No. 05-1345

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

MOTION FOR LEAVE TO FILE POST-ARGUMENT BRIEF AND POST-ARGUMENT BRIEF FOR THE PETITIONERS

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MOTION FOR LEAVE TO FILE POST-ARGUMENT BRIEF

Pursuant to S. Ct. Rule 25.6, petitioners respectfully move for leave to file the accompanying post-argument brief. This brief is necessary because, during the oral argument, Justice Breyer raised a question regarding the potential impact of the Court's decision on the legality of local government-owned monopolies for the provision of gas and electric service. Because this issue was not raised by respondents or their *amici*, petitioners have not had the opportunity to direct the Court's attention to the substantial body of law pertinent to these heavily regulated industries. We submit that the accompanying post-argument brief, which succinctly outlines the history of local control over the retail distribution of natural gas and electricity, would assist the Court in resolving the issues in this case.

For the foregoing reasons, the motion for leave to file the accompanying post-argument brief should be granted.

Respectfully submitted.

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PETITIONERS' SUPPLEMENTAL BRIEF

During the oral argument in this case, Justice Breyer asked whether a holding that *Carbone* applies equally to flow-control laws that favor publicly owned waste management facilities would require invalidation of local government-owned monopolies for the provision of gas and electric service. The answer is that the Court's decision in this case will have no impact on the ability of state and local governments to regulate the provision of gas and electric service to consumers because Congress has affirmatively "apportioned regulatory power between state and federal governments" in these heavily-regulated areas (*Federal Power Comm'n v. Southern California Edison Co.*, 376 U.S. 205, 211 (1964)) and thereby has largely exempted local regulation of retail distribution of electricity and natural gas from the reach of the dormant Commerce Clause.

The Court has explained that "[b]y the time natural gas became a widely marketable commodity, the States had learned from chastening experience that public streets could not be continually torn up to lay competitors' pipes, that investments in parallel delivery systems for different fractions of a local market would limit the value to consumers of any price competition, and that competition would soon give over to monopoly in due course." *General Motors Corp. v. Tracy*, 519 U.S. 278, 289-290 (1997). Accordingly, "it seemed virtually an economic necessity for States to provide a single, local franchise with a business opportunity free of competition from any source, within or without the State." *Id.* at 290.

"Almost as soon as States began regulating natural gas retail monopolies," however, "their power to do so was challenged by interstate vendors as inconsistent with the dormant Commerce Clause." *Ibid.* In a series of cases in the 1920's, this Court ruled that States had the power to regulate the direct sale of natural gas to consumers within their borders, but

could not, consistent with the dormant Commerce Clause, regulate the interstate transportation or sale for resale of natural gas. *See id.* at 290-291 (citing cases).

In 1938, Congress enacted the Natural Gas Act, 15 U.S.C. § 717 *et seq.* ("NGA"), which "confers upon [the Federal Energy Regulatory Commission ('FERC')] exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-301 (1988). In enacting the NGA, Congress "clearly recognized the value of such state-regulated monopoly arrangements for the sale and distribution of natural gas directly to local consumers." *Tracy*, 519 U.S. at 291. Thus, in Section 1(b) of the NGA, 15 U.S.C. § 717(b), Congress "explicitly exempted 'local distribution of natural gas' from federal regulation." *Ibid.*

This Court "has construed § 1(b) of the NGA as altogether exempting state regulation of in-state retail sales of natural gas from attack under the dormant Commerce Clause." *Tracy*, 519 U.S. at 293 (citing *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Indiana*, 332 U.S. 507, 521 (1947)). Accordingly, the grant of an exclusive local franchise to a single natural gas distributor, whether public or private, has not been subject to challenge under the dormant Commerce Clause for more than half a century.[1]

The division of state and federal power over the sale of electricity has followed a similar path. See *Southern California Edison*, 376 U.S. at 211-212. "In 1935, when the [Federal Power Act ("FPA")] became law, most electricity was sold by vertically integrated utilities that had constructed

[1] Nevertheless, as *Tracy* recognizes, by the mid-1980s many state and local governments permitted industrial consumers "to bypass utilities' local distribution networks by constructing their own pipeline spurs to interstate pipelines." *Id.* at 284 (internal quotations marks and brackets omitted).

their own power plants, transmission lines, and local delivery systems." *New York v. FERC*, 535 U.S. 1, 5 (2001). "Although there were some interconnections among utilities, most operated as separate, local monopolies subject to state or local regulation." *Ibid.*

In 1927, however, this Court ruled that the dormant Commerce Clause precluded state regulation of the interstate sale of electricity for resale. See *Public Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89 (1927). This led to federal legislation to fill what was known as the "*Attleboro* gap." "When it enacted the FPA in 1935, Congress authorized federal regulation of electricity in areas beyond the reach of state power * * * but it also extended federal coverage to some areas that previously had been state regulated." *New York v. FERC*, 535 U.S. at 6. At the same time, Congress "expressly exclude[d] [federal] jurisdiction 'over facilities used in local distribution,'" which remained the province of state and local regulation. *Southern California Edison*, 376 U.S. at 210 n.6.

In enacting the FPA, Congress "was trying to reconcile the claims of federal and of local authorities and to apportion federal and state jurisdiction over the industry." *Connecticut Light & Power v. Fed. Power Comm'n*, 324 U.S. 515, 531 (1945); see also *Southern California Edison*, 376 U.S. at 215-216 ("Congress meant to draw a bright line easily ascertained between state and federal jurisdiction"). Thus, today, publicly owned electric utilities are subject to pervasive regulation by both local and federal authorities. See, *e.g.*, *Gainesville Util. Dep't v. Florida Power Corp.*, 402 U.S. 515 (1971) (affirming order of the Federal Power Commission requiring private utility to interconnect with municipally owned and operated electric utility).

It has long been true, therefore, that the limits of state and local power to maintain local monopolies for the provision of gas and electric service have been set by affirmative congres-

sional action rather than by the operation of the dormant Commerce Clause. The complex history of these unique industries has no relevance whatever here, because Congress has not acted to authorize local regulation inconsistent with the dormant Commerce Clause.

Respectfully submitted.

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