ALTERNATE QUESTION PRESENTED

Whether the solid waste flow control laws of two local governments, which have been found to place no burden on interstate commerce, violate the dormant Commerce Clause of the Constitution?

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SUMMARY OF THE ARGUMENT

The Court should deny the Petition because the decisions below are consistent with *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994) and the Court's other dormant Commerce Clause jurisprudence. In *United Haulers I*, 261 F.3d 245 (2d Cir. 2001), the Court of Appeals properly found that strict scrutiny should not apply because the burdens of the Oneida-Herkimer regulatory scheme were designed to fall equally on all private sector actors, were not applied to waste generated in other states, and did not target any out-of-state business for different treatment from any local business. It remanded the matter for development of a record which ultimately explored all of the alleged burdens on interstate commerce and all of the putative benefits provided by the challenged legislation.

In *United Haulers II*, 438 F.3d 150 (2d Cir. 2006), the court examined the developed record under the balancing test of *Pike v. Bruce Church*, 397 U.S. 137 (1970), and found no burden on interstate commerce that could be distinguished from identical burdens on intra-state commerce, and further found that the substantial benefits of the Oneida-Herkimer waste management system could not be fully achieved through any means other than flow control.

The petitioner's reading of *Carbone* as a blanket *per se* prohibition of flow control laws of all kinds is not supported by *Carbone*, and was properly rejected by the Second Circuit and by other courts of appeals. The court of appeals' focus on the public nature of the Oneida-Herkimer facilities is entirely consistent with this Court's traditional respect for the responsibilities of state and local government in waste management. The Second Circuit's application of the *Pike* standard was correct, because the benefits provided by the

counties' flow control laws were far more than "minimal," while petitioners could not articulate any burden on interstate commerce that differed in quality or quantity from identical burdens placed on intrastate commerce.

The conflict alleged in the petition is shallow, and not yet appropriate for consideration by this Court. The Sixth Circuit's criticism of *United Haulers I* in *NSWMA v. Daviess County*, 434 F.3d 898 (6th Cir. 2006), is dicta. That court ruled against the public agency because it felt bound by precedent established in cases which did not address the distinction between public and private solid waste facilities. No other circuit has directly addressed the issue. The resolution of other cases where the public/private issue is presented squarely, and the reviewing court is not implicitly bound by local precedent, may provide a vehicle for review by this Court.

However, respondents agree that the issues addressed in the decision below are important ones, as they go to the heart of state and local power to provide basic sanitation service to the public. To the extent that this Court finds it necessary to address the distinction between public and private beneficiaries under the dormant Commerce Clause, this case would be an appropriate vehicle to do so.

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with this Court's dormant Commerce Clause cases, nor with other courts of appeals' decisions. Nor does *United Haulers II* fail to properly apply *Pike v. Bruce Church.*

In 2001, the court of appeals reversed and remanded the first decision of the district court granting summary judgment

to the petitioners (Petition Appendix 103a-117a)[1] with its decision in *United Haulers I*, App. 22a-53a. The court recognized that waste disposal is a traditional local government function and found that because the local laws of Oneida and Herkimer counties directed local waste to public, not private facilities, the laws did not discriminate against interstate commerce. *Id.* at 51a. Therefore, the court held that the laws should be reviewed under the balancing test articulated in *Pike v. Bruce Church.* In addition, the court of appeals found that the district court had improperly granted summary judgment in the absence of discovery by the parties, and "without reference to the unique facts of this case." *Id.* at 39a. Respondents had argued that discovery was necessary, and would reveal facts establishing that the flow control laws were indispensable to the success of respondent's waste management system, even under strict scrutiny. Accordingly, the court of appeals remanded the matter for development of the record and "further argument by the parties, which will undoubtedly assist the court in this fact intensive determination." *Id.* at 52a.

As a result, when the court of appeals heard the matter for the second time in 2006, an extensive record had been developed, addressing both the alleged burdens on interstate commerce and the public benefits of the laws in substantial detail. Testimony and expert reports from both sides explored the organization and economics of the waste industry, the organization, economics and objectives of the respondent's public waste system, the role of the challenged laws in the

1. The decisions of the U.S. District Court for the Northern District of New York and the Second Circuit Court of Appeals are reproduced in the Appendix to the Petition for Certiorari, and will be cited here with reference to the Appendix, as App. 1a, *et seq.*

public system, and their effects on a variety of private interests both within and outside of the counties and the State of New York. Significantly, both sides presented fact and argument directed at the potential alternatives to flow control available to Oneida and Herkimer counties as a means of achieving the counties' waste management goals.

Petitioners were unable to identify any burden that the local laws placed on interstate commerce. Petitioners presented no evidence that the laws had an extraterritorial effect, no sign of interference with the regulatory regimes of other states, and no evidence that in-state and out-of-state interests compete in Oneida and Herkimer counties on anything other than an equal footing. App. 18a. Each lower court found substantial and obvious benefits provided by the local laws, with the court of appeals noting in particular that

> 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 the use of an approach as straightforward as the use of flow control.

Id. at 20a.

At the end of the day, when the court of appeals considered all the evidence of burdens on interstate commerce that could be mustered by the petitioners against all of the evidence of environmental, social and economic benefit offered by respondents, and examined the alternative means available to the counties to achieve their legitimate waste management goals, the court rightly concluded that

the laws do not violate the dormant Commerce Clause. That conclusion is sustainable under *either* the *Pike* or strict scrutiny tests.

I. *United Haulers I* Does Not Conflict With *Carbone* Or Other Dormant Commerce Clause Jurisprudence of this Court.

The Second Circuit Court of Appeals was correct in finding that the laws of Oneida and Herkimer counties did not discriminate against interstate commerce, remanding the matter to the district court for review of incidental impacts under *Pike*. Discrimination, for purposes of the dormant Commerce Clause, "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems v. Dep't of Environmental Quality*, 511 U.S. 93, 99 (1994). The laws at issue here treat both in-state and out-of-state economic interests exactly alike, and the facts of this case are distinguishable from the circumstances presented in *Carbone* in several ways.

First, there is no evidence that these laws impact the movement of solid waste originating in other states in any way. The laws at issue in *Carbone* operated to capture waste originating in New Jersey and require its delivery to the Clarkstown, New York transfer station designated by the law. As a result, this Court found that the Clarkstown laws had the effect of raising the price of waste disposal for residents of New Jersey. 511 U.S. at 389.

Second, there is no evidence that any waste hauler, processor, transporter or disposal facility is treated differently in Oneida and Herkimer counties because it is based locally

or out-of-state. In contrast, Clarkstown's designated transfer station operator was a private monopolist, guaranteed 120,000 tons of waste per year at a rate of $81 per ton for five years. 511 U.S. at 387. The value of this contract was over $48 million, but it was not to be paid by the Town unless the ordinance failed in its purpose. The funds were to come through private transactions between the operator and Clarkstown's residents, enforced by the law. Here, fees are paid to local government for the direct provision of public services by local government.

Third, the Oneida-Herkimer laws mandate participation in a public system, in which local government has assumed responsibility for waste management. In contrast, Clarkstown's scheme operated to relieve the Town of responsibility for its waste problem, by designating someone else to manage it. Here, the public agencies have stepped into, not out of, their waste management responsibilities, and crafted a multi-facility system designed to reduce waste generation, increase recycling, and remove hazardous substances from the waste stream. Unlike Clarkstown's action, the Oneida-Herkimer system is the product of a solid waste management plan adopted after extensive public participation, approved by the State of New York and designed to comport with the national solid waste management goals articulated by Congress in the Resource Conservation and Recovery Act of 1976 (42 U.S.C. § 6901 *et seq.*). App. 24a-29a.

Fourth, the decisions below properly recognized that solid waste management is a traditional interest of local government. The concern of public waste management is safe and reliable sanitation, protection of public health and preservation of natural resources. Public agencies do not set out to manage their citizens' waste as a form of entrepreneurial activity. They do so to

fulfill the responsibilities given to them by the electorate. These motives and responsibilities cannot be fairly compared to the ambitions of private economic interests, which arise from quite different purposes and responsibilities. This Court has founded its dormant Commerce Clause jurisprudence on the principle of fair comparison. "Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities." *General Motors v. Tracy*, 519 U.S. 278, 298 (1997). In *United Haulers I*, the court rightly rejected the false comparison of public and private interests urged by the petitioners. App. 47a-51a.

The court of appeals was in accord with the jurisprudence of this Court in refusing to read the *Carbone* decision as a *per se* prohibition of all flow control laws, and the elimination of a constitutional distinction between public and private facilities.[2] This Court has always been careful to preserve the distinction between public and private entities in its waste cases. The power to provide exclusive municipal waste disposal service was recognized by the Supreme Court over 100 years ago in *California Reduction Company, et al. v. Sanitary Reduction*

2. *See also Harvey & Harvey v. County of Chester, Pa.*, 68 F.3d 788, 802 (3d Cir. 1995), "While *Carbone* clearly has broad application, it did not establish a *per se* rule subjecting all flow control ordinances to strict scrutiny"; and *Houlton Citizen's Coalition v. Town of Houlton*, 175 F.3d 178, 188 (1st Cir. 1999),

> We do not interpret *Clarkstown* as explicating a broadbased ban on every flowcontrol ordinance that happens to be coupled with an exclusive contractual arrangement in favor of an instate operator. To suggest that every such ordinance violates *Clarkstown* would stretch both Justice Kennedy's language and the logic of the dormant Commerce Clause past the breaking point.

Works of San Francisco, 199 U.S. 306 (1905), when the Court rejected a challenge by local waste "scavengers" to San Francisco's award of a disposal franchise to a single company.

More recently, in striking down New Jersey legislation barring the import of Philadelphia waste into the state in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), the Court was careful not to disturb the state's power to restrict the use of public facilities. "We express no opinion about New Jersey's power, consistent with the Commerce Clause, to restrict to state residents access to state-owned resources." *Id.* at 627 n.6. Similarly, in striking down Michigan regulations that barred certain out-of-state waste from Michigan landfills, the Court was careful to limit its ruling to private facilities. "Nor does the case raise any question concerning policies that municipalities or other governmental agencies may pursue in the management of publicly owned facilities. The case involves only the validity of the Waste Import Restrictions as they apply to privately owned and operated landfills." *Fort Gratiot Sanitary Landfill v. Michigan Dept. of Natural Resources*, 504 U.S. 353, 358-359 (1992).

The Second Circuit concurred with this Court's observation in *Carbone* that "state and local governments are expending significant resources to develop trash control systems that are efficient, lawful and protective of the environment. The difficulty of their task is evident from the number of recent cases that we have heard involving waste transfer and treatment." 511 U.S. at 386. The court observed in *United Haulers I*

> 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. . . . 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.

App. 32a.

The decisions of this Court and the Second Circuit are in accord as to the unique responsibilities of local government in managing waste. Where local regulations favor no entity save the public waste management system, and otherwise treat all private sector interests alike, there is no "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter" and no discrimination against interstate commerce. The Second Circuit correctly ruled that such regulations should be reviewed under the balancing test of *Pike v. Bruce Church.*

II. *United Haulers II* Contains No New Construction Of *Pike*, But Confirms The Overwhelming Benefits Of The Laws In Comparison To Any Presumptive Burdens On Interstate Commerce.

Petitioners misstate the Second Circuit's ruling when they allege that the decision in *United Haulers II* misconstrues the *Pike* standard. (Pet. 28-30). Contrary to petitioners' claim, the court did not narrow the range of cognizable burdens under *Pike*, but accepted the petitioners' proposed formulation for purposes of the *Pike* balance.

The court found, however, that as a matter of fact, petitioners' alleged burden was insubstantial and far outweighed by the benefits of the local laws. App. 16a-21a. Because the court's ruling was a factual, not a legal determination, it is not appropriate for review by this Court.

On remand to the district court, the parties conducted discovery and explored the nature and operation of the Authority's solid waste management system in great detail. Expert reports were prepared by both sides, and testimony was taken from public officials and the private plaintiffs. Each side analyzed the effects of the local laws on various aspects of waste handling operations, from local collection, through processing of recyclable and non-recyclable wastes, transportation within and beyond the borders of New York State, and disposal at facilities within a market radius of Oneida and Herkimer counties. In the evidence submitted to the court, special attention was paid to the role of the fees charged by the Authority in the administration of its waste management plan, in requiring the participation of local haulers in the delivery of specific wastes to specific facilities, and to the alternatives available to the counties and the Authority in financing and implementing the system.

The petitioners conceded that they could not identify any out-of-state interest, whether a hauler, processor, transporter or disposal facility, that was treated differently by the local laws than a similar interest located within the counties. App 68a, 97a. Instead, petitioners simply alleged that the injury to interstate commerce was a potential diminution of the general commerce in solid waste, an injury that was indistinguishable from the injury to intrastate commerce.

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Both the magistrate and the district court examined the evidence to determine whether the laws placed a "burden on interstate commerce that is qualitatively or quantitatively different from that imposed upon intrastate commerce" (App 66a, 90a), each applying the Second Circuit's recent articulation of the showing needed to establish an incidental burden under the *Pike* standard. *Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205, 217-28 (2d Cir. 2004), *National Electric Manufacturers Assoc. v. Sorrell*, 272 F.3d 104, 109 (2d Cir. 2001). Both the magistrate and the district court found no "disparate impact" on interstate commerce, and therefore, no incidental burden on interstate commerce. Consequently, neither the magistrate nor the district court performed any balancing of non-existent burdens against the putative benefits of the laws. App 70a, 101a. Rather, they each found that petitioners' Commerce Clause claim failed because no burden had been established.

On appeal, petitioners argued that the Second Circuit's jurisprudence had not foreclosed the possibility that a general diminution of commerce in waste might, in and of itself, be a cognizable burden on interstate commerce. The court of appeals responded that "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." App. 13a-14a. The court, however, declined to address that question, finding it "readily apparent that even if we were to endorse 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." *Id.* at 16a. The court then proceeded to address the benefits of the counties' laws within the context of their solid waste management system, and balance those benefits against the presumed burden advanced by the petitioners.

The district court adopted the Report and Recommendation of the magistrate as the factual basis for its analysis. App. 57a. In that Report, the magistrate noted that the counties' flow control laws were "enacted as part of an overall waste management program that included creation of the [Authority]" (App. 76a) and characterized them as "forming the underpinning of comprehensive solid waste reform" (*Id.* at 97a), and as "one component of a wholly integrated waste management scheme." *Id.* at 101a. The court of appeals found that "the ordinances' benefits . . . are clear and substantial." App. 17a.

Specifically, the court of appeals found that financial security for the counties' comprehensive system was a legitimate benefit of the laws, and sufficient under this Court's precedent to justify a non-discriminatory regulation. App. 18a-19a. The court also found that the use of "tipping fees" to fund the system allowed distribution of the costs of the system to the individuals and businesses who placed the most demand upon it, in an administratively convenient way. *Id.* at 19a-20a. More importantly, the court found that the flow control laws "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." The laws also allowed the Authority to direct specific kinds of waste to specific facilities, to use differential pricing for different categories of waste, to inspect waste and fine violators, and to ensure environmentally sound disposal. *Id.* at 20a.

Indeed, considering the number and variety of legitimate interests served by the local laws, the court found no suggestion in the record that the counties could achieve all

of them "in any other way, let alone through an approach as straightforward as the use of flow control." *Id.* at 20a.[3]

The factual record here overwhelmingly supports the conclusion of the court of appeals that the incidental burdens of these laws on interstate commerce, however quantified, do not outweigh their benefits. This case does not present the hypothetical balancing of a "minimal" local benefit against an "insubstantial" burden, as postulated by petitioners. Thus, the application of the *Pike* balance in *United Haulers II* does not merit this Court's attention.

III. There Is No True Conflict With The Law Of Another Circuit.

Petitioners cite the recent decision of the Sixth Circuit Court of Appeals in *National Solid Wastes Management Ass'n v. Daviess County, Ky.*, 434 F.3d 898 (6th Cir. 2006) as being in conflict with the Second Circuit's decision in *United Haulers I.*[4] The decision entered in *Daviess County*, however, was governed by Sixth Circuit precedent established in two prior decisions, *Waste Mgmt. v. Metro. Gov't of Nashville*, 130 F.3d 731 (6th Cir. 1997) and *Huish Detergents v. Warren County*, 214 F.3d 707 (6th Cir. 2000). As the *Daviess* court observed

> Those cases did not directly address the public-private ownership issue raised by *United Haulers*;

3. This finding, although made in the context of the *Pike* balance, vindicates the respondents' position that these laws are essential to the achievement of the counties' waste management goals and would meet the strict scrutiny test of *Maine v. Taylor*, 437 U.S. 131 (1986).

4. As of the submission of this response, the time for Daviess County, Kentucky to file a petition for certiorari with this Court had not yet expired.

> however, an adoption by this Court of the public-private ownership distinction, as suggested by Defendant and *amici*, would amount to the overturning of our prior decisions, as a necessary implication of those decisions was that public ownership did not change the dormant Commerce Clause inquiry. This Court does not have the ability to take such action.

434 F.3d at 910.

The court in *Daviess* then went on to express, in dicta, its respectful disagreement with the Second Circuit's reading of *Carbone*. The *Daviess* panel pointed out various textual references in *Carbone* that it felt could counter the Second Circuit's view that the justices in *Carbone* ultimately disagreed on whether the Clarkstown facility was publicly or privately owned. 434 F.3d 910-912.

However, the ruling of the Second Circuit in *United Haulers I* was not based solely upon its textual analysis of the *Carbone* decision. "Nevertheless, we require more than the Court's silence on this point before concluding that it either accepted or rejected the public/private distinction advocated by the concurring and dissenting opinions." App. 45a. The court of appeals went on to analyze the line of local processing cases cited by the majority in *Carbone* before ultimately concluding that the public nature of the Oneida-Herkimer facilities was a deciding factor on the issue of discrimination. *Id.* at 45a-51a.

The Sixth Circuit in *Daviess* did not address the balance of the Second Circuit's reasoning in *United Haulers*, but concluded with an observation that Daviess County was

acting as a local business in a local industry of waste disposal. 434 F.3d at 912. Daviess County's waste system was not compared to that of Oneida-Herkimer, and any factual similarities or differences between the two were not explored in the decision.

To the extent that a conflict exists between the *Daviess County* and *United Haulers* decisions, it is a shallow one. The *Daviess* court, moreover, was not informed by the subsequent decision rendered by the Second Circuit in *United Haulers II*, made with the benefit of a more complete record and thoughtful analysis by the lower court.

The full import of the reasoning of both *United Haulers I* and *II* has not been directly addressed by any other circuit court, and it may be premature for this Court to grant certiorari on the public/private distinction. The Court may benefit from the percolation of the reasoning of these decisions in the appellate courts, under circumstances where the public/private issue is presented squarely.

The respondents do not disagree with the petitioners as to the importance of this issue. The local power to control the manner of disposal of local waste, within the strictures of the Constitution, goes to the heart of local government's responsibility for the health and safety of its residents. Nor is there disagreement that the issues raised in *United Haulers* will likely continue to be litigated in the courts — not because public agencies seek an economic advantage over private competitors — but because local government remains responsible for public health, and innovative waste management requires the participation of those who collect waste locally.

Consequently, while it is clear that the decisions below are consistent in all respects with the dormant Commerce Clause jurisprudence of this Court, and the existence of a conflict with the Sixth Circuit is shallow at best, it is also clear that the record and reasoning in the decisions below make this case suitable for review, should the Court wish to address the public/private distinction without further delay.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

MICHAEL J. CAHILL
Counsel of Record
GERMANO & CAHILL, PC
4250 Veterans Memorial Highway
Suite 275
Holbrook, New York 11741
(631) 588-8778

JUDY DRABICKI
25723 NYS Rte 180
Dexter, NY 13634-4009

PETER M. RAYHILL
KERNAN & KERNAN P.C.
258 Genesee Street
Utica, NY 13502

Attorneys for Oneida–Herkimer Solid Waste Management Authority

RICHARD A. FRYE
FRYE FOLEY & CARBONE
2219 Genesee Street
Utica, NY 13501

Attorneys for Oneida County NY

THOMAS E. KELLY
HORRIGAN, HORRIGAN, LOMBARDO
& KELLY PC
49 East Main Street
Amsterdam, NY 12010

Attorneys for Herkimer County, NY.