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1 P R O C E E D I N G S

2 (11:10 a.m.)

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

6 Mr. Tager.

7 ORAL ARGUMENT OF EVAN TAGER

8 ON BEHALF OF THE PETITIONERS

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

11 The barriers to interstate commerce imposed  
12 by the flow control ordinances in this case are even  
13 more severe than those resulting from the ordinance this  
14 Court struck down in Carbone. As in Carbone, no local  
15 waste can leave the counties for processing. In  
16 addition, now that Respondent's landfill is up and  
17 running no local waste can leave the counties for  
18 disposal either. The issue here is whether Carbone is  
19 inapplicable to this outright embargo merely because  
20 Respondent's own the facilities to which the haulers are  
21 required to bring the waste. The answer is no, and the  
22 reason is that the concerns underlying the Commerce  
23 Clause are implicated whether interstate commerce was  
24 being obstructed for the benefit of a public enterprise  
25 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           JUSTICE BREYER: I guess in many thousands  
9   of municipalities throughout the United States it's  
10  fairly common to have a locally owned electricity  
11  distribution company, or an electrically -- or a gas  
12  distribution company. And I thought it was fairly  
13  common for a municipally owned pipeline, gas pipeline,  
14  or electricity distribution to say, if you live in our  
15  town you've got to buy from us; you've got to buy from  
16  the local community. And I guess that's been going on  
17  for about 110 years.

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

24           Now, if we agree with you are we saying that  
25  all those gas companies, distribution companies, et

1     cetera, are behaving unconstitutionally?

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

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

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

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

1     constitutionality of this. But of course, memory is  
2     fallible, including mine. Therefore, I raise the  
3     question.

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

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

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

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

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

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

24                JUSTICE BREYER: Well, the fact is there is  
25    a difference between public ownership and giving an

1 exclusive franchise to a public company. And the public  
2 ownership means that the people of the State have  
3 decided to have their own little nationalized industry,  
4 which again people don't like, many. But I never knew  
5 there was anything in the Constitution that forbid it.

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

9 JUSTICE BREYER: Nationalized industries?

10 MR. TAGER: Well, to stop the idea that  
11 everything can be localized.

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

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

21 CHIEF JUSTICE ROBERTS: Yes.

22 MR. TAGER: -- from engaging in interstate  
23 commerce, in the event, for example, that you found  
24 there to be some additional benefit from engaging in an  
25 interstate transaction, I think we would have -- the

1 Commerce Clause would be implicated. But as a practical  
2 matter, they would be able to accomplish much the same  
3 thing because most people would take the free service.

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

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

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

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

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

24 MR. TAGER: If you parrot the Flow Control  
25 ordinance I think it's exactly the same.



1 JUSTICE SCALIA: Okay, so that's fair. Even  
2 if they support it entirely by taxes?

3 MR. TAGER: Yes.

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

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

10 JUSTICE SCALIA: Oh, it is indeed.

11 MR. TAGER: -- the Court's Commerce  
12 Clause --

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

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

19 JUSTICE KENNEDY: Well, I'm not so sure.

20 MR. TAGER: This case is almost on all fours  
21 with Carbone. All you've done is transfer the  
22 ownership. As you know, in Carbone that facility was  
23 destined to be owned within less than 2 years from the  
24 time the Court issued its opinion.

25 JUSTICE GINSBURG: But in the majority

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

8 MR. TAGER: Well, two responses to that,  
9 Justice Ginsburg. First, there were other references  
10 where the opinion said "the town's facility." Indeed,  
11 the Flow Control witness himself referred to it as the  
12 town's facility.

13 And the other response is, to call someone a  
14 proprietor doesn't mean that they're private. In this  
15 case, they're charging \$81 -- or \$86 a ton. Every ton  
16 that comes in, they make more money.

17 JUSTICE GINSBURG: I'm sorry. At least as I  
18 read the Carbone opinion, it didn't deal with the  
19 public-private distinction. It seemed to assume it was  
20 a private entrepreneur. And it didn't take a position  
21 one way or another whether there would be a distinction.

22 MR. TAGER: Well, I don't think the Court  
23 affirmatively decided the issue. I think the  
24 distinction didn't matter to the majority. I think the  
25 majority is focusing on the consequences of putting up

1 barriers to interstate commerce, of putting up embargoes  
2 and local processing requirements. And you could take  
3 almost any one of the Court's cases and just substitute  
4 in public ownership. Take, for example --

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

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

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

1 found that it was in a total line-drawing morass. And  
2 so it said we're throwing that out.

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

11 So I don't think it was an object of the  
12 Commerce Clause to prevent a State from favoring its own  
13 government.

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

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

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

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

23 MR. TAGER: No. First of all, what was  
24 being protected was this plan. The town had to fund its  
25 transfer station, a transfer station that it was going

1 to take possession of less than two years after this  
2 Court decided the case.

3 So the protectionism that was going on there  
4 was really protection of their investment in their  
5 scheme.

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

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

20 MR. TAGER: But it would be equally  
21 protected, Your Honor, if the government owned the  
22 facility but said you keep all the tipping fees until  
23 it's paid off and take a nice profit on top, too.

24 This distinction --

25 JUSTICE SOUTER: Well, that's -- that's a

1 third case but that's not the question we have here, is  
2 it?

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

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

20 MR. TAGER: Well, I just think you are going  
21 to be walking into so many line-drawing problems because  
22 if that example is one, are you going to require 100  
23 percent public ownership, or a majority interest, 50-50?  
24 Once you go down this road, I think it is just opening  
25 up a huge can of worms when the focus ought to be what

1 is the impact on interstate commerce? What we have here  
2 now that the landfill is up and running is an absolute  
3 embargo. No waste generated in this town, in these  
4 counties, excuse me, can leave the State, period, end of  
5 story.

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

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

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

23 And -- and what the Court cases say is do it  
24 the right way and we'll worry about the consequences  
25 later.

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

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

18 MR. TAGER: Several answers to that,  
19 Justice Breyer.

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

22 Two, this is an argument about why they  
23 might survive strict scrutiny, it's not a -- I know you  
24 don't like hearing about that -- but the question here  
25 is do we apply strict scrutiny or not. And that goes to



1 the strength of their interest. And then of course the  
2 question turns on, can it be met in nondiscriminatory  
3 ways? The answer is "very well." Since Carbone was  
4 decided, the municipalities have been living with no  
5 flow control, virtually every one in the country, yet  
6 recycling has gone up in the, in that intervening  
7 period.

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

20           They can also impose regulations directly on  
21 the generators and directly on the haulers to make sure  
22 they're doing these things. So it is hardly a reason  
23 for creating a brand-new public-private distinction.

24           JUSTICE SOUTER: It sounds to me as though,  
25 if we accept your argument that, going back to

1 Justice Breyer's first question, every municipal utility  
2 in the United States is going to fall.

3 MR. TAGER: Well -- I'm not an expert on --  
4 on that industry.

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

13 So that if you win on this argument, no more  
14 municipal lifelines.

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

16 JUSTICE SOUTER: No more municipal  
17 pipelines.

18 MR. TAGER: Well, I think they can have the  
19 plant. They just -- assuming that is --

20 JUSTICE SOUTER: Well, they'd like to run  
21 them as --

22 MR. TAGER: They'd like to have a monopoly,  
23 and --

24 JUSTICE SOUTER: -- an exclusive monopoly,  
25 and in that sense they won't, they won't be around

1     any more because the Commerce Clause will, will declare  
2     them unconstitutional.

3                   MR. TAGER: Well, but that's excluding that  
4     -- as I understand it --

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

8                   MR. TAGER: Yes.

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

15                  MR. TAGER: Absolutely.

16                  JUSTICE SCALIA: So long as they don't  
17    prohibit anybody from out of State.

18                  MR. TAGER: Yes.

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

24                  You said, you said distinctions on -- I  
25    thought you said distinctions like that were purely

1 formalistic --

2 MR. TAGER: Well --

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

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

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

21 MR. TAGER: Well, I'm not sure that one is  
22 completely formalistic. The Court said there, that  
23 gives people a choice. They can still take it out of  
24 the State if they want to, and they may have good reason  
25 to.

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

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

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

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

25           JUSTICE KENNEDY: But you don't make that,

1     that's not the argument you make.

2                   MR. TAGER:   Well, I would --

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

5                   MR. TAGER:   I like your answer better, Your  
6     Honor.

7                   (Laughter.)

8                   MR. TAGER:   But what, what I was trying to  
9     get back to was --

10                  JUSTICE BREYER:   Like it --

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

13                  MR. TAGER:   He'd changed the hypo.

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

17                  MR. TAGER:   You can --

18                  JUSTICE KENNEDY:   -- actually is greater  
19     than the sum of it.

20                  JUSTICE BREYER:   I actually point out that  
21     California, I think, wants to own the grid and privatize  
22     the rest of it.   And there are -- I mean, it --  
23     Justice Kennedy is totally right.   There are all kinds  
24     of combinations and permutations.   There, there could be  
25     distributors who are in fact regulated private companies

1 and local distributors who are owned by the city, and I  
2 guess there, there is one generator, at least, company  
3 that's owned by the -- that's a -- TV -- with TVA.  
4 They, they make their own.

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

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

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

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

8 MR. TAGER: I think it's hypothetical.

9 JUSTICE KENNEDY: It's a quite different  
10 assumption.

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

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

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

21 JUSTICE KENNEDY: Can you give me one case  
22 of it being strict scrutiny?

23 MR. TAGER: For?

24 JUSTICE KENNEDY: I mean, I just didn't  
25 realize that that phrase entered into our Commerce



1 Clause jurisprudence. Correct me if I'm wrong.

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

5 JUSTICE KENNEDY: That is to say, if it  
6 discriminates?

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

9 JUSTICE KENNEDY: But certainly on burden  
10 cases we don't require that.

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

22 Indeed, Pike itself has that very statement.  
23 That's sort of the classic case in which you invoke that  
24 high level of scrutiny.

25 If the Court has no further questions, I'd

1     like to reserve the balance of my time.

2                   CHIEF JUSTICE ROBERTS:  Thank you, counsel.

3                   Mr. Cahill.

4                   ORAL ARGUMENT OF MICHAEL J. CAHILL

5                   ON BEHALF OF THE RESPONDENTS

6                   MR. CAHILL:  Mr. Chief Justice, and may it  
7     please the Court:

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

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

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

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

6 MR. CAHILL: Your Honor.

7 JUSTICE KENNEDY: That's not a burden on  
8 interstate commerce?

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

13 JUSTICE KENNEDY: Suppose the user fee were  
14 ten times what it is?

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

18 JUSTICE KENNEDY: Why is that?

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

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

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

2 JUSTICE SCALIA: Call it a tax ripoff.

3 (Laughter.)

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

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

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

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

20 CHIEF JUSTICE ROBERTS: To get back to the  
21 public-private distinction, what is the answer to  
22 Mr. Tager's point that that's difficult to -- what if  
23 you have a 50 percent publicly owned, 50 percent  
24 privately owned company? Is that covered by the  
25 Commerce Clause cases or not?

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

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

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

25                   JUSTICE SCALIA: You know, there's a general

1 agreement throughout the world nowadays that sovereign  
2 immunity, which usually applies to governments, doesn't  
3 apply when the government is engaged in a commercial  
4 activity. Now, why shouldn't something similar apply to  
5 government regulation which ends up discriminating  
6 against out of State businesses, when the government is  
7 engaging in a commercial activity it is subject to the  
8 restrictions of the Commerce Clause? Why isn't that a  
9 reasonable rule?

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

17 JUSTICE KENNEDY: Well, I suppose any  
18 private entity can choose its market.

19 MR. CAHILL: Pardon me, Your Honor?

20 JUSTICE KENNEDY: I suppose any private  
21 entity can choose its market. You're a market  
22 participant. You're saying, we're going to serve this  
23 class of consumers. That's your privilege. But what  
24 you do is you have a market participation which is  
25 sanctioned by the criminal law. You've built this trash

1 utopia where everybody sends wonderful trash and you  
2 enforce use of that by the criminal law. So you're  
3 engaging as a market participant, but you're taking an  
4 extra advantage by using the criminal law to enforce, to  
5 enforce its use.

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

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

20 MR. CAHILL: No, Your Honor. There is no  
21 competition between our program and -- that's offered by  
22 the private sector. What we do is different than what  
23 the private sector offers and there's no place else for  
24 it to go. The haulers are required today to comply with  
25 the program and to coordinate their activities with the

1 separation done by the residents and the facilities that  
2 the authority has putting to.

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

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

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

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

24           MR. CAHILL: I think we do.

25           JUSTICE SCALIA: Why?



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

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

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

18                  JUSTICE SCALIA: So your answer is yes?

19                  MR. CAHILL: Yes.

20                  JUSTICE SCALIA: It doesn't matter?  
21 Hamburgers are just as good?

22                  MR. CAHILL: Well, hamburgers, Your Honor,  
23 if the government was going to be the sole purveyor of  
24 hamburgers in a community, I think they'd have to have a  
25 very, very good reason. If they had such a good reason,

1 then yes, government could do that.

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

4 MR. CAHILL: Of --

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

9 MR. CAHILL: I am not, Your Honor. I have  
10 no idea --

11 JUSTICE SOUTER: What are you referring to,  
12 then?

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

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

20 MR. CAHILL: That's one reason. It would  
21 also --

22 JUSTICE SOUTER: But there's no Commerce  
23 Clause reason?

24 MR. CAHILL: I think there's no Commerce  
25 Clause reason.

1 JUSTICE SOUTER: Okay.

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

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

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

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

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

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

24 MR. CAHILL: We are not attempting to  
25 regulate what goes on in other States. We

1 are attempting --

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

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

12 JUSTICE SCALIA: Whether they want the  
13 protection or not?

14 MR. CAHILL: Well --

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

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

19 JUSTICE SCALIA: We're the government and  
20 we're here to help you?

21 MR. CAHILL: Yes.

22 JUSTICE SOUTER: But isn't that almost a  
23 fourth point? I realize you didn't get the third point  
24 out yet. But isn't -- I remember your brief and isn't  
25 there sort of a fourth point? And that is, I will

1     assume that the government does have some basic health  
2     and safety objectives and the objective to protect its  
3     citizens here.

4                     MR. CAHILL:   Yes.

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

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

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

24                    But this leads me also to my third point,  
25     which is that we're attempting to implement a

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

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

23 JUSTICE KENNEDY: Who mandated this plan?  
24 The State of New York?

25 MR. CAHILL: The State of New York.

1 JUSTICE KENNEDY: But the State of New York  
2 can't mandate what happens to interstate commerce.

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

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

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

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

21 MR. CAHILL: That would not discriminate  
22 against interstate commerce.

23 JUSTICE SCALIA: That's right. And it would  
24 really advantage Wisconsin dairy farmers, wouldn't it,  
25 and really disadvantage out of Wisconsin dairy farmers,

1 and you think that the Commerce Clause doesn't speak to  
2 that.

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

11 I think the Pike test --

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

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

25 CHIEF JUSTICE ROBERTS: Well, if we accepted



1     that argument, we would treat the public services just  
2     like we treat, you know, the legislation favoring  
3     private companies. You're the one that's arguing for  
4     special treatment based on public ownership.

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

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

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

1 economic interests. And whether we use the taxing power  
2 or police power to support a public enterprise, it would  
3 be subject to challenge.

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

8 MR. CAHILL: Yes.

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

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 Mr. Cahill.

23 Ms. Halligan.

24 ORAL ARGUMENT OF CAITLIN J. HALLIGAN

25 ON BEHALF OF NEW YORK AS AMICUS CURIAE

1 SUPPORTING THE RESPONDENTS

2 MS. HALLIGAN: Mr. Chief Justice, and may it  
3 please the Court:

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

15 The Court has said, and it has stressed  
16 repeatedly in its precedent, that discrimination is the  
17 differential treatment of in state and out of State  
18 economic interests, not government interests, in a way  
19 that benefits the former and burdens the latter. That's  
20 from Oregon Waste System.

21 JUSTICE STEVENS: Let me ask you a sort of  
22 simple question. Is there an interstate impact on, of a  
23 municipal rule whether it is milk, or garbage, or what,  
24 that says all of this product must be processed within  
25 this city before it can go out of State?

1 MS. HALLIGAN: There may well be an  
2 interstate impact.

3 JUSTICE STEVENS: Doesn't that have a burden  
4 on interstate commerce?

5 MS. HALLIGAN: It may well, and that is  
6 something that is appropriately judged under the Pike  
7 standard.

8 JUSTICE STEVENS: Isn't that exactly what we  
9 have here?

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

14 JUSTICE KENNEDY: But Pike doesn't apply to  
15 discrimination. Pike applies to burdens.

16 MS. HALLIGAN: Yes, Your Honor. And where  
17 you have --

18 JUSTICE KENNEDY: It seems you are  
19 conflating the two.

20 MS. HALLIGAN: Respectfully, I disagree,  
21 Your Honor. Where you have the government taking over a  
22 service entirely, that doesn't constitute discrimination  
23 because there is no local private interest that is  
24 advantaged, and no burden that is shifted to out of  
25 state interest. That is where the dormant Commerce

1 Clause is primarily --

2 JUSTICE SCALIA: So long as the government  
3 enters the commercial market, it can, it can create  
4 Fortress California? MS. HALLIGAN: We're not asking  
5 for a rule that broad, Your Honor. What we are  
6 suggesting is that where you have a publicly owned  
7 operation, a government operation, and it does not  
8 disproportionately benefit in state or local interests,  
9 as against out of state interests -- But it always does.  
10 It benefits the people of the State, who make the money  
11 from the money from the, from the very expensive  
12 hamburgers that are sold by the State of California.

13 MS. HALLIGAN: If --

14 JUSTICE SCALIA: It always benefits the  
15 State of California.

16 MS. HALLIGAN: Well --

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

20 MS. HALLIGAN: No, Your Honor --

21 JUSTICE SCALIA: I don't see the distinction  
22 as far as the harm to the national market is concerned.

23 MS. HALLIGAN: If you were to have  
24 government action, for example, someone suggested could  
25 the government sell hamburgers. I believe Justice Alito

1 suggested that, and that was to operate to the  
2 disadvantage of out of state interests, even if it only  
3 advantaged one in state interest, we would agree that  
4 that would be appropriate for treatment under strict  
5 scrutiny. But that's not what you have here.

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

14 JUSTICE KENNEDY: What would you do with  
15 Justice Alito's question? Dean Milk versus Madison:  
16 All milk must be processed whether been 20 miles of  
17 where it's --

18 MS. HALLIGAN: It's --

19 JUSTICE KENNEDY: -- produced.

20 MS. HALLIGAN: Yes.

21 JUSTICE KENNEDY: Held discriminatory  
22 against interstate commerce. Could -- under your view,  
23 could your city require all milk be pasteurized within  
24 your city at a government owned, city owned facility?

25 MS. HALLIGAN: If that rule imposed no

1 disproportionate benefits on out of state --

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

4 MS. HALLIGAN: It's different if it benefits  
5 --

6 JUSTICE KENNEDY: You have -- by criminal  
7 laws --

8 JUSTICE STEVENS: You -- I'm sorry. We're  
9 looking at the interstate aspect from the wrong point of  
10 view.

11 I'm a home owner. I have two choices. I  
12 either send it to the local facility or I can ship it  
13 over to New Jersey. You're telling me I can't ship it  
14 to New Jersey. Doesn't that burden an interstate  
15 transaction?

16 MS. HALLIGAN: This is very different from  
17 those kinds of export bans. Those export bans did one  
18 of two things.

19 JUSTICE STEVENS: This is an export ban.

20 MS. HALLIGAN: The export bans that this  
21 Court has struck down either created local --

22 JUSTICE STEVENS: Your case involves an  
23 export ban. All the trash has to be processed in your  
24 tipping facility.

25 MS. HALLIGAN: It does, and it does, and to

1 the extent that's what you are characterizing as an  
2 export ban, that's certainly correct. What the Court  
3 has found problematic about export bans are either that  
4 they are put in place to create local to correct  
5 economic opportunities, for example the timber cases or  
6 the shrimp cases.

7 That's not what you have here. There's no  
8 allegation that the purposes of these statutes is to  
9 foster or promote local industry. In fact, the only  
10 plaintiffs in this case are local haulers themselves.

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

14 MS. HALLIGAN: For a different basket of  
15 services, Your Honor. A basket of services that  
16 includes a wider range of, of goals that the private  
17 sector has no interest in providing.

18 To return, to return to the question of  
19 whether or not this is an inappropriate benefit for the  
20 citizens, I would argue that there is a meaningful  
21 distinction between government taking an action which  
22 benefits the citizens as a whole, which we would hope  
23 any government law would -- any law passed by a  
24 government would do, as opposed to a law that benefits a  
25 local private economic interest and is intended to do



1 so.

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

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

17 MS. HALLIGAN: Two answers if I can, Your  
18 Honor. First of all, I think this Court has answered  
19 that question with respect to waste management more than  
20 a hundred years ago in the California Reduction case.  
21 It was clearly held there the provision of waste  
22 management services is an essential function that  
23 governments appropriately provide.

24 So that's been answered here. With respect  
25 to this question about hamburgers and other services

1    that look commercial, I think there are two checks on  
2    those kinds of ordinances. First of all, I think it is  
3    very likely that in most circumstances if you were to  
4    say that hamburgers will be sold at a government  
5    operated facility, that that would disadvantage local  
6    interests significantly, and there would be a political  
7    process check.

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

18              JUSTICE ALITO: Is that what it turns on,  
19   the motive? If the motive were to keep the jobs at the  
20   plant in New York, rather than in some facility outside  
21   of New York, that would be, that would make a  
22   difference?

23              MS. HALLIGAN: No, I think this Court has  
24   held the purpose alone cannot cure an inappropriate  
25   means that is used. But what we are arguing is that

1 here you have both a very legitimate purpose, as my  
2 co-counsel outlined for you; you also have appropriate  
3 means. It is not inappropriate under the dormant  
4 Commerce Clause for the government to step in and take  
5 over provision of a service. Petitioners themselves  
6 agree that, in fact, the government could take over  
7 waste management services from soup to nuts. They  
8 suggest that there is some difference of a  
9 constitutional magnitude because some aspect of that is  
10 contracted out to the private market, and would argue  
11 that actually turns the dominant Commerce Clause on its  
12 head.

13 One final point, if I could make. Several  
14 of you asked about whether or not there are other  
15 mechanisms that the localities could use to further  
16 these goals, goals which are set forth in both Federal  
17 and State laws.

18 First of all, under the Pike test, there is  
19 no least restrictive alternative test. So it is not  
20 required that the localities demonstrate that there is  
21 no other option that might meet these goals. The Second  
22 Circuit concluded and rightly so I think on page 20a of  
23 the appendix to the petition that there was no other  
24 option that presented itself in the record that the  
25 counties could address, or could use to address their

1 liability concerns and to encourage recycling across a  
2 very wide range of products.

3 JUSTICE SCALIA: There is no determinative  
4 element in the Pike test whatever. It is a totality of  
5 the circumstances test, right?

6 MS. HALLIGAN: Yes, Your Honor.

7 JUSTICE SCALIA: That's wonderful.

8 (Laughter.)

9 MS. HALLIGAN: And we suggest that that is  
10 the appropriate test here.

11 JUSTICE GINSBURG: Ms. Halligan, how do you  
12 answer something in the Petitioner's brief that says  
13 there's no difference between this case and Carbone  
14 because these transfer stations are constructed and  
15 operated by a private company?

16 MS. HALLIGAN: I think that that distinction  
17 is essential here. It is essential because of the  
18 purposes of the dormant Commerce Clause. These are  
19 publicly owned facilities. The facility in Carbone was  
20 privately owned and as you suggested, Justice Ginsburg,  
21 the opinion is replete with careful references to that.

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

24 MS. HALLIGAN: I think that's a hard  
25 question, Your Honor. And I think there the kind of

1 approach that the Court took in a case like Westland  
2 Creamery and Hunt versus Washington Apple is helpful.

3 If it appears to the Court that the motive  
4 is protectionist then it is appropriate to apply strict  
5 scrutiny. Whether that line is 50 percent, 55 percent  
6 --

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

10 MS. HALLIGAN: Yes, Your Honor. I'm saying  
11 you should look as you have -- and I see my time is up.  
12 If I may continue -- you should look as you have, in all  
13 of the dormant Commerce Clause cases at the context that  
14 is presented. So if there is 100 --

15 CHIEF JUSTICE ROBERTS: Thank you. Thank  
16 you, Counsel.

17 Mr. Tager you have three minutes remaining.

18 REBUTTAL ARGUMENT OF EVAN TAGER,

19 ON BEHALF OF PETITIONERS

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

21 The first point I'd like to make is I'd like  
22 to ask the Court to review Reeves versus Stake which is  
23 a market participant case. But what is significant  
24 there -- that's the cement plant case -- there's two  
25 significant things about that case which I think are of

1 interest.

2 First, the Court's footnote 1 is an  
3 interesting historical footnote about how South Dakota  
4 had elected to make a lot of these different industries  
5 state-run industries, so the hypotheticals we've been  
6 discussing are not completely off the wall.

7 If you can do it for waste you can do it  
8 for, in that case coal. They wanted to do it for  
9 stockyards but I think the legislature rejected the  
10 government's proposal. So the hypos are right on point.

11 Secondly, the Court made a point there in  
12 rejecting the argument, the constitutional argument that  
13 the state was not prohibiting competing cement  
14 companies. And I think the inference from that is that  
15 it had, there would have been a Commerce Clause problem.

16 Second, Mr. Cahill's user -- user fee point.  
17 I just want to remind the Court that in addition to  
18 paying for the recycling and everything, they were using  
19 the user fee to pay off the bond for their failed energy  
20 recovery facility. So, if you start focusing on what  
21 you use it for, it is a very slippery slope.

22 On his point about protecting the generator  
23 from liability, we've addressed that at great lengths in  
24 our briefs. But one other point I want to make is he's  
25 wrong about their ability to determine whether other

1 facilities that the haulers want to use are safe for  
2 environmental purposes. That's exactly what the city of  
3 New York does. Because it doesn't have its own disposal  
4 facility, its got very stringent requirements for where  
5 the waste can be taken.

6 Fourth, Justice Souter, I believe you were  
7 raising an inquiry about the political process and  
8 whether that's adequate to protect the out of State  
9 interests.

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

16 In terms of your other question about --

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

19 MR. TAGER: Yes.

20 JUSTICE SCALIA: Money goes to a State.

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

23 On Ms. Halligan's point about California  
24 Reduction, I just would like to remind the Court that  
25 that was a case of flow control to a private company.

1 So Carbone, to the extent that case was concerned at all  
2 with the Commerce Clause, and it didn't say that it was,  
3 it was a taking case, I think, it has been overruled to  
4 the extent it had any Commerce Clause implications.

5 Finally, I would like end with the point  
6 that Carbone has been the law for 13 years -- may I  
7 finish?

8 If the Respondents have a problem with  
9 Carbone, Congress can fix it. That's one of the unique  
10 things about the Commerce Clause that is different from  
11 other constitutional provisions.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
13 The case is submitted.

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

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|---|--|---|---|--|
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