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P R O C E E D I N G S

(11:10 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in United Haulers Association versus Oneida-Herkimer Solid Waste Management Authority.

Mr. Tager.

ORAL ARGUMENT OF EVAN TAGER

ON BEHALF OF THE PETITIONERS

MR. TAGER: Thank you, Mr. Chief Justice, and may it please the Court:

The barriers to interstate commerce imposed by the flow control ordinances in this case are even more severe than those resulting from the ordinance this Court struck down in Carbone. As in Carbone, no local waste can leave the counties for processing. In addition, now that Respondent's landfill is up and running no local waste can leave the counties for disposal either. The issue here is whether Carbone is inapplicable to this outright embargo merely because Respondent's own the facilities to which the haulers are required to bring the waste. The answer is no, and the reason is that the concerns underlying the Commerce Clause are implicated whether interstate commerce was being obstructed for the benefit of a public enterprise or a private one.

1 The whole point of the Commerce Clause was
2 to promote the national economy and to put an end to
3 parochial barriers to interstate trade. This Court has
4 consistently held that embargoes, local processing
5 requirements, and other barriers to interstate commerce
6 violate the Commerce Clause because such laws inevitably
7 prompt resentment, retaliation, and ultimately
8 balkanization --

9 JUSTICE BREYER: I guess in many thousands
10 of municipalities throughout the United States it's
11 fairly common to have a locally owned electricity
12 distribution company, or an electrically -- or a gas
13 distribution company. And I thought it was fairly
14 common for a municipally owned pipeline, gas pipeline,
15 or electricity distribution to say, if you live in our
16 town you've got to buy from us; you've got to buy from
17 the local community. And I guess that's been going on
18 for about 110 years.

19 And yet I've never seen anybody think or
20 write or anything that that violated the Commerce
21 Clause. But of course, there could be somebody in
22 another State who'd like to sell electricity to the
23 people in our town. They can't do it because the town
24 says, we own the company and you got to buy from us.

25 Now, if we agree with you are we saying that

1 all those gas companies, distribution companies, et
2 cetera, are behaving unconstitutionally?

3 MR. TAGER: The first point of clarification
4 on that is the question -- the question is does strict
5 scrutiny apply.

6 JUSTICE BREYER: No, I'm not interested in
7 tests. I'm interested in just the outcome. I just
8 raise the question.

9 MR. TAGER: Yes. I am not, I am not sure
10 that it's correct that in all of those municipalities
11 you hypothesize that they are actually pairing their
12 provision of local --

13 JUSTICE BREYER: Well, I used to teach the
14 subject and I can't say you're wrong. But I knew that
15 it was a fairly common thing to have a certification
16 that gave you a -- as a company, it would give them a
17 local area in which they had an exclusive monopoly. And
18 that was common and it was called a service area, and in
19 the local town, service area, I never even heard of
20 a company trying to come in and sell from abroad,
21 because I thought that this certificate gave them an
22 exclusive right to provide the local electricity service
23 or the natural gas service. I mean, it's a fairly
24 obvious thing. And I might be wrong and I mention that
25 my memory -- I've never focused directly on it. I just --

1 everybody I read and everything I read, I just assumed the
2 constitutionality of this. But of course, memory is
3 fallible, including mine. Therefore, I raise the
4 question.

5 MR. TAGER: Well, if the utility is -- if
6 the utility is privately owned --

7 JUSTICE BREYER: No, no. I'm not talking
8 about that because I guess that would be trying to
9 attack Carbone. Far be it from me.

10 But I know at least there are these things
11 called municipal gas utilities and municipal electricity
12 companies; and during the New Deal that was thought to
13 be quite a good thing, and that's years ago. In all
14 that time when people were attacking New Deal agencies,
15 I've never seen an attack based on this ground.

16 MR. TAGER: Well, I think that the same
17 logic would apply as in --

18 JUSTICE BREYER: Yeah, I think it would.
19 The same logic would apply.

20 MR. TAGER: And it would apply to all of the
21 cases this Court has already held. In every single case
22 involving an embargo or a local processing requirement
23 or a local needs requirement, if you just substitute "in
24 public ownership" you'd have the exact same impact on the
25 national economy --

1 JUSTICE BREYER: Well, the fact is there is
2 a difference between public ownership and giving an
3 exclusive franchise to a private company. And the public
4 ownership means that the people of the State have
5 decided to have their own little nationalized industry,
6 which again people don't like, many. But I never knew
7 there was anything in the Constitution that forbid it.

8 MR. TAGER: Well, I think that the whole
9 point of the Commerce Clause was to stop these kind of
10 --

11 JUSTICE BREYER: Nationalized industries?

12 MR. TAGER: Well, to stop the idea that
13 everything can be localized.

14 CHIEF JUSTICE ROBERTS: Well, but you don't
15 even have to get into the theory. What happens in a lot
16 of municipalities of course is that they decide, well,
17 we're going to run the waste treatment facility and
18 we're going to tax the people in the municipality to
19 support it and the service is going to be free. Now, is
20 that a violation of the Commerce Clause?

21 MR. TAGER: If they're only providing it for
22 free and not barring you --

23 CHIEF JUSTICE ROBERTS: Yes.

24 MR. TAGER: -- from engaging in interstate
25 commerce, in the event, for example, that you found

1 there to be some additional benefit from engaging in an
2 interstate transaction, I think we would have -- the
3 Commerce Clause would be implicated. But as a practical
4 matter, they would be able to accomplish much the same
5 thing because most people would take the free service.

6 JUSTICE SCALIA: Well, I don't understand.
7 You know, as far as the impact on out-of-State
8 competitors are concerned, it's exactly the same. The
9 State or the municipality runs its own waste disposal
10 facility. There is no charge for dumping the waste
11 there. The cost of it is entirely covered by taxes.
12 Okay.

13 Now, the people you're representing, out-of-
14 State people who would provide dumping grounds for this
15 waste, they would charge 9 dollars a ton or whatever
16 they would charge. It would be more than what the
17 municipality is charging.

18 Now, why isn't that a restraint on
19 interstate commerce, discrimination against interstate
20 commerce?

21 MR. TAGER: Well, it's market participation
22 if all they're doing is public collection and bringing
23 it --

24 JUSTICE SCALIA: Oh, I'm sorry. You -- have
25 to dump your waste in the municipal garbage dump.

1 MR. TAGER: Well I -- if you pair it with a flow
2 control ordinance I think it's exactly the same.

3 JUSTICE SCALIA: Okay, so that's bad. Even
4 if they support it entirely by taxes?

5 MR. TAGER: Yes.

6 JUSTICE SCALIA: So that they're not
7 competing in the marketplace in any way, they're not
8 getting any money from the people who are dumping
9 garbage. They get money from the whole tax base.

10 MR. TAGER: The impact on the interstate
11 market is the same, and I think that --

12 JUSTICE SCALIA: Oh, it is indeed.

13 MR. TAGER: -- the Court's Commerce
14 Clause --

15 JUSTICE SCALIA: I didn't think you'd be
16 willing to go that far, but you'd say that that violates
17 the Commerce Clause.

18 MR. TAGER: But I don't think I -- let me be
19 clear. We don't need to win that case in order to win
20 this case, because in this case --

21 JUSTICE SCALIA: Well, I'm not so sure.

22 MR. TAGER: This case is almost on all fours
23 with Carbone. All you've done is transfer the
24 ownership. As you know, in Carbone that facility was
25 destined to be owned within less than two years from the

1 time the Court issued its opinion.

2 JUSTICE GINSBURG: But in the majority
3 opinion, as opposed to the dissent, at least as I read
4 it, on almost every page it uses words like "local
5 operator," "local enterprise," "local proprietor,"
6 "local business," doesn't speak, as the dissent did,
7 about a municipal facility. It seems great care was
8 taken in the majority to not characterize that transfer
9 pledge as a municipal facility.

10 MR. TAGER: Well, two responses to that,
11 Justice Ginsburg. First, there were other references
12 where the opinion said "the town's facility." Indeed,
13 the flow control ordinance itself referred to it as the
14 town's facility.

15 And the other response is, to call someone a
16 proprietor doesn't mean that they're private. In this
17 case, they're charging \$81 -- or \$86 a ton. Every ton
18 that comes in, they make more money. The cash register
19 rings every time --

20 JUSTICE GINSBURG: What I'm saying is -- at
21 least as I read the Carbone opinion, it didn't deal with
22 the public-private distinction. It seemed to assume it
23 was a private entrepreneur. And it didn't take a position
24 one way or another whether there would be a distinction.

25 MR. TAGER: Well, I don't think the Court

1 affirmatively decided the issue. I think the
2 distinction didn't matter to the majority. I think the
3 majority is focusing on the consequences of putting up
4 barriers to interstate commerce, of putting up embargoes
5 and local processing requirements. And you could take
6 almost any one of the Court's cases and just substitute
7 in public ownership. Take, for example --

8 JUSTICE GINSBURG: But not -- you know, you
9 have a whole string of commercial products, but you have
10 recognized, too, that garbage disposal has for long been
11 considered a municipal responsibility, a municipal
12 function.

13 And you also say that the total, the -- what
14 is it -- cradle to grave, if the county took over all of
15 the garbage disposal business, the hauling from the
16 garbage generator to the plant, and then there wouldn't
17 be any commerce problem, right? But if it does
18 something less, there is?

19 MR. TAGER: Well, there were two questions
20 embedded there. Let me see if I can take them in order.
21 The idea that it is a traditional local function, I
22 don't think can support any kind of meaningful test in
23 this case. The Court has rejected that very -- that very
24 standard in Garcia and the Tenth Amendment cases, and
25 prior to that in the intergovernmental tax immunity

1 cases, and the reason it did so is it found that it was
2 unworkable to try to determine what is a traditional
3 Government function in any particular case. The Court
4 found that it was in a total line-drawing morass. And
5 so it said we're throwing that out.

6 JUSTICE BREYER: Well, there is still at
7 least the obvious distinction, that one of the main
8 purposes of the dormant Commerce Clause is to prevent
9 protectionism. Protectionism is when a State favors its
10 own producers. And you could see, indeed a big argument
11 in *Carbone* was, you aren't favoring your own producer;
12 well, we are at least favoring one. But now where the
13 municipality is running it itself, no one is favored.

14 So I don't think it was an object of the
15 Commerce Clause to prevent a State from favoring its own
16 Government.

17 MR. TAGER: I don't know whether the framers
18 considered it but I do know --

19 JUSTICE BREYER: Well, it's about --

20 MR. TAGER: -- protectionism wasn't the only
21 thing that they were concerned about.

22 JUSTICE BREYER: Well, is there something
23 here that is not protection? Because *Carbone* was still
24 perhaps viewing it most favorably, an extreme case of
25 protection, though only one individual was protected.

1 MR. TAGER: Well, first of all, what was
2 being protected was this plan the town had, to fund its
3 transfer station, a transfer station that it was going
4 to take possession of less than two years after this
5 Court decided the case.

6 So the protectionism that was going on there
7 was really protectionism of their investment in their
8 scheme.

9 JUSTICE SOUTER: But it was also
10 protectionism -- I mean, I didn't agree with this at the
11 time, but I mean there, it -- you have to admit that
12 there was protectionism of the one licensee, the person
13 who constructed the plant and was going to sell it to
14 the town for a dollar. That, so far as we know, that
15 person or that company was in it for the money.

16 And so for the period of the five years
17 prior to the transfer to the town for the dollar, that
18 particular entity was being protected so it could make
19 money, and therefore, make it worthwhile for that
20 company to sell its, its real estate to the town for a
21 dollar. Surely that entity was being protected
22 handsomely.

23 MR. TAGER: But it would be equally
24 protected, Your Honor, if the Government owned the
25 facility but said you keep all the tipping fees until

1 it's paid off and take a nice profit on top, too.

2 This distinction --

3 JUSTICE SOUTER: Well, that's -- that's a
4 third case but that's not the case we have here, is
5 it?

6 MR. TAGER: Well, the question you have
7 here is are you going to adopt a new formalistic
8 distinction between public and private ownership,
9 when in the past this Court has concluded that a lot
10 of these other distinctions were unworkable.

11 CHIEF JUSTICE ROBERTS: Counsel, you say
12 formalistic as if it's a bad thing. But the, the
13 distinction, say in the First Amendment, if the private
14 contractor the day before the municipality bought the
15 facility for a dollar had fired an employee because of
16 his or her political views, you wouldn't argue that that
17 is State action just because the next day it was going
18 to be controlled by the public entity. And yet the next
19 day, that type of action would be subject to First
20 Amendment scrutiny. It may be a formalistic distinction
21 but in many areas of the law it makes all the
22 difference.

23 MR. TAGER: Well, I just think you are going
24 to be walking into so many line-drawing problems because
25 if that example is one, are you going to require 100

1 percent public ownership, or a majority interest, 50-50?
2 Once you go down this road, I think it is just opening
3 up a huge can of worms when the focus ought to be what
4 is the impact on interstate commerce? What we have here
5 now that the landfill is up and running is an absolute
6 embargo. No waste generated in this town, in these
7 counties, excuse me, can leave the State, period, end of
8 story.

9 It is no different, in effect, it is no less
10 likely to breed resentment and retaliation than --

11 CHIEF JUSTICE ROBERTS: It is kind of
12 formalistic on the other side because you, I thought you
13 agreed that if the municipality did it through tax
14 revenues and there was no formal flow restriction and
15 yet it only made sense to dump your waste at the free
16 facility, you seem to suggest that would be okay.

17 MR. TAGER: Well, I'm glad you reminded me
18 of that point. I meant to make it earlier. In West
19 Lynn Creamery this Court said that these kind of things
20 make a difference. There are certain ways you do things
21 and certain ways you can't do things. If you place an
22 embargo, that's traditionally been regarded as subject
23 to strict scrutiny. If you try to do the same thing by
24 making it free and providing public -- public -- public
25 collection, that's okay.

1 And -- and what the Court's cases say is do it
2 the right way and we'll worry about the consequences
3 later.

4 JUSTICE BREYER: Here, I take it the reason
5 they want to do this is because they wanted their
6 municipal facility to charge a higher price for the
7 non-recyclable rubbish and that will encourage people to
8 segregate the rubbish and thereby have more cyclable --
9 recyclable rubbish, and therefore overall pay less.

10 And that's why they want to do it, and of
11 course that's not going to work. If somebody comes in
12 from out of State and charges a lower price for all of
13 the non-recyclable rubbish or you know, for all rubbish,
14 it just won't work. It is rather like electricity,
15 interestingly enough, where municipalities would do the
16 same thing. They want discriminatory rates in order to
17 push out the possibility of poorer people getting
18 electricity. This they want to do the same thing but
19 they want to do it for rubbish, for, to encourage
20 recycling.

21 MR. TAGER: Several answers to that,
22 Justice Breyer.

23 One, the same argument was made in Carbone.
24 It doesn't matter who owns the facility.

25 Two, this is an argument about why they

1 might survive strict scrutiny, it's not a -- I know you
2 don't like hearing about tests -- but the question here
3 is do we apply strict scrutiny or not. And that goes to
4 the strength of their interest. And then of course the
5 question turns on, can it be met in nondiscriminatory
6 ways? The answer is "very well." Since Carbone was
7 decided, the municipalities have been living with no
8 flow control, virtually every one in the country, yet
9 recycling has gone up in the, in that intervening
10 period.

11 Indeed the best way to accomplish recycling
12 is to charge volume-based fees to, to the -- between the
13 haulers and the, and the generators. That's not what is
14 going on here. They're just charging it at the disposal
15 point. So there are plenty of communities all -- excuse
16 me -- plenty of communities all over the country that
17 are charging what's known as a "bag fee" where you pay
18 for each -- you pay -- you get a label, that you put on
19 a bag; you can't dispose of the bag without the label,
20 the label costs a certain amount of money. None of
21 these people have flow -- none of these communities have
22 flow control but there's a direct, straightforward way.

23 They can also impose regulations directly on
24 the generators and directly on the haulers to make sure
25 they're doing these things. So it is hardly a reason

1 for creating a brand new public-private distinction.

2 JUSTICE SOUTER: It sounds to me as though,
3 if we accept your argument that, going back to
4 Justice Breyer's first question, every municipal utility
5 in the United States is going to fall.

6 MR. TAGER: Well -- I'm not an expert on --
7 on that industry.

8 JUSTICE SOUTER: No, but you know, you know
9 that there are plenty of, of communities that don't have
10 municipal utilities and they seem to get natural gas.
11 They seem to get electricity. The lights go on. And
12 therefore by parity of reasoning to what we have just
13 heard, there just wouldn't be the justification for,
14 let's say, embargoing the importation of electricity and
15 gas by private entities from outside.

16 So that if you win on this argument, no more
17 municipal lifelines.

18 MR. TAGER: I didn't hear the last part.

19 JUSTICE SOUTER: No more municipal lifelines.

20 MR. TAGER: Well, I think they can have the
21 plants. They just -- assuming that is --

22 JUSTICE SOUTER: Well, they'd like to run
23 them as --

24 MR. TAGER: They'd like to have a monopoly,
25 and --

1 JUSTICE SOUTER: -- an exclusive monopoly,
2 and in that sense they won't, they won't be around
3 anymore because the Commerce Clause will, will declare
4 them unconstitutional.

5 MR. TAGER: Well, subject to strict scrutiny,
6 but -- as I understand it --

7 JUSTICE SCALIA: You would say that they can
8 do it so long as they charge less than out-of-State
9 people --

10 MR. TAGER: Yes.

11 JUSTICE SCALIA: -- and therefore people buy
12 their services because they're cheaper. So long as they
13 don't prohibit the importation, if they run the
14 municipal facility on tax revenues, and therefore charge
15 very little for the electricity or whatever they're
16 providing, that's perfectly okay for you. Right?

17 MR. TAGER: Absolutely.

18 JUSTICE SCALIA: So long as they don't
19 prohibit somebody from out of State.

20 MR. TAGER: Yes.

21 JUSTICE SOUTER: Then where does your
22 argument about formalism go? Isn't it a formalistic
23 distinction whether the utility -- does its financing
24 through or its collection through taxes, or through a
25 user fee?

1 You said, you said distinctions on -- I
2 thought you were saying distinctions like that were purely
3 formalistic --

4 MR. TAGER: Well --

5 JUSTICE SOUTER: -- for purposes of the
6 Commerce Clause, and therefore the distinction I suppose
7 wouldn't count.

8 MR. TAGER: Well, I think what I was talking
9 about, the public-private distinction -- it is different
10 in kind from saying there are certain kinds of conduct,
11 certain kinds of Government conduct that are permissible
12 like a subsidy, for example. Take the South Central
13 Timber versus Wunnicke case. The Court said in that
14 opinion -- you can't impose contractually on the people
15 who buy the timber the obligation to process it in the
16 State; but what you can do is you can subsidize it, so
17 they will want to do it. So this is something that has
18 --

19 JUSTICE SOUTER: Then some, then I guess
20 you are saying some formalistic distinctions, some
21 distinctions that don't make any difference economically
22 but are formalistically different are okay.

23 MR. TAGER: Well, I'm not sure that one is
24 completely formalistic. The Court said there, that
25 gives people a choice. They can still take it out of

1 the State if they want to, and they may have good reason
2 to.

3 Going back to the trash argument, the trash
4 example, you could provide it for free; but a consumer
5 might say, you know what, I'd like to have more days of
6 pickup than you're providing me. Or I think that
7 trucks of this private company are a lot nicer; I'd
8 rather having them stopping in front of my house than
9 your beaten up municipal trucks. So a case like Wunnicke
10 establishes that that's the way it works. That it's
11 okay to have alternatives. What you can't have is
12 forcing people to do this through regulation.

13 JUSTICE KENNEDY: Well, I -- is there a
14 distinction between the question Justice Breyer put to
15 you, the hypothetical of a municipal electricity
16 company, and this case? In this case you have private
17 haulers, you have private waste dumps at the end, you
18 just have a public, a publicly owned and mandated
19 processing center in the middle.

20 It would be as if in the electric case you
21 have private electric companies that generate the power,
22 private electric companies that distribute the power,
23 but they all have to go through a Government-owned
24 transformer at a fee. It seems to me that that's case you
25 have here.

1 MR. TAGER: Yes. That's why --

2 JUSTICE KENNEDY: But you don't make that,
3 that's not the argument you make.

4 MR. TAGER: Well, I would --

5 JUSTICE KENNEDY: At least that's not the
6 way you answered Justice Breyer.

7 MR. TAGER: I like your answer better, Your
8 Honor.

9 (Laughter.)

10 MR. TAGER: But what, what I was trying to
11 get back to was --

12 JUSTICE BREYER: Like it --

13 JUSTICE KENNEDY: But, but then, but then
14 Justice Breyer is going to say well, you --

15 MR. TAGER: He changed the hypo.

16 JUSTICE KENNEDY: -- that you, that you can
17 bar it altogether but you can't regulate it just a
18 little bit --

19 MR. TAGER: You can --

20 JUSTICE KENNEDY: -- the whole is greater
21 than the sum of it.

22 JUSTICE BREYER: I actually point out that
23 California, I think, wants to own the grid and privatize
24 the rest of it. And there are -- I mean, it --
25 Justice Kennedy is totally right. There are all kinds

1 of combinations and permutations. There, there could be
2 distributors who are in fact regulated private companies
3 and local distributors who are owned by the city, and I
4 guess there, there is one generator, at least, company
5 that's owned by the -- that's a -- TV -- with TVA.
6 They, they make their own.

7 So there are all kinds of permutations and
8 combinations. And I think we're getting at, when we
9 take that aspect of the permutation and combination and
10 say that aspect of it which is owned by a Government
11 says: "Our way or the highway." You know, that's what
12 they say. "Buy from us." Period.

13 And if you're in a certain region, I've
14 always thought they could do that. And I have to admit
15 I never really looked it up; I've just never come across
16 a case that says to the contrary.

17 MR. TAGER: I, I haven't seen a case either
18 way. My, my way of seeing this case law is that
19 there's -- that the rule is simple: if you are doing
20 something to interfere with the free flow of interstate
21 commerce, you're subject to strict scrutiny. And maybe
22 in that situation, they would survive strict scrutiny. I
23 don't know that they would in this day and age, when
24 getting, getting gas or other kinds of power to a
25 commercial establishment, for example, is not very

1 difficult and would not necessarily tear up the
2 infrastructure, or whatever. I think they might --

3 JUSTICE STEVENS: What I guess we really
4 don't know is whether Justice Breyer's parade of
5 horrors are cases in which the municipality was able
6 to provide the service more cheaply because it subsidized it,
7 in which case there's no burden on commerce, or were
8 they accompanied by prohibitions against competition, as
9 Justice Scalia pointed out. I don't know.

10 MR. TAGER: I think his hypothetical assumed --

11 JUSTICE KENNEDY: It's a quite different
12 assumption.

13 MR. TAGER: I think his hypothetical assumed
14 a ban. But I certainly agree with you, Justice Stevens,
15 that if they do it simply by competing, then that's
16 perfectly acceptable.

17 JUSTICE KENNEDY: Well, what is your
18 authority for the proposition that we use strict
19 scrutiny?

20 MR. TAGER: I draw it from the entire line
21 of cases, from the local processing cases, the embargo
22 cases, the local --

23 JUSTICE KENNEDY: Can you give me one case
24 where we say we have to use strict scrutiny?

25 MR. TAGER: For?

1 JUSTICE KENNEDY: I mean, I just didn't
2 realize that that phrase entered into our Commerce
3 Clause jurisprudence. Correct me if I'm wrong.

4 MR. TAGER: Well, I was using it as a
5 synonym for the "virtually per se unconstitutional"
6 rule.

7 JUSTICE KENNEDY: That is to say, if it
8 discriminates?

9 MR. TAGER: If it discriminates, or some of
10 the earlier cases didn't use the term --

11 JUSTICE KENNEDY: But certainly our burden
12 cases we don't require that.

13 MR. TAGER: Well, not the burden that we
14 talk about in the Pike context. But in the earlier
15 cases they referred, cases like Minnesota versus Barber
16 and some of the other, earlier cases, refer to it as
17 being burdens on commerce, but clearly what they meant
18 was there are certain kinds of regulations, and I think
19 it's easier to just categorize them: embargoes, local
20 needs requirements, local processing requirements,
21 things like that, which basically so obstruct
22 interstate commerce as to require this virtually per se
23 rule.

24 Indeed, Pike itself has that very statement.
25 That's sort of the classic case in which you invoke that

1 high level of scrutiny.

2 If the Court has no further questions, I'd
3 like to reserve the balance of my time.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Cahill.

6 ORAL ARGUMENT OF MICHAEL J. CAHILL

7 ON BEHALF OF THE RESPONDENTS

8 MR. CAHILL: Mr. Chief Justice, and may it
9 please the Court:

10 No decision of this Court has held that
11 public service is comparable to private enterprise for
12 purposes of dormant Commerce Clause analysis. Here the
13 only entity that benefits from these laws is the
14 Government itself.

15 JUSTICE ALITO: All the local processing
16 cases, would they have come out differently if those
17 facilities -- the milk processing plant, the shrimp
18 processing plant, and so forth -- had been publicly
19 owned?

20 MR. CAHILL: I think, Your Honor, they would
21 be different. In each of those cases the laws in
22 question operated to protect a private entity or group
23 of entities. In Dean Milk, for instance, it was a
24 group of private milk pasteurizers within a five-mile
25 radius of the town -- the city of Madison. In none of

1 those cases was the Government itself engaged in
2 providing the service to the public.

3 JUSTICE KENNEDY: Well, it might be a good
4 revenue device for the Government to say, you know,
5 let's have our own pasteurizing plant, we'll make it a
6 criminal offense for anybody to use a facility other
7 than ours and we'll charge triple the price.

8 MR. CAHILL: Your Honor, I --

9 JUSTICE KENNEDY: That's not a burden on
10 interstate commerce?

11 MR. CAHILL: That might be. In our case
12 that is not the case here. What we use is a user fee.
13 We have a limit. There's a limit to a user fee. We can
14 --

15 JUSTICE KENNEDY: Suppose the user fee were
16 ten times what it is?

17 MR. CAHILL: We can only charge something
18 that's reasonably related to the cost of what, of the
19 service that we provide.

20 CHIEF JUSTICE ROBERTS: Why is that?

21 MR. CAHILL: In Evansville Airport, Your
22 Honor, this Court held that -- versus Delta Airlines --
23 that a user fee is constitutionally limited; there has
24 to be a relationship between the cost of a service and
25 the amount that's charged.

1 JUSTICE SCALIA: So don't call it a user
2 fee. Call it something else.

3 MR. CAHILL: Your Honor, if we --

4 JUSTICE SCALIA: Call it a tax ripoff.

5 (Laughter.)

6 JUSTICE SCALIA: Then you can charge
7 whatever you want, so long as you don't call it a user
8 fee, right?

9 MR. CAHILL: In New York, Your Honor, you
10 either have to call it a user fee or a tax or something
11 else.

12 CHIEF JUSTICE ROBERTS: Call it a cable TV
13 franchise fee. I mean, isn't that the way
14 municipalities used to make a lot of money? They
15 charged outrageous amounts to give the cable franchise
16 and then grant a monopoly in exchange.

17 MR. CAHILL: I don't know what cable
18 franchises base their, base their amounts on. I do know
19 that in our case the cost to tip a ton of waste is
20 directly related to the value of the services that we
21 provide to the public.

22 CHIEF JUSTICE ROBERTS: To get back to the
23 public-private distinction, what is the answer to
24 Mr. Tager's point that that's difficult to -- what if
25 you have a 50 percent publicly owned, 50 percent

1 privately owned company? Is that covered by the
2 Commerce Clause cases or not?

3 MR. CAHILL: Your Honor, I think that the --
4 they would not be -- it would not be unconstitutional
5 under the Commerce Clause cases. I think that the
6 distinction is that when Government is actually in the
7 transaction, when it's taking the risks, when it's
8 spending public money, when it's providing a service
9 directly to the people, it's a public, it's a public
10 service.

11 JUSTICE SOUTER: But at the same -- exactly
12 that -- that avoids the problem. At exactly the same
13 time, it's protecting the private 50 percent interest.
14 Why isn't the better answer that in fact that would be
15 subject to Commerce Clause analysis and that would fall,
16 that if the Government wants to do this the Government's
17 going to do it the way the Government's doing it in your
18 case, it's got to be 100 percent Government. If it
19 doesn't, it's protectionism.

20 MR. CAHILL: Your Honor, I agree with you.
21 We don't have a 50 percent ownership. We don't have any
22 private ownership anywhere. There are, however,
23 Government agencies in other contexts where there is a
24 private partner. That's a case that isn't here today.
25 But the question was what if there was, and I don't

1 think the answer is automatic one way or the other.

2 JUSTICE SCALIA: You know, there's a general
3 agreement throughout the world nowadays that sovereign
4 immunity, which usually applies to Governments, doesn't
5 apply when the Government is engaged in a commercial
6 activity. Now, why shouldn't something similar apply to
7 Government regulation which ends up discriminating
8 against out-of-State businesses, when the Government is
9 engaging in a commercial activity it is subject to the
10 restrictions of the Commerce Clause? Why isn't that a
11 reasonable rule?

12 MR. CAHILL: I think it is a reasonable
13 rule. But I don't think that we're engaging in
14 commercial activity in this particular case. If we were
15 to offer our services to citizens to whom we do not have
16 a governmental responsibility, then I think we're
17 entering into the realm of competition with the private
18 sector.

19 JUSTICE KENNEDY: Well, I suppose any
20 private entity can choose its market.

21 MR. CAHILL: Pardon me, Your Honor?

22 JUSTICE KENNEDY: I suppose any private
23 entity can choose its market. You're a market
24 participant. You're saying, we're going to serve this
25 class of consumers. That's your privilege. But what

1 you do is you have a market participation which is
2 sanctioned by the criminal laws. You've built this trash
3 utopia where everybody sends wonderful trash and you
4 enforce use of that by the criminal law. So you're
5 engaging as a market participant, but you're taking an
6 extra advantage by using the criminal law to enforce, to
7 enforce its use.

8 MR. CAHILL: Your Honor, I don't -- I agree
9 with you that we're providing a service here, and we do
10 use the law to require that haulers and generators
11 participate in the service that we -- in the system that
12 we've created. We need to have -- to achieve the goals
13 that we're trying to achieve. We've asked our public to
14 separate their wastes and we've asked our haulers to
15 collect it in a way that's consistent with the programs
16 that we've established.

17 JUSTICE SCALIA: You could do that by
18 requiring all trash pickup to segregate recyclable and
19 non-recyclable, and if it's going to cost each
20 householder just as much trouble then there could be
21 competition and you would have achieved your goal. No?

22 MR. CAHILL: No, Your Honor. There is no
23 competition between our program and -- that's offered by
24 the private sector. What we do is different than what
25 the private sector offers and there's no place else for

1 it to go. The haulers are required today to comply with
2 the program and to coordinate their activities with the
3 separation done by the residents and the facilities that
4 the authority has put together.

5 We do things -- we have three different,
6 three basic differences between what we do and what the
7 private sector would do. The first one is to step in
8 and take some of the risk for proper disposal. When the
9 haulers make the decision about where the garbage goes,
10 there's a liability that attaches to the waste. If it
11 goes to the wrong place it's going to follow, follow
12 back both to the hauler and to the person who generated
13 it. We had had some bad experiences with people making
14 bad decisions about where waste goes in the 1980s and
15 the public asked us to set something up so that they
16 could trust who was making the disposal decisions. So
17 as a Government we've stepped into that problem. We've
18 stepped into the shoes of the generator, and we're
19 trying to set up a place --

20 JUSTICE SCALIA: You could do that by law.
21 You could do that by law. You could specify that only
22 certain waste facilities can be used.

23 MR. CAHILL: I think not, Your Honor.

24 JUSTICE SCALIA: You don't have to run the
25 business in order to assure that, do you?

1 MR. CAHILL: I think we do.

2 JUSTICE SCALIA: Why?

3 MR. CAHILL: Because we don't have the power
4 as a local government in New York to talk to landfills
5 in Ohio or Pennsylvania about how they should run their
6 facilities. The only way that we can be sure that it
7 goes to the right place, that's engineered the right way
8 and built the right way and run the right way is to
9 offer to do it ourselves. And that's what we've --

10 JUSTICE ALITO: But none of that -- in
11 answer to my earlier question, I thought you said none
12 of that really matters, right? The only thing that
13 matters is that this is a publicly owned facility. You
14 could be selling hamburgers or renting videos and it
15 would come out the same way.

16 MR. CAHILL: I think why public ownership
17 matters is that it's not discriminatory. I think the
18 strict scrutiny test should not apply when Government
19 owns --

20 JUSTICE SCALIA: So your answer is yes?

21 MR. CAHILL: Yes.

22 JUSTICE SCALIA: It doesn't matter?
23 Hamburgers are just as good?

24 MR. CAHILL: Well, hamburgers, Your Honor,
25 if the Government was going to be the sole purveyor of

1 hamburgers in a community, I think they'd have to have a
2 very, very good reason. If they had such a good reason,
3 then yes, Government could do that.

4 JUSTICE SOUTER: Well, that's just a
5 question of New York law, isn't it?

6 MR. CAHILL: Of --

7 JUSTICE SOUTER: I don't know, I don't know
8 what municipalities can do in New York. You say they've
9 got to have a good reason. I assume you're referring to
10 New York law for that purpose.

11 MR. CAHILL: I am not, Your Honor. I have
12 no idea --

13 JUSTICE SOUTER: What are you referring to,
14 then?

15 MR. CAHILL: The concept, the concept that
16 Government might be, might find it necessary to get into
17 the hamburger business. I can't --

18 JUSTICE SOUTER: Then essentially it's just
19 a political check on it. When you say there's got to be
20 a good reason, politically people would get mad if you
21 didn't have a good reason; is that basically it?

22 MR. CAHILL: That's one reason. It would
23 also --

24 JUSTICE SOUTER: But there's no Commerce
25 Clause reason?

1 MR. CAHILL: I think there's no Commerce
2 Clause reason.

3 JUSTICE SOUTER: Okay.

4 MR. CAHILL: I think there's no Commerce
5 Clause reason.

6 JUSTICE STEVENS: Mr. Cahill, you started to
7 tell us three reasons why it was important that you
8 regulate. You gave us one. Mention the other two.

9 MR. CAHILL: The other two are, Your Honor,
10 that we are fulfilling national objectives in trying to
11 establish the system that reduces the amount of waste
12 that we generate and recycles as much as possible.
13 That's not necessarily something that the private sector
14 would do. A landfill is not built to discourage the
15 amount of waste that comes to it. Our system is
16 designed to try to change the habits of our citizens and
17 increase recycling --

18 JUSTICE KENNEDY: Well, but it's basic
19 Commerce Clause analysis that a State has no interest in
20 what happens to the product out of State. That's Baldwin
21 versus Seelig.

22 MR. CAHILL: Your Honor, I think --

23 JUSTICE KENNEDY: You can't say that we want --
24 that we're enacting this law to affect what happens in other
25 States. That's just contrary to the Commerce Clause.

1 MR. CAHILL: We are not attempting to
2 regulate what goes on in other States. We
3 are attempting --

4 JUSTICE KENNEDY: But I thought that was
5 just the answer you gave to Justice Stevens on your
6 point two.

7 MR. CAHILL: We are attempting to protect
8 our own citizens by reducing the liabilities that they
9 may incur if that waste is shipped anywhere outside of
10 the counties. We hope to give them a better solution
11 for disposal than they would get from the marketplace.
12 So to the extent that liability crosses State lines, we are
13 trying to protect our citizens from that liability --

14 JUSTICE SCALIA: Whether they want the
15 protection or not?

16 MR. CAHILL: Well --

17 JUSTICE SCALIA: And whether a private
18 individual can come and offer them the same protection
19 for less money or not?

20 MR. CAHILL: Yes, Your Honor, that's true.

21 JUSTICE SCALIA: We're the Government and
22 we're here to help you?

23 MR. CAHILL: Yes.

24 JUSTICE SOUTER: But isn't that almost a
25 fourth point? I realize you didn't get the third point

1 out yet. But isn't -- I remember your brief and isn't
2 there sort of a fourth point? And that is, I will
3 assume that the Government does have some basic health
4 and safety objectives and the objective to protect its
5 citizens here.

6 MR. CAHILL: Yes.

7 JUSTICE SOUTER: If the Government tries to
8 pursue these policies solely by private inducement,
9 trash haulers may say, we don't want to deal on those
10 terms, we can haul somewhere else, in another county,
11 another State, what-not.

12 By taking on the job itself, the Government
13 in effect is guaranteeing that to the extent it can
14 protect its citizens, induce respect for environmental
15 policy, and so on, it will do so without any cessation
16 of service? There's kind of an assurance of service
17 plus the objectives that the Government gets by running
18 the plant itself. And isn't that sort of the nub of all
19 of your points?

20 MR. CAHILL: Yes, Your Honor, that's true.
21 That is the essence of Government. We are there and we
22 are going to have to stay there. Whether -- where a
23 private entity might decide to go out of business
24 tomorrow, Government is going to be there to continue to
25 do what we set out to do.

1 But this leads me also to my third point,
2 which is that we're attempting to implement a
3 comprehensive solid waste plan. With the passage of
4 Federal legislation on these environmental matters
5 touching on waste in the 1970s, with the Resource
6 Conservation and Recovery Act, and with the
7 Comprehensive Environmental Response and Liability Act,
8 there was a new message sent to the country, which to
9 generators meant, you better think about what you're
10 doing with this stuff. You better make a -- you better
11 watch where it goes and you better be careful because
12 liability could attach to you.

13 And RCRA told government, States and
14 localities, it was their responsibility to come up with
15 plans to find new ways to manage solid wastes. That's
16 what we've done. Any time a government comes together
17 to put a plan together to dispose of solid wastes,
18 whether like ours it uses several different technologies
19 to try to address different parts of the waste stream,
20 you have to have the cooperation of the people who
21 collect the waste. If the people who collect the waste
22 could simply drive it away to anywhere they please, the plan
23 is no plan; the plan is just a suggestion. The haulers
24 --

25 JUSTICE KENNEDY: Who mandated this plan?

1 The State of New York?

2 MR. CAHILL: The State of New York.

3 JUSTICE KENNEDY: But the State of New York
4 can't mandate what happens to interstate commerce?

5 MR. CAHILL: No, Your Honor, it cannot.

6 JUSTICE KENNEDY: If you say the Congress of
7 the United States has authorized discrimination against
8 interstate commerce, then of course it can do that.
9 That has happened.

10 MR. CAHILL: That is not our position, Your
11 Honor. We're not saying that RCRA or any of these
12 statutes authorize discrimination against interstate
13 commerce. What the Federal statutes did do, however,
14 was recognize that the States do have the sovereign
15 power to act, and they expected the States to act in
16 this way.

17 JUSTICE SCALIA: Let's take one of these
18 classic discrimination cases involving milk. I think
19 what you're telling us is that if Wisconsin adopted a
20 law requiring all milk to be pasteurized at a facility
21 owned and operated by the State of Wisconsin, that would
22 be perfectly okay.

23 MR. CAHILL: That would not discriminate
24 against interstate commerce.

25 JUSTICE SCALIA: That's right. And it would

1 really advantage Wisconsin dairy farmers, wouldn't it,
2 and really disadvantage out of Wisconsin dairy farmers,
3 and you think that the Commerce Clause doesn't speak to
4 that.

5 MR. CAHILL: No, I do think the Commerce
6 Clause speaks to it, Your Honor, but I just -- our
7 position is it just doesn't require strict scrutiny. I
8 think the Pike test is a very good test to get to the
9 bottom of why Wisconsin would want to do such a thing,
10 and it would also be a good test to show just what the
11 adverse impact on interstate commerce was, and what
12 precisely the benefits of, to Wisconsin there might be.

13 I think the Pike test --

14 CHIEF JUSTICE ROBERTS: So then, the
15 Commerce Clause would become the vehicle by which we
16 would develop Federal law about what's appropriate for
17 municipal Governments to do and what's not appropriate?
18 We could decide it may be appropriate to run waste
19 facilities but not to run milk pasteurization. I don't
20 know how we would do that.

21 MR. CAHILL: I don't know how you would do
22 that either, Your Honor, but you would be led into that
23 by accepting the Petitioner's argument that public
24 services and private sector services are comparable
25 under the Commerce Clause. To go back to your example,

1 earlier, Justice Scalia --

2 CHIEF JUSTICE ROBERTS: Well, if we accepted
3 that argument, we would treat the public services just
4 like we treat, you know, the legislation favoring the
5 private company. You're the one that's arguing for
6 special treatment based on public ownership.

7 MR. CAHILL: I think we are not, Your Honor.
8 I think public ownership and public services are unique
9 and they're different, and they should be subject to
10 Commerce Clause scrutiny, but not --

11 CHIEF JUSTICE ROBERTS: But the whole point
12 is these are not unique. The whole point is that there
13 are private companies that provide these kinds of services.
14 Maybe water, maybe electricity, maybe those are or are
15 not unique. But you can't say that this is a unique
16 service being provided by Government.

17 MR. CAHILL: I think the approach that
18 Oneida-Herkimer has taken is in fact unique. It is
19 tailored to our local situation. It's not something
20 that the marketplace would provide if the Government was
21 not there. And if the Petitioner's idea that any
22 Government service could be challenged under the dormant
23 Commerce Clause simply because there's a private entity
24 out there that says they could do the same thing were
25 accepted, the definition of discrimination would be

1 changed from differential treatment of economic
2 interests to differential treatment of Government or
3 economic interests. And whether we use the taxing power
4 or police power to support a public enterprise, it would
5 be subject to challenge.

6 JUSTICE STEVENS: But the challenge here
7 isn't gauging this business, the question is whether you
8 can require everybody in the area to go through the one
9 facility and pay a tipping fee.

10 MR. CAHILL: Yes.

11 I would like to close, I think, because I'm
12 running out of time, with just the admonition or
13 requirement that we are, in providing a public service,
14 still subject to the Constitution and we must deal with
15 the part private sector fairly. But if we do deal with
16 the private sector fairly and we don't favor anyone in
17 State or anyone out of State, we should be judged under
18 the balancing test of Pike, so that the Court, as the
19 court below found the benefits of our system
20 substantially outweigh any incidental burdens that are
21 placed on it by commerce, placed on commerce by the
22 system. Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 Mr. Cahill.

25 Ms. Halligan.

1 ORAL ARGUMENT OF CAITLIN J. HALLIGAN
2 ON BEHALF OF NEW YORK AS AMICUS CURIAE
3 SUPPORTING THE RESPONDENTS

4 MS. HALLIGAN: Mr. Chief Justice, and may it
5 please the Court:

6 As you suggested, Justice Breyer, the theory
7 that Petitioners would have the Court adopt here is in
8 fact a novel one. What they are suggesting is that
9 there is discrimination sufficient to trigger near fatal
10 scrutiny any time the Government takes over, to the
11 exclusion of all private actors both in State and out of
12 State, a Government service, that that is sufficient to
13 trigger strict scrutiny. That is completely
14 inconsistent with the way that this Court has defined
15 what constitutes discrimination for purposes of the
16 dormant Commerce Clause.

17 The Court has said, and it has stressed
18 repeatedly in its precedents, that discrimination is the
19 differential treatment of in State and out-of-State
20 economic interests, not Government interests, in a way
21 that benefits the former and burdens the latter. That's
22 from Oregon Waste Systems.

23 JUSTICE STEVENS: Let me ask you a sort of
24 simple question. Is there an interstate impact on, of a
25 municipal rule whether it is milk, or garbage, or what,

1 that says all of this product must be processed within
2 this city before it can go out of State?

3 MS. HALLIGAN: There may well be an
4 interstate impact.

5 JUSTICE STEVENS: Doesn't that have a burden
6 on interstate commerce?

7 MS. HALLIGAN: It may well, and that is
8 something that is appropriately judged under the Pike
9 balancing test.

10 JUSTICE STEVENS: Isn't that exactly what we
11 have here?

12 MS. HALLIGAN: I think that you do have that
13 here, and you should judge it under the Pike balancing
14 test, not under the near fatal scrutiny that's, that's
15 --

16 JUSTICE KENNEDY: But Pike doesn't apply to
17 discrimination. Pike applies to burdens.

18 MS. HALLIGAN: Yes, Your Honor. And where
19 you have --

20 JUSTICE KENNEDY: It seems to me that you
21 are conflating the two.

22 MS. HALLIGAN: Respectfully, I disagree,
23 Your Honor. Where you have the Government taking over a
24 service entirely, that doesn't constitute discrimination
25 because there is no local private interest that is

1 advantaged, and no burden that is shifted to out-of-
2 State interest. That is where the dormant Commerce
3 Clause is primarily --

4 JUSTICE SCALIA: So long as the Government
5 enters the commercial market, it can, it can create
6 Fortress California?

7 MS. HALLIGAN: We're not asking
8 for a rule that broad, Your Honor. What we are
9 suggesting is that where you have a publicly owned
10 operation, a Government operation, and it does not
11 disproportionately benefit in State or local interests,
12 as against out-of-State interests --

13 JUSTICE SCALIA: But it always does.
14 It benefits the people of the State, who make the money
15 from the money from the, from the very expensive
16 hamburgers that are sold by the State of California.

17 MS. HALLIGAN: If --

18 JUSTICE SCALIA: It always benefits the
19 State of California.

20 MS. HALLIGAN: Well --

21 JUSTICE SCALIA: And you're saying so long
22 as it doesn't benefit one particular malefactor of great
23 wealth in the State of California, it is okay.

24 MS. HALLIGAN: No, Your Honor --

25 JUSTICE SCALIA: I don't see the distinction

1 as far as the harm to the national market is concerned.

2 MS. HALLIGAN: If you were to have
3 government action -- for example, someone suggested could
4 the Government sell hamburgers. I believe Justice Alito
5 suggested that, and that were to operate to the
6 disadvantage of out-of-State interests, even if it only
7 advantaged one in State interest, we would agree that
8 that would be appropriate for treatment under strict
9 scrutiny. But that's not what you have here.

10 What both the district court and the circuit
11 court in fact found here is that the primary burden of
12 these local ordinances in fact is on local residents.
13 And so the political process check that this Court has
14 found critical in cases like Minnesota versus Cloverleaf
15 and Wunnicke is very much present here. This is not
16 an attractive proposition that these localities have
17 entered into.

18 JUSTICE KENNEDY: What would you do with
19 Justice Alito's question? Dean Milk versus Madison:
20 All milk must be processed within 20 miles of
21 where it's --

22 MS. HALLIGAN: Yes, Your Honor.

23 JUSTICE KENNEDY: -- produced.

24 MS. HALLIGAN: Yes.

25 JUSTICE KENNEDY: Held discriminatory

1 against interstate commerce. Could -- under your view,
2 could your city require that all milk be pasteurized
3 within your city at a Government owned, city owned
4 facility?

5 MS. HALLIGAN: If that rule imposed no
6 disproportionate benefit on out-of-State --

7 JUSTICE KENNEDY: No, but Justice Scalia
8 says it always does because it benefits the locality.

9 MS. HALLIGAN: It's different if it benefits
10 --

11 JUSTICE KENNEDY: You have -- by criminal
12 laws --

13 JUSTICE STEVENS: You -- I'm sorry. It seems
14 to me you're looking at the interstate aspect from the
15 wrong point of view.

16 I'm a home owner. I have two choices. I
17 either send it to the local facility or I can ship it
18 over to New Jersey. You're telling me I can't ship it
19 to New Jersey. Doesn't that burden an interstate
20 transaction?

21 MS. HALLIGAN: This is very different from
22 those kinds of export bans. Those export bans did one
23 of two things.

24 JUSTICE STEVENS: This is an export ban.

25 MS. HALLIGAN: The export bans that this

1 Court has struck down either created local --

2 JUSTICE STEVENS: Your case involves an
3 export ban. All the trash has to be processed in your
4 tipping facility.

5 MS. HALLIGAN: It does, it does, and to
6 the extent that's what you are characterizing as an
7 export ban, that's certainly correct. What the Court
8 has found problematic about export bans are either that
9 they are put in place to create local economic
10 opportunities, for example the timber case or
11 the shrimp cases.

12 That's not what you have here. There's no
13 allegation that the purpose of these statutes is to
14 foster or promote local industry. In fact, the only
15 plaintiffs in this case are local haulers themselves.

16 CHIEF JUSTICE ROBERTS: Well, there is an
17 allegation that you charge above market rates to pursue
18 particular economic goals that the municipality has.

19 MS. HALLIGAN: For a different basket of
20 services, Your Honor. A basket of services that
21 includes a wider range of, of goals that the private
22 sector has no interest in providing.

23 To return, to return to the question of
24 whether or not this is an inappropriate benefit for the
25 citizens, I would argue that there is a meaningful

1 distinction between Government taking an action which
2 benefits the citizens as a whole, which we would hope
3 any Government law would -- any law passed by a
4 Government would do, as opposed to a law that benefits a
5 local private economic interest and is intended to do
6 so.

7 For the dormant Commerce Clause to reach
8 that far would be unprecedented. It would implicate not
9 only electricity but under Petitioner's theory it would
10 implicate, I would think for example Government
11 decisions to provide prison and correctional services
12 through a public system as opposed to a private one.
13 What about school bus services? Car insurance --

14 CHIEF JUSTICE ROBERTS: If only facilities
15 on your side of the case that are traditional municipal
16 services, but then this seems to be at the borderline.
17 I mean, on the other side, they have the hamburger cases
18 or the milk processing cases. How do we decide whether
19 this is one of the traditional governmental services,
20 the police, the prisons, whatever, or is it one of these
21 that looks more like regular market participation?

22 MS. HALLIGAN: Two answers if I can, Your
23 Honor. First of all, I think this Court has answered
24 that question with respect to waste management more than
25 a hundred years ago in the California Reduction case.

1 It was clearly held there that the provision of waste
2 management services is an essential function that
3 Governments appropriately provide.

4 So that's been answered here. With respect
5 to this question about hamburgers and other services
6 that look commercial, I think that there are two checks on
7 those kinds of ordinances. First of all, I think it is
8 very likely that in most circumstances if you were to
9 say that all hamburgers will be sold at a Government
10 operated facility, that that would disadvantage local
11 interests significantly, and there would be a political
12 process check.

13 Secondly the Court has been clear that it is
14 not bound by formalistic distinctions in the Commerce
15 Clause arena and so it will look for discrimination that
16 is protectionist in nature whether it is, as the Court
17 has said, forthright or ingenious. So if case were to
18 present itself, and the facts in this case carry
19 no whiff of that protectionism, where you were to
20 believe that the motive of a Government entity was, in
21 fact, to favor some local private interest, then strict
22 scrutiny might be appropriate.

23 JUSTICE ALITO: Is that what it turns on,
24 the motive? If the motive here were to keep the jobs at
25 the plant in New York, rather than in some facility

1 outside of New York, that would be, that would make a
2 difference?

3 MS. HALLIGAN: No, I think this Court has
4 held that the purpose alone cannot cure an inappropriate
5 means that is used. But what we are arguing is that
6 here you have both a very legitimate purpose, as my
7 co-counsel outlined for you; you also have appropriate
8 means. It is not inappropriate under the dormant
9 Commerce Clause for the Government to step in and take
10 over provision of a service. Petitioners themselves
11 agree that, in fact, the Government could take over
12 waste management services from soup to nuts. They
13 suggest that there is some difference of a
14 constitutional magnitude because some aspect of that is
15 contracted out to the private market, and I would argue
16 that actually turns the dormant Commerce Clause on its
17 head.

18 One final point, if I could make. Several
19 of you asked about whether or not there are other
20 mechanisms that the localities could use to further
21 these goals, goals which are set forth in both Federal
22 and State law.

23 First of all, under the Pike test, there is
24 no least restrictive alternative test. So it is not
25 required that the localities demonstrate that there is

1 no other option that might meet these goals. But also,
2 the Second Circuit concluded and rightly so I think on
3 page 20a of the appendix to the petition that there was no
4 other option that presented itself in the record that the
5 counties could address, or could use to address their
6 liability concerns and to encourage recycling across a
7 very wide range of products.

8 JUSTICE SCALIA: There is no determinative
9 element in the Pike test whatever. It is a totality of
10 the circumstances test, right?

11 MS. HALLIGAN: Yes, Your Honor.

12 JUSTICE SCALIA: That's wonderful.

13 (Laughter.)

14 MS. HALLIGAN: And we would suggest that that
15 is the appropriate test here.

16 JUSTICE GINSBURG: Ms. Halligan, how do you
17 answer something in the Petitioner's brief, it said that
18 there's really no difference between this case and Carbone
19 because these transfer stations are constructed and
20 operated by a private company?

21 MS. HALLIGAN: I think that that distinction
22 is essential here. It is essential because of the
23 purposes of the dormant Commerce Clause. These are
24 publicly owned facilities. The facility in Carbone was
25 privately owned and as you suggested, Justice Ginsburg,

1 the opinion is replete with careful references to that.

2 CHIEF JUSTICE ROBERTS: Where do you, where
3 do you come out on the 50-50 facility?

4 MS. HALLIGAN: I think that's a hard
5 question, Your Honor. And I think there the kind of
6 approach that the Court took in a case like West Lynn
7 Creamery and Hunt versus Washington Apple is helpful.

8 If it appears to the Court that the motive
9 is protectionist then it is appropriate to apply strict
10 scrutiny. Whether that line is 50 percent, 55 percent
11 --

12 CHIEF JUSTICE ROBERTS: Well, I thought you
13 said earlier motive was not the test, in response to I
14 think it was Justice Alito.

15 MS. HALLIGAN: Yes, Your Honor. I'm saying
16 that you should look as you have -- and I see my time is
17 up. If I may continue -- you should look as you have, in
18 all of the dormant Commerce Clause cases at the context
19 that is presented to you. So if there is 100 --

20 CHIEF JUSTICE ROBERTS: Thank you. Thank
21 you, counsel.

22 Mr. Tager you have three minutes remaining.

23 REBUTTAL ARGUMENT OF EVAN TAGER,

24 ON BEHALF OF PETITIONERS

25 MR. TAGER: Thank you, Mr. Chief Justice.

1 The first point I'd like to make is I'd like
2 to ask the Court to review Reeves versus Stake which is
3 a market participant case. But what is significant
4 there -- that's the cement plant case -- there's two
5 significant things about that case that I think are of
6 interest.

7 First, the Court's footnote 1 is an
8 interesting historical footnote about how South Dakota
9 had elected to make a lot of these different industries
10 State-run industries, so the hypotheticals we've been
11 discussing are not completely off the wall.

12 If you can do it for waste you can do it
13 for, in that case, coal. They wanted to do it for
14 stockyards but I think the legislature rejected the
15 Government's proposal. So the hypos are right on point.

16 Secondly, the Court made a point there in
17 rejecting the argument, the constitutional argument that
18 the State was not prohibiting competing cement
19 companies. And I think the inference from that is if
20 it had, there would have been a Commerce Clause problem.

21 Second, Mr. Cahill's user -- user fee point.
22 I just want to remind the Court that in addition to
23 paying for the recycling and everything, they were using
24 the user fee to pay off the bonds for their failed energy
25 recovery facility. So, if you start focusing on what

1 you use it for, it is a very slippery slope.

2 On his point about protecting the generator
3 from liability, we've addressed that at great lengths in
4 our briefs. But one other point I'd like to make is he's
5 wrong about their ability to determine whether other
6 facilities that the haulers want to use are safe for
7 environmental purposes. That's exactly what the city of
8 New York does. Because it doesn't have its own disposal
9 facility, so it's got very stringent requirements for
10 where the waste can be taken.

11 Fourth, Justice Souter, I believe you were
12 raising an inquiry about the political process and
13 whether that's adequate to protect the out-of-State
14 interests.

15 And I'd like to refer you to the West Lynn
16 Creamery decision where the Court said the people whose
17 oxen are being gored by a tariff are the local residents
18 as well, but a tariff is the prototypical Commerce
19 Clause violation. The political process is simply not a
20 good answer to our argument.

21 In terms of your other question about --

22 JUSTICE SCALIA: A tariff is also imposed by
23 a State, isn't it? As opposed to --

24 MR. TAGER: Yes.

25 JUSTICE SCALIA: Money goes to the State.

1 MR. TAGER: It would go to the State. I
2 suppose it could be done by a subdivision, though.

3 On Ms. Halligan's point about California
4 Reduction, I just would like to remind the Court that
5 that was a case of flow control to a private company.
6 So Carbone, to the extent that case was concerned at all
7 with the Commerce Clause, and it didn't say that it was,
8 it was a takings case, I think. It has been overruled to
9 the extent it had any Commerce Clause implications.

10 Finally, I would like end with the point
11 that Carbone has been the law for 13 years -- may I
12 finish?

13 If the Respondents have a problem with
14 Carbone, Congress can fix it. That's one of the unique
15 things about the Commerce Clause that is different from
16 other constitutional provisions.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.
18 The case is submitted.

19 (Whereupon, at 12:08 p.m., the case in the
20 above-entitled matter was submitted.)

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A	<p>affect 35:24 affirmatively 11:1 age 23:23 agencies 6:14 29:23 ago 6:13 49:25 agree 4:25 13:10 24:14 29:20 31:8 46:7 51:11 agreed 15:13 agreement 30:3 Airlines 27:22 Airport 27:21 AL 1:4,9 Alito 26:15 33:10 46:4 50:23 53:14 Alito's 46:19 allegation 48:13 48:17 alternative 51:24 alternatives 21:11 altogether 22:17 Amendment 11:24 14:13,20 amicus 1:23 2:10 43:2 amount 17:20 27:25 35:11,15 amounts 28:15 28:18 analysis 26:12 29:15 35:19 answer 3:21 17:6 22:7 28:23 29:14 30:1 33:11,20 36:5 52:17 55:20 answered 22:6 49:23 50:4 answers 16:21 49:22</p>	<p>anybody 4:19 27:6 anymore 19:3 APPEARAN... 1:17 appears 53:8 appendix 52:3 Apple 53:7 applies 30:4 44:17 apply 5:5 6:17 6:19,20 17:3 30:5,6 33:18 44:16 53:9 approach 41:17 53:6 appropriate 40:16,17,18 46:8 50:22 51:7 52:15 53:9 appropriately 44:8 50:3 area 5:17,18,19 42:8 areas 14:21 arena 50:15 argue 14:16 48:25 51:15 arguing 41:5 51:5 argument 1:15 2:2,5,8,12 3:3 3:7 12:10 16:23,25 18:3 18:16 19:22 21:3 22:3 26:6 40:23 41:3 43:1 53:23 54:17,17 55:20 asked 31:13,14 32:15 51:19 asking 45:7 aspect 23:9,10 47:14 51:14 Association 1:4 3:4</p>	<p>assume 10:22 34:9 37:3 assumed 6:1 24:10,13 assuming 18:21 assumption 24:12 assurance 37:16 assure 32:25 attach 38:12 attaches 32:10 attack 6:9,15 attacking 6:14 attempting 36:1 36:3,7 38:2 attractive 46:16 authority 1:9 3:5 24:18 32:4 authorize 39:12 authorized 39:7 automatic 30:1 avoids 29:12 a.m 1:16 3:2</p>	<p>28:18 based 6:15 41:6 basic 32:6 35:18 37:3 basically 25:21 34:21 basket 48:19,20 beaten 21:9 behalf 1:18,20 1:23 2:4,7,10 2:14 3:8 26:7 43:2 53:24 behaving 5:2 believe 46:4 50:20 55:11 benefit 3:24 8:1 45:11,22 47:6 48:24 benefits 26:13 40:12 42:19 43:21 45:14,18 47:8,9 49:2,4 best 17:11 better 22:7 29:14 36:10 38:9,10,10,11 big 12:10 bit 22:18 bonds 54:24 borderline 49:16 bottom 40:9 bought 14:14 bound 50:14 brand 18:1 breed 15:10 Breyer 4:9 5:6 5:13 6:7,18 7:1 7:11 12:6,19 12:22 16:4,22 21:14 22:6,12 22:14,22 43:6 Breyer's 18:4 24:4 brief 37:1 52:17 briefs 55:4 bring 3:21</p>
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