United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Management Authority (05-1345)

Oral argument:
January 8, 2007

Appealed from: United States Court of Appeals for the Second Circuit

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Commerce clause, waste manangement, trash, flow-control ordinance.

Solid waste processing has been a contentious issue since the 1980s when local governments were implicated in environmental lawsuits regarding solid waste disposal. Local governments tried to take control of the issue, but found that they faced commerce clause issues when they tried to protect their local facilities by passing ordinances to ensure enough tipping fees through flow control ordinances. This case represents the latest attempt by local governments to protect local waste processing facilities by requiring that local solid waste be directed to the publicly owned facility. In a key case, C *& A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 386 (1994), the Supreme Court struck down an ordinance similar to the one at issue in this case because it was discriminatory to other waste processing facilities and placed a burden on interstate commerce. In this case, the Second Circuit ruled that because the ordinance at issue favored a public facility rather than a private facility as in *Carbone*, it passed the discrimination test. The Court also held that it passed a balancing test whereby the court balances the local interest and the burden on interstate commerce. At stake in this case are the local governments' interests in sustaining environmentally sound local processing plants that represent significant sunk cost versus interstate waste hauling and out of state processing plants hoping to sustain their businesses.

- [Question(s) presented] | [Issue(s)] | [Facts] | [Discussion] | [Analysis]

Question(s) presented

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

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

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

Issues

1. Does a local ordinance that directs solid waste to a publicly owned facility discriminate against interstate commerce in the same way as an ordinance that directs solid waste to a private facility?

2. If the ordinance does not discriminate, does the ordinance place a burden on interstate commerce that is greater than its benefit to the local community?

Facts

In 1988, Oneida and Herkimer Counties ("the Counties"), in upstate New York, formed the Oneida and Herkimer Solid Waste Management Authority ("The Authority"). Brief for Petitioners at 3. The Authority contracted with the counties to create facilities to process and dispose of waste and recyclables generated in the counties. *Id.* The Counties agreed to ensure that all waste generated within their borders would be delivered to the facilities designated by the Authority. To do this, the Counties enacted what is called a "flow control ordinance." The ordinance requires that all garbage generated in the town must be delivered to the appropriate facility. *Id.* at 4. In this case, the Authority's newly created waste processing facilities were those appointed as the appropriate facilities. *Id.*

In April 1995, this ordinance was challenged by Petitioners, six waste haulers that operated in Oneida and Herkimer Counties and a trade association. *Id.* at 6. They filed suit against the Authority and Oneida and Herkimer counties, alleging that the flow-control ordinances and the Authority's Rules and Regulations violated the dormant Commerce Clause, which prohibits a state from burdening interstate commerce. *Id.* Petitioners claimed that in enforcing the ordinances and the Rules and Regulations, Respondents deprived Petitioners of their constitutional rights in violation of 42 U.S.C. § 1983. *Id.* Over the years things such as favoring in-state businesses over out of state businesses and hoarding a state's natural resources have been found as violations of the Dormant Commerce Clause.

The District Court decided that the facts of this case were essentially the same as the facts of a prior case, . *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 386 (1994).. In *Carbone*, the Supreme Court found that an ordinance requiring all local trash to be delivered to a privately owned local facility was invalid under the Dormant Commerce Clause. *Carbone*, 511 U.S. 383, 386 (1994). The District Court reasoned that this ordinance, also favoring a local facility, should similarly be held invalid under the Dormant Commerce Clause.

The Counties appealed to the Court of Appeals noting that the facts of this case were very different from the facts of *Carbone* because in this case the facility being favored was publicly, not privately, owned. The Court of Appeals agreed. They held, in *United Haulers I*, that because this regulation required the waste be delivered to a public facility, it was not analogous to *Carbone* and did not discriminate in favor of a local business. *United Haulers Association, Inc v. Oneida-Herkimer Solid Waste Management Authority*, 261 F.3d 245, 263 (2d Cir. 2001). As such, the ordinance needed only to pass the balancing test articulated in *Pike v. Bruce Church, Inc*., 397 U.S. 137 (1970) to be found valid under the dormant Commerce Clause. *Id.* The *Pike* test requires the ordinance's benefits to the county to be weighed against its effects on interstate commerce. When an ordinance that regulates evenhandedly it should be held invalid only if "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142.

The District Court, as directed by the Court of Appeals, applied the *Pike* balancing test. They determined that because in state collectors were treated no differently than out of state collectors were, there was no burden imposed on interstate commerce. Therefore, the District Court upheld the ordinance.

United Haulers appealed because they thought the District Court should have not only looked at the treatment of in and out of state collectors, but should have recognized that the consequence of the ordinance, preventing waste from crossing state lines, was a burden imposed on interstate commerce. The Court of Appeals recognized, in *United Haulers II*, that the removal of waste from interstate commerce was a burden on interstate commerce. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 438 F.3d 150, 160 (2d Cir. 2006). Therefore, the Court applied the *Pike* balancing test. The court weighed this burden, which they characterized as insubstantial, against the ordinance's benefits. The burden was found to be easily outweighed by the benefits and the ordinance was upheld. United Haulers appealed to the Supreme Court.

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Discussion

This case is one in a long line of solid waste disposal cases. *United Haulers Association, Inc v. Oneida-Herkimer Solid Waste Management Authority*, 261 F.3d 245, 248 (2d Cir. 2001); U.S. Const. art. I, § 8, cl.3. The central problem is that after municipalities and school districts were named as third-party defendants to environmental lawsuits, the counties took it upon themselves to provide adequate solid waste disposal programs. *United Haulers*, 261 F.3d at 248; U.S. Const. art. I, § 8, cl.3. In order to do this without incurring substantial loss, the municipalities felt they

needed to insure an adequate flow of solid waste to generate revenues to sustain the facilities. *United Haulers*, 261 F.3d at 249. The Supreme Court struck down an initial plan whereby private firms would run the facilities, but be protected by municipal laws guaranteeing adequate flow for violating the Commerce Clause. *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 386 (1994).

"The Commerce Clause states that 'Congress shall have Power…[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.'" *United Haulers,* 261 F.3d at 253; U.S. Const. art. I, § 8, cl.3. In an area devoid of Congressional legislation, the Commerce Clause does not "say what the states may or may not do." *Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 749 (1978). If actions burden interstate commerce or impede its free flow, then they fall within the domain of the Commerce Clause. *Carbone*, 511 U.S. at 389. The domain of the interstate Commerce Clause has broadened over time such that an action or ordinance can affect interstate commerce if its economic effects reach interstate. *Id.* An ordinance may be valid even if it affects interstate commerce if it passes a two pronged inquiry: "first, whether the ordinance discriminates against interstate commerce, and second, whether the ordinance imposes a burden on interstate commerce that is clearly excessive in relation to the putative local benefits." *Id.* at 390 (internal citations omitted). In *Carbone*, the Court determined at the outset that the town's flow-control ordinance affected interstate commerce because by requiring waste to be directed to the designated station with higher costs, the ordinance drove the cost up for out-of-state interests, and thus had an economic effect. *Id.* at 390. After finding that the ordinance affected interstate commerce, it could then apply the two-pronged inquiry of discrimination and balancing. *Id.*

A discriminating state or local regulation is virtually *per se* unconstitutional because of "the virtual certainty that such laws, at least in their discriminatory aspect serve no legitimate, non-protectionist purpose." *Id.* at 422. The *Carbone* Court found that the ordinance discriminated against interstate commerce because like many other local processing requirement ordinances, it deprives out of state service providers of local demand for their services. *Id.* at 392. Because the *Carbone* Court found that the ordinance discriminates against interstate commerce, it did not need to reach the question of whether the burden on interstate commerce was excessive. *Id.* at 390.

The facts in this case are similar to those of *Carbone*, with the key difference being that in this case, the town owns the processing plant rather than the plant being a private enterprise. *United Haulers,* 261 F.3d at 248. The first time the Second Circuit heard this case, it held "that because the favored facilities are publicly owned , the ordinances do not discriminate against interstate commerce, and therefore are not subject to the rigorous test set forth in *Maine v. Taylor*." *Id.* After determining that the ordinance did not discriminate, the Court went on to decline to apply the *Pike* balancing test in favor of the municipality as a matter of law, but remanded to the lower court for analysis under *Pike*. *Id.* at 263–264. The second time the court heard the case, it assumed that the regulations were non-discriminatory and declined to address the relative burden the ordinances would place on interstate commerce, stating "that any such burden would not be clearly excessive in relation to the putative local benefits of the flow control scheme." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 438 F.3d 150, 153

(2d Cir. 2006). Thus, this case will likely decide whether a state or local ordinance can discriminate when it favors a public entity.

Petitioners in this case primarily argues for reversal based on the similarity of this case to *Carbone*. Brief for Petitioners at 20–21. Petitioners state that the ordinances in this case and *Carbone* are virtually identical and they have the same affect on interstate commerce. *Id.* at 21. Petitioners argue that the processing facility in *Carbone* was private in only the most formal sense because the private nature of the facility was merely a financing mechanism, and the town could obtain title to the facility at nominal cost. *Id.*

Respondents argue that under Pike analysis, there is no difference between the burden on in-state versus out-of-state interests. Respondents' Brief at 18. Furthermore, the Respondents distinguish this case from *Carbone* because that case held that an ordinance requiring waste to be processed at a private facility violated the commerce clause. *Id.* Respondents then argue that this ordinance survives *Pike* balancing because the local benefits are substantial because it allows the risks of waste disposal to be born by the county; allows the county to pursue policies that minimize waste and maximize recycling; and allows the county to manage waste in the best possible way. *Id.* at 18–19. Finally, Respondent argue that this ordinance is constitutional because it treats all waste haulers alike. *Id.* at 19.

Amici writing in favor of Petitioners, United Haulers, argue that preventing municipalities from enacting ordinances such as Oneida-Herkimer's creates a vibrant interstate market in waste processing and disposal. Brief for Amici Curiae Sussex County, Virginia and Charles City County, Virginia in Support of Petitioners at 8. Furthermore, they argue that they relied on *Carbone* in designing their own facilities and would be harmed if their sources of Municipal Solid Waste were curtailed by similar ordinances. *Id.* at 9.

This case will resolve a conflict between the lower court here and the Third Circuit, which held in *Atlantic Coast Demolition* that a similar regulation directing flow to a public facility was discriminatory, and thus unconstitutional under *Carbone*. *Atlantic Coast Demolition & Recycling v. Board of Chosen Freeholders*, 48 F.3d 701 (3d Cir. 1995). In their Amicus Curiae brief responding to the first petition for Certiorari in 2001, New Jersey urged the Supreme Court to take this case, but not to hold for Petitioners. Brief of Amicus Curiae State of New Jersey in Support of the Petition for Certiorari at 2. Rather New Jersey hoped that the Supreme Court would uphold the Second Circuit's ruling in this case and thus overrule *Atlantic Coast Demolition*. *Id.* New Jersey states that initially, they understood from a 1988 Third Circuit decision that ordinances directing solid waste to local treatment facilities withstood legal challenge because they met the balancing test of *Pike*. Brief of Amicus Curiae State of New Jersey in Support of the Petition for Certiorari at 1. New Jersey spent substantial amounts of money to build treatment facilities they thought would have enough flow because they would be able to guarantee that the solid waste would not leave New Jersey for treatment. *Id.* However, the Third Circuit reversed itself in *Atlantic Coast Demolition* in 1995, after the Supreme Court handed down the decision in *Carbone*. Brief of Amicus Curiae State of New Jersey in Support of the Petition for Certiorari at 1.

While New Jersey, like Respondents in this case, seeks to protect its interests in their local processing plants, the National Solid Wastes Management Association, and the American Trucking Associations seek to protect their business hauling and processing waste. Brief of Amici Curiae National Solid Wastes Management Association, American Trucking Associations, Inc., and National Association of Manufacturers at 11. They argue that if the Court upholds the Second Circuit's decision below, this will seriously disrupt the interstate solid waste market because municipalities that had previously avoided solid waste management ordinances under *Carbone*, will enact them, greatly increasing their effect. *Id.*

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Analysis

The Constitution of the United States reserves for the federal government the right to regulate interstate commerce. Therefore, state governments may not discriminate against interstate commerce. It is well settled that the hoarding of resources for the benefit of in-state residents is an example of improper discrimination. A county's ordinance that requires all resources to be processed by a certain local or in-state *private* business is an example of improper hoarding because the county is hoarding local garbage for the benefit of an in-state business. *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 386 (1994). The first question to be answered by the Supreme Court in this case is whether or not a county's ordinance that requires all waste to be processed by a certain local or in-state *public* facility represents the same kind of unlawful discrimination as the ordinance in *Carbone* did. In answering this question the Court will have to decide what the major offensive characteristic of the *Carbone* ordinance was. Was it that a local private business was preferred over potential out-of-state competitors or was it that that a resource (garbage) was removed from the interstate market? (Under both the *Carbone* ordinance and this one, garbage from the counties in question can not be brought out-of-state to be processed by an out-of-state facility which might desire more waste to process.) If the Court decides that the latter was the offensive characteristic, then it makes no difference whether the preferred facility is public or private. In either case a resource will be removed from the interstate market. This decision would render the ordinance of Oneida and Herkimer Counties' invalid. If, on the other hand, the Court reasons that the *Carbone* ordinance violated the commerce Clause because it preferred a local private facility, then an ordinance preferring a public facility (like this ordinance) would not violate the commerce clause.

Petitioners will try to show that the Supreme Court felt that the removal of a resource from the interstate market was the offensive characteristic of the ordinance in *Carbone* and did not intend to create a distinction between public facilities and private facilities. They will focus on the fact that prior cases have held that any protectionist law is invalid whether or not they favor a public or private facility. Brief for Petitioners at 20. They argue that discrimination occurs whenever a county inhibits the flow of goods or resources across state lines. *Id.* at 27. Petitioners will try to show that the ordinance in this case has characteristics of each of the three classes of invalid, protectionist laws (export restrictions, import restrictions, and hoarding). The first class of law that the petitioner will rely on is export restrictions. These laws are invalid under the Supreme Court's dormant Commerce Clause analysis when they require things to be done in-state that could be done out-of-state. *Id.* The ordinance in this case, like those export restriction cases,

requires the in-state processing of garbage that could be processed out-of-state. *Id.* at 29. Next, Petitioners compare this ordinance to import restrictions which have been held to be invalid as protectionist laws. *Id.* Import restrictions keep out-of-state providers from vying for in-state customers. The ordinance in this case restricts out-of-state processing facilities from competing for the right to processes the waste of households and businesses in Oneida and Herkimer Counties. *Id.* at 30. As their last example, Petitioners will liken this ordinance to the hoarding laws which have been invalidated by the Supreme Court in cases such as *City of Philadelphia v. New Jersey*. *Id.* at 32. In that case, New Jersey prohibited the disposal of out-of-state waste in landfills located in New Jersey. This was seen by the Supreme Court as hoarding local landfill space for in-state commercial interests. As such, it was held to be and invalid discrimination against interstate commerce because it prohibited the flow of out-of-state resources (waste) into the state to allow for local demand (the need for landfill space) to be met. Petitioners argue that this ordinance does the same thing by disallowing local trash to be shipped out-of-state to allow for local demand (the need for garbage to be processed) to be met. *Id.* Since the ordinance in this case shows characteristics of all three classes of invalid protectionist laws, it too should be held to be protectionist in nature. As a protectionist law, Petitioners will argue, it should be invalidated regardless of whether it favors a public or private facility.

Respondents, Oneida and Herkimer Counties, will argue that all of the cases relied on by Petitioners, specifically the hoarding cases, have one thing in common that is not present in this case: a disadvantage to, or disfavoring of, out-of-state residents. Brief for Respondents at 14. For example, the underlying protectionist motive of the law which was invalidated in *City of Philadelphia v. New Jersey* was to preserve in-state resources (landfill space) for use by in-state residents to the disadvantage of out-of-state residents. Respondents will argue that the ordinance in *Carbone* likewise burdened out-of-state residents. *Id.* at 15. Because the ordinance in this case places no burden on out-of-state residents it should not be invalidated.

The Second question to be answered by the Supreme Court in this case is if the measures are not discriminatory, do they pass the *Pike* balancing test? Petitioners argue that the ordinances do not hold up under the *Pike* test because they prohibit articles of commerce from crossing interstate lines, creating a "severe burden on interstate commerce." Brief for Petitioners at 22. This severe burden is clearly excessive compared to the interests the ordinance serves. Petitioners invoke Justice O'Connor's concurrence from *Carbone* where she stated that widespread adoption of such flow control ordinances would lead to Balkanization of the interstate solid waste market, which is what the Founders intended to prevent through the Commerce clause. *Id.* at 22–23.

Respondents counter that the ordinance holds up under the *Pike* test if they are subject to review under that test. Brief for Respondents at 9. The burden imposed by the ordinance on interstate commerce is not clearly excessive in relation to the putative local benefits. *Id.* In fact, Respondents argue, there is no burden at imposed on interstate commerce because there is no "differential impact" on out-of-state entities. *Id.* At 35. The benefits of the ordinance, on the other hand, are substantial. The ordinance allows the Counties to take the burden of environmental risks off of its resident businesses, to implement policies to increase recycling, and to manage waste in a way most suited to the needs of the community. *Id.* at 9. Respondents are confident that the lack of burdens and wealth of benefits provided by the ordinance cannot fail under the *Pike* test.

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Conclusion

United Haulers v. Oneida-Herkimer is an important case with respect to commerce clause jurisprudence and the ongoing battle between local governments and their interest in solid waste process and waste haulers and industrial processing facilities that rely on a steady supply of solid waste for their livelihood. This case represents an opportunity for the Supreme Court to fill a gap in their holding in *Carbone* by deciding the impact of public versus private ownership in determining whether state and local legislation is discriminatory.

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