather abstract harm identified by the plaintiffs as a differential burden triggering the need for *Pike* analysis.

We decline to resolve this question today, however. We do so because, as we explain in the following section, we find it readily apparent that, even if we were to endorse the plaintiffs' claim that the Counties' ordinances burden interstate commerce by preventing the Counties' wastes from being processed by non-local facilities, the resulting burden would be substantially outweighed by the ordinances' local benefits.

C. Application of the *Pike* Balancing Test

As noted above, even if we found that the Counties' flow control ordinances impose a cognizable burden on interstate commerce, we then would turn to the ultimate question of whether this burden is one which the Commerce Clause will tolerate. In our view, any arguable burden imposed on interstate commerce by the challenged flow control ordinances,

far from being "clearly excessive" in relation to the local benefits they confer, is modest. The ordinances' benefits, on the other hand, are clear and substantial. We therefore conclude, without deciding whether the ordinances impose any burden on interstate commerce, that the Counties' ordinances do not violate the dormant Commerce Clause.

As we discussed in the previous section, the challenged ordinances arguably burden interstate commerce by prohibiting the export of unprocessed solid waste and recyclables. In deciding what weight to ascribe to this purported burden, we take note of our prior holding that a municipality, consistent with the Commerce Clause, may impose a public monopoly encompassing the activities of waste collection, processing and disposal. *USA Recycling*, 66 F.3d at 1293-94. If a municipal government may *eliminate* the local private market for waste disposal services, we think it necessarily follows that a local government imposes no more than a limited burden on interstate commerce when it creates a partial monopoly with respect to solid waste management here, at the processing stage that has the ancillary effect of diminishing interstate commerce in that same market.

Plaintiffs' argument that economic "balkanization" would result if jurisdictions across the country were to adopt a similar flow control scheme fails for similar reasons. It is unquestionably the case that the interstate market for waste disposal services would suffer if numerous jurisdictions were to impose restrictions like these on private entities that engage in trash collection. But it is difficult to muster much alarm about that result when, for at least one hundred years, this nation has allowed municipalities to exercise the greater power of taking exclusive control of all locally generated solid waste from the moment that it is placed on the curb. *See, e.g.*, *Gardner v. Michigan*, 199 U.S. 325 (1905) and *Cal. Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905).

The absence of any suggestion that the ordinances have a protectionist effect, or that they interfere with the authority of any other jurisdiction to decide whether and how to regulate its own local waste management concerns, also persuades us that any arguable burden imposed on interstate commerce by the ordinances is easily tolerated. While we have presumed for present purposes that the absence of these effects is not determinative of whether the ordinances create *any* cognizable burden, these factors remain critical to our consideration of the *degree* to which they might burden interstate commerce. This is so because we think the courts have safeguarded the ability of commercial goods to cross state lines primarily as a means to protect the right of businesses to compete on an equal footing wherever they choose to operate, *see H.P. Hood & Sons*, 336 U.S. at 539 ("Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation …"), and of states and municipalities to exercise their police powers without undue interference from the laws of neighboring jurisdictions, *see Healy v. Beer Inst.*, 491 U.S. 324, 336-37 (1989) ("[T]he Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State."). Where neither of these underlying purposes is implicated by a particular legislative enactment, the burden imposed on interstate commerce must be regarded as insubstantial.

Our conclusion that the assumed burden created by the challenged ordinances is slight means that the defendants need to present only a minimal showing of local benefit in order to compel a finding that this burden is not "clearly excessive" to the benefits that the ordinances provide. The Counties' flow control regulations easily clear this hurdle. First, the flow control measures secure the financial viability of the Counties' comprehensive waste management program

by ensuring that sufficient waste (with its attendant "tipping" fees) is delivered to the Authority's facilities. We readily acknowledge that "revenue generation is not a local interest that can justify discrimination against interstate commerce." *Carbone*, 511 U.S. at 393. However, we are not persuaded by the plaintiffs' suggestion that revenue generation likewise is an insufficient justification to support a *non-discriminatory* regulation, given that the Supreme Court has held in other contexts that a rationale which is insufficient to justify a discriminatory law often is capable of supporting a non-discriminatory statute. *Compare Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (striking down poll tax and declining to adopt dissent's suggestion that the poll tax was adequately supported by the State's interest in collecting revenue) with *M.L.B. v. S.L.J.*, 519 U.S. 102, 123 (1996) (noting that a "State's need for revenue to offset costs, in the mine run of cases, satisfies the rationality requirement" in Equal Protection and Due Process analyses). *But see Carbone*, 511 U.S. at 405-06 (O'Connor, J., concurring) (finding financing rationale insufficient under *Pike* where the municipality could have employed other means to raise necessary revenue).[3] Moreover, the flow control requirement allows

[3] In light of the plaintiffs' heavy reliance on Justice O'Connor's concurring opinion in *Carbone*, we note that no other Justice joined this opinion or otherwise agreed with Justice O'Connor's analysis. The other five justices who voted to strike down the ordinance did so on the basis that the town's ordinance discriminated against interstate commerce. *Carbone*, 511 U.S. at 391-92. Justice O'Connor disagreed that the discrimination test was applicable, but thought that the flow control measures failed the *Pike* test because the burden placed on interstate commerce was excessive. *Id*. at 405-07. The three dissenting justices also disagreed with the majority's assessment, but, unlike Justice O'Connor, opined that the benefits of the ordinances outweighed any incidental burden on interstate commerce. *Id*. at 423-30. (Souter, J., dissenting). In particular, the dissenters emphasized that "[p]rotection of the pub-

the Counties to distribute the costs associated with operating its waste management system in a manner commensurate with the extent that local individuals and businesses place demands on those facilities, and to do so in an administratively convenient way.

The record also demonstrates that financing is not the sole purpose of the flow control ordinances. Rather, the flow control measures substantially facilitate the Counties' goal of establishing a comprehensive waste management system that encourages waste volume reduction, recycling, and reuse and ensures the proper disposal of hazardous wastes, thereby reducing the Counties' exposure to costly environmental tort suits. *See B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192,1198 (2d Cir. 1992) (holding that "a municipality may be liable as a potentially responsible party if it arranges for the disposal of hazardous substances"). Requiring that all solid waste be delivered to an appropriate processing facility allows the Authority to pursue these goals by establishing differential pricing for different categories of waste, assessing fines for noncompliance, and directing the region's trash to landfill facilities that employ acceptable environmental practices. We agree with plaintiffs that some of these goals, particularly those relating to revenue generation, also might be achieved through other instruments of municipal policy. However, nothing in the record before us demonstrates, or even suggests, that the Counties could address their liability concerns or encourage recycling across the wide range of waste products accepted by the Authority's recycling program in any other way, let alone through an approach as straightforward as the use of flow control.

In our view, then, the local benefits of the flow control measures substantially outweigh whatever modest differen-

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lic fisc is a legitimate local benefit directly advanced by the ordinance." *Id.* at 429.

tial burden they may place on interstate commerce. Because the *Pike* test places the onus on the plaintiffs to show that this burden is clearly excessive in relation to these benefits, we easily find that the Counties' flow control ordinances do not violate the dormant Commerce Clause, and therefore do not decide whether the ordinances burden interstate commerce at all.

IV. CONCLUSION

We have considered all of plaintiffs' other arguments and find them to be without merit. For the reasons set forth above, the district court correctly granted summary judgment to the Defendants-Appellees. Accordingly, the judgment of the district court is hereby **AFFIRMED**.

APPENDIX B

United States Court of Appeals,
Second Circuit.

UNITED HAULERS ASSOCIATION, INC., Transfer Systems Inc., Bliss Enterprises, Inc., Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial Containers, Inc. and Ingersoll Pickup Inc., Plaintiffs-Appellees,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, County of Oneida and County of Herkimer, Defendants-Appellants.

Docket Nos. 00-7593, 00-7595 and 00-7597.

Argued Dec. 19, 2000.
Decided July 27, 2001.

Before: MESKILL, LEVAL and CALABRESI, Circuit Judges.

MESKILL, Circuit Judge:

Defendants-appellants Oneida-Herkimer Solid Waste Management Authority (Authority) and the Counties of Oneida and Herkimer (Counties) appeal a March 31, 2000 order of the United States District Court for the Northern District of New York, Pooler, *Circuit Judge* sitting by designation, granting summary judgment in favor of plaintiffs-appellees United Haulers Association, Inc., Transfer Systems, Inc., Bliss Enterprises, Inc., Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial Containers, Inc. and Ingersoll Pickup, Inc. (collectively "United Haulers") with respect to defendants' liability under 42 U.S.C. § 1983,

enjoining the enforcement of the Counties' solid waste laws and declaring those laws unconstitutional under the Commerce Clause.

We must decide whether the Counties' so-called "flow control" ordinances, which require that all waste generated within the Counties be delivered to one of five publicly owned facilities, are unconstitutional under the Commerce Clause. The district court found the flow control laws "virtually indistinguishable from the laws examined and struck down" in *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994) (*Carbone*), and *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), and, therefore, held that the ordinances were unconstitutional.

We hold that because the favored facilities are publicly owned, the ordinances do not discriminate against interstate commerce, and therefore are not subject to the rigorous test set forth in *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986). We remand to the district court to consider whether the ordinances impose burdens on interstate commerce that are clearly excessive in relation to the local benefits. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

BACKGROUND

The history of local solid waste regulation in the State of New York and across the country has been well documented. *See, e.g., Inc. Vill. of Rockville Ctr. v. Town of Hempstead*, 196 F.3d 395, 396-98 (2d Cir. 1999); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 791-92 (3d Cir. 1995). Thus, we only briefly discuss the events that prompted the Counties to implement their waste management scheme.

Historically, each city, town or village within the Counties was responsible for its own waste management. This balkanization led to the proliferation of waste dumps of all sizes, and with varying degrees of environmental account-

ability. The environmental risks and liabilities became apparent in the 1980s when over 600 local businesses and several local municipalities and school districts were named as third-party defendants in a federal environmental clean-up action against the Ludlow Landfill in Oneida County. *See generally* Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675.

This "solid waste crisis," as Oneida County describes it, and the increased environmental risks and exposure to federal and state liability which flowed from it, prompted the Counties to seek a solution. Like many of their municipal neighbors in New York and throughout the country, the Counties devised a comprehensive waste management system in an attempt to provide for the safe and cost-effective disposal of their residents' solid waste. Like many of their municipal neighbors, the Counties' plan is now the subject of a constitutional challenge.

A. The Counties' Solid Waste Management Solution

Oneida and Herkimer Counties are located in central New York, in the Mohawk Valley, and together encompass over 2,600 square miles with a combined population of approximately 306,000 persons, residing in 78 different cities, towns and villages. Both Counties are municipal corporations of the State of New York, and together constitute a single "planning unit" under the New York State Solid Waste Management Plan and its authorizing legislation. *See* N.Y. Envtl. Conserv. L. § 27-0107(1)(a).

In late 1987, the Counties entered into a municipal contract for the purpose of coordinating and consolidating the management of their solid waste. To that end, they hired a consulting firm to prepare an environmental statement and solid waste management plan. The statement and plan contemplate the construction of six facilities collectively to manage the Counties' solid waste: a recycling center, a compost facility, a transfer station, a waste-to-energy plant, an ash

landfill and a C & D (construction and demolition) debris landfill. The estimated cost of these facilities was $155-200 million.

The Counties requested that then-Governor Cuomo and the New York State Legislative Commission on Solid Waste Management (Commission) create a waste management authority to assume the Counties' joint waste management responsibilities. The Governor and Commission complied by creating the Authority, a public benefit corporation authorized by the Oneida-Herkimer Solid Waste Management Authority Act of 1988(Act). *See generally* N.Y. Pub. Auth. L. § 2049-aa. The Authority has the power, among other things, to collect, process and dispose of solid waste generated in the Counties. Moreover, the Act permits the Counties to contract with the Authority to obligate the Counties to ensure the continued operation and solvency of the Authority. *See id.* at §§ 2049-ee and tt. As amended in 1990, the Act prohibits the Authority from accepting solid waste (other than recyclable material) from outside of the Counties. *See id.* at §§ 2049-ee(4) and (7).

1. Agreements Between the Counties and the Authority

On May 10, 1989, the Authority and the Counties entered into a Solid Waste Management Agreement, in which the Authority agreed to manage and dispose of all solid waste within the Counties. In particular, the Authority agreed to take control of the operation of the Oneida County Energy Recovery Facility and the Oneida-Herkimer Recycling Center (Recycling Center) beginning on January 1, 1990, and to collect "tipping fees" sufficient to pay its operating and maintenance costs. *See SSC Corp.*, 66 F.3d at 505 n.5 (describing "tipping fee" as an industry term for a disposal charge or gate fee). The Authority assumed the Counties' regulatory powers with regard to private haulers operating within the Counties. For their part, the Counties agreed to

direct all recyclables to the Recycling Center and agreed to direct all solid waste generated in the Counties to facilities designated by the Authority.

On December 28, 1989, the Authority and the Counties entered into a second solid waste management agreement. In that agreement, the Authority reaffirmed its obligations under the first agreement and the Counties agreed to pay the Authority's operating costs and debt service to the extent those costs were not recouped through tipping fees and other disposal related charges.

2. The Local Laws

In December 1989, the Oneida County Board of Legislators enacted Local Law No. 1 of 1990, Oneida's flow control law. The law requires that all solid waste generated within the County be picked up by the municipality, a licensed private hauler or the generator, and delivered to certain approved processing sites designated by the Authority.[1] Accordingly, private haulers must obtain a permit from the Authority to pick up solid waste in the Counties. Failure to deliver that waste to the designated facilities subjects the private hauler to revocation of its permit, fines and imprisonment.

Two months later, in February 1990, the Herkimer County Legislature enacted Herkimer County Local Law No.

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[1] Section 2(a) of the Oneida Local Law provides:

> In order to provide for public health and safety and to facilitate the conservation of vital resources: Each person shall provide for the removal of solid waste and recyclables from the property on which they are generated either through a service provided by a municipality or licensed private hauler or by direct haul by the individual generator *to a disposal location approved by the County.*

(emphasis added).

1 of 1990, Herkimer's flow control law, which is substantially similar to the Oneida flow control law.[2]

3. Authority Activities

Between 1990 and 1992 the Authority issued over $51 million in bonds to finance the designated facilities, to construct the Green Waste Compost Facility and the Utica Transfer Station, and to refinance prior bonds. The Authority owns all five designated facilities and operates all but the Utica Transfer Station.

a. *Utica Transfer Station Operating Agreement*

In 1991, the Authority accepted bids for the operation of the Utica Transfer Station. The bidding process was open to all private waste disposal companies, in-state and out-of-state. The Authority received four bids, all from out-of-state businesses, which proposed delivery of the solid waste at the transfer station to eight landfills, seven of which were located outside of New York.

In June 1991, the Authority entered into a contract with Empire Sanitary Landfill, Inc. (Empire) to operate the Utica Transfer Station. Pursuant to that contract, Empire transported all solid waste processed at the transfer station to Empire's landfill in Taylor, Pennsylvania for disposal. The

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[2] Section 2(c) of the Herkimer Local Law provides:

> After placement of garbage and of recyclable materials at the roadside or other designated area approved by the Legislature by a person for collection in accordance herewith, such garbage and recyclable material *shall be delivered to the appropriate facility designated by the Legislature, or by the Authority pursuant to contract with the County.*

(emphasis added).

Authority agreed to deliver or cause to be delivered all solid waste generated or originating in the Counties (other than recyclables and waste burned at the Energy Recovery Facility) to the transfer station. The parties extended the contract to span the period 1995 to 1998.

In 1998, the Authority again accepted bids from private waste disposal companies. This time, Waste Management of New York (Waste Management), a Delaware limited liability company, prevailed. Waste Management agreed to dispose of the waste processed at the transfer station at two facilities, one located in-state and the other located in Erie, Pennsylvania. Waste Management continues to operate the transfer station on behalf of the Counties.

In the May 20, 1991 Final Local Solid Waste Management System Plan for the Counties, the Authority contemplates the development of additional facilities "to provide for *all* components of the waste stream for all residents of the two counties" (emphasis added). The Authority expressly states in the Plan that it "is wholly committed to the development of facilities within Oneida and Herkimer Counties to provide for the region's long-term needs." In other words, the current out-sourcing of the transfer station's operation is a temporary measure until the Authority brings into operation a County landfill, the last of the six facilities contemplated in the original environmental plan, and is otherwise able to meet all of the Counties' solid waste management needs.

b. *The Authority's Rules and Regulations*

Pursuant to the May and December 1989 agreements and the local flow control laws enacted by the Counties, the Authority has promulgated rules and regulations. The Authority's 1995 Rules and Regulations provide that private haulers "must deliver all acceptable solid waste and curbside collected recyclables generated within Oneida and Herkimer Counties to an Authority designated facility." The 1995 Rules and Regulations also require all private haulers to ob-

tain a Solid Waste Collection and Disposal Permit from the Authority. The Authority sets the applicable tipping fees, designates access route patterns to four of the five designated facilities and retains the right to redirect "solid waste … to the appropriate facility according to waste production, waste origin, waste type, seasonal fluctuations or planned operating procedures." To enforce the Counties' local laws and the 1995 Rules and Regulations, the Authority employs "garbage cops" (as coined by United Haulers) to monitor private haulers' activities and ensure compliance with the flow control ordinances.

B. Alleged Effect on Private Haulers

The individual plaintiff haulers are four New York corporations and two New York sole proprietorships, each of which engaged in the collection, transport, processing and disposal of solid waste within the Counties. United Haulers Association, Inc. (Association) is a not-for-profit New York corporation comprised of solid waste management companies doing business within the Counties. Each of the individual plaintiffs is a member of the Association.

Under the 1995 Rules and Regulations, private haulers must pay the Authority a tipping fee of at least $86 per ton of solid waste disposed of at the Authority's facilities. If witnessed disposal is required or if the load contains more than 25% recyclables, the charge is increased to as much as $172 per ton. Even the lowest tipping fee charged under the Counties' scheme is higher than the market value for the disposal services the Authority provides. But for the Counties' flow control laws, United Haulers claims that it could deliver and dispose of solid waste at other facilities within the State of New York or in other states at a lower price. United Haulers submitted affidavits from Jeff Bliss, President of Bliss Enterprises, Inc. and David N. Levitt, Vice President of Levitt's Commercial Containers, Inc., averring that out-of-state disposal facilities accessible to the haulers charged significantly

lower tipping fees. For example, United Haulers claims that Greentree Landfill in Pennsylvania is capable of accepting municipal waste from the haulers at a tipping fee of $26-30 per ton. Therefore, according to United Haulers, the Counties' flow control laws bar them from accessing a viable, and significantly cheaper, interstate market for waste disposal.

C. District Court Proceedings

On April 14, 1995, United Haulers commenced the present action against the Counties and the Authority alleging that the flow control laws are unconstitutional and constitute a deprivation of United Haulers' constitutional rights. *See* 42 U.S.C. § 1983.

Soon thereafter, United Haulers moved for summary judgment, seeking an order (1) declaring that the flow control laws unconstitutionally discriminate and/or unduly burden interstate commerce in violation of the Commerce Clause, (2) enjoining the Authority and the Counties from enforcing the flow control laws, (3) declaring that the Counties and the Authority deprived United Haulers of rights, privileges or immunities secured by the Constitution, and (4) holding the Counties and the Authority liable for damages and attorney's fees under 42 U.S.C. § 1988.

United Haulers argued, as it does now, that "the recent and controlling decision by the United States Supreme Court in *C & A Carbone, Inc. v. Town of Clarkstown* establishes the unconstitutionality of the Flow Control Laws." *United Haulers* asserted that, like the laws stricken in *Carbone*, the Counties' flow control laws discriminate against interstate commerce to finance the Counties' solid waste management scheme. United Haulers pointed out that the flow control laws in this case are designed to support a much larger waste management system (almost 50 times more expensive) than that in *Carbone* and impact approximately three times more solid waste than in *Carbone*.

In opposition, the Counties and the Authority argued that they had adopted "an integrated system of solid waste disposal" to alleviate "important public health and environmental concerns" caused by the hodge-podge system of private enterprise and sub-standard disposal sites. They argued that the waste management system did not discriminate against or unduly burden interstate commerce under *Carbone*. Alternatively, they argued that they were entitled to further discovery pursuant to Fed.R.Civ.P. 56(e) and (f) to enable them to show that there were no alternative means to accomplish their legitimate goals. In their view, anything less than full discovery would "reward[ ] plaintiffs for their guerilla litigation strategy and punish[ ] the [defendants] in contravention of the intent and spirit of the Federal Rules of Civil Procedure."

Shortly after United Haulers moved for summary judgment, the Counties and the Authority answered the Complaint and served an initial set of interrogatories. At a June 1, 1995 scheduling conference, however, United Haulers requested a protective order staying discovery pending resolution of its motion. The magistrate judge granted the protective order suspending discovery. Accordingly, no discovery took place prior to the district court's determination of United Haulers' summary judgment motion that is the subject of this appeal.

The district court heard oral argument on United Hauler's motion for summary judgment in October 1995. Almost five years later, on March 31, 2000, the district court entered an order granting United Haulers' motion. The district court declared the flow control laws unconstitutional and enjoined the Counties and the Authority from enforcing them. After concluding that the Association did not have standing to assert a section 1983 damages claim, the district court granted summary judgment in favor of the individual haulers on that claim and referred the action to a magistrate judge for calculation of damages.

The Counties and the Authority filed timely notices of appeal on April 28, 2000. We heard argument on December 19, 2000, and following argument solicited supplemental briefing from the parties on several issues. We now reverse and remand.

DISCUSSION

In 1996, we remarked that the federal docket was "clogged with—of all things—garbage." *SSC Corp.*, 66 F.3d at 505. It remains so today. *See, e.g.*, *Maharg, Inc. v. Van Wert Solid Waste Mgmt. Dist.*, 249 F.3d 544 (6th Cir. 2001); *On the Green Apartments L.L.C. v. City of Tacoma*, 241 F.3d 1235 (9th Cir. 2001); *see generally* Stanley E. Cox, *Garbage In, Garbage Out: Court Confusion about the Dormant Commerce Clause*, 50 Okla. L.Rev. 155, 156 (1997) (noting that garbage cases lie "on the cutting edge of dormant Commerce Clause theory").

Although the Supreme Court's and this Court's recent spotlight on local, solid waste regulation provides us with a framework within which to analyze this challenge, many questions remain unanswered with respect to the constitutionality of municipal flow control laws. *See generally* Colin A. Fieman, *The Second Circuit Upholds Waste Management Systems in the Wake of* Carbone *v.* Clarkstown: *The Decisions in* USA Recycling, Inc. *v.* Town of Babylon *and* SSC Corp. *v.* Smithtown, 23 Fordham Urb. L.J. 767, 769 (1996) ("[A]lthough the Second Circuit has made considerable progress in clarifying the law in this area, it has left questions about the constitutionality of flow control unanswered."). Unfortunately, these missing pieces to the constitutional puzzle often force states and municipalities to engage in guesswork about the constitutionality of proposed solid waste management schemes, which are expensive and time-consuming to implement. *See generally, e.g.*, Jennifer M. Anglim, *Note, The Need for a Rational State and Local Response to* Carbone: *Alternate Means to Responsible, Afford-*

able Municipal Solid Waste Management, 18 Va. Envtl. L.J. 129, 130-32 (1999) ("[T]he federal municipal solid waste … management jurisprudence has followed intertwined and often-conflicting legal theories and precedents, making it difficult for states and municipalities to plan."). With frequent reference to the guiding principles underlying the Supreme Court's dormant Commerce Clause jurisprudence, we attempt to fill in one more piece of this puzzle.

A. Legal Background

The Commerce Clause states that "Congress shall have Power … [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. On its face, the clause does not speak to the power, if any, of the states to regulate interstate commerce. Although the Supremacy Clause prohibits state regulation of interstate commerce in areas where Congress has spoken, *see* U.S. Const. art. VI, cl. 2, neither the text of the Commerce Clause nor the Supremacy Clause "say what the states may or may not do in the absence of congressional action." *Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 749, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978) ("The Commerce Clause does not state a prohibition; it merely grants specific power to Congress. The prohibitive effect of the Clause on state legislation results from the Supremacy Clause and the decisions of this Court."). That question did not remain open for long.

In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824), Justice Johnson sowed the seeds for the "dormant" or "negative" Commerce Clause by arguing that the power to regulate interstate commerce could not rest with two sovereigns. *See id.* at 227 (Johnson, J., concurring) (arguing that "since the power to prescribe the limits to … freedom [of commerce], necessarily implies the power to determine what shall remain unrestrained, it follows, that the power must be exclusive"); *see also id.* at 209 (Daniel Webster, as counsel,

arguing that the Commerce Clause's affirmative grant to Congress "necessarily" prohibits local action that alters "what the regulating power designs to leave untouched"). In the years that followed, the Supreme Court consistently held that the Commerce Clause's affirmative grant of power to the federal government requires some concomitant limitation on the power of the several states. *See* Boris I. Bittker, *Regulation of Interstate and Foreign Commerce* § 6.01[A] (1999 & Supp. 2001); *see also SSC Corp.*, 66 F.3d at 509 (noting that "federal courts have for more than 150 years invoked the Commerce Clause to scrutinize state regulations affecting interstate commerce").

Justice Jackson later expressed the rationale underlying the judicially created dormant Commerce Clause:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them.

H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 539, 69 S.Ct. 657, 93 L.Ed. 865 (1949); *see Carbone*, 511 U.S. at 390, 114 S.Ct. 1677 ("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent."). Justice Jackson's "national market" has led to "material success … the most impressive in the history of commerce," *H.P. Hood & Sons*, 336 U.S. at 538, 69 S.Ct. 657, arguably because the Supreme Court "consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state." *Id.* at 535, 69 S.Ct. 657. *But see* Edmund W. Kitch, *Regulation, the American Common Market and Public Choice*, 6 Harv. J.L.

& Pub. Pol'y 119, 123-24 (1982) (challenging the practical efficiency resulting from the Court's dormant Commerce Clause jurisprudence).

Not surprisingly, the Court's effort to preserve a national market has, on numerous occasions, come into conflict with the states' traditional power to "legislat[e] on all subjects relating to the health, life, and safety of their citizens." *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960). On these occasions, the Supreme Court has "struggled (to put it nicely) to develop a set of rules by which we may preserve a national market without needlessly intruding upon the States' police powers, each exercise of which no doubt has some effect on the commerce of the Nation." *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 596, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997) (Scalia, J., dissenting) (citing *Okla. Tax Comm'n v. Jefferson Lines*, 514 U.S. 175, 180-83, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995)); *see generally* Boris I. Bittker, *Regulation of Interstate and Foreign Commerce* § 6.01[A], at 6-5 ("[T]he boundaries of the [State's] off-limits area are, and always have been, enveloped in a haze."). Those rules are "simply stated, if not simply applied." *Camps Newfound/Owatonna*, 520 U.S. at 596, 117 S.Ct. 1590 (Scalia, J., dissenting).

B. Dormant Commerce Clause Analysis

As a threshold matter, a court must determine whether a state or local government is "regulating" and, if so, whether that regulation affects interstate commerce. *See Carbone*, 511 U.S. at 389, 114 S.Ct. 1677; *On the Green Apartments L.L.C.*, 241 F.3d at 1241-42.

The dormant Commerce Clause restricts certain state regulation of interstate commerce. It does not prohibit a state from participating in the free market if it acts like a private enterprise. *See, e.g., Reeves, Inc. v. Stake*, 447 U.S. 429, 437, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980) ("There is no indica-

tion of a constitutional plan to limit the ability of the States themselves to operate freely in the free market."); *Sal Tinnerello & Sons v. Town of Stonington*, 141 F.3d 46, 55 (2d Cir. 1998). In general, a state regulates when it exercises governmental powers that are unavailable to private parties. *See SSC Corp.*, 66 F.3d at 512. Classic hallmarks of government regulation include the threatened imposition of fines and/or jail terms to compel behavior. *See id.* The Counties' flow control laws require private haulers to obtain a permit from the Counties and to deliver all waste to Authority-designated facilities. Failure to do either exposes the private hauler to fines, revocation of its permit to pick up solid waste, and imprisonment. Therefore, the Counties have "avail[ed themselves] of the unique powers or special leverage [they] enjoy[ ] by virtue of [their] status as sovereign[s]," *Inc. Vill. of Rockville Ctr.*, 196 F.3d at 399, and, thus, are regulating the market for waste collection and disposal.

The Supreme Court has left no doubt that flow control regulation affects interstate commerce. In *Carbone*, the Supreme Court stated that "[w]hile the immediate effect of the ordinance is to direct local transport of solid waste to a designated site within the local jurisdiction, its economic effects are interstate in reach." 511 U.S. at 389, 114 S.Ct. 1677. Although the Clarkstown ordinance differs from the Counties' laws in that it applied to solid waste originating outside of Clarkstown, the Court also noted that "even as to waste originant in Clarkstown, the ordinance prevents everyone except the favored local operator from performing the initial processing step." *Id.*; *see On the Green Apartments L.L.C.*, 241 F.3d at 1241 ("While Tacoma's ordinance does not require that the local transportation of out-of-state waste be deposited at a site in the city, it does prevent waste from within the city from being deposited outside of the city."). As such, the Counties' flow control laws sufficiently affect interstate commerce to trigger a deeper dormant Commerce Clause review. As in *Carbone*, "[t]he real question is whether the

flow control ordinance[s][are] valid despite [their] undoubted effect on interstate commerce." 511 U.S. at 389, 114 S.Ct. 1677.

1. Discrimination or Incidental Effects

Once a court determines that a state regulation affects interstate commerce, it must next determine whether the regulation "discriminates against interstate commerce" or regulates even-handedly with incidental effects on interstate commerce. *Id.* at 390, 114 S.Ct. 1677 (internal quotation marks and citations omitted); *see also Gary D. Peake Excavating v. Town Bd. of Hancock*, 93 F.3d 68, 73 (2d Cir. 1996) ("The Supreme Court has established a two-step approach to determine whether a state or municipal law violates the dormant Commerce Clause.").

A local law is discriminatory if it provides for "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *USA Recycling v. Town of Babylon*, 66 F.3d 1272, 1281 (2d Cir. 1995) (quotation marks omitted); *see also Sal Tinnerello & Sons*, 141 F.3d at 55. Where a plaintiff shows that a regulation is discriminatory, the burden shifts to the state or local government to demonstrate that the local benefits outweigh the discriminatory effects and that no nondiscriminatory alternative exists to effectuate the local goals. *See USA Recycling*, 66 F.3d at 1281-82. A discriminatory state or local regulation is virtually *per se* unconstitutional because of "the virtual certainty that such laws, at least in their discriminatory aspect, serve no legitimate, non-protectionist purpose." *Carbone*, 511 U.S. at 422, 114 S.Ct. 1677 (Souter, J., dissenting); *see Gary D. Peake Excavating*, 93 F.3d at 74. In the rare case where a court finds the local interest compelling and the alternatives non-existent, it must uphold the challenged regulation. *See, e.g.*, *Taylor*, 477 U.S. at 151, 106 S.Ct. 2440 ("Maine's ban on the importation of live baitfish serves le-

gitimate purposes that could not adequately be served by available nondiscriminatory alternatives.").

On the other hand, "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142, 90 S.Ct. 844; *Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994). Because this burden is far less demanding than the burden under *Maine v. Taylor*, the critical inquiry is often "whether [the local law] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978).

The district court held that the Counties' flow control laws discriminated against interstate commerce in favor of the Authority's designated facilities and that, in light of *Carbone*, the Counties could not, as a matter of law, demonstrate that no alternatives existed. The district court relied on its belief that "[c]ourts have considered it almost a foregone conclusion that flow control laws violate the dormant commerce clause." (citing *Sal Tinnerello & Sons*, 141 F.3d at 56; *Inc. Vill. of Rockville Ctr.*, 196 F.3d at 397). Accordingly, the district court did not reach the second line of inquiry, *i.e.*, whether "the burden imposed [by the regulations] on [interstate] commerce [was] clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142, 90 S.Ct. 844. We review the district court's determination on summary judgment *de novo*, applying the same legal standard as that used by the district court. *See Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 91 (2d Cir. 2001). We disagree with the district court on several grounds.

First, the district court erroneously attributed to the Supreme Court a *per se* prohibition against flow control laws. *See Harvey & Harvey*, 68 F.3d at 798 ("That [an] ordinance requires the use of [a] selected facility, thus prohibiting the use of non-designated facilities (which may be out of state), does not itself establish a Commerce Clause violation."); *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 188 (1st Cir. 1999) ("We do not interpret *Clarkstown* as explicating a broad-based ban on every flow-control ordinance that happens to be coupled with an exclusive contractual arrangement in favor of an in-state operator."). Unfortunately, the district court's misconception led it to deny the Counties' discovery and essentially grant summary judgment without reference to the unique facts of this case.[3] The Counties' flow control laws, like any other challenged ordinance, must be analyzed under the principles articulated in *Carbone* according to their unique facts. Second, and more importantly, the district court erred in its Commerce Clause analysis by failing to recognize the distinction between private and public ownership of the favored facility.

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[3] In doing so, the district court also effectively foreclosed the Counties' ability to show that they had no reasonable alternatives to implementing flow control laws. Although *Maine v. Taylor* is the only example of a state meeting the strict burden imposed on a discriminatory regulation, district courts should allow localities an opportunity to make that showing. *See, e.g.*, *Southcentral Pa. Waste Haulers Ass'n v. Bedford-Fulton-Huntingdon Solid Waste Auth.*, 877 F.Supp. 935, 944 (M.D.Pa. 1994) (denying plaintiffs' motion for summary judgment because the defendants' claim that there were no alternatives "raises a disputed issue of material fact"). Such an opportunity may require discovery into, and an examination of, the specific alternatives, if any, available to the locality, based on its unique geographical, practical and historical characteristics.

The following discussion focuses on the latter of these errors and concludes that a municipal flow control law does not discriminate against out-of-state interests in violation of the Commerce Clause when it directs all waste to publicly owned facilities. As such, the district court should have analyzed the Counties' flow control laws under the *Pike* test to determine whether the laws' effects on interstate commerce substantially outweigh the local benefits.

2. Private Ownership vs. Public Ownership

The Counties' waste management scheme creates a bottleneck. Within the bottle, private waste haulers compete for the opportunity to collect solid waste from individual and corporate generators located within the Counties. Once collected, the private waste haulers must deliver the waste to one of five designated, Authority-owned processing facilities located within the Counties, the "bottleneck." For the time being, once the waste has been delivered, private waste disposal companies, both in-state and out-of-state, stand outside the bottle to bid, on an open and competitive basis, for the right to process and ultimately dispose of the waste delivered to the Counties' transfer station. The parties do not dispute, in any relevant respect, how the Counties' system is organized, but instead disagree about whether the flow control restrictions on private haulers, those within the bottle, are discriminatory under the Commerce Clause.

The Counties and the Authority urge us to analyze the flow control ordinances as part of their overall waste management scheme. Specifically, they argue that the bidding process for the operation of the Utica Transfer Station negates any alleged hoarding of the disposal service because it opens the local disposal market to out-of-state bidders. *See, e.g.*, *Harvey & Harvey*, 68 F.3d at 801-02 (holding that selecting a favored facility or business with an open and fair bidding process that permits out-of-state competition comports with the dormant Commerce Clause). The district

court, however, did not reach this aspect of the Counties' system. Furthermore, in several post-*Carbone* decisions, we severed our analysis of flow control ordinances from other aspects of a municipal waste management plan. *See, e.g.*, *Inc. Vill. of Rockville Ctr.*, 196 F.3d at 398-99; *SSC Corp.*, 66 F.3d at 512-13; *see also Huish Detergents v. Warren County*, 214 F.3d 707, 715 (6th Cir. 2000). We do so here as well.

a. *Carbone*

Our analysis naturally begins with *Carbone*, the Supreme Court's only occasion thus far to apply the Commerce Clause to a flow control ordinance. The Supreme Court was presented with the following setting.

The Town of Clarkstown, New York agreed with environmental authorities to close its landfill and build a solid waste transfer station. *See Carbone*, 511 U.S. at 387, 114 S.Ct. 1677. "A local private contractor agreed to construct the facility," which the local contractor would own and operate for a period of five years. *Id.* The town thereafter agreed to buy the station back for one dollar. *Id.* To make the endeavor worthwhile, the contractor charged a set tipping fee for each ton of solid waste disposed of at the transfer station. The town guaranteed the transfer station a minimum yearly waste flow, which was intended to generate tipping fees sufficient to finance the cost of the facility. *See id.* at 412, 114 S.Ct. 1677. To meet the minimum tonnage guarantee, the town enacted a flow control ordinance that required all waste within the town to be delivered to the transfer station. *Id.* The purpose of the ordinance was to "finance [the] new facility with the income generated by the tipping fees." *Id.*

Clarkstown's ordinance differs from the Counties' ordinances in two significant respects. First, the Clarkstown ordinance applied to all solid waste within the town, whether that waste was generated within or outside the town. In contrast, the Counties' flow control ordinances apply only to

waste generated within the Counties.[4] We do not rely on that distinction because, in *SSC Corp.*, we struck down a flow control ordinance as "indistinguishable" from the ordinance in *Carbone*, even though the challenged law, unlike *Carbone*, applied only to waste originating within the town. 66 F.3d at 514. Second, the Clarkstown ordinance differs from the Counties' ordinances because the transfer station in Clarkstown was owned by a "local private contractor." *Carbone*, 511 U.S. at 387, 114 S.Ct. 1677. The Counties' transfer station, as well as the other designated facilities, are publicly owned. This latter distinction is determinative.

The majority opinion in *Carbone* held that Clarkstown's flow control ordinance was "just one more instance of local processing requirements that [the Court] long [has] held invalid." *Id.* at 391, 114 S.Ct. 1677. Stated otherwise, the ordinance "hoard[ed] solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility," in that case "a single local proprietor." *Id.* at 392, 114 S.Ct. 1677. The Court repeatedly referenced the private nature of the favored facility and repeatedly alluded to the dangers of allowing local government to favor local industry or a single local

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[4] Carbone owned a recycling facility within the Town of Clarkstown, but a significant amount of its waste was collected in the State of New Jersey. The briefs and oral argument transcript reveal that Carbone challenged the ordinance only to the extent that its application to waste originating out-of-state increased the cost of disposal for New Jersey generators and subjected Carbone to inconsistent local regulations. *See C & A Carbone v. Town of Clarkstown*, 1993 WL 757637, at *18-19 (U.S. Dec. 7, 1993) (oral argument transcript); *C & A Carbone v. Town of Clarkstown*, 1993 WL 433038, at *23 (U.S. July 16, 1993) (petitioners' brief); *see also Carbone*, 511 U.S. at 407, 114 S.Ct. 1677 (O'Connor, J., concurring) (striking the ordinance under the *Pike* test, in part because "operations like petitioners' cannot comply with the requirements of both [Clarkstown and the State of New Jersey]").

business over out-of-state competition. For example, the Court held that "the town may not employ discriminatory regulation to give [the designated facility] an advantage over *rival businesses* from out of State." *Id.* at 394, 114 S.Ct. 1677 (emphasis added). And again, "[s]tate and local governments may not use their regulatory power to favor *local enterprise* by prohibiting patronage of out-of-state competitors or their facilities." *Id.* (emphasis added).

United Haulers casts a blind eye to the Court's repeated reference to Clarkstown's favoritism for a single local proprietor. United Haulers contends that, read in conjunction, all three *Carbone* opinions imply a rejection of the distinction between public and private ownership for Commerce Clause purposes. The argument proceeds as follows: The dissenters in *Carbone* argued that the favored facility was an agent of the municipality and therefore publicly owned. Accordingly, the dissent argued that the ordinance did not discriminate against out-of-state business in favor of in-state business:

> While our previous local processing cases have barred discrimination in markets served by private companies, Clarkstown's transfer station is essentially a municipal facility, built and operated under a contract with the municipality and soon to revert entirely to municipal ownership….
>
> The majority ignores this distinction between public and private enterprise, equating Local Law 9's "hoard[ing]" of solid waste for the municipal transfer station with the design and effect of ordinances that restrict access to local markets for the benefit of local private firms.

See id. at 419-20, 114 S.Ct. 1677 (Souter, J., dissenting) (footnote omitted). The majority, the argument continues, although clearly aware of the dissent's contention, nonetheless held that the town may not use discriminatory regulation

to earn revenues for its project. This holding, according to United Haulers, necessarily rejected the distinction between public and private ownership relied on by the dissent.

We disagree with United Haulers' reading of *Carbone*. A careful reading of the separate opinions in *Carbone* does not support United Haulers' theory. Indeed, if we were to divine direct guidance from those opinions, we would reach the opposite conclusion; namely, that in *Carbone* the Justices were divided over the *fact of whether* the favored facility was public or private, rather than on the import of that distinction.

As noted above, the *Carbone* majority referenced the private character of the favored facility several times, *id.* at 387, 114 S.Ct. 1677 ("local private contractor"); *id.* at 392, 114 S.Ct. 1677 ("single local proprietor"); *id.* at 394, 114 S.Ct. 1677 ("to give that project an advantage over *rival businesses* from out of State" (emphasis added)). In contrast, Justice O'Connor, in her concurrence, characterized the Clarkstown scheme as a *public* monopoly, foreclosing competition from all competitors in-state and out-of-state. *See id.* at 402-03, 114 S.Ct. 1677. As such, Justice O'Connor rejected the notion that the Clarkstown ordinance should be found discriminatory and, thus, analyzed under the *Maine v. Taylor* framework. Instead, Justice O'Connor would have analyzed, and ultimately struck down, the ordinance under the *Pike* balancing test. *Id.* at 403-07, 114 S.Ct. 1677. Like Justice O'Connor, the three-justice dissent clearly articulated its view that the Clarkstown transfer station was public for dormant Commerce Clause purposes and, therefore, would have analyzed the ordinance under the *Pike* test. *See id.* at 410-30, 114 S.Ct. 1677. Unlike Justice O'Connor, however, the dissent would have upheld the ordinance. In the face of these opinions, the majority's frequent reference to the private local contractor that legally owned the transfer station and its silence regarding the distinction between public and private ownership leads us to conclude that underlying its analysis of

the constitutionality of the ordinance was a finding that the favored facility was private rather than public.

Nevertheless, we require more than the Court's silence on this point before concluding that it either rejected or accepted the public/private distinction advocated by the concurring and dissenting opinions. *See Fort Gratiot Sanitary Landfill v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 358-59, 112 S.Ct. 2019, 119 L.Ed.2d 139 (1992) (noting that the case did not "raise any question concerning policies that municipalities or other governmental agencies may pursue in the management of publicly owned facilities"). As the majority in *Carbone* did not directly address the issue and its language can fairly be described as elusive on that point, we proceed to examine those "local processing" cases, upon which the Court placed heavy reliance. This examination removes any remaining doubt we may have had regarding the importance of the distinction between private and public ownership in the dormant Commerce Clause analysis of such cases. As discussed in great detail by the *Carbone* dissent, in each and every one of the local processing cases the challenged laws favored a local private business, industry or investment (not a state-owned facility or a public monopoly) to the detriment of out-of-state competitors.

b. *The Local Processing Cases*

A commonly cited example of the Court's local processing cases is *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951). There, the Court struck down a city of Madison, Wisconsin ordinance that required all milk sold in the city to be pasteurized within five miles of the central portion of the city. The ordinance applied to all businesses, in-state and out-of-state. The "practical effect" of the ordinance, however, was to "erect[ ] an economic barrier protecting a *major local industry* against competition from without the State." 340 U.S. at 354, 71 S.Ct. 295 (emphasis added). The fact that out-of-state businesses could build pas-

teurizing facilities within the five-mile radius did not make it any less discriminatory. Requiring local investment benefitted the city at the expense of other states and municipalities. In *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984), a four-justice plurality confirmed that export restraints undertaken to "promot[e] employment" or investment within the state fell "within the rule of virtual *per se* invalidity." *Id.* at 100-01, 104 S.Ct. 2237. There, the Court struck down a state regulation requiring in-state processing of timber. *See id.*; *see also Hughes v. Oklahoma*, 441 U.S. 322, 338, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979) (striking statute that restricted the number of minnows that could be transported out-of-state); *Minnesota v. Barber*, 136 U.S. 313, 323, 10 S.Ct. 862, 34 L.Ed. 455 (1890).

Other decisions in the local processing line of cases evidence the same intent to prevent state or local governments from favoring in-state business or investment at the expense of out-of-state businesses. In *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032 (1935), another milk case, the Court struck down an ordinance which erected barriers to out-of-state competition of the local milk industry by instituting a "system of minimum prices." *Id.* at 519, 55 S.Ct. 497. In *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 49 S.Ct. 1, 73 L.Ed. 147 (1928), the Court struck down a Louisiana statute which forbade the export of shrimp unless the heads and hulls had first been removed within the state. *Id.* at 12-14, 49 S.Ct. 1; *see Johnson v. Haydel*, 278 U.S. 16, 49 S.Ct. 6, 73 L.Ed. 155 (1928) (striking a similar Louisiana statute regarding the pre-shipment processing of oysters); *see also Toomer v. Witsell*, 334 U.S. 385, 403-07, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948) (striking down South Carolina statute that required shrimp fishermen to unload, pack and stamp their catch before shipping it to another state). The Court held these statutes discriminatory because, whether in design or effect, they benefitted the local seafood processing industry over out-of-state competition.

United Haulers asks us to focus on the Court's broadly stated prohibition against the "hoarding" of local resources that otherwise would enter the stream of interstate commerce. A blanket prohibition against the hoarding of articles of commerce would appear to preclude the Counties' flow control scheme. However, we must interpret the Court's holdings in context, not in a vacuum. The common thread in the Court's dormant Commerce Clause jurisprudence, highlighted in the local processing cases discussed above, is that a local law discriminates against interstate commerce when it hoards local resources *in a manner* that favors local business, industry or investment over out-of-state competition. *See, e.g., College Sav. Bank v. Fl. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999) (describing the "evil" addressed by the Commerce Clause as "the prospect that States will use custom duties, exclusionary trade regulations, and other exercises of governmental power (as opposed to the expenditure of state resources) to favor their own citizens"). The majority in *Carbone* recognized this additional requirement while describing the evils of local processing laws: "Put another way, the offending local laws hoard a local resource—be it meat, shrimp, … milk [or garbage]—*for the benefit of local businesses that treat it.*" 511 U.S. at 392, 114 S.Ct. 1677 (emphasis added).

There is sound reason for the Court's consistent, although often unstated, recognition of the distinction between public and private ownership of favored facilities:

> Reasons other than economic protectionism are … more likely to explain the design and effect of an ordinance that favors a public facility.… An ordinance that favors a municipal facility, in any event, is one that favors the public sector, and if we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce

> Clause must reflect that position, then surely this Court's dormant Commerce Clause jurisprudence must itself see that favoring state-sponsored facilities differs from discriminating among private economic actors, and is much less likely to be protectionist.

Id. at 421, 114 S.Ct. 1677 (Souter, J., dissenting) (internal quotation marks and citation omitted). Not only are such regulations "less likely to be protectionist," *id.*, they are less likely to give rise to retaliation and jealousy from neighboring states. Moreover, ordinances that favor a public facility to the detriment of all private actors are equipped with a built-in check: municipal legislators are accountable to citizens, many of whose interests are likely to be aligned to some degree with the interests of private business, either as owners, employees or investors. Where the local legislation benefits local industry to the detriment of its competition, as in all of the local processing cases, this check is inadequate. Here it is not.

The principal burden of any economic inefficiency imposed by the Counties' ordinances falls on the residents of the Counties. They must pay over twice as much to dispose of their solid waste as they paid prior to the adoption of the ordinances. There is no evidence that any out-of-state business or individual is paying more for waste collection or disposal as a result of the ordinances (as was the case in *Carbone*). The plaintiffs here are local waste collection companies. While it is true that private waste processors both in-state and out-of-state are prevented by the ordinances from competing to perform and receive payment for the operations performed at the mandatory transfer station, that disadvantage does not fall more heavily on out-of-state concerns than on local ones. The out-of-state processors furthermore have not complained, and there is no indication the deprivation represents a meaningful economic loss.

> The Commerce Clause was not passed to save the citizens of Clarkstown from themselves. It should not be wielded to prevent them from attacking their local garbage problems with an ordinance that does not discriminate between local and out-of-town participants in the private market for trash disposal services and that is not protectionist in its purpose or effect.

Id. at 430, 114 S.Ct. 1677 (Souter, J., dissenting). To the extent that a state or local government risks causing inconsistent local laws or inciting retaliation among the states to the detriment of the "national market," the *Pike* test is a suitable vehicle for meaningful judicial review. 397 U.S. at 142, 90 S.Ct. 844; *see Healy v. Beer Inst.*, 491 U.S. 324, 336-37, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989) (holding that, under the *Pike* test, "the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States").

United Haulers also relies on the fact that no case has yet expressly relied on the distinction between public and private ownership, *see U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1067-68 (8th Cir. 2000); *Huish Detergents*, 214 F.3d at 715-16 (striking down regulation that awarded private local waste collection company franchise over County collection duties); *Waste Mgmt. v. Metro. Gov't*, 130 F.3d 731, 733-36 (6th Cir. 1997); *Harvey & Harvey*, 68 F.3d at 807-09 (remanding for consideration of effects of local action awarding exclusive waste disposal contract to private local business), and that a number of appellate and district courts have implicitly rejected the distinction without discussion. *See Waste Sys. Corp. v. County of Martin*, 985 F.2d 1381, 1385-89 (8th Cir. 1993) (striking down ordinance that required all waste generated within locality to be delivered to public waste facility); *Coastal Carting Ltd. v. Broward County*, 75 F.Supp.2d 1350, 1352 & n.1 (S.D.Fla. 1999); *Randy's Sanitation v. Wright County*, 65 F.Supp.2d 1017 (D.Minn. 1999);

Zenith/Kremer Waste Sys. v. W. Lake Superior Sanitary Dist., 1996 WL 612465, at *1-*3, *10 n.13 (D.Minn. July 2, 1996); *Waste Recycling v. Southeast Ala. Solid Waste Disposal Auth.*, 814 F.Supp. 1566, 1570, 1577-83 (M.D.Ala. 1993) (striking down flow control ordinances which required all waste to be delivered to a Public Authority landfill), *aff'd*, 29 F.3d 641 (11th Cir. 1994) (unpublished table decision). Assuming that these courts were faced with pure public ownership of the favored facility, as we are here, their holdings are not binding on our determination and have little persuasive value given that the courts did not directly address the issue we decide today.

Only one case has expressly addressed and rejected the distinction. *See Southcentral Pa. Waste Haulers Ass'n*, 877 F.Supp. at 943. There, private waste haulers were required by law to deliver all solid waste to a landfill, owned and operated by the local solid waste authority, a public corporation. *Id.* at 938. The defendants, like the Counties and the Authority here, argued that *Carbone* did not apply to an ordinance that favored a publicly owned facility. *Id.* at 943. The district court, relying primarily on the Supreme Court's statements about hoarding local resources, was "not persuaded that the public nature of the Authority facility changes the applicable analysis." *Id.* (citing *Waste Sys. Corp.*, 985 F.2d at 1387, and *Waste Recycling*, 814 F.Supp. at 1578). We believe that it does change the analysis and we respectfully disagree with that decision for the reasons already discussed.

Moreover, we find ample precedential support for our conclusion in (1) the consistent underlying facts of the local processing line of cases, a line in which the majority squarely placed *Carbone*, and (2) the opinions of four Supreme Court Justices, all of whom characterized the facility in *Carbone* as publicly owned, and therefore would have analyzed the challenged ordinance under the more lenient *Pike* test. In this case, unlike *Carbone*, there is no confusion or room for de-

bate regarding the ownership of the favored facilities. They are owned by the Authority, a public entity, and not by any local business.

To summarize, a flow control ordinance governing the processing of waste is not discriminatory under the Commerce Clause unless it favors local private business interests over out-of-state interests. Flow control regulations like the Oneida-Herkimer ordinances, which negatively impact all private businesses alike, regardless of whether in-state or out-of-state, in favor of a publicly owned facility, are not discriminatory under the dormant Commerce Clause. The district court erred by so holding.

C. The *Pike* Balancing Test

Having concluded that the Counties' system does not discriminate against interstate commerce in favor of in-state business interests, we admit a temptation to undertake the *Pike* balancing test in the first instance.

This temptation, to which we do not succumb, arises from the well-settled principle that waste disposal is a traditional local government function. *See* Resource Conservation and Recovery Act, 42 U.S.C. § 6901(a)(4); N.Y. Gen. Mun. L. § 120-aa; *Carbone*, 511 U.S. at 419-20, 114 S.Ct. 1677 (Souter, J., dissenting); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956, 102 S.Ct. 3456, 73 L.Ed.2d 1254 (1982) ("[P]rotecting the health of its citizens—and not simply the health of its economy—is at the core of its police power."); *see also Cal. Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306, 320-21, 26 S.Ct. 100, 50 L.Ed. 204 (1905); *Gary D. Peake Excavating*, 93 F.3d at 76 ("Legislation pertaining to public health and safety consistently has been recognized as an important local interest.").

In the past, we have held that a municipality "has legitimate—indeed, compelling—interests that are served by its waste management program." *USA Recycling*, 66 F.3d at

1288. In *USA Recycling* we went so far as to state that "[t]he local interests that are served by consolidating garbage service in the hands of the town—safety, sanitation, reliable garbage service, cheaper service to residents—would in any event outweigh any arguable burdens placed on interstate commerce." *Id.* at 1295; *see Carbone*, 511 U.S. at 430, 114 S.Ct. 1677 (Souter, J., dissenting) (arguing that any burdens on interstate commerce were "readily justified by the ordinance's legitimate benefits in reliable and sanitary trash processing"). *But see Carbone*, 511 U.S. at 407-10, 114 S.Ct. 1677 (O'Connor, J., concurring). We will follow our own advice, however, and resist the temptation to rule as a matter of law prior to adequate discovery and further argument by the parties, which will undoubtedly assist the district court in this fact-intensive determination.

We do hold, however, that although it does not, in and of itself, give a municipality free reign to place burdens on the free flow of commerce between the states, the fact that a municipality is acting within its traditional purview must factor into the district court's determination of whether the local interests are substantially outweighed by the burdens on interstate commerce. With that understanding, we reverse and remand for a determination of whether the Counties' flow control laws pass constitutional muster under the *Pike* balancing test.

CONCLUSION

For the foregoing reasons, we reverse the district court's judgment and remand for further proceedings consistent with this opinion.

The parties shall bear their own costs.

CALABRESI, J., concurring:

I concur in both the result and the opinion. I do so because this case deals with waste processing by a publicly owned facility. Waste disposal is both typically and tradi-

tionally a local government function. With respect to such functions, the opinion's analysis of the significance of public ownership under *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994), seems to me quite right. Whether the same analysis would apply to activities that are not traditionally governmental is not before us. This case therefore does not answer the question of how such situations are to be examined in light of *Carbone*.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED HAULERS ASSOC., INC., ET AL.,

5:95-CV-516 (NAM/DEP)

Plaintiffs,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA AND COUNTRY OF HERKIMER

Defendants.

Appearances:	**Of Counsel:**
DEVORSETZ STINZIANO GILBERTI HEINTZ & SMITH, P.C. *Counsel for Plaintiffs* 30 Pearl Street, 1st Floor Albany, New York 12207	Kevin C. Murphy, Esq. Lisa DiPoala Haber, Esq. Timothy J. Lambrecht, Esq.
GERMANO & CAHILL, P.C. *Counsel for Defendant Oneida-Herkimer* Solid Waste Management Authority 4250 Veterans Memorial Highway, Suite 275 Holbrook, New York 11741	Michael J. Cahill, Esq.
FOLEY FRYE & FOLEY *Counsel for Defendant Oneida County* 2219 Genesee Street	Richard A. Frye, Esq.

Utica, New York 13501

HORIGAN HORIGAN PENNOCK & LOMBARDO — Thomas E. Kelly, Esq.
Counsel for Defendant Herkimer County
49 East Main Street, Box 520
Amsterdam, New York 12010

NORMAN A. MODUE, District Judge

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiffs, an amalgamation of solid waste collectors, haulers, processors and disposers, along with a trade association whose membership includes solid waste management companies, complain herein about the high cost of trash disposal. The present dispute is one in a long line of "garbage" cases that the Second Circuit remarked has been "clog[ging]" the federal docket for some time. *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 505 (2d Cir.1995). Indeed, the facts and background of this case are recounted thoroughly in a previous opinion by the Second Circuit, *United Haulers Assoc., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245 (2d Cir. 2001). In short, plaintiffs allege that solid waste flow control provisions enacted by the defendant Counties which result in elevated charges for disposal of solid waste at facilities designated by the defendant Authority are unconstitutional.

Plaintiffs commenced this action on April 14, 1995, alleging that the aforementioned flow control legislation enacted by the defendant Counties unconstitutionally discriminates and/or unduly burdens interstate commerce in violation of the Commerce Clause. The previous district court judge assigned to this case agreed with plaintiffs in March 2000, and entered summary judgment in their favor. The previous district court found that the garbage flow con-

trol laws enacted by the defendant Counties were a per se violation of the Constitution's dormant commerce clause which restricts certain state regulation of interstate commerce. The Second Circuit thereafter reversed with the admonition that the waste management scheme enacted by defendants did not on its face or in obvious effect discriminate against interstate commerce in favor of in-state business interests. *United Haulers*, 261 F.3d at 263. The Circuit remanded the case for completion of discovery and application of the balancing test suggested by the Supreme Court in *Pike v. Bruce Church, Inc.*, 397 U.S.137, 142 (1970). There, the Supreme Court held that when reviewing legislation that "regulates [commerce] even-handedly to effectuate a legitimate local public interest" and its effects on interstate commerce are only incidental, the legislation should be upheld "unless the burden imposed on [interstate commerce] is clearly excessive in relation to the putative local benefits." *Id.*, 397 U.S. at 142.

Upon remand and after completion of substantial discovery, both parties moved for, summary judgment asserting the absence of disputed material facts. Because of his substantial involvement in numerous discovery disputes between the parties and his consequent intimate familiarity with the background of this matter, the parties' cross-motions for summary judgment were referred to the Hon. David E. Peebles, United States Magistrate Judge, for a Report-Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72.3(c). After finding plaintiffs had failed to demonstrate that the disputed flow control provisions resulted in any burden whatsoever on interstate commerce, Magistrate Judge Peebles recommended that defendants' motions for summary judgment dismissing the complaint be granted. Plaintiffs fled timely objections to the Report-Recommendation. Defendants did not object.

In addition to the parties' cross-motions for summary judgment, the Magistrate Judge also considered plaintiffs'

motion to strike two attorneys' affidavits submitted by counsel for defendants in connection with the pending dispositive motions. Magistrate Peebles recommended largely granting said motion. There were no objections filed to this portion of the Report-Recommendation..

Pursuant to 28 U.S.C. § 636(b)(l)(C), this Court engages in a de novo review of any part of a magistrate judge's report-recommendation to which a party specifically objects. However, "[w]hen parties make only frivolous, conclusive or general objections, the court reviews the report-recommendation for clear error." *See Brown v. Peters*, 1997 WL 599355 at *2 (N.D.N.Y.1997) (Pooler, J.) (citing *Camardo v. General Motors Hourly-Rate Employees Pension Plan*, 806 F.Supp. 380, 382 (W.D.N.Y. 1992)); *see also Greene v. WCI Holdings Corp.*, 956 F.Supp. 509, 513 (S.D.N.Y. 1997). Failure to object timely to any portion of a magistrate's, report-recommendation operates as a waiver of further judicial review of those matters. See *Roldan v. Racette*, 984 F.2d 85, 89 (2d Cir. 1993); *Small v. Secretary of Health & Human Serv.*, 892 F.2d 15, 16 (2d Cir. 1989).

II. FACTUAL BACKGROUND

The facts on which the present motion is based are set forth in the Report-Recommendation prepared by Magistrate Judge Peebles which this Court adopts:

> Oneida and Herkimer are two contiguous counties located in Central New York, comprising a geographical area in excess of 2600 square miles with a combined population of approximately 306,000, residing in seventy-eight separate municipalities. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 248 (2d Cir. 2001). During the 1980s the two counties undertook joint exploration of ways to address what has been described by the defendants as a "solid waste crisis." *United Haulers*, 261 F.3d at 249. Those collaborative

efforts of the two counties led ultimately to the creation in 1988 of the Authority, a public benefit corporation operated under N.Y. Public Authorities Law § 2049-aa *et seq.* (McKinney 2000), and empowerment of the Authority to collect, process and dispose of all solid waste generated within the two counties. *United Haulers*, 261 F.3d at 249.

Following its creation, the Authority entered into contracts with Herkimer and Oneida Counties to manage and dispose of the solid waste generated within their respective boundaries. *Id.* To implement those agreements, the two counties enacted flow control provisions which, in essence, require that all solid waste generated within them, whether collected by a municipality or a licensed private hauler, or instead delivered by the generator, be deposited at approved processing sites designated by the Authority. *United Haulers*, 261 F.3d at 249. The net effect of these flow control provisions and their requirement that any solid waste collected by them within the two counties must be conveyed to processing facilities established by the Authority is that trash haulers and generators are required to deliver solid waste to those designated central collection points, and to make a per ton payment — often referred to as a "tipping fee" — for all solid waste delivered. *United Haulers*, 261 F.3d at 251. The tipping fee payable to the Authority typically is significantly higher than that charged by privately operated instate and out-of-state disposal facilities. *Id.* The solid waste delivered to the Authority for processing is then removed and dispensed with by private disposal companies operating under a

competitively-bid contract with the Authority. *Id.* at 250-51.[1]

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[1] In footnotes included as part of this portion of the Report-Recommendation and Order, Magistrate Judge Peebles also included the following information:

1) The Oneida County flow control law, passed in December of 1989, provides that:

> [i]n order to provide for public health and safety and to facilitate the conservation of vital resources: Each person shall provide for the removal of solid waste and recyclables from the property on which they are generated either through a service provided by a municipality or licensed private hauler or by direct haul by the individual generator to a disposal location approved by the County.

Oneida County Local Law No. I of 1990, as cited in *United Haulers*, 261 F.3d at n.1; *see also* Defendants' Exhibits Vol. I (Dkt. No. 167) Exh. 13. The Herkimer County flow control provision, adopted in February of 1990, is substantially similar, providing that:

> [a]fter placement of garbage and of recyclable materials at the roadside or other designated area approved by the Legislature by a person for collection in accordance herewith, such garbage and recyclable material shall be delivered to the appropriate facility designated by the Legislature, or the Authority pursuant to contract with the County.

Herkimer County Local Law No. 1 of 1990, as cited in *United Haulers*, 261 F.3d at n.2.: *see also* Defendants' Exhibits Vol. I (Dkt. No. 167) Exh. 12; and

2) According to Ronald N. Soltys, who gave an affidavit in this action in July of 1995 at a time when he chaired that county's legislature, the impetus for Herkimer County's efforts to address waste management issues included concerns over existing landfills and their environmental impact, the lack of any

III. THE REPORT-RECOMMENDATION

After setting forth the appropriate standard for summary judgment, the Magistrate Judge concluded that while there were genuinely disputed issues of fact in the record submitted by the parties, none of the disputed facts was material to the outcome of the litigation. After analyzing all evidentiary submissions and arguments of the parties, Magistrate Judge Peebles found that the flow control provisions complained of by plaintiffs impose no burdens on interstate commerce "that are qualitatively or quantitatively different from those experienced in relation to intrastate commerce." Based thereupon the Magistrate Judge found no need to weigh the nonexistent burdens of the flow control legislation against its putative benefits as required by Pike and recommended that this Court: l) deny plaintiffs' motion for summary judgment; 2) and grant defendants' cross-motion for summary judgment dismissing the complaint in its entirety.

Having conducted a *de novo* review of the record, the Court agrees with the determination of the Magistrate Judge

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significant recycling efforts within the county, and problems experienced with the dumping of residential household garbage, construction debris and roofing waste along county roads. *See* Singh Aft. (Dkt. No. 159) Exh. A. The genesis of Oneida County's participation was described by one former Oneida County Legislator (now a New York State Supreme Court Justice), Robert Julian, to include concern over the lack of interested participants in the local waste management industry, owing to the fact that one vendor held a competitive advantage by virtue of its ownership of the local landfill utilized for waste disposal. Julian Affidavit, dated July 5,1995 (Dkt. No. 24), repeated at Defendants' Exhibits Vol. Ill (Dkt. No. 174) Tab 32994-9. The Julian Affidavit also chronicles the same types of solid waste disposal problems which confronted Herkimer County and led lawmakers to take action, as well as concerns over environmental hazards associated with local landfill operations. *Id.*¶9 13-28.

that defendants' motion for summary judgment should be granted.

IV. DISCUSSION

A. Standard of Review

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). Substantive law determines which facts are material; that is, which facts might affect the outcome of the suit under the governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 258 (1986). Irrelevant or unnecessary facts do not preclude summary judgment, even when they are in dispute. *See id.* The moving party bears the initial burden of establishing that there is no genuine issue of material fact to be decided. *See Celotex Corp v. Catrett*, 477 U.S. 317, 323 (1986). With respect to any issue on which the moving party does not bear the burden of proof, it may meet its burden on summary judgment by showing that there is an absence of evidence to support the nonmoving party's case. *See id.* at 325. Once the movant meets this initial burden, the nonmoving party must demonstrate that there is a genuine unresolved issue for trial. *See* Fed. R. Civ. P. 56(e). It is with these considerations in mind that the Court reviews plaintiffs' objections to the Report-Recommendation.

B. Relevant Constitutional Framework

The "dormant" Commerce Clause is a judicial creation. *C.A. Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 401 (1994) (O'Connor, J., concurring). On its face, the Commerce Clause provides only that "[t]he Congress shall have Power ... To regulate Commerce ... among the several States...." U.S. Const., Art. I, § 8, cl. 3. The Supreme Court has consistently concluded, however, that the Clause not only empowers Congress to regulate interstate

commerce, but also imposes limitations on the States in the absence of congressional action:

> This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units.... [W]hat is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 537-38 (1949) (internal quotation marks and citations omitted). The Supreme Court has determined that the dormant Commerce Clause forbids States and their subdivisions from regulating interstate commerce. See *id.* at 535 (Supreme Court "consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state;").

However, the Supreme Court has traditionally distinguished between two types of impermissible regulations. "A facially nondiscriminatory regulation supported by a legitimate state interest which incidentally burdens interstate commerce is constitutional unless the burden on interstate trade is clearly excessive in relation to the local benefits." *Carbone*, 511 U.S., at 403 (citing *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986); Pike, 397 U.S. at 142)). Where, however, a regulation "affirmatively" or "clearly" discriminates against interstate commerce on its face or in practical effect, it violates the Constitution unless the discrimination is demonstrably justified by a valid factor unrelated to protectionism. *See Maine v. Taylor*, 477 U.S.131, 138 (1986). "In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." *Brown-Forman Distillers*, 476 U.S., at 579.

C. Supreme Court's Analysis of Flow Control Legislation

In *Carbone*, the Supreme Court for the first time applied the Commerce Clause to a local solid waste flow control ordinance. There, the Town of Clarkstown, New York agreed with environmental authorities to close its landfill and build a solid waste transfer station. *See Carbone*, 511 U.S. at 387. A local private contractor agreed to construct the facility, which the local contractor would own and operate for a period of five years. *Id.* The town thereafter agreed to buy the station back for one dollar. *Id.* To make the endeavor worthwhile, the contractor charged a set tipping fee for each ton of solid waste disposed of at the transfer station. The town guaranteed the transfer station a minimum yearly waste flow, which was intended to generate tipping fees sufficient to finance the cost of the facility. *See id.* at 412. To meet the minimum tonnage guarantee, the town enacted a flow control ordinance that required all waste within the town to be delivered to the transfer station. *Id.*

Upon review, the Supreme Court found the town's ordinance unconstitutional because it "hoard[ed] solid waste, and the demand to get rid of it, for the benefit of "a single local proprietor." *Id.* at 392. Relying on the private nature of the favored facility, the Court found that the town could "not employ discriminatory regulation to give [the designated private facility] an advantage over rival businesses from out of State." *Id.* at 394. Further, the Court held that "[s]tate and local governments may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities." *Id.*

D. Second Circuit's Analysis of Defendants' Flow Control Provisions

After *Carbone*, the "Supreme Court ... left no doubt that flow control regulation," though passed by municipal legislatures and aimed at local or regional solid waste concerns, "af-

fects interstate commerce." *United Haulers*, 261 F.3d at 255. The Circuit found that like the legislation at issue in *Carbone*, the flow control laws at issue here do not escape "a deeper dormant Commerce Clause review." *Id.* Indeed, "[w]hile the immediate effect of the [legislation] is to direct local transport of solid waste to a designated site within the local jurisdiction, its economic effects are interstate in reach." *Id.* (quoting *Carbone*, 511 U.S. at 389). Here as in *Carbone*, however, "[t]he real question is whether the flow control ordinance[s] [are] valid despite [their] undoubted effect on interstate commerce." 511 U.S. at 389.

The Second Circuit distinguished the flow control laws enacted by defendants from those at issue in *Carbone* on two grounds:

> First, the Clarkstown ordinance applied to all solid waste within the town, whether that waste was generated within or outside the town. In contrast, the Counties' flow control ordinances apply only to waste generated within the Counties ....Second, the Clarkstown ordinance differs from the Counties' ordinances because the transfer station in Clarkstown was owned by a "local private contractor." *Carbone*, 511 U.S. at 387. The Counties' transfer station, as well as the other designated facilities, are publicly owned.

United Haulers, 261 F.3d at 258. The Court found the latter distinction to be "determinative." *Id.* After performing an exhaustive review of the Supreme Court's jurisprudence in the "local processing line" of Commerce Clause cases, the Second Circuit observed an unmistakable intent on the part of the Court to prevent state or local governments from favoring in-state business or investment at the expense of out-of state businesses. *Id.* at 260.

According to the Second Circuit, the previous district court judge erroneously attributed to the Supreme Court a per se prohibition against flow control laws. *Id.* at 256. Based

thereupon, the district court mistakenly applied the strict scrutiny test advanced by the Supreme Court in *Maine v. Taylor, supra*. In Maine, the Supreme Court held that discrimination against interstate commerce in favor of local business or investment is *per se* invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest. 477 U.S. at 151. However, in this case, the public nature of the favored waste management facilities renders the flow control ordinances non-discriminatory

> To summarize, a flow control ordinance governing the processing of waste is not discriminatory under the Commerce Clause unless it favors local private business interests over out-of-state interests. Flow control regulations like the Oneida-Herkimer ordinances, which negatively impact all private businesses alike, regardless of whether in-state or out-of-state, in favor of a publicly owned facility, are not discriminatory under the dormant Commerce Clause.

United Haulers, 261 F.3d at 263. Based on the non-discriminatory effect on commerce created by the flow control laws, the challenged provisions should have been analyzed under the less restrictive balancing test prescribed in *Pike*. *Id.* at 257. Applying *Pike*, the district court should have determined whether the flow control laws' effects on interstate commerce substantially outweigh the local benefits. *See id.*

The Circuit "admit[ted] a temptation" to undertake the Pike balancing test itself. *Id.* at 263. "This temptation ... [arose] from the well-settled principle that waste disposal is a traditional local government function." *Id.* Waste management legislation, which pertains to the public health and safety of citizens, is the type of regulation traditionally upheld as a compelling local interest. *See id.* (citations omit-

ted). However, in the absence of adequate discovery and further argument from the parties, the Court declined to find as a matter of law that the flow control laws passed constitutional muster.

E. Application of *Pike*

Under the *Pike* balancing test, plaintiffs are required to show that the flow control laws, although enacted for a legitimate public purpose and apparently evenhanded, actually 1) impose" 'burdens on interstate commerce that exceed the burdens on intrastate commerce,' " *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 217-28 (2d Cir. 2004) (citations omitted) (New York cigarette contraband statutes, conditioning tax stamp issuance on cigarette manufacturer either being participant in multi-state tort suit settlement agreement or making escrow payments required of nonparticipants, did not violate dormant Commerce Clause absent showing of disparate impact on interstate commerce; statute applied equally to in-state and out-of-state, manufacturers, and state's generation of revenues at expense of in-state and out-of-state economic interests alike was not invalidly protectionist); and 2) that those excess burdens on interstate commerce are "clearly excessive in relation to the putative local benefits," *Id.* (quoting *Pike*, 397 U.S. at 142). "[T]he statute, at a minimum, must impose a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce." *Id.* (quoting *Nat'l Elec. Mfrs. Assn. v. Sorrell*, 272 F.3d 104,109 (2d Cir. 2001). Under the *Pike* test, "if no such unequal burden be shown, a reviewing court need not proceed further." *Id.* "The bottom line is therefore that, under either the "clear discrimination" or the "*Pike*" forms of analysis, "the minimum showing required ... is that [the state statute] have a disparate impact on interstate commerce." *Id.* (citation omitted).

Because he found that the flow control ordinances at issue herein have no such disparate impact, either facially or in

incidental effect, the Magistrate Judge deemed plaintiffs' claims deficient as a matter of law.

> Under the regime now being challenged, a local private trash business is treated no differently than one situated out of state. Any hauler, for example, is permitted to collect solid waste within the counties of Herkimer and Oneida. Similarly, any trash hauler, regardless of location, is entitled to bid on the right to contract for the hauling of waste from transfer stations for disposal and all private concerns are disqualified, without exception, from the processing phase. Finally, the ordinances place no restriction on the final disposal location for waste hauled from the transfer station, subject to the ultimate goal of establishing an Authority-operated disposal site. While [plaintiffs' expert] noted the counties' system deprives trash collectors the opportunity to align with disposal companies, and thereby gain competitive advantage, this applies equally to both in-state and non-New York based entities. Simply stated, there is no distinction between the treatment of interstate as opposed to intrastate providers under the disputed regulations.

Based thereupon, Magistrate Judge Peebles determined: l) that plaintiffs had failed to make the threshold showing required under *Pike*; and 2) that it was therefore unnecessary to proceed to the second part of the test, *e.g*., balancing the burdens against the putative benefits associated with the legislation.

This Court has reviewed the entire record herein and likewise finds no distinction in the treatment of in-state versus out-of-state businesses under the challenged flow control ordinances. Importantly, in arguing that the legislation nevertheless violates the Commerce Clause, plaintiffs do not dispute the absence of the required discriminatory impact on

non-New York businesses. Rather, they quibble over the definition of a "burden" on interstate commerce and argue that limiting the present inquiry to whether the flow control provisions favor an in-state "business" interest is too narrow based on historical Commerce Clause jurisprudence.

Plaintiffs are mistaken. Their argument that the Magistrate Judge misinterpreted and misapplied *Pike* because he required them to show a discriminatory burden on interstate commerce misses the mark for several reasons. Indeed, review of plaintiffs' objections to the Report-Recommendation reveals that they have apparently confused the notion of a permissible "incidental" burden on interstate commerce with one that is prohibitively discriminatory. For instance, Section A(2) of plaintiffs' objections is captioned "Plaintiffs Object to the Magistrate's Determination that to Establish an Incidental Burden, Plaintiffs Must Prove Discrimination." In essence, plaintiffs contend that *Pike* does not require a showing of discriminatory impact. To wit, they argue that *Pike* is only applied **after** a court determines that a challenged statute which regulates even-handedly" is **not** discriminatory and therefore not subject to strict scrutiny analysis. According to plaintiffs, "by definition, a statute that is subject to *Pike* (*i.e*., one that regulates ***even-handedly***) is not discriminatory." Plaintiff's Objections to the Report Recommendation, p. 11 (emphasis in original).

Here, the Second Circuit has already deemed the flow control ordinances in this case nondiscriminatory on their face and therefore subject to *Pike*. Plaintiffs charge that the Magistrate Judge did not apply *Pike*, but instead simply repeated the same test used by the Circuit because he found the flow control ordinances satisfactory under *Pike* based on plaintiffs' failure to demonstrate discriminatory impact on interstate commerce. Plaintiffs aver: "If this were the correct approach, having failed the test for discrimination (or proven to be even-handed), no statute would ever be invalidated under *Pike* because there would never be a threshold finding of

an incidental burden." *Id.* The problem for plaintiffs under this view is that *Pike* does not require them to demonstrate an "incidental" burden on commerce. The incidental or consequential burden on commerce imposed by the flow control regulations is **presumed**. It is only those "incidental" burdens which are "excessive in relation to the local putative local benefits" which are prohibited under the Commerce Clause. *Pike*, 397 U.S. at 142.

Moreover, contrary to plaintiff's argument, statutes like the flow control ordinances in this case are not presumed to be non-discriminatory if they regulate even-handedly. If a statute is discriminatory on its face, it is subject to strict scrutiny. *See Freedom Holdings*, 357 F.3d at 217 ("A state statute violates the 'clear discrimination' standard when it constitutes 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.' *Or. Waste Sys., Inc. v. Dept of Envtl. Quality*, 511 U.S. 93, 99 (1994); *see also West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192 (1994) ("[T]he [dormant] Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.") (internal citation and quotation marks omitted)). "In contrast, under the Pike balancing test, appellants must show that a statute enacted for a legitimate public purpose although apparently evenhanded, actually imposes burdens on interstate commerce that exceed the burdens on intrastate commerce." *Id.* (citations omitted) (emphasis added). In short, legislation may appear to have no disparate impact on in-state versus out-of-state commercial interests or even be designed to regulate interstate commerce evenhandedly. However, even if such apparently neutral legislation has the effect — even an unintended one — of negatively impacting commerce between the states, it is prohibited by the Commerce Clause. *See Pike*, 397 U.S. at 145 (striking down neutral packaging law which required all cantaloupes grown in Arizona and

shipped out of state to be so labeled because it would require a single Arizona grower which sent its raw crop out of state for packaging and distribution to build a packing plant in the state).

In this case, the Counties' flow control regulations are evenhanded because they "negatively impact all private businesses alike, regardless of whether in-state or out-of-state." *United Haulers*, 261 F.3d at 263. Nevertheless, the Second Circuit held out the possibility that under *Pike*, the negative impact of the ordinances on interstate commerce could outweigh their local utility. Like the appellants in *Freedom Holdings*, plaintiffs here have not and cannot identify "**any** in-state commercial interest that is favored, directly or indirectly," by the waste management legislation enacted by defendants at the expense of out-of-state competitors. 357 F.3d at 218 (emphasis added). In the absence of any evidence that the flow control laws impacted interstate commerce differently than intrastate commerce, there were no detrimental "effects" to weigh against the putative benefits of the legislation. Thus, it was not error, as plaintiffs contend, for the Magistrate Judge to decline to engage in the second part of the *Pike* balancing test by weighing non-existent burdens against obvious benefits. Likewise, it was not error for Magistrate Judge Peebles to fail to consider "less restrictive" means than the challenged flow control ordinances of financing Authority facilities. Short of evidence that interstate commerce is indeed being "restricted" by the subject provisions, weighing of alternatives was and remains unnecessary.

Plaintiffs contend that the Magistrate Judge erred in concluding that they were required to show negative impact to commercial interests outside the state to show discriminatory effect. This, according to plaintiffs, too "narrowly" defines commerce. Fatal to plaintiffs' contention, however, is the obvious fact that commerce is "commercial." Under the Commerce Clause, states are prohibited from regulating interstate private business activity. They are notably not pro-

hibited from regulating or even favoring public facilities at the expense of private business. *See United Haulers*, 261 F.3d at 263 (citing its own language in *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272,1295 (2d Cir. 1995) wherein the Court stated that "[t]he local interests that are served by consolidating garbage service in the hands of the town — safety, sanitation, reliable garbage service, cheaper service to residents — would in any event outweigh any arguable burdens placed on interstate commerce.") (citations and inner quotation marks omitted).

The Second Circuit could not have been clearer in its earlier opinion in this case that the public nature of the Authority was a determinative factor in this case. In the first instance, the public nature of the Authority which was favored at the expense of private business was the primary factor which rendered the flow control ordinances nondiscriminatory on their face. *See id.* at 257. Secondly, to the extent that the ordinances might effectively impact businesses out of state, the public purpose of the flow control legislation and the corresponding public benefit which inures to the Authority as the regulator of solid waste in the defendant Counties is something the Circuit found "must" factor into the district court's determination under *Pike* of whether the benefits of the challenged flow control ordinances are outweighed by the burdens on interstate commerce." *Id.* at 264. Based thereupon, it was not error for the Magistrate to restrict his inquiry to evidence of a disparate impact of the regulations on in-state and out-of-state private businesses.

In a related argument, plaintiffs object to the Magistrate Judge's characterization of' this case as one involving "performance by a municipal authority of a function traditionally carried out by municipalities — the collection and disposal of solid waste." That the Second Circuit, as well as the Supreme Court, heartily agree with this characterization could not have escaped plaintiffs' notice. *See United Haulers*, 261 F.3d at 263 ("waste disposal is a traditional local government

function."); *see also USA Recycling*, 66 F.3d at 1295 ("This case boils down to two simple propositions. First, towns [or counties via public waste management authorities] can assume exclusive responsibility for the collection and disposal of local garbage...."); *see also Carbone*, 511 U.S. at 405 (O'Connor, concurring) ("The local interest in proper disposal of waste is obviously significant."). The Circuit remanded the case to this Court for application of the *Pike* balancing test with the following admonition: "[A]lthough it does not, in and of itself, give a municipality free reign to place burdens on the free flow of commerce between the states, the fact that a municipality is acting within its traditional purview must factor into the district court's determination of whether the local interests are substantially outweighed by the burdens on interstate commerce." *Id.*

In a second related argument, plaintiffs assert that evidence that the waste management scheme at issue in this case will incidentally benefit the local economy is evidence of the "protectionist" nature of the flow control ordinances. In support of this argument they cite, *inter alia*, a recent statement by the executive director of the Authority who opined, after receiving final authority to build a public landfill, that in addition to providing comprehensive waste management services to the region, the project would "also" keep waste management dollars in the Counties and preserve jobs. It is obvious that as a consequence of creating a "comprehensive waste management system in an attempt to provide for the safe and cost-effective disposal of their residents' solid waste," *United Haulers*, 261 F.3d at 248, the Counties will also likely support and stimulate the local economy. However, it is neither reasonable in theory nor supportable on the present record to conclude that the primary purpose of the waste management scheme, and the flow control ordinances in particular, is to favor businesses within the Counties at the expense of their out-of-state counterparts. Moreover, even if plaintiffs had presented evidence — which they have not —

of pretext by defendants in the apparent versus actual reasons for enacting the flow control ordinances, it remains that the Authority, the favored facility herein, is a public entity managing an indisputably important local issue of public health and safety.

Moreover, there is no proof that the regulations are anything but evenhanded in their impact on private businesses regardless of location. As a result of the flow control ordinances, it is more expensive for every entity involved in or impacted by garbage disposal in the two counties to conduct business. Plaintiffs assert that as a result of the challenged flow control provision, "non-local haulers are either cut out of the market or must invest capital in a local facility" but provide no evidence demonstrating any actual business has suffered under such an alleged burden. As a further matter it is obvious that local economy in the two Counties — insofar as attracting residents and new business with government services and perhaps even creating jobs — has been or will be improved by the comprehensive nature of the waste management scheme. However, there is no proof that this local benefit was the **purpose** of enacting the flow control laws rather than a welcome incidental effect. At bottom, the challenged laws do not treat similarly situated in-state and out-of-state business interests differently. Thus, they are not prohibitively "protectionist" in purpose or effect as that term has been defined in Commerce Clause jurisprudence. *See Carbone*, 511 U.S. at 394 ("State and local governments may not use their regulatory power to ***favor local enterprise*** by prohibiting patronage of out-of-state competitors or their facilities.") (emphasis added). It was not error for the Magistrate Judge to refuse to revisit the issue of whether strict scrutiny should apply to the Counties' flow control ordinances. Short of evidence demonstrating that private businesses are regulated or impacted differently by the Authority, there is no Commerce Clause violation.

Finally, plaintiffs object to the Magistrate Judge's alleged failure to "make specific findings of undisputed material facts" concerning the lack of evidence of demonstrable discriminatory impact of the flow control ordinances. Of course plaintiffs point to no fact overlooked by the Magistrate Judge which would alter the ultimate conclusion that they have not demonstrated any Commerce Clause violation in this case. The Magistrate Judge produced an accurate and detailed account of the factual and procedural history in this case as well as a thorough recitation of the evidence in the record — or lack thereof — on the critical issues. As such, the Court finds no error in Magistrate Judge Peebles' conclusions in connection therewith.

V. CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the Report-Recommendation of Magistrate Judge Peebles is hereby adopted in its entirety based upon the reasons set forth by the Magistrate Judge in his Report-Recommendation and after *de novo* review upon those additional reasons set forth herein and it is therefore

ORDERED that the defendants' motion for summary judgment is GRANTED and the complaint is hereby dismissed.

IT IS SO ORDERED.

Dated: March 24, 2005
Syracuse, New York

/S/NORMAN A. MORDUE
Norman A. Mordue
U.S. District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

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UNITED HAULERS ASSOC., INC., ET AL.,

Plaintiffs,

v.

Civil Action
No. 95-CV-516 (NAM/DEP)

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, ET AL.,

Defendants.

_____

APPEARANCES: _____OF COUNSEL:

FOR PLAINTIFFS:

DEVORSETZ, STINZIANA, GILBERTI HEINTZ & SMITH
555 East Genesee St.
Syracuse, New York 13202

Kevin C. Murphy, Esq.
Lisa DiPoala Haber, Esq.
Timothy J. Lambrecht, Esq.

For Defendants:

GERMANO & CAHILL, P.C.
Attorneys for Defendant
Oneida-Herkimer
Solid Waste Management
Authority
4250 Veterans Memorial
Highway, Suite 275
Holbrook, NY 11741

Michael J. Cahill, Esq.

FOLEY, FRYE & FOLEY
Attorneys for Defendant
County of Oneida
2219 Genesee St.
Utica, NY 13501

Richard A. Frye, Esq.

HORIGAN, HORIGAN LAW FIRM
Attorneys for Defendant
County of Herkimer, New York
P.O. Box 520
49 E. Main St.
Amsterdam, NY 12010

Krishna K. Singh, Esq.
Thomas E. Kelly, Esq.

DAVID E. PEEBLES
U.S. Magistrate Judge

REPORT AND RECOMMENDATION

The plaintiffs in this action represent an amalgamation of solid waste collectors, haulers, processors, and disposers, together with United Haulers Association, Inc. — a not-for-profit association whose membership includes such solid waste management companies. Together, they have commenced this action to challenge the constitutionality of flow control laws enacted by Oneida and Herkimer Counties in 1990, as part of an overall waste management program that included creation of the Oneida-Herkimer Solid Waste Management Authority (the "Authority"). In their complaint, plaintiffs allege that the disputed flow control provisions represent an impermissible restraint upon interstate commerce, in contravention of the Commerce Clause of the United States Constitution.

As a result of a decision rendered by the United States Court of Appeals for the Second Circuit in July of 2000, the matter was returned to this Court with instruction that a determination be made as to whether the burdens imposed by the disputed ordinances on interstate commerce are clearly

excessive in relation to the local benefits sought to be achieved by their adoption. The parties have since cross-moved for summary judgment, both arguing that this test — described by the Second Circuit as "fact-intensive" — can be applied as a matter of law, based upon the record now before the court, without the necessity of a trial.[1] In addition, plaintiffs have moved for an order striking two attorneys' affidavits submitted by the defendants in connection with the pending summary judgment motions.

Having analyzed each side's summary judgment motion independently, as I must, I find the existence of genuinely disputed issues of fact, based upon the record now before the court. Those disputed facts, however, are not material to the outcome of the litigation, and accordingly do not stand as a barrier to the entry of summary judgment. I further find that because the record now before the court fails to disclose that the flow control provisions impose burdens on interstate commerce that are qualitatively or quantitatively different from those experienced in relation to intrastate commerce, summary judgment should be entered dismissing plaintiffs' complaint. Finally, although this ruling is not outcome determinative, I find that plaintiffs' arguments in support of their application to strike the affirmation of Michael J. Cahill, Esq. (Dkt. No. 154) and affidavit of Richard A. Frye (Dkt. No. 158) are well taken, and that with minor exception, the contents of those submissions should not be considered.

I. BACKGROUND

Oneida and Herkimer are two contiguous counties located in Central New York, comprising a geographical area

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[1] As will be seen, in their motion plaintiffs also urge the court to employ a more stringent Commerce Clause test than that embraced by the court of appeals, arguing that facts which have come to light through pretrial discovery require this raising of the bar. *See* pp.16-21, *post*.

in excess of 2600 square miles with a combined population of approximately 306,000, residing in seventy-eight separate municipalities. *United Haulers Ass'n, Inc. v. Oneida Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 248 (2d Cir. 2001). During the 1980s the two counties undertook joint exploration of ways to address what has been described by the defendants as a "solid waste crisis."[2] *United Haulers*, 261 F.3d at 249. Those collaborative efforts of the two counties led ultimately to the creation in 1988 of the Authority, a public benefit corporation operated under N.Y. Public Authorities Law § 2049-aa *et seq*. (McKinney 2000), and empowerment of the Authority to collect, process and dispose of all solid waste generated within the two counties. *United Haulers*, 261 F.3d at 249.

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[2] According to Ronald N. Soltys, who gave an affidavit in this action in July of 1995 at a time when he chaired that county's legislature, the impetus for Herkimer County's efforts to address waste management issues included concerns over existing landfills and their environmental impact, the lack of any significant recycling efforts within the county, and problems experienced with the dumping of residential household garbage, construction debris and roofing waste along county roads. *See* Singh Aft. (Dkt. No. 159) Exh. A. The genesis of Oneida County's participation was described by one former Oneida County Legislator (now a New York State Supreme Court Justice), Robert Julian, to include concern over the lack of interested participants in the local waste management industry, owing to the fact that one vendor held a competitive advantage by virtue of its ownership of the local landfill utilized for waste disposal. Julian Affidavit, dated July 5, 1995 (Dkt. No. 24), repeated at Defendants' Exhibits Vol. III (Dkt. No. 174) Tab 32 ¶¶ 4-9. The Julian Affidavit also chronicles the same types of solid waste disposal problems which confronted Herkimer County and led lawmakers to take action, as well as concerns over environmental hazards associated with local landfill operations. *Id.* ¶¶ 13-28.

Following its creation, the Authority entered into contracts with Herkimer and Oneida Counties to manage and dispose of the solid waste generated within their respective boundaries. *Id.* To implement those agreements, the two counties enacted flow control provisions which, in essence, require that all solid waste generated within them, whether collected by a municipality or a licensed private hauler, or instead delivered by the generator, be deposited at approved processing sites designated by the Authority.[3] *United Haulers*, 261 F.3d at 249.

The net effect of these flow control provisions and their requirement that any solid waste collected by them within the two counties must be conveyed to processing facilities estab-

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[3] The Oneida flow control law, passed in December of 1989, provides that

> [i]n order to provide for public health and safety and to facilitate the conservation of vital resources: Each person shall provide for the removal of solid waste and recyclables from the property on which they are generated either through a service provided by a municipality or licensed private hauler or by direct haul by the individual generator to a disposal location approved by the County.

Oneida County Local Law No. 1 of 1990, as cited in *United Haulers*, 261 F.3d at n.1; *see also* Defendants' Exhibits Vol. I (Dkt. No. 167) Exh.13. The Herkimer flow control provision, adopted in February of 1990, is substantially similar, providing that

> [a]fter placement of garbage and of recyclable materials at the roadside or other designated area approved by the Legislature by a person for collection in accordance herewith, such garbage and recyclable material shall be delivered to the appropriate facility designated by the Legislature, or the Authority pursuant to contract with the County.

Herkimer County Local Law No. 1 of 1990, as cited in *United Haulers*, 261 F.3d at n.2; *see also* Defendants' Exhibits Vol. 1 Dkt. No. 167) Exh. 12.

lished by the Authority is that trash haulers and generators are required to deliver solid waste to those designated central collection points, and to make a per ton payment — often referred to as a "tipping fee" — for all solid waste delivered. *United Haulers*, 261 F.3d at 251. The tipping fee payable to the Authority typically is significantly higher than that charged by privately operated in-state and out-of-state disposal facilities. *Id.* The solid waste delivered to the Authority for processing is then removed and dispensed with by private disposal companies operating under a competitively-bid contract with the Authority. *Id.* at 250-51.

II. PROCEDURAL HISTORY

Plaintiffs commenced this action on April 14, 1995. Dkt. No. 1 Following the joinder of issue by the filing of answers on behalf of Oneida County, the Authority, and the County of Herkimer (Dkt. Nos. 6, 8 and 9, respectively), plaintiffs moved seeking entry of summary judgment. Dkt. Nos. 14-22 (moving papers), 23-29 (opposition), 30-34 (reply). Plaintiffs' motion was granted by an order issued by Circuit Judge Rosemary S. Pooler on March 31, 2000.[4] Dkt. No. 83.

In her decision, Judge Pooler declared the disputed flow control laws to be unconstitutional, and enjoined the defendants from their enforcement. 2000 WL 339551 70, at *4-*6. As a basis for doing so, Judge Pooler first concluded that the laws were discriminatory in that they do not regulate evenhandedly with regard to interstate commerce, instead benefitting a single, local vendor — in this case, the Author-

[4] At the time her decision was issued, Judge Pooler, having recently been elevated to the Second Circuit, was sitting as a district judge by designation for purposes of this case. That decision, which is unreported, can be found at No. Civ. A. 95-CV-516, 2000 WL 33955170 (N.D.N.Y. Mar. 31, 2000), and will be cited as such in this Report and Recommendation.

ity — over the plaintiffs and others similarly situated. *Id.*, at *4. Finding the flow control laws at issue to be virtually indistinguishable from those examined and struck down in both the Supreme Court's decision in *C&A Carbon, Inc. v. Town of Clarkstown*, 511 U.S. 383, 114 S. Ct.1677 (1994), and the Second Circuit's decision in *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), Judge Pooler concluded that the disputed flow provisions run afoul of the dormant Commerce Clause, characterizing them as "discriminatory and *per se* invalid."[5] *United Haulers*, 2000 WL 339551, at *4. In making that finding, Judge Pooler concluded as a matter of law, based upon established Supreme Court precedent, that the defendants could not satisfy their shifted burden of demonstrating that the public benefits resulting from the laws outweigh their burdens on interstate commerce, and no less restrictive alternatives exist.[6] *United Haulers*, 2000 WL 33955120, at *5.

An ensuing appeal by the defendants resulted in reversal of the trial court's determination. *United Haulers*, 261 F.3d 245. In its decision vacating the finding of unconstitutionality, the Second Circuit initially expressed respectful disagreement with the district court's threshold determination that trash flow ordinances similar to those at issue are virtually certain to violate the dormant Commerce Clause, recog-

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[5] The Constitution provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States[.]" U.S. Const. art. I, § 8, cl. 3. Over time, courts have construed the Commerce Clause as limiting a state's power to legislate in areas which affect interstate commerce, giving rise to "dormant" or "negative" limitations associated with the original provision. *Automated Salvage Transport, Inc. v. Wheelabrator Environ. Sys., Inc.*, 155 F.3d 59, 74 (2d Cir. 1994)

[6] In her decision Judge Pooler also rejected a challenge to plaintiffs' standing to attack the trash flow control laws. 2000 WL 33955170, at *5.

nizing the unfairness of depriving the defendants of an opportunity to develop and present evidence that there were no reasonable alternatives to implementing the challenged provisions. *Id.* at 256-57, n.3. More fundamentally, the Second Circuit rejected the notion that the flow control laws at issue were facially discriminatory, and thus *per se* unlawful, distinguishing *Carbone* and its progeny based upon the court of appeals' finding that unlike the legislation at issue in those cases, which differentiated between similarly situated local and out-of-state entities, the regulations involved in this matter favor only the Authority a public entity while all private waste management processors, both in-state and out-of-state, are treated alike. *United Haulers*, 261 F.3d at 258-63. On this basis the court distinguished *Carbone*, and concluded that the appropriate analysis under the dormant Commerce Clause should be based upon *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844 (1970), requiring the trial court to examine the balance between the burdens imposed on interstate commerce as a result of the regulations and the putative local benefits associated with them. *United Haulers*, 261 F.3d at 263-64.

Upon its return to this court the matter was referred to me, initially for the handling of non-dispositive matters, including the implementation of a case management order, and later for the issuance of a report and recommendation regarding the parties' pending cross-motions, pursuant to 28 U.S.C. § 636(b)(1)(B). Dkt. No. 180.

III. DISCUSSION

A. Summary Judgment Standard

Summary judgment is warranted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322,

106 S. Ct. 2548, 2552 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 2509-10 (1986). The moving party has the initial burden of demonstrating that there is no genuine issue of material fact to be decided with respect to any essential element of the nonmoving party's claim. *Anderson*, 477 U.S. at 250 n.4, 106 S. Ct. at 2511 n.4. Once that burden is met, the opposing party must show, through affidavits or otherwise, that there is a material factual issue requiring a trial.[7] Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324, 106 S. Ct. at 2553; *Anderson*, 477 U.S. at 250, 106 S. Ct. at 2511. When deciding a summary judgment motion, the court must resolve any ambiguities and draw all inferences from the facts in a light most favorable to the nonmoving party. *Wright v. Coughlin*, 132 F.3d 133, 137-38 (2d Cir. 1998). Summary judgment is inappropriate where "review of the record reveals sufficient evidence for a rational trier of fact to find in the [non-movant's] favor." *Treglia v. Town of Manlius*, 313 F.3d 713, 719 (2d Cir. 2002) (citation omitted).

Both parties in this fact-intensive matter have sought summary judgment, urging the court to find that all of the material facts necessary to adjudicate the claims in this action have been established, without contradiction, and thus there is no need to conduct a trial in this case.[8]

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[7] A material fact is genuinely in dispute "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510.

[8] Defendants, by way of example, state in their papers that "[t]he parties have agreed that no relevant or material facts are in dispute, and that cross-motions for summary judgment should be filed . . . ." Defendants' Memorandum of Law In Support of Motion for Summary Judgment (Dkt. No. 155) at 1. Elsewhere in that submission defendants reassert the proposition, observing that "[h]ere, the parties disagree over the legal significance of certain facts, but agree that the record is complete and that summary judgment can

The mere fact that both parties believe that they are entitled to summary judgment, however, does not necessarily obviate the need for a trial in order to resolve disputed issues of material fact. *Schwabenbauer v. Board of Ed. of City Sch. Dist. of City of Olean*, 667 F.2d 305, 313 (2d Cir. 1981). When confronted with cross-motions for summary judgment, a court must consider each motion separately. *I.V. Services of Am., Inc. v. Trustees of Am. Consulting Eng'rs Council Ins. Trust Fund*, 136 F.3d 114, 119 (2d Cir. 1998) (citing and quoting *LaFond v. General Physics Servs. Corp.*, 50 F.3d 165, 171 (2d Cir. 1995)). In such an instance, the court's mission is to "evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Hotel Employees & Rest. Employees Union, Local 100 v. City of New York Dep't of Parks & Recreation*, 311 F.3d 534, 543 (2d Cir. 2002) (citations and internal quotations omitted).

B. Motion To Strike Attorneys' Affidavits

One element of the legal skirmish now confronting the court is ,a motion by the plaintiffs to strike an affirmation submitted by Michael J. Cahill, Esq., counsel for the Authority (Dkt. No. 154), and an affidavit given by Richard Frye, Esq., the attorney representing Oneida County (Dkt. No. 158), from consideration in connection with the pending cross-motions for summary judgment. As a basis for that request, plaintiffs assert the impropriety of including within those affidavits both factual statements which are not based on personal knowledge and legal argument. Oneida County

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be granted." *Id.* at 6. Plaintiffs have taken a similar position, noting in their motion papers that "both parties have moved for summary judgment, thus confirming there are no material facts in dispute precluding such relief." Plaintiff's Memorandum of Law in Support of Plaintiff's Cross-motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment (Dkt. No. 163) at 1.

actively opposes that request, asserting that the disputed documents merely discuss and summarize matters already in evidence, and report upon background facts which are well known to the citizenry of Oneida and Herkimer Counties. That defendant therefore asks that the affidavits be considered in this light or, alternatively, that they be treated as legal memoranda.[9]

> The rules of this court provide, in pertinent part, that
>
> [a]n affidavit [given in connection with a motion filed with the court] must not contain legal arguments, but must contain factual and procedural background as appropriate for the motion being made.

N.D.N.Y.L.R. 7.1(a)(2). That rule represents little more than an embodiment of the longstanding custom and practice, particularly as it relates to summary judgment motions, that affidavits presented in support of or opposition to a motion should contain factual assertions made upon personal knowledge, to the exclusion of mere hearsay or legal arguments better reserved for legal memoranda. *DiTullio v. Village of Massena*, 81 F. Supp.2d 397, 403 (N.D.N.Y. 2000) (McAvoy, C.J.) (citing *Hollander v. American Cyanamid Co.*, 172 F.3d 192, 198 (2d Cir.), *cert. denied*, 528 U.S. 965, 120 S. Ct. 399 (1999) and N.D.N.Y.L.R. 7.1(a)(2)); *see also* 10B Wright, Miller & Kane, Federal Practice and Procedure, § 2738 (3d ed. 1998).

A review of the disputed submissions reveals that they exceed the permissible bounds established in accordance with these principles. Paragraph five of the Cahill Affirmation describes its remainder as "intended to discuss the salient facts established (or not established) in discovery, with particular regard to the opinions of the expert witnesses provided by both sides." Cahill Affirmation (Dkt. No. 154) ¶ 5.

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[9] The docket fails to reflect any papers submitted by the Authority or Herkimer County in opposition to plaintiffs' motion to strike.

As advertised, the matters set forth in the balance of the Cahill Affirmation essentially represent commentary on expert reports and deposition transcripts which are already before the court. Such advocacy is better reserved for inclusion in legal memoranda, which have been submitted to the court in abundant quantity in connection with the pending cross-motions. Paragraphs six through forty-five of the Cahill Affirmation should therefore be stricken.

The Frye Affidavit suffers from similar infirmity. It is true that in offering his affidavit, Attorney Frye lays what could be viewed as a foundation for his ability to comment regarding certain matters, averring that he is a lifetime resident of the county and has practiced law there for forty-five years, including to serve as Oneida County Attorney. Frye Aff. (Dkt. No. 158) ¶ 3. The affidavit goes on, however, to make certain factual representations regarding the history of solid waste collection and disposal in Oneida County, without providing an indication of the specific basis of Attorney Frye's knowledge, and at times becomes opinionated and argumentative. Based upon my review of the Frye Affidavit, I find that its contents, beginning at paragraph five and extending through the end, should not be regarded by the court as evidentiary material, and therefore recommend the striking of those portions of the affidavit.

C. Framing The Issue/Law Of The Case

The question which the court of appeals charged this court to consider on remand, while potentially rife with complex and highly fact-intensive considerations, is quite simply stated. The Second Circuit squarely rejected this court's earlier holding that in light of *Carbone*, the flow control laws at issue should be scrutinized under the stricter test associated with facially discriminatory enactments, which would have required the defendants to justify their actions and establish that no less restrictive alternatives exist, instead concluding that the ordinances should be reviewed under the less rigid

Pike test. *United Haulers*, 261 F.3d at 263-64. That test requires the court to examine and uphold the challenged provisions "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142, 90 S. Ct. at 847.

Despite the higher court's directive, the plaintiffs now urge the court to eschew the *Pike* test in favor of the stricter scrutiny required under *Carbone* and other similar cases. In making this argument plaintiffs do not regard the Second Circuit's decision as binding, in light of the fact that at the time it was rendered discovery had not yet occurred, a factor which in their view makes the law of the case doctrine inapplicable. Plaintiffs further contend that through discovery conducted since the trial court's earlier decision, they have been able to demonstrate the existence of a discriminatory effect resulting from the disputed ordinances sufficient to raise the bar and invoke the *per se* discriminatory test. In support of this argument, plaintiffs assert that because the overall waste management program developed by the counties was designed, in part, to keep and attract employers, it therefore has the discriminatory effect of favoring local businesses over out-of-state competitors. Plaintiffs argue that the Second Circuit did not perceive this potentially discriminatory impact at the time its decision was rendered, since the argument is based upon information subsequently developed through pretrial discovery.

Plaintiffs' request for departure from the seemingly limited task assigned to this court requires an analysis of the Second Circuit's decision and mandate in light of established principles, including those related to law of the case. Generally speaking, law of the case tenets dictate that when a court rules upon an issue, that decision continues to govern the same issues in subsequent stages of that case. *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 7-8 (2d Cir. 1996). Although the doctrine is admittedly discretionary and a court is always free to modify its own pretrial rulings at any time

before it enters a final judgment, based upon jurisprudential principles underlying the law of the case doctrine - including the desire that litigants be able to rely on judicial holdings and adjust their conduct accordingly - courts have steadfastly refused to reexamine issues previously decided in a case absent compelling circumstances, such as an intervening change of controlling law, the introduction of new evidence, or the need to correct a clear error or prevent manifest injustice. *Pescatore*, 97 F.3d at 8; *Doe v. New York City Dept of Soc. Servs.*, 709 F.2d 782, 789 (2d Cir. 1981) (citations omitted), *cert. denied, Catholic Home Bureau v. Doe*, 464 U.S. 864, 104 S. Ct. 195 (1983).

While under law of the case teachings a court retains a certain measure of discretion to revisit its own earlier rulings, provided that in doing so it does no injustice to the desirable end of ensuring predictability and uniformity of results and avoiding needless relitigation of questions already decided, that same flexibility does not empower a district court to avoid the clear dictates of an appellate court mandate when, as is the case in this instance, that mandate "describes the duty of the district court on remand upon receipt of the mandate, which is the appellate court's direction to the trial court[.]" *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001) (internal quotation marks and citation omitted). Upon receipt of such a mandate, the inferior court to which the matter has been remanded is left with no choice but to proceed in accordance with the mandate as well as "such law of the case as was established by the appellate court." *Stagl v. Delta Airlines, Inc.*, 117 F.3d 76, 79 (2d Cir. 1997) (internal quotation marks and citation omitted). Upon review following the issuance of the mandate, the court retains no discretion to consider questions which have been necessarily determined by the appellate court issuing the mandate. *Oneida Indian Nation of New York v. County of Oneida*, 214 F.R.D. 83, 92 (N.D.N.Y. 2003) (McCurn, S.J.).

In this instance the assignment delegated to this court by the Second Circuit's mandate, and the analysis to be now undertaken as a result of that directive, could not be clearer. The mandate provided that the district court's earlier determination and resulting judgment was reversed and remanded "for further proceedings in accordance with the opinion of this Court." Dkt. No. 101. That decision, in turn, specifically held "that the Counties' system does not discriminate against interstate commerce in favor of in-state business interests[.]" *United Haulers*, 261 F.3d at 263. The Second Circuit explained this finding by noting that

> [f]low control regulations like the Oneida-Herkimer ordinances, which negatively impact all private businesses alike, regardless of whether in-state or out-of-state, in favor of a publicly owned facility, are not discriminatory under the dormant Commerce Clause.

Id. Having made that finding the Second Circuit acknowledged temptation to undertake a *Pike* balancing analysis on its own initiative, but resisted the urge and instead remanded to this court with the following crisp and concise directive:

> [W]e reverse and remand for a determination of whether the Counties' flow control laws pass constitutional muster under the *Pike* balancing test.

United Haulers, 261 F.3d at 264.

Given this clear instruction, embodied by reference in the Second Circuit's mandate, this court is duty bound to faithfully comply with that court's narrow and quite specific directive. Accordingly, I recommend rejection of plaintiffs' efforts to reframe the issue, resolution of which has been assigned to this court, and to convince the court to reject the *Pike* balancing test in favor of a more strict scrutiny test.

D. *Pike* Test Analysis

As earlier noted, this court is now tasked with reviewing the record in order to determine whether, when applying the

Pike balancing test, it can discern the existence of any genuinely disputed material issues of fact which would warrant denial of one or both cross-motions, in favor of conducting a trial. Defendants take the position that no reasonable factfinder could conclude that the incidental burdens imposed on interstate commerce by the regulations now under scrutiny are qualitatively or quantitatively different than those imposed on intrastate commerce, and thus there are no incidental burdens against which putative local benefits must be measured. As such, they argue, it is unnecessary for the court to consider the extensive submissions of the parties and engage in the "fact-intensive" balancing under *Pike* contemplated by the Second Circuit in its remand of this case.

The Second Circuit has observed that the "incidental burdens" on interstate commerce of concern in *Pike* "are the burdens on interstate commerce that exceed the burdens on intrastate commerce." *Automated Salvage Transport, Inc.*, 155 F.3d at 75; *see also New York State Trawlers Assn. v. Jorling*, 16 F.3d 1303, 1308 (2d Cir. 1994). As that court has noted,

> [t]hus, the minimum showing required to succeed in a Commerce Clause challenge to a state regulation is that it have a disparate impact on interstate commerce. The fact that it may otherwise affect commerce is not sufficient.

Id. In a case in which the *Pike* balancing test is employed, summary judgment upholding the challenged regulatory measure "is appropriate where no reasonable factfinder could find that the statute's 'incidental burdens on interstate commerce' are clearly excessive in relation to the local benefits." *New York State Trawlers Ass'n*, 16 F.3d at 1308 (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-72, 101 S. Ct. 715, 727-28 (1981)).

In applying *Pike*, the court may consider that waste management falls within the "traditional purview" of municipali-

ties. *United Haulers*, 261 F.3d at 264. Despite plaintiffs' contention to the contrary, it is well-recognized — certainly at least within this circuit — that "[w]aste disposal is both typically and traditionally a local government function." *United Haulers*, 261 F.3d at 264 (Calabresi, J., concurring) (citations omitted); *see also USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1275 (2d Cir. 1995) ("For ninety years, it has been settled law that garbage collection and disposal is a core function of local government in the United States.").

While there is some common ground associated with the parties' positions on these issues, both they and their respective experts seemingly exhibit some disagreement in their analyses of the burdens upon interstate commerce associated with the trash flow regulations at issue.[10]

Mark P. Berkman, plaintiffs' expert, characterizes the designated purposes underlying the disputed trash flow regulations as being consistent with the intent of trash flow laws generally. Defendants' Exhibits Vol. II (Dkt. No. 168) Tab 14 ¶¶ 37, 41. In the face of trends favoring large regional waste processing and disposal facilities and vertically integrated waste collection, processing and disposal operations, according to Dr. Berkman, such trash flow provisions as those now under scrutiny generally lead to "balkanization," with municipalities hoarding waste in an effort to achieve waste disposal self-sufficiency. *Id.* 30.

Although specifics are conspicuously lacking in his report, Dr. Berkman opines that the counties' flow control

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[10] Not surprisingly, those experts also hold very different views regarding the benefits sought to be achieved by the disputed trash flow regulations. In addition, although this factor is in all likelihood legally irrelevant under *Pike*, the experts also disagree strongly over whether those putative benefits could be realized by implementing less restrictive measures.

laws, while facially affording equal access to solid waste generated within the two counties to both in-state and out-of-state waste collectors, transporters and disposal companies, and excluding all commercial waste processors, in-state and out-of-state, from the market, in reality discourage out-of-state companies from participating on an equal footing. *Id.* ¶ 18. This, Dr. Berkman suggests, is due to the inability of the haulers to take advantage of potential alliances with out-of-state landfills or waste disposal facilities as well as the requirement of a single point of access created by the flow control laws. *Id.* ¶ 19. This, in the estimation of plaintiffs' expert, prevents local haulers, and in turn the consumer, "from benefiting from the highly competitive interstate solid waste disposal market." *Id.*

In view of these trends and the restrictions placed on waste generators and collectors in which waste from the counties must be transported for processing, plaintiffs' expert opines, there is a resulting burden on interstate commerce. *Id.* ¶¶ 16-20. The trash flow ordinances at issue require that all waste collected be taken to centralized processing facilities operated by the Authority. Id. ¶ 16. Without such restrictions, Dr. Berkman notes, trash collected within the counties of Herkimer and Oneida would likely be transported elsewhere for processing, taking advantage of the large interstate market for waste disposal and the trend for large regional waste and processing of disposal facilities. *Id.* ¶¶ 18-20. While recognizing that the current regime does allow for the possibility of transport of waste to disposal sites outside of New York — and in fact that did occur during earlier years — Dr. Berkman attributes this solely to the failure of the two counties to meet their ultimate objective of having the Authority create its own landfill, with the intended effect of removing all non-recyclable waste generated within the two counties from interstate commerce. *Id.* ¶ 17. Dr. Berkman also suggests that given the reality of vertical integration and the demonstrated availability of waste haulers to negoti-

ate agreements which include waste processing components, interstate commerce would be enhanced without the limitation that processing occur at an Authority facility. *Id.* ¶¶ 24-25.

Dr. Berkman characterizes the challenged trash flow ordinances as an inefficient means of achieving the stated goals, and an impediment to the ability to take advantage of the "price discipline" resulting from free competition. *Id.* ¶¶ 17, 37. Dr. Berkman notes that the tipping fees associated with waste collected within the counties are substantially higher than average, a fact he attributes to the current restrictions. *Id.* ¶¶ 37, 45. Dr. Berkman suggests that in light of the Second Circuit's earlier decision in this case, the relevant inquiry requires assessment of the benefits associated with the trash flow provisions, rather than the Authority's entire integrated waste control structure, as well as a determination as to whether those benefits are clearly outweighed by the burdens on interstate commerce. *Id.* ¶ 40. Characterized this way, Dr. Berkman suggests that the answer is obvious, since there are far less restrictive means of financing the work of the Authority. *Id.*¶ 56.

Dr. Robert N. Stavins, defendants' expert, acknowledges that the trash flow provisions at issue were calculated to ensure sufficient revenues to cover all costs of the Authority's integrated waste disposal system, and further that the tipping fees charged are higher than those typical of facilities which merely engage in collection, processing and disposal of waste in general without being subjected to the requirements associated with a more comprehensive integrated waste management program. Defendants' Exhibits Vol. III (Dkt. No. 169) Tab 17 ¶ 9. He maintains, however, that the trash flow ordinances do not impermissibly differentiate between New York and out-of-state private concerns. *Id.* ¶ 29.

Focusing on the four segments of the industry — generation, collection, processing and disposal — Dr. Stavins con-

cludes that there are minimal, if any, burdens on interstate commerce associated with the provisions at issue. *Id.* ¶¶ 15-19. In terms of generation, according to Dr. Stavins, there is no resulting disparate impact on interstate commerce, since the local laws relate exclusively to waste collected within the counties. *Id.* ¶ 16. The collection portion of the waste management process is open to all interested parties, without regard to their location, and thus there is no theoretical differentiation made between in-state and out-of-state collectors by the flow provisions. *Id.* ¶ 17.

Addressing the processing component, Dr. Stavins points out that the laws require that all non-recyclable waste collected within the county by any party be brought to an Authority transfer station for processing prior to ultimate disposition. *Id.* ¶ 18. This is a requirement which does not affect interstate commerce, instead simply removing all non-recyclable waste generated in the counties from private commerce, without making any distinction between in-state and out-of-state processors. *Id.*

With regard to hauling and the final disposition of the waste, Dr. Stavins recognizes only minimal potential benefit to in-state versus out-of-state interests, based principally upon geographical considerations, including proximity to the source of supply.[11] Defendants' Exhibits Vol. III (Dkt. No. 169) Tab 17 ¶19. Dr. Stavins also notes that the counties' waste management provisions actually encourage interstate commerce, insofar as they relate to recyclable materials. Defendants' Exhibits Vol. III (Dkt. No. 169) Tab 17 ¶19.

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[11] This potential benefit to local entities is a function of distance, and not necessarily whether a hauler or waste disposer is in-state or out-of-state, though certainly there is some measure of correlation. This potential benefit, however, does not result from the trash flow ordinances now at issue, and would obtain even absent those provisions.

The opinions of the respective experts diverge considerably when considering the possibility that the Authority could one day recognize the objective of developing its own landfill. Plaintiffs' expert notes that historically, publicly operated landfills are more costly and less environmentally compliant than those operated by their private sector counterparts. Defendants' Exhibits Vol. II (Dkt. No. 168) Tab 14 ¶ 48. Dr. Berkman also states the obvious — that the development of a local facility would remove waste from interstate commerce for purposes of disposal, thus by definition favoring a local facility over those existing out of state. *Id.* ¶¶ 17, 46. Dr. Stavins, by contrast, disagrees with this ultimate conclusion, and opines that construction of a waste disposal facility by the Authority would not materially impact upon interstate commerce. Defendants' Exhibits Vol. Ill (Dkt. No. 169) Tab 17 ¶¶ 30-31.

The lesson of the Second Circuit's earlier decision in this case, as well as *Pike* itself, is that regulatory provisions under scrutiny pass dormant Commerce Clause muster unless they treat out-of-state entities less favorably than similarly situated in-state concerns. While arguing that the Second Circuit, including in *New York State Trawlers Association, Inc.*, has misinterpreted Supreme Court precedent, the plaintiffs do not genuinely challenge this threshold need to establish some incidental burden upon interstate commerce, which in turn requires a showing of some disparity in treatment between in-state and out-of-state interests. See Plaintiffs' Memorandum of Law in Support of Plaintiffs' Cross-Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment (Dkt. No. 163) at 11-12. The critical inquiry, as plaintiffs acknowledge, is whether an out-of-state business is treated less favorably than one similarly situated but within the state. *Id.*

Having engaged in a thorough review of the record, including the most recent submissions of the parties, I fail to discern any disparate impact resulting from the challenged

regulations on interstate commerce. Under the regime now being challenged, a local private trash business is treated no differently than one situated out of state. Any hauler, for example, is permitted to collect solid waste within the counties of Herkimer and Oneida. Similarly, any trash hauler, regardless of location, is entitled to bid on the right to contract for the hauling of waste from transfer stations for disposal, and all private concerns are disqualified, without exception, from the processing phase. Finally, the ordinances place no restriction on the final disposal location for waste hauled from the transfer station', subject to the ultimate goal of establishing an Authority-operated disposal site. While Dr. Berkman notes that the counties' system deprives trash collectors the opportunity to align with disposal companies, and thereby gain competitive advantage, this applies equally to both in-state and non-New York based entities. Simply stated, there is no distinction between treatment of interstate as opposed to intrastate service providers under the disputed regulations.

Unquestionably, the challenged ordinances differentiate between the Authority and private entities which would be positioned to receive and process the solid waste in issue. In the event that the Authority does realize its goal of developing its own disposal site, then the flow control laws will obviously remove solid waste generated in the two counties which otherwise would be available to private, commercial waste disposal companies. The fact that the disputed regulations favor a governmental entity over private interests, however, does not in and of itself violate the dormant Commerce Clause. *Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205, 218 (2d Cir. 2004). Indeed, as the Second Circuit has already made clear in this instance, a flow control ordinance governing the processing of waste is not discriminatory under the Commerce Clause unless it favors local private business interests over out-of-state interests:

> [f]low control regulations like the Oneida-Herkimer ordinances, which negatively impact all private busi-

> nesses alike, regardless of whether in-state or out-of-state, in favor of a publicly owned facility, are not discriminatory under the dormant Commerce Clause.

United Haulers, 261 F.3d at 263. Both the plaintiffs and their expert, Dr. Berkman, apparently acknowledge that the trash flow provisions under scrutiny do not have disparate impact upon out-of-state private entities, as compared to those located within New York. Defendants' Exhibits Vol. I (Dkt. No. 167) Tab 7 (Plaintiff's Supplemental Response to Defendants' Third Set of Interrogatories) No. 3; Defendants' Exhibits Vol. II (Dkt. No. 168) Tab 16 at 67-71, 211.

Demonstrating admirable creativity in their advocacy, plaintiffs point to legislative history suggesting that the disputed regulations were motivated, at least in part, by a desire on the part of local county officials to provide effective waste removal as a means of enhancing the local business climate in order to keep existing employees from relocating elsewhere, and attracting new businesses into the area. This, they argue, represents the sort of protectionism condemned under dormant Commerce Clause jurisprudence. Plaintiffs' Memorandum of Law in Support of Plaintiffs' Cross-Motion for Partial Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment. Dkt. No. 163, at 5-6.

The cases striking down such protectionist measures, however, typically focus on those enactments which directly regulate a particular industry and favor local businesses operating within that industry, to the detriment of out-of-state, but otherwise similarly situated, entities. *See, e.g.*, *Carbone*, 511 U.S. at 387-94, 114 S. Ct. at 1680-84. The present circumstance, involving efforts by municipal officials to create a favorable environment for local businesses and residents, represents an entirely different situation. By enacting laws forming the underpinning of comprehensive solid waste reform, local government officials were performing the very function with which they are charged — to provide govern-

mental services for the citizenry, in this case obviously driven at least in part by a legitimate desire to provide a business-friendly atmosphere designed to attract industry and provide jobs in the community. While such a measure is clearly "protectionist" to the extent that it seeks to prevent erosion of the local business community, it does not represent the type of regulation proscribed by the Commerce Clause and addressed by the line of cases upon which plaintiffs rely.

The trash flow ordinances at issue in this case also do not bear the trappings of legislation which, though facially neutral, is designed to serve the interests of the sort of protectionism which the framers sought to avoid by enactment of the Commerce Clause. This is a factor which readily distinguishes the present situation from that presented in such cases as *Atlantic Prince, Ltd. v. Jorling*, 710 F. Supp. 893 (E.D.N.Y. 1989). In that action, one of several reported cases involving the right to engage in offshore fishing for squid and other species in coastal waters off of New York and nearby states, the court struck down a facially neutral requirement limiting vessels engaged in commercial fishing in New York's waters to a length of ninety feet or less. *Atlantic Prince*, 710 F. Supp. at 894. The basis for doing so was the court's finding that while the statute was neutral in its wording, the unabashed intention of lawmakers in adopting the requirement was to protect the New York commercial fishing industry, which at the time of enactment had at most one commercial fishing vessel exceeding ninety feet in length, to the exclusion of several out-of-state commercial fishing boats over ninety feet in length which had applied for licenses to fish in New York waters. *Id.* at 897. Given the district court's observation that the "case may present one of those 'rare instance[s] where a state artlessly discloses an avowed purpose to discriminate against interstate goods[,]" the court in *Atlantic Prince* found that the law discriminated with respect to interstate commerce, and enjoined its en-

forcement.[12] *Atlantic Prince*, 710 F. Supp. at 901. In this case, by contrast, there is no evidence in the record to suggest that by enacting the trash flow ordinances at issue and the broader waste management regime which led to those ordinances and creation of the Authority, the legislative bodies of Herkimer and Oneida Counties were motivated by a desire to protect local, in-state commercial waste management companies to the detriment of similarly situated, out-of-state concerns. *Atlantic Prince* and similar cases thus provide no basis to set aside the trash flow ordinances now at issue.

Having searched the record, without success, to find any evidence of a quantitative or qualitative difference in the burdens placed by the challenged ordinances on interstate and intrastate commerce, I conclude that there is no violation of the dormant Commerce Clause, and the court therefore need not proceed to the next step of balancing the burdens against the putative benefits associated with the legislation,[13]

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[12] In *Davrod Corp. v. Coates*, the First Circuit endorsed the district court's analysis of Atlantic Prince and distinguished the somewhat similar circumstances before it by finding that the "heavy discriminatory footprints" left in the legislative history in the New York statute were not present in the Massachusetts legislation. 971 F.2d 778, 789-90 (1st Cir. 1992).

[13] In support of their argument that the *Pike* test favors the finding that flow control laws are unconstitutional, plaintiffs place considerable emphasis upon the alternatives which exist to achieve the ends cited by the counties as providing the rationale for the "hoarding" effect of those ordinances. *See* Plaintiff's Reply Memorandum (Dkt. No. 166) at 8. While consideration of alternatives does not appear to be directly relevant under the *Pike* test, the Second Circuit did intimate in its decision in this case that consideration of "specific alternatives, if any, available to the locality, based on its unique geographical, practical and historical characteristics" could potentially be appropriate. *United Haulers*, 261 F.3d at 256 n.3. That finding, however, appears to have been directed to the perceived premature disposal of the case by the district court under

Freedom Holdings Inc., 357 F.3d at 217-18 (citing *National Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 109 (2d Cir. 2001)).

Given the conviction with which the Second Circuit spoke in its decision in this case regarding the lack of a showing of any disparity in treatment of in-state and out-of-state private concerns under the challenged flow control laws, and considered in light of other decisions from that court including the more recent opinion in *Freedom Holdings, Inc.*, it is at least slightly perplexing that the appellate court did not remand the matter with a directed finding that as a matter of law, the disputed flow control ordinances are not unconstitutional. The language of that court's opinion, however, suggests its strong belief that this was the result which ultimately would obtain upon remand.[14] Based upon my careful review of the record, I now recommend a finding that no reasonable factfinder could determine that the burden imposed in interstate commerce by those regulations is "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142, 90 S. Ct. at 847.

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the more harsh *per se* invalidity test under *Carbone*, and was seemingly rendered academic by its later finding that the ordinances at issue should be evaluated utilizing a *Pike* test analysis.

[14] As was noted earlier, in its decision the Second Circuit expressed temptation to engage in the *Pike* balancing test itself without remanding the matter to this court for consideration of that issue in the first instance, but in the end resisted. *United Haulers*, 261 F.3d at 263-64. Both the majority and concurring opinions in the case, however, strongly suggest that court's inclination to find, in deference to the belief that "[w]aste disposal is both typically and traditionally a local government function", that the ordinances pass muster under *Pike*. See *United Haulers*, 261 F.3d at 264 (Calebresi, J. concurring). This view is fortified by the Second Circuit's recent characterization of its decision in this case as "upholding" the disputed ordinances. *See Freedom Holdings Inc.*, 315 F.3d at 219 (citing *United Haulers*, 261 F.3d at 262).

IV. SUMMARY AND RECOMMENDATION

This action involves performance by a municipal authority of a function traditionally carried out by municipalities — the collection and disposal of solid waste. In their complaint, the plaintiffs have challenged a measure, which serves as one component of a wholly integrated waste management scheme, requiring that all non-recyclable solid waste collected by any trash hauler, private or municipal, within the Counties of Herkimer and Oneida be taken to a central location for processing and redistribution, and then hauled by a contract vendor to the ultimate' disposal site, which until the Authority recognizes its goal of operating its own disposal site, can be one of the vendor's choosing. Because the challenged ordinances, from an interstate commerce point of view, are facially neutral in their impact, in that they do not affect similarly situated in-State business concerns materially differently from those out of State, I find that it does not run afoul of the dormant Commerce Clause.

Analyzing, as I must, the parties' cross-motions independently, and in each instance resolving all ambiguities and drawing all inferences in favor of the opposing party, I find no basis upon which a reasonable factfinder could conclude that the ordinances now under scrutiny impose burdens on interstate commerce that exceed those placed on intrastate commerce. Accordingly, there is no need to weigh any such individual burdens against putative benefits resulting from flow control provisions, and a finding as a matter of law that they pass muster under the Pike test is warranted. Accordingly, it is hereby

RECOMMENDED that defendants' motion for summary judgment dismissing plaintiffs' complaint (Dkt. No. 152-1) be GRANTED; and it is further

RECOMMENDED that plaintiffs' motion for partial summary judgment on the issue of liability (Dkt. No. 145-1) be DENIED; and it is further

RECOMMENDED that plaintiffs' cross-motion for partial summary judgment on the issue of liability (Dkt. No. 160-1) be DENIED; and it is further hereby

RECOMMENDED that plaintiffs' motion to strike the Affirmation of Michael J. Cahill, Esq., and Affidavit of Richard H. Frye (Dkt. No. 145-1) be GRANTED in part, and that paragraphs five through forty-five of the Cahill Affirmation, and paragraphs five through twenty-five of the Frye Affidavit, be STRICKEN from the record.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1), the parties may lodge written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court within ten (10) days. FAILURE TO SO OBJECT TO THIS REPORT WILL PRECLUDE APPELLATE REVIEW. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(e), 72; *Roland v. Racette*, 984 F.2d 85 (2d Cir. 1993).

IT IS FURTHER ORDERED, that the Clerk of the Court serve a copy of this Report and Recommendation upon the parties electronically.

/S/ DAVID E. PEEBLES
David E. Peebles
U.S. Magistrate Judge

Dated: March 17, 2004
Syracuse, NY

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED HAULERS ASSOC., INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC. and INGERSOLL PICKUP, INC.,

Plaintiffs,

-v.-

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA and COUNTY OF HERKIMER,

Defendants.

Civil Action No. 95-CV-516

APPEARANCES:	OF COUNSEL:
YOUNG & RITZENBERG Attorneys for Plaintiffs Executive Woods Three Atrium Drive Albany, New York 12205	Kevin M. Young, Esq. Kristin Carter Rowe, Esq.
RAYHILL BANKERT & RAYHILL Attorneys for Defendant Oneida-Herkimer Solid Waste Management Authority P.O. Box 156 5 Paris Road New Hartford, New York 13413	Philip A. Rayhill, Esq.
SMITH, SOVIK, KENDRICK & SUGNET, P.C. Attorneys for Defendant County	James A. O'Shea, Esq.

of Oneida
250 South Clinton Street
Suite 600
Syracuse, New York 13202-1252

HORIGAN, HORIGAN, PENNOCK & LOMBARDO, P.C.
Attorneys for Defendant
County of Herkimer
P.O. Box 520
49 East Main Street
Amsterdam, New York 12010

Carrie McLoughlin Noll, Esq.
Thomas E. Kelly, Esq.

ROSEMARY S. POOLER, C.J.*

MEMORANDUM-DECISION AND ORDER

Plaintiffs United Haulers Association, et. al (collectively, the "Haulers") brought this lawsuit against defendants Oneida-Herkimer Solid Waste Management Authority (the "Authority") and Oneida and Herkimer Counties to challenge the laws defendants enacted to manage disposal of local solid waste, known as flow control. Plaintiffs claim that the flow control laws violate the U.S. Constitution's commerce clause because they restrict interstate trade in solid waste and waste disposal services. Defendants argue that their comprehensive waste management system, of which flow control is one part, is a necessary public service.

BACKGROUND

During the 1980s, Oneida and Herkimer Counties commissioned several professional studies and conducted a series of public and legislative hearings and debates in order to

* Rosemary S. Pooler, United States Court of Appeals Judge for the Second Circuit, sitting by designation as a United States District Court Judge for the Northern District of New York.

fashion a solid waste management plan. Their efforts culminated in a request to the New York state legislature to pass the Oneida-Herkimer Solid Waste Management Authority Act, which was effective on September 1, 1998. The Act created the public benefit corporation Oneida-Herkimer Solid Waste Management Authority. N.Y. Pub. Auth. L. §§ 2049-aa, *et. seq.* (McKinney 2000).

According to defendants, the Authority "is a public body which has functioned at all material times as an instrument of the Counties in the administration of local solid waste management policy." Def.'s Statement of Material Facts, Dkt. No. 21, ¶ 8. Specifically, the Authority has the power to collect, transport, process and dispose of solid waste; to plan, develop and construct waste management projects; to contract with Oneida and Herkimer regarding waste management; to issues regulations and set and collect fees related to waste management projects; and to borrow money and issue bonds. See N.Y. Pub. Auth. L. § 2049-ee. The Authority also has the power to enter contracts with the counties concerning, among other things, flow control, and the counties have the power to pass flow control ordinances. Id. § 2049-tt.

In May 1989 and December 1989, Oneida, Herkimer and the Authority entered contracts concerning solid waste management. Aff. of Kristin Carter Rowe, Esq., Dkt. No. 15, Exs. F & G. The contracts required the Authority to purchase or lease existing county facilities, which included an incinerator in Rome, a recycling center in Utica, and a recycling center in Ilion; to operate the existing facilities; to develop future facilities; and to issue rules and regulations concerning facilities' operations. Oneida and Herkimer agreed to deliver "all solid waste originated or brought within their respective jurisdictions to the transfer station or stations or other facility designated by the Authority." Id. Ex. F, § 205. The May 1989 contract permitted the Authority to charge tipping and user fees to fund the purchase, construc-

tion and operation of waste management facilities. Under the December 1989 contract, the Authority agreed to issue and sell bonds to fund the study and implementation of a solid waste management plan for Oneida and Herkimer, and the counties agreed to pay any shortfall between the Authority's operating expenses and revenues. Id. Ex. G, §§ 3.03, 5.01, 5.02.

In December 1989, Oneida passed its flow control ordinance, and Herkimer followed suit in February 1990. Rowe Aff., Dkt. No. 15, Exs. B & C. In relevant part, the Oneida ordinance states that "solid waste and recyclables shall be delivered to the appropriate facility, entity or person responsible for disposition designated by the County or by the Authority pursuant to contract with the [County]." Id. Ex. B § 2(d). The Oneida law requires all haulers to obtain a permit from the Authority, and the law states that construction debris, green waste, commercial and industrial waste, and hazardous waste shall be delivered to designated facilities. Penalties for noncompliance include permit revocation, fines up to $5,000, and up to 30 days in jail. Id. Ex. B, § 12(b). The Herkimer ordinance is nearly identical to the Oneida law, although the Herkimer law caps fines at $2,000. Id. Ex. C, §§ 2(c), 13(a).

The Authority itself issued rules and regulations for its facilities, which include an ash landfill, an incinerator, a green waste compost facility, a household hazardous waste collection site, a recycling center and a transfer station. Aff. of Hans G. Arnold, Dkt. No. 25, Ex. A-7. Most importantly, the regulations state that "[h]aulers must deliver all acceptable solid waste and curbside collected recyclables generated within Oneida and Herkimer Counties to an Authority designated facility." Id. § 8. The regulations also require all haulers to obtain and comply with permits that the Authority issues or face penalties including permit revocation, fines up to $5,000, and up to 30 days imprisonment. Id. at §§ 1, 8-9. The permits incorporate Authority regulations.

With the various contracts, local ordinances, and regulations in place, the Authority issued $42.8 million in revenue bonds in March 1990 to fund the purchase and construction of waste management facilities. Rowe Aff., Dkt. No. 15, Ex. H. The Authority issued $8.1 million in revenue bonds in November 1991 to, among other things, finance a transfer station in Utica. Id. In 1992, the Authority redeemed its outstanding bonds with proceeds from a new bond issue of $50.5 million. Id. The Authority has enforced flow control in the counties and in 1995 charged a tipping fee for solid waste of $86 per ton. Id. ¶ 23. According to plaintiffs, they could dispose of the same solid waste at various New York and out-of-state landfills at tipping fees ranging from $40 to $70 per ton.[1] See, e.g., Aff. of David N. Levitt, Dkt. No. 16, at ¶ 10; Aff. of Jeff Bliss, Dkt. No. 17, at ¶ 11. Plaintiffs estimate that the economic impact of the solid waste trade in Oneida and Herkimer Counties in 1995 was approximately $30.9 million, which is the product of 359,890 tons of waste and the $86 per ton tipping fee. See Rowe Aff., Dkt. No. 15, at ¶ 32.

Plaintiffs filed their complaint in federal court on April 14, 1995. Compl., Dkt. No. 1. In their first cause of action, the Haulers claim that defendants' flow control laws violate the Constitution's commerce clause because the laws discriminate against interstate commerce. Compl. ¶¶ 73-86.

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[1] Defendants state that the Haulers operate pursuant to contracts they signed with individual municipalities or residents. According to defendants, these contracts "establish that plaintiffs do not absorb any of the tipping fees or other disposal costs charged by the Authority," which the Haulers pass through to their customers, and "that plaintiffs are not in fact authorized by their customers to dispose of non-recyclable waste at facilities other than those operated by the Authority." Def.'s Statement of Material Facts, Dkt. No. 21, ¶ 19. These contracts are not in the record, and their relevance, if any, is limited to damages.

Plaintiffs seek declaratory relief and a permanent injunction preventing defendants from enforcing flow control laws. In their second cause of action, the Haulers claim damages under Section 1983, 42 U.S.C. § 1983, because defendants violated their constitutional rights. Compl. ¶¶ 87-95. The Haulers state that they suffered damages as a result of "excessive tipping and disposal fees and the costs and attorneys' fees incurred in this action." Compl. ¶ 95. Defendants filed their answers to the complaint on June 15 and 16 of 1995. Dkt. Nos. 8, 9. The parties have conducted no discovery.[2] By notice of motion, the Haulers sought summary judgment. While decision on the summary judgment motion was pending, I denied plaintiffs' motion for a temporary restraining order. See Dkt. No. 71.

DISCUSSION

I. Summary judgment standard

Summary judgment shall enter if, when viewing the evidence in the light most favorable to the nonmovant, the court determines that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 456 (1992). A party seeking summary judgment must demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the movant satisfies this initial burden, then the burden shifts to the nonmovant to proffer evidence demonstrating that a trial is required because a disputed issue of fact exists. Weg. v. Macchiarola, 995 F.2d 15, 18 (2d Cir. 1993). The nonmovant must do more than present evidence that is merely colorable, conclusory, or speculative and must present "concrete evidence from which a reasonable juror

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[2] The magistrate judge assigned to this matter stayed discovery pending decision on the summary judgment motion. See Dkt. No. 58.

could return a verdict in his favor …." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The nonmovant must do more than show "some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

II. Commerce Clause

The legal analysis required to determine whether defendants' flow control laws violate the commerce clause is well settled in light of several Second Circuit decisions following the Supreme Court's examination of the same issue in C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994). While the commerce clause permits Congress to act affirmatively in regulating interstate commerce, the so-called dormant commerce clause "prohibit[s] the states, in the absence of specific congressional authorization, from regulating interstate commerce." Incorporated Village of Rockville Centre v. Town of Hempstead, 196 F.3d 395, 398 (2d Cir. 1999). A state's "actions are within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow." Carbone, 511 U.S. at 389.

A. Legal Standard

The court first must decide whether the state is regulating the market or participating in it. See Sal Tinnerello & Sons v. Town of Stonington, 141 F.3d 46, 55 (2d Cir.), cert. denied, 525 U.S. 923 (1998). Participating in the market typically means that the state is "buying or selling goods as any private economic actor might." USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272, 1281 (2d Cir. 1995). No commerce clause violation exists in the case of market participation. See Sal Tinnerello, 141 F.3d at 55. Regulating the market generally means that a state is exercising its governmental powers in methods unavailable to private parties. See SSC Corp. v. Town of Smithtown, 66 F.3d 502, 512 (2d Cir. 1995). Classic hallmarks of government regulation are the threatened imposition of fines and/or jail terms to compel

behavior. See id. If the state is regulating interstate commerce, then the court next must decide whether the regulation (1) is even-handed with only incidental effects on interstate commerce; or (2) discriminates against interstate commerce. See USA Recycling, 66 F.3d at 1281 (quotation and citation omitted). See also Sal Tinnerello, 141 F.3d at 55.

An even-handed, or nondiscriminatory regulation has only "incidental effects on interstate commerce" and is valid "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." USA Recycling, 66 F.3d at 1281 (quotations and citations omitted). In contrast, a discriminatory regulation is "virtually per se invalid," and courts strictly scrutinize it. See Gary D. Peake Excavating Inc. v. Town Bd. of the Town of Hancock, 93 F.3d 68, 74 (2d Cir. 1996) (quotation omitted). A discriminatory regulation entails "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." USA Recycling, 66 F.3d at 1281 (quotation and citation omitted). In other words, the invalid regulation "discriminates against commerce by treating in-state interests preferentially." Sal Tinnerello, 141 F.3d at 55.

In order to prevail, plaintiffs must show either that (1) the flow control laws are discriminatory; or (2) the flow control laws place a burden on interstate commerce clearly excessive in relation to the claimed local benefits. See USA Recycling, 66 F.3d at 1281-82. If plaintiffs prove that a regulation is discriminatory, "the burden shifts to the state or local government to show that the local benefits of the statute outweigh its discriminatory effects, and that the state or municipality lacked a nondiscriminatory alternative that could have adequately protected the relevant local interests." Id.

B. Application of Standard

The local laws that Oneida and Herkimer Counties enacted require all commercial haulers to deliver solid waste they collect within the counties to facilities that the counties or the Authority designate, which are the facilities that the Authority owns and operates. These flow control laws are virtually indistinguishable from the laws examined and struck down in both Carbone and SSC Corp. See Carbone, 511 U.S. at 386; see also SSC Corp., 66 F.3d at 505. As the Second Circuit recently summarized those holdings, "[t]he ordinances in Carbone and SSC Corp. were found to be discriminatory because they required all waste within the town to be disposed of at the one favored local facility, to the exclusion of out-of-state competitors." Gary D. Peake, 93 F.3d at 75. Courts have considered it almost a foregone conclusion that flow control laws violate the dormant commerce clause. See Sal Tinnerello, 141 F.3d at 56 (summarizing SSC Corp. holding striking down flow control law); Rockville Centre, 196 F.3d at 397 (noting that defendant town conceded and district court agreed that flow control ordinance was unconstitutional under Carbone); Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc., 155 F.3d 59, 75 (2d Cir. 1998) (summarizing Carbone holding striking down flow control laws); USA Recycling, 66 F.3d at 1278 (noting that defendant town stopped enforcing its flow control ordinance in light of Carbone). All of these cases determined that flow control ordinances were discriminatory. I accordingly conclude that the flow control laws in Oneida and Herkimer Counties also violate the dormant commerce clause. The laws are discriminatory and per se invalid. As explained more fully below, defendants offered no evidence to meet their burden justifying the ordinances, and the Supreme Court has rejected as a matter of law the arguments they raise on this point. Summary judgment in favor of plaintiffs therefore is appropriate.

In their opposition papers, defendants argue preliminarily that plaintiffs lack standing to challenge the flow control laws because they are in the business of collecting and hauling waste rather than disposing of it. Defendants claim that plaintiffs have no legitimate expectation to take the waste to out-of-state facilities. This argument ignores the fact that the Haulers suffer injury when they pay higher tipping fees at the Authority facilities than they would at other plants. Moreover, many of the relevant cases featured haulers as plaintiffs challenging various aspects of flow control, and all of these haulers had standing in federal court. See Automated Salvage Transp., 155 F.3d at 66; Sal Tinnerello, 141 F.3d at 51; SSC Corp., 66 F.3d at 507; USA Recycling, 66 F.3d at 1279-80. Finally, as discussed in part III of this opinion, while the United Haulers Association, Inc. does not have standing to pursue a claim under 42 U.S.C. § 1983, it does have standing under the Declaratory Judgment Act cause of action. See American Charities for Reasonable Fundraising Regulation, Inc. v. Shiffrin, 46 F. Supp. 2d 143, 153 (D. Conn. 1999) (granting defendants' motion to dismiss plaintiff organization from Section 1983 cause of action but leaving intact organization's request for declaratory relief), aff'd, 2000 WL 232656 (2d Cir. Feb. 25, 2000).

Defendants argue that summary judgment is inappropriate because they are entitled to discovery regarding the discriminatory effects of flow control on interstate commerce and the lack of a nondiscriminatory alternative to flow control, which concern their burden under the strict scrutiny test outlined above. Defendants also contend that they are entitled to discovery concerning the history of the counties' solid waste management efforts, purpose of flow control, and materials disposed of within the counties. To the extent that any factual issues exist, they are not material to my decision regarding the constitutionality of the flow control laws. The laws and regulations speak for themselves and are not disputed. The discriminatory effects of flow control also are a

settled matter of law after the Supreme Court's decision in Carbone, and defendants offer no new arguments on this point. See Carbone, 511 U.S. at 391-92. The Supreme Court also rejected as a matter of law defendants' arguments that no less restrictive alternative to flow control exists or that the public benefits of the laws outweigh a burden on interstate commerce. See id. at 392-93. The remaining issues defendants raise are wholly irrelevant to my analysis. Defendants' plea for discovery therefore is unavailing.

Defendants also contend that their legislation is not like the unconstitutional flow control laws because it is an inextricable part of a public waste management system for the local management of local waste. As noted above, however, the relevant case law consistently has extracted flow control laws as an improper element of general waste management schemes. See, e.g., Rockville Centre, 196 F.3d at 397. Defendants argue that their waste management system is like the scheme that the Second Circuit approved in USA Recycling, where the town assumed exclusive responsibility for garbage collection and disposal. See USA Recycling, 66 F.3d at 1283. What defendants ignore, however, is that the defendant town in USA Recycling stopped enforcing its illegal flow control ordinance, which Oneida and Herkimer counties have not done. See id. at 1278. Nor have the counties entirely eliminated the private market for garbage collection services, which the local government did in USA Recycling. The counties only have taken over disposal and ordered all local private haulers to purchase that service from the counties and the Authority. In other words, the counties impermissibly act "as a business selling to a captive consumer base." Id. at 1283. Defendants argue that they merely have restructured the private collection market and prohibited haulers from crossing over into the disposal market, but the flow control laws dictate where the haulers must bring local solid waste and at what price. Although defendants contend repeatedly that their system treats all parties alike with re-

spect to disposal services, what they actually are doing is hoarding all local solid waste for the benefit of a preferred local disposal facility. See Carbone, 511 U.S. at 392. Consequently, I find based on undisputed facts that the flow control laws are unconstitutional because they discriminate against interstate commerce.

C. Remedy

Because the flow control laws violate the commerce clause, defendants are enjoined from enforcing them. The parties at this stage of the proceedings have not addressed the issue of damages, which may involve complex assessments of lost profit and lost business opportunities that the plaintiffs incurred over a period of years. Defendants contend that the Haulers passed on their increased costs from higher tipping fees to their municipal and residential customers, but there is no evidence in the record to support this claim. See Def.'s Statement of Material Facts, Dkt. No. 21, ¶ 19. I therefore refer this matter to the magistrate judge solely for assessment and calculation of damages. The magistrate judge is free to take evidence in whatever form he or she deems appropriate. I do not express any view regarding whether a limitation on damages is appropriate.

III. Section 1983

The Haulers also brought a cause of action pursuant to 42 U.S.C. § 1983, claiming that defendants deprived them of the right to freely engage in interstate commerce by enacting and enforcing flow control.[3] Defendants' primary argument re-

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[3] The statute provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory … subjects, or causes to be subjected, any citizen of the United States … to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

garding this claim concerns not its merits but the alleged need for discovery on the issue of plaintiffs' standing.[4]

Plaintiffs can sue local governments directly under Section 1983 "for monetary, declaratory, or injunctive relief where… the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers." Monell v. Department of Soc. Servs., 436 U.S. 658, 690 (1978). Violations of the commerce clause fall within the scope of Section 1983. Dennis v. Higgins, 498 U.S. 439, 446 (1991). The commerce clause confers a right on plaintiffs "to engage in interstate trade free from restrictive state regulation." Id. at 448. Cf. Valley Disposal, Inc. v. Central Vermont Solid Waste Management Dist., 31 F.3d 89, 102 (2d Cir. 1994) (allowing plaintiffs to pursue Section 1983 claim challenging flow control laws as violating dormant commerce clause). As noted above, defendants violated the dormant commerce clause as a matter of law when they enacted flow control laws. Defendants do not dispute that the counties and public benefit corporation Authority are state actors. Defendants do not enjoy immunity from suit because they are municipalities whose policies caused a constitutional injury. See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 166 (1993).

Defendants contend only that the Haulers, specifically the United Haulers Association, Inc., failed to demonstrate standing because the association has not (1) identified its members

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> shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

[4] Defendants also argue that the Section 1983 claim is without merit because plaintiffs failed to establish a commerce clause violation. Obviously, I disagree.

or explained its purpose; or (2) explained the nature of its members' injuries or linked the injuries to its purposes. Although I do not adopt defendants' arguments, I agree that the association lacks standing only with respect to the Section 1983 cause of action. The Second Circuit "has restricted organizational standing under § 1983 by interpreting the rights it secures to be personal to those purportedly injured." League of Women Voters of Nassau County v. Nassau County Bd. of Supervisors, 737 F.2d 155, 160 (2d Cir. 1984); see also American Charities, 46 F. Supp. 2d at 152-53.[5] The association therefore may not sue under Section 1983 to secure the interstate commerce rights of its members. As noted in part II of this opinion, the association does have standing to pursue its claim under the Declaratory Judgment Act. The named plaintiffs have standing under Section 1983 because the interstate commerce rights that defendants violated are personal to these parties. Finally, plaintiffs note correctly that damages are not an element of the Section 1983 claim, and while the association itself cannot collect damages, the individual named plaintiffs may. See Warth v. Seldin, 422 U.S. 490, 515-16 (1975). I refer this matter to the magistrate judge to determine what, if any, damages and attorneys' fees are warranted.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for summary judgment on their first cause of action is granted and defendants are enjoined from enforcing flow control laws as described in this opinion. The United Haulers Association, Inc. lacks standing only with respect to the claim under Section 1983, but I grant the remaining plaintiffs summary judgment

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[5] Plaintiffs do not argue that they have standing under the exception that the Second Circuit identified for organizations asserting a violation of the right to associate. See League of Woman Voters, 737 F. 2d at 161.

on that second cause of action. This matter is referred to the magistrate judge for calculation of damages, which may require the solicitation of additional evidence from the parties.

IT IS SO ORDERED.

Dated: March 31, 2000
Syracuse, New York

/s/ ROSEMARY S. POOLER
Designated District Court Judge

APPENDIX F

ONEIDA COUNTY BOARD OF LEGISLATORS

RESOLUTION NO. 301

INTRODUCED BY: MESSRS. JULIAN, HARTWELL, CREASER, HERTLINE

2ND BY: MR. KELLY

LOCAL LAW INTRODUCTORY "I" OF 1989

LOCAL LAW NO. 1 OF 1990

RE: LOCAL LAW FOR THE COLLECTION AND DISPOSITION OF SOLID WASTE INCLUDING GARBAGE, RECYCLABLES, CONSTRUCTION AND DEMOLITION DEBRIS, APPLIANCES, FURNISHINGS, GREEN WASTE, HOUSEHOLD HAZARDOUS WASTE, FARM HAZARDOUS WASTE AND INFECTIOUS WASTE, AND FOR THE PROHIBITION OF THE DISPOSAL OF ANY WASTE MATERIALS IN ANY MANNER EXCEPT AS SET FORTH IN THE LAW.

Section 1. Definitions.

As used in this local law, the following terms shall have the following meanings:

(a) "Authority" means the Oneida-Herkimer Solid Waste Management Authority.

(b) "Board" means the Oneida County Board of Legislators.

(c) "Commercial" means any person, company, partnership, municipality or other entity providing a public service or engaged in a business for profit.

(d) "Commercial and Industrial Waste" shall include all non-hazardous and non-toxic solid wastes generated by

commercial and industrial sources exclusive of commercial and industrial by-products.

(e) "Construction and Demolition Debris" means solid waste resulting from construction, remodeling, repair and demolition of structures, road building, and land clearing. Such wastes include but are not limited to bricks, concrete and other masonry materials, soil, rock, lumber, road spoils, paving material, and tree and brush stumps.

(f) "County" means the County of Oneida.

(g) "Farm Hazardous Waste" shall mean pesticides and/or pesticide residue, and all containers containing the same which are or will no longer be utilized for farm purposes.

(h) "Green Waste" shall mean grass clippings, leaves and cuttings from shrubs, hedges and trees, and garden debris.

(i) "Household Garbage" means putrescible solid waste, including animal and vegetable waste resulting from the handling, storage, sale, preparation, cooking or serving of foods. Household garbage originates primarily in home kitchens, stores, markets, restaurants, and other places where food is stored, prepared or served.

(j) "Household Hazardous Wastes" are exempt from State and Federal regulations; for the purpose of this local law, household hazardous waste shall include pesticides, pesticide residue, and all containers containing the same, used motor oil and automobile batteries.

(k) "Household Metals" shall mean any empty metal food containers including aluminum, bimetal and steel cans.

(l) "Infectious Waste" shall be as defined in 6 NYCRR Part 360 as amended.

(m)"Large Household Furnishings" shall mean all other large and/or bulky articles actually used in the home and

which equip it for living (as chairs, sofas, tables, beds, carpets, etc.)

(n) "Major Appliances" shall mean a large and/or bulky household mechanism (as a refrigerator, washer, dryer, stove, etc.) ordinarily operated by gas or electric current.

(o) "Municipality(ies)" means any village, town or city in the County.

(p) "Person" shall mean any individual head of household, landlord, chief executive officer, owner or manager of a commercial or industrial establishment.

(q) "Recyclable Commercial and Industrial By-products" shall include all materials which are a by-product of production utilized in production or sale after sale by a commercial enterprise or industrial enterprise.

(r) "Recyclable Material(s)" means any material which, under any applicable law, is not hazardous and which may be separated from the waste stream and held for its material recycling or reuse value.

(s) "Recyclables" means any material designated, from time to time, by the County or the Authority pursuant to contract with the County which, under any applicable law or regulation, is not hazardous and which is separated from the waste stream and held for its material recycling or reuse value.

(t) "Recyclers" shall mean those who deal with recyclable material, including but not limited to, collectors, separators and marketers. This definition shall include not-for-profit corporations and charitable corporations which collect recyclables for fund raising purposes.

(u) "Solid Waste" means all putrescible and non-putrescible solid wastes, including, but not limited to, materials or substances discarded or rejected as being spent, useless, worthless, or in excess to the owners at the time of such

discard or rejection, or are being accumulated, stored, or physically, chemically or biologically treated prior to being discarded or rejected, having served their intended use, or as a manufacturing by-product, including, but not limited to, garbage, refuse, industrial, commercial and agricultural waste, sludges from air or water pollution control facilities or water supply treatment facilities, rubbish, ashes, contained gaseous material, incinerator residue, demolition and construction debris and offal, but not including sewage and other highly diluted water-carried materials or substances and those in gaseous form, special nuclear or by-prodcut [sic] material within the meaning of the Atomic Energy Act of 1954, as amended, or waste which appears on the list or satisfies the characteristics of hazardous waste promulgated by the Commissioner of the Department of Environmental Conservation.

(v) "Source Separation" means the segregation of recyclable materials from the solid waste stream at the point of generation for separate collection, sale or other disposition.

(w) "Vehicular Tires" shall mean tires from cars and trucks and their casings.

(x) The terms "solid waste," "recyclable material," "construction and demolition debris" and "major appliances" shall not be construed to include "green waste".

Section 2. Preparation of Solid Waste and Recyclables for Residential Collection.

In order to provide for public health and safety, and to facilitate the conservation of vital natural resources, each city, town and/or village within the County shall provide for the collection of solid waste and recyclable material. Each municipality shall provide to the County a plan for approval to provide for such collection. Such plan must demonstrate that regular, reliable collection of solid waste and recyclable ma-

terial will be provided to each property which generates that material to that municipality.

No person shall dispose of solid waste or recyclable or nonrecyclable material except as follows:

(a) In order to provide for public health and safety, and to facilitate the conservation of vital resources, each person shall provide for the removal of solid waste and recyclables from the property on which they are generated either through a service provided by a municipality or licensed private hauler, or by direct haul by the individual generator to a disposal location approved by the County.

(b) In order to facilitate the conservation of vital natural resources through recycling, each person shall provide for the separation of recyclables in a suitable container for recyclable material as authorized or provided by the County or by the Authority pursuant to contract with said County.

(c) In order to further facilitate the conservation of vital natural resources through recycling, discarded newspapers, glass, metals, corrugated cardboard, plastics, office paper and green waste shall be separated from other nonrecyclable material and placed in said container; the particular requirements for separation shall be established by the County or by the Authority pursuant to contract with the County.

(d) From the time of placement of solid waste and of recyclables at the roadside or other designated area approved by the County or by the Authority pursuant to contract with the County, or by a person for collection in accordance herewith, such solid waste and recyclables shall be delivered to the appropriate facility, entity or person responsible for disposition designated by the County or by the Authority pursuant to contract with the Authority. It shall be a violation of this ordinance for any person without a valid permit issued by the County to commercially collect, pick up, remove or cause to be collected, picked up or removed, any solid waste

and/or recyclables placed at the roadside or other designated area, and each such collection, picking up, or removal from one or more premises shall constitute a separate and distinct offense in violation of this ordinance. A resident may dispose of their recyclables by selling or donating the same to recyclers, but these recyclables may not be picked up at the roadside.

(e) It shall be a violation of this ordinance for any person to place at the roadside for collection any can or container other than one which has its contents separated into solid waste and/or recyclables.

(f) Tipping fees, if necessary for the collection, handling and disposal of recyclables shall be established by the Board as needed from time to time (i) upon its initiative, (ii) upon the recommendation of the County Executive, or (iii) pursuant to contract with the Authority.

Section 3. Marketing of Recyclables.

(a) In order to facilitate the marketing of recyclables, the County shall request letters of interest from recyclers expressing their willingness to accept recyclables. A list of interested parties will be established by the County.

(b) Prior to the marketing of recyclables, recyclers appearing on the list will be notified and given specifications with regard to available recyclables.

(c) In the event that recyclers submit a written proposal on said recyclables, it shall be required that said proposal be delivered to the County according to the specifications set forth by the County. Overall costs, the reliability that recyclables will be accepted by the proposer, the contract terms and conditions, including recyclables specifications, for the acceptance of recyclables shall all be major factors in evaluating and awarding a contract.

(d) All marketing of recyclables collected and separated shall, where practicable, be subject to competitive bid. It

shall be a term and condition of all bids for recyclables collected under this local law that the material purchased will be recycled and not landfilled or burned or otherwise not recycled.

(e) For purposes of this Section 3, all contracts awarded on or prior to the acceptance test of the Oneida-Herkimer Materials Recovery Facility shall be effective pursuant to its terms. The acceptance test referred to in this subsection 3(e) shall be the Plant Acceptance Test conducted pursuant to Section 15600.4 as contained in Specifications for the Oneida-Herkimer Materials Recovery Facility, Contract No. 5, Contractor Bid No. H-104-C-1, Process Mechanical. After the date of the acceptance test, this Section 3 shall no longer be of any force or effect.

Section 4. Preparation of Residential, Commercial and Industrial Construction, and Demolition Debris and Disposal of Same.

(a) Each city, town and/or village within the County shall provide a schedule for the collection of residential, commercial and industrial, and construction and demolition debris. Such debris which is recycled or reused for construction shall not be regulated by this ordinance.

(b) Said debris shall be delivered to the appropriate facility, entity or person responsible for disposition designated by the County or by the Authority pursuant to contract with the County.

(c) Tipping fees or other charges for the handling and disposal of residential, commercial and industrial, and construction and demolition debris shall be established and modified by the Board as needed from time to time (i) upon its initiative, (ii) upon the recommendation of the County Executive, or (iii) pursuant to contract with the Authority.

Section 5. Preparation of Residential Green Waste and Disposal of Same.

(a) Each city, town and/or village within the County shall provide a schedule for the collection of residential green waste.

(b) Said green waste shall be composted either by the County or pursuant to contract with the Authority at a site or sites designated by the County or, as applicable, the Authority, or at sites approved by it and operated by cities, towns or villages. Where allowed by law or regulation, this section shall not prohibit private composting of green waste.

(c) Tipping fees or other charges for the handling and disposal of residential green waste shall be established and modified by the Board as needed from time to time either upon [sic] (i) upon its initiative, (ii) upon the recommendation of the County Executive, or (iii) pursuant to contract with the Authority.

Section 6. Disposal of Commercial and Industrial Waste, and Recyclables.

(a) All commercial and industrial waste collected by either municipal or private haulers shall be delivered to the appropriate facility, entity or person responsible for disposition designated by the County.

(b) All commercial and industrial recyclables collected by either municipal or private haulers, and designated for processing and/or disposal at a County or Authority facility shall be packaged and collected in a manner designated by the County or the Authority pursuant to contract with the County, and delivered to a facility, entity or person responsible for its disposition designated by the County.

(c) Tipping fees or other charges for the handling and disposal of commercial and industrial waste, and recyclables shall be established and modified by the Board as needed from time to time upon [sic] (i) upon its initiative, (ii) upon the recommendation of the County Executive, or (iii) pursuant to contract with the Authority.

(d) Commercial or industrial recyclables collected by the metal industry, recyclers, and their agents, as well as the recyclable materials that they separate and market shall be exempt from this ordinance. Any waste they tender for municipal collection shall not include recyclables.

(e) Recyclable industrial and commercial by-products may be sold or donated by an industrial and/or commercial enterprise to any scrap metal enterprise or recycler. However, said by-products cannot be placed at the curbside for collection by said scrap metal enterprise or recycler.

Section 7. Disposal of Major Appliances and Tires.

(a) Each city, town and/or village within the County shall provide a schedule for the collection and disposal of major appliances and tires.

(b) Said major appliances and tires shall be disposed either by the County or pursuant to contract with the Authority at a site or sites designated by the County or at sites approved by the County operated by city, towns or villages.

(c) Tipping fees or other charges for the handling and disposal of major appliances and tires shall be established and modified by the Board as needed from time to time upon [sic] (i) upon its initiative, (ii) upon the recommendation of the County Executive, or (iii) pursuant to contract with the Authority.

Section 8. Preparation of Residential Hazardous Waste for Collection and Disposal of the Same.

(a) All household hazardous waste and farm hazardous waste shall be placed in a container determined by the County or the Authority pursuant to contract with the County.

(b) Household hazardous waste and farm hazardous waste shall be delivered to such facility, entity or person re-

sponsible for disposition as the County or the Authority, pursuant to contract with the County, shall determine.

(c) Tipping fees or other charges for the handling and disposal of household hazardous waste and farm hazardous waste shall be established and modified by the Board as needed from time to time upon [sic] (i) upon its initiative, (ii) upon recommendation of the County Executive, or (iii) pursuant to contract with the Authority.

Section 9. Disposal of Infectious Waste.

(a) Commencing January 1, 1990, all infectious waste as defined and regulated by Title 6 of the official compilation of Codes, Rules and Regulations of the State of New York (NYCRR) Part 360, shall be disposed of at a location designated by the County or by the Authority pursuant to a contract with the County, and by a method specified and approved by the County or the Authority, pursuant to contract with the County, and in compliance with all applicable State laws and regulations.

Section 10. Solid Waste Collection and Disposal Permit.

(a) Commencing January 1, 1990, all persons, companies, partnerships, municipalities or other entities engaged in the commercial collection, pick-up, transfer, and removal and/or disposal of solid waste and/or recyclables, in the County placed at the roadside or other designated location, and as defined in this law shall obtain a permit issued by the County or by the Authority pursuant to contract with the County. Failure to obtain such permit shall prohibit any such person, company, partnership, municipality or other entity from conducting such activities within the County. Failure to comply with this Subsection 10(a) shall subject the violator to the penalties set forth in Section 12.

(b) Failure to comply with the conditions and requirements of a permit issued pursuant to Section 10(a) hereof shall subject such person, company, partnership, municipali-

ties or entity to a revocation of such permit and revocation of all rights and privileges to collect, pick up, transfer, remove or dispose of solid waste or recyclables in the County as defined herein, and further, such failure to comply with this Subsection 10(b) shall subject the violator to the penalties set forth in Section 12.

Section 11. Prohibition Against Unauthorized Dumping.

By the adoption of this law, the Oneida County Board of Legislators also declares its intent to regulate the throwing, dumping, depositing and placing of solid waste and recyclable material on lands within Oneida County. This ordinance shall apply to throwing, dumping, depositing and placing of solid waste and recyclable material upon all lands, public or private, within Oneida County and thereon only in the manner herein provided:

(a) In order to provide for public health and safety and to facilitate the conservation of vital natural resources, each person shall provide the removal of garbage and recyclables from the property on which they are generated either through a service provided by a municipality or licensed private hauler, or by direct haul by the individual generator to a disposal location approved by the County or the Authority pursuant to contract with the County.

1) It shall be a violation of this law for any person to place, for the purpose of collection, solid waste and/or recyclables at a property other than the property generating said material.

2) It shall be a violation of this law for any person to place solid waste and/or recyclable material in dumpsters and/or containers designated for solid waste use by commercial and/or industrial establishments.

3) It shall be a violation of this law for any person to bury and/or burn solid waste material on public or private property.

4) It shall be a violation of this law for any person to throw, dump, deposit or place solid waste and/or recyclable material along the roadside or on public and/or private property within Oneida County.

5) It shall be a violation of this law for any person to cause to be thrown, dumped, deposited, or placed, solid waste and/or recyclable material along any public or private road or on lands bordering such roads.

Section 12. Enforcement: Penalties.

(a) Failure to comply with this ordinance by any person or tenant in cases where a lease agreement gives specific responsibility for solid waste disposal to said tenant, shall be an offense punishable as provided.

(b) Conviction of a first offense provided by this article shall be punishable by a fine of not less than $100 and not more than $500 and/or loss of solid waste collection and disposal permit, and, in addition, anyone convicted of a first offense thereunder shall be liable to pay a civil penalty of not less than $100 and not more than $500. Conviction of a second offense within a year of the first offense shall be punishable by a fine of not less than $500 nor more than $1,000 and/or loss of solid waste collection and disposal permit, or imprisonment of not more than fifteen (15) days, or both, and in addition, anyone convicted of a second offense thereunder shall be liable to pay a civil penalty of not less than $500 nor more than $1,000. Conviction of a subsequent offense within a year of the first offense shall be punishable by a fine of at least one thousand dollars ($1,000) and not more than two thousand dollars ($2,000) and/or loss of solid waste collection and disposal permit, or imprisonment of not more than thirty (30) days, or both, and, in addition, anyone convicted of a subsequent offense thereunder shall be liable to pay a civil penalty of one thousand dollars ($1,000). Conviction of any company, partnership, municipality or any entity other

than an individual person, shall be subject to a fine of not less than $2,500 nor more than $5,000.

(c) The prosecution and enforcement of violators for any non-compliance with this law shall lie as follows: (i) Municipalities (city, town or village) in the County which provide municipal collection or contract for collection with private haulers shall prosecute and enforce such violations. (ii) To the extent municipalities do not provide for municipal collection or contract for collection with private haulers, the County shall prosecute and enforce such violations.

Section 13. Effective Date.

Upon approval of the County Executive, this local law shall be effective immediately as per the implementation schedule attached and made a part hereof as if fully set forth herein.

Section 14. Severability.

If any part of this ordinance is found to be illegal by a court of competent jurisdiction, the remaining sections shall remain in full force and effect.

Section 15.

This Local Law shall take effect immediately and shall be the final version of all past and present legislation for the collection and disposition of solid waste, thereby repealing and rendering null and void Local Law #2 of 1989 and Local Law #1 of 1988.

APPROVED: Environmental Conservation Committee (October 25, 1989)

Laws & Rules Committee (October 31, 1989)

Ways & Means Committee (November 15, 1989)

ADOPTED BY THE FOLLOWING VOTE:
AYES 34 NAYS 0
DATED: December 13, 1989

APPENDIX G

LOCAL LAW
INTRODUCTORY NO. 1 – 1990

A LOCAL LAW FOR THE COLLECTION AND DISPOSITION OF SOLID WASTE INCLUDING GARBAGE, RECYCLABLES, CONSTRUCTION AND DEMOLITION DEBRIS, APPLIANCES, FURNISHINGS, YARD WASTE, HOUSEHOLD HAZARDOUS WASTE, AND FARM HAZARDOUS WASTE, TO SUPPLEMENT LOCAL LAW NO. 2 FOR THE YEAR 1988 AND AMEND CERTAIN SECTIONS THEREOF.

BE IT ENACTED by the Legislature of the County of Herkimer:

Section 1. Definitions.

(a) "Solid Waste" means all putrescible and non-putrescible solid wastes, including, but not limited to, materials or substances discarded or rejected as being spent, useless, worthless, or in excess to the owners at the time of such discard or rejection, or are being accumulated, stored, or physically, chemically or biologically treated prior to being discarded or rejected, having served their intended use, or as a manufacturing by-products [sic], including, but not limited to, garbage, refuse, industrial, commercial and agricultural waste sludges from air or water pollution control facilities or water supply treatment facilities, rubbish, ashes, contained gaseous material, incinerator residue, demolition and construction debris and offal, but not including sewage and other highly diluted water-carried materials or substances and those in gaseous form, special nuclear or by-product material within the meaning of the Atomic Energy Act of 1954, as amended, or waste which appears on the list or satisfies the characteristics of hazardous waste promulgated by the Commissioner of Environmental Conservation.

(b) "Garbage" means putrescible solid waste, including animal and vegetable waste resulting from the handling, storage, sale, preparation, cooking and/or serving of foods.

(1) "Household Garbage" originates primarily in home kitchens.

(2) "Commercial and Industrial Garbage" originates primarily in stores, markets, restaurants and other places where food is stored, prepared, and/or served, and the term shall also include all non-hazardous and non-toxic wastes which are not commercial and industrial by-products.

(c) "Hazardous Waste" includes pesticides and containers used for pesticides, used motor oil, automobile batteries, and all other materials, determined now or in the future to be hazardous by state or federal rule, regulation and/or statute.

(1) "Household Hazardous Waste" originates primarily in the home.

(2) "Farm Hazardous Waste" originates primarily on farms and/or results from farming activities.

(3) "Commercial and Industrial Hazardous Waste" originates primarily from commercial and industrial activities.

(d) "Yard Waste" means grass clippings, leaves, cuttings and other debris from shrubs, hedges and trees. "Garbage," "Recyclable Material," and "Construction and Demolition Debris" shall not be construed to include "Yard Waste".

(e) "Construction and Demolition Debris" means waste resulting from construction, remodeling, repair and demolition of structures, road building, and land clearing. Such wastes include, but are not limited to, bricks, concrete and other masonry materials, soil, rock, lumber, road spoils, paving material, and tree and brush stumps.

(f) “Major Appliances” means a large and/or bulky household mechanism (as a refrigerator, washer, dryer, stove, etc.) ordinarily operated by gas or electric current.

(g) “Large Household Furnishings” means all other large and/or bulky articles actually used in the home and which equip it for living (as chairs, sofas, tables, beds, carpets, etc.)

(h) “Recyclable Material” means any material designated, from time to time, by Herkimer County which, under any applicable law or regulation, is not hazardous and which is separated from the waste-stream and held for its material recycling or reuse value.

(i) “Recyclable Commercial and Industrial By-products” includes all materials which are a by-product of production utilized in production or sale by a commercial enterprise or industrial enterprise.

(j) “Recyclers” means those persons who deal with recyclable material as collectors, separators and/or marketers. This definition includes not-for-profit corporations and charitable corporations which collect recyclables for fund raising purposes.

(k) “Source Separation” means the segregation of recyclable materials from the solid waste stream at the point of generation for separate collection, sale or other disposition.

(1) “Vehicular Tires” means tires from cars, trucks, domestic, recreational and farm vehicles.

(m) “Person” means any owner or owners of residential property, individual head of household, landlord, Chief Executive Officer, school superintendent, owner or manager of a commercial or industrial establishment.

(n) “Legislature” means the Herkimer County Legislature or for the purpose of this Local Law only, a Committee of the Legislature, or an employee or officer of the County of Herkimer designated by the Legislature to perform duties under

this Local Law and/or the regulations adopted pursuant thereto.

(o) "Household Metals" shall mean any empty metal food containers including aluminum, by-metal and steel cans.

(p) "Infectious Waste" shall be as defined in 6 NYCRR Part 360 as amended.

(q) Authority shall mean the Oneida-Herkimer Solid Waste Management Authority.

Section 2. Preparation of Solid Waste and Recyclable Material for Residential Collection.

In order to provide for public health and safety and to facilitate the conservation of vital natural resources, each city, town and/or village within the county shall provide for the collection of solid waste and recyclable material. Each municipality shall provide by June 30, 1990 to the Legislature a plan for approval to provide for such collection, which plan shall include the schedules required by Sections 4(a), 5(a) and 7(a) of this Local Law. Such plan must demonstrate that regular, reliable collection of solid waste and recyclable material will be provided to each property which generates that material in that municipality. Amendments to any such plan may be filed with the County but shall not be effective until accepted and approved by the Legislature.

The Legislature shall determine the schedule of implementation for collection of recyclable material in the County. If the Legislature has designated an employee, officer or committee, as provided in this Local Law, the determination shall be subject to approval by the Legislature.

After the schedule of implementation has been imposed in an area of the County and becomes effective by its terms, no person shall dispose of garbage or recyclable or nonrecyclable material except as follows:

(a) In order to facilitate the conservation of vital natural resources through recycling: Each person shall provide for the separation of recyclable material in a suitable container or containers as authorized by the Legislature or as approved by the County of Herkimer or the Authority contracting with said County.

(b) In order to further facilitate the conservation of vital natural resources through recycling: Discarded newspapers, emptied glass containers, household metals, corrugated cardboard, plastics, high grade office paper and yard waste shall be separated from other nonrecyclable material and placed in authorized containers. The particular requirements for separation shall be established by the Legislature, or by the Authority pursuant to contract with the County.

(c) After placement of garbage and of recyclable materials at the roadside or other designated area approved by the Legislature by a person for collection in accordance herewith, such garbage and recyclable material shall be delivered to the appropriate facility designated by the Legislature, or by the Authority pursuant to contract with the County. It shall be a violation of this Local Law for any person without authority from the Legislature to collect, pick up, remove or cause to be collected, picked up or removed any garbage or recyclable material placed at the roadside or other designated area and each such collection, picking up, or removal from one or more premises shall constitute a separate and distinct offense in violation of the Local Law. A person may dispose of their recyclables by selling or donating the same to recyclers, but these recyclables may not be picked up at the roadside.

(d) It shall be a violation of this Local Law for any person to place at the roadside or other designated area for collection any can or container other than one which contains only garbage on [sic] recyclable material, except under regulations established by the Legislature.

(e) Tipping fees if necessary for the collection, handling and disposal of recyclables shall be established by the Legislature, or by the Authority pursuant to contract with the County.

Section 3. Public Sale of Recyclables.

(a) In order to facilitate the sale and/or marketing of recyclable material, the Legislature or the Authority pursuant to contract with the County shall request letters of interest from recyclers expressing their willingness to purchase recyclable material from the County. A list of interested parties shall be established.

(b) Prior to the sale of recyclable material, recyclers appearing on the list will be notified and given specifications with regard to available recyclable material for sale.

(c) In the event that recyclers bid on said recyclable material, it shall be required that said bid be written and delivered to the Legislature or the Authority in accordance with the specifications set forth.

In the case of awarding a bid, the highest bid price from a responsible bidder will be accepted. The Legislature and the Authority, however shall retain the right to reject all bids and authorize a rebidding.

(d) All sales and/or marketing of recyclables collected and separated shall be subject to bid. It shall be a term and condition of all bids for recyclables collected under this local law that the material purchased will be recycled and not landfilled or burned or otherwise not recycled.

Section 4. Preparation of Residential, Commercial and Industrial Construction and Demolition Debris and Disposal of the Same.

(a) Each city, town and/or village within the county shall provide a schedule for the collection of residential, commercial and industrial construction and demolition debris. Such

material which is recycled or reused for construction shall not be regulated by this Local Law.

(b) Said debris shall be disposed of at the Demolition Debris Disposal Site or other suitable site as designated by the Legislature under the terms and conditions established by the Legislature.

(c) Tipping fees or other charges for the handling and disposal of residential, commercial and industrial and construction debris shall be established and modified by the Legislature as needed from time to time, or by the Authority pursuant to contract with the County.

Section 5. Preparation of Yard Waste and Disposal of the Same.

(a) Each city, town and/or village within the county shall provide a schedule for the collection of yard waste.

(b) Said yard waste shall be composted either by the County of Herkimer at a site or sites designated by the Legislature, or by the Authority pursuant to contract with the County or at sites approved by the Legislature operated by cities, towns or villages. Where allowed by law or regulation, this section shall not prohibit private composting of yard waste.

(c) Tipping fees or other charges for the handling and disposal of residential yard waste shall be established and modified by the Legislature as needed from time to time.

Section 6. Disposal of Commercial and Industrial Garbage and Recyclables.

(a) All commercial and industrial waste collected by either municipal haulers or private haulers shall be delivered to the appropriate facility designated by the Legislature, or by the Authority pursuant to contract with the County.

(b) All commercial and industrial recyclables designated for disposal at a County facility shall be packaged and col-

lected in a manner designated by the Legislature, and delivered to a facility designated by the Legislature, or by the Authority pursuant to contract with the County.

(c) Tipping fees and other charges for the handling and disposal of commercial and industrial garbage and recyclables shall be established and modified by the Legislature, or by the Authority pursuant to contract with the County as needed from time to time.

(d) The materials collected by the metal industry and Recyclable Commercial and Industrial by-Products collected by recyclers shall be exempt from this Local Law. Any waste tendered for municipal collection by commercial and industrial enterprises shall not include such recyclables.

(e) Recyclable industrial and commercial by-products may be sold or donated by an industrial and/or commercial enterprise to any scrap metal enterprise or recycler. However, said materials cannot be placed at the curbside for collection by said scrap metal enterprise or recycler.

Section 7. Disposal of Major Appliances, Large Household Furnishings and Vehicular Tires

(a) Each city, town and/or village within the county shall provide a schedule for the collection of and disposal of major appliances, large household furnishings and vehicular tires.

(b) Said major appliances, large household furnishings and vehicular tires shall be disposed of by delivery to a site or sites designated by the Legislature or at sites approved by the Legislature, or by the Authority pursuant to contract with the County operated by city, towns or villages.

(c) Tipping fees or other charges for the handling and disposal of major appliances and tires shall be established and modified by the Legislature, or by the Authority pursuant to contract with the County as needed from time to time.

Section 8. Preparation of Household Hazardous Waste for Collection and Disposal of the Same.

(a) All household hazardous waste and farm hazardous waste shall be placed in a container determined by the Legislature, or the Authority pursuant to contract with the County.

(b) Household hazardous waste and farm hazardous waste shall be delivered to such facility as the Legislature, or the Authority pursuant to contract with the County shall designate.

(c) Tipping fees or other charges for the handling and disposal of residential hazardous waste shall be established and modified by the Legislature, or by the Authority pursuant to contract with the County[,] as needed from time to time.

Section 9. Disposal of Infectious Waste

(a) Commencing January 1, 1990 to March 1, 1990, all infectious waste as defined and regulated by Title 6 of the official compilation of Codes, Rules and Regulations of the State of New York (NYCRR) Part 360, shall be disposed of at a location designated by the County or by the Authority pursuant to a contract with the County and by a method specified and approved by the County or the Authority, pursuant to contract with the County, and in compliance with all applicable State laws and regulations.

Section 10. Solid Waste Collection and Disposal Permit.

(a) Commencing January 1, 1990, all persons, companies or other [sic] engaged in the commercial collection, pick-up, transfer, removal and/or disposal of solid waste and/or recyclables, placed at the roadside or other designated location and as defined in this law shall obtain a permit issued by the County or by the Authority pursuant to contract with the County. Failure to obtain such permit shall prohibit a person, company or other entity from conducting such activities

within the County. Failure to comply with this Subsection 10(a) shall subject the violator to the penalties set forth in Section 13.

(b) Failure to comply with the conditions and requirements of a permit issued pursuant to Section 10(a) hereof shall subject such person, company or entity to a revocation of such permit and revocation of all rights and privileges to collect, pick up, transfer, remove or dispose of solid waste or recyclables as defined herein, and further such failure to comply with this Subsection 10(b) shall subject the violator to the penalties set forth in Section 13.

Section 11. Prohibition Against Unauthorized Dumping.

By adoption of this law, the Herkimer County Legislature also declares its intent to regulate the throwing, dumping, depositing and placing of solid waste and recyclable material on lands within Herkimer County. This ordinance shall apply to throwing, dumping, depositing and placing of solid waste and recyclable material upon all lands, public or private, within Herkimer County and thereon only in the manner herein provided:

(a) In order to provide for public health and safety and to facilitate the conservation of vital natural resources: each person shall provide for the removal of garbage and recyclables from the property on which they are generated either through a service provided by a municipality or licensed private hauler or by direct haul by the individual generator to a disposal location approved by the County or the Authority pursuant to contract with the County.

(1) It shall be a violation of this law for any person to place for the purpose of collection solid waste and/or recyclables at a property other than the property generating said material.

(2) It shall be a violation of this law for any person to place solid waste and/or recyclable material in dumpsters and/or containers designated for solid waste use by commercial and/or industrial establishments.

(3) It shall be a violation of this law for any person to bury and/or burn solid waste material on public or private property.

(4) It shall be a violation of this law for any person to throw, dump, deposit or place solid waste and/or recyclable material along the roadside or on public and/or private property within Herkimer County.

(5) It shall be a violation of this law for any person to cause to be thrown, dumped, deposited, or placed solid waste and/or recyclable material along any public or private road or on lands bordering such roads.

Section 12. Rules and Regulations.

(a) Rules and regulations imposed for the purpose of implementing the provisions of this Local Law shall be adopted or approved by the Herkimer County Legislature.

(b) Before adopting or approving such rules and regulations the Committee on Solid Waste of the Herkimer County Legislature, or such other committee as shall be designated, shall hold a public hearing upon at least five (5) days notice to consider the proposed rules and regulations. Such notice shall be published one time in the official newspapers of the County and mailed by regular mail to the supervisors of all the towns and the mayors of the city and villages in the County.

(c) Said rules and regulations shall not become effective until ten (10) days after adoption or approval by the Herkimer County Legislature. During such ten (10) day period the Legislature shall, by such means it deems proper, publicize the said rules and regulations.

Section 13. Enforcement: Penalties

(a) Any person who violates any provision of this Local Law, or any rule or regulation issued pursuant thereto, which has been approved by the Legislature, shall be guilty of an offense punishable, by a fine of One Hundred to Five Hundred Dollars ($100.00-500.00), and in addition thereto, shall be liable to pay a civil penalty of Two Hundred Fifty to Five Hundred Dollars ($250.00-500.00); for a second violation within one year of the first violation shall be guilty of an offense punishable by a fine of Five Hundred to One Thousand Dollars ($500.00-1,000.00), or by imprisonment for up to Fifteen (15) days, or both, and in addition thereto, shall be liable to pay a civil penalty of Five Hundred to One Thousand Dollars ($500.00-$1,000); for a third and each subsequent violation shall be guilty of a misdemeanor punishable by a fine of not less than One Thousand Dollars ($1,000.00), or more than Two Thousand Dollars ($2,000.00), or by imprisonment for up to Thirty (30) days, or both, and in addition thereto, shall be liable to pay a civil penalty of One Thousand Dollars ($1,000.00) to Two Thousand Dollars ($2,000.00). Each violation shall be a separate and distinct offense and, in the case of a continuing violation, each day's continuance thereof shall be deemed a separate and distinct violation. Corporations, companies, partnerships and municipalities shall be subject to the monetary fines and civil penalties set forth above.

(b) The prosecution and enforcement of violations for any non-compliance with this law shall lie as follows: Municipalities (city, town or village) in the County which provide municipal collection of solid waste or any type thereof or contract for such collection with private haulers shall prosecute such violations. If municipalities neglect or refuse to prosecute such violations or if municipalities do not provide for collection or contract for collection with private haulers, the County shall prosecute such violators.

(c) In the event that a person shall be found guilty of violating this Local Law he shall be liable for civil penalties as set forth in subparagraph (a) above and also for further civil penalties in the amount of reasonable attorneys fees, costs of expert witnesses, costs of testing if and when necessary for prosecution and other reasonable and necessary costs associated with the prosecution of the action.

(d) The County Attorney is authorized to commence an action in any court of competent jurisdiction to adjoin any violation of this Local Law when directed by the Herkimer County Legislature.

Section 14. Implementation.

(a) The County of Herkimer shall cause to be drawn up an implementation schedule or schedules which shall list all portions of this Local Law previously implemented and all portions thereof which remain to be implemented. Such schedule or schedules shall be mailed by certified mail return receipt requested to each municipality, addressed to the clerk of the governing board of the municipality. Said schedule or schedules shall be effective upon the date of such mailing.

Section 15. Severability.

If any part or section of this ordinance is found to be illegal by a court of competent jurisdiction, the remaining parts or sections shall remain in full force and effect.

Section 16. Effective Date:

(a) This Local Law shall take effect immediately.