

Issue No.

4

Volume No. 34

January 8, 2007



**COVERING THE COURT'S ENTIRE JANUARY
CALENDAR OF CASES, INCLUDING ...**

SCHIRO V. LANDRIGAN

Jeffrey Landrigan claims that his attorney rendered constitutionally ineffective assistance by failing to present mitigation evidence at his capital sentencing. He now asks the courts to grant him an evidentiary hearing and an opportunity to develop a factual record in support of this claim. The Arizona state courts denied this request on the grounds that Landrigan had waived his rights by ordering his attorney not to present such evidence, but the Ninth Circuit reversed.

**DAVENPORT ET AL. V. WASHINGTON EDUCATION ASSOCIATION
AND
WASHINGTON V. WASHINGTON EDUCATION ASSOCIATION**

The First Amendment protects nonunion employees from having to fund political activities not germane to the labor union's general workplace duties. Most unions have procedures by which nonmembers can "opt out" of agreeing to fund such union activity. The state of Washington, however, established an "opt-in" system that required unions to obtain affirmative assent from nonmembers before using their funds for political expression. Now the Supreme Court of Washington has ruled that this law infringes on the First Amendment rights of the union.

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Division for Public Education



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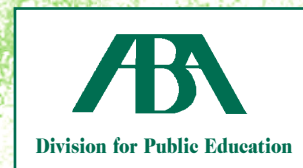
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The 2006–2007 volume is Volume # 34, the 1972–1973 term, the first term that the ABA published *PREVIEW*, being identified retroactively as Volume #1.

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Mabel C. McKinney-Browning
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Charles F. Williams
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Case at a Glance

In 1994, the Supreme Court struck down as unconstitutional a town's flow-control law that required all solid waste originating in the town to be disposed at a local transfer station because it violated the Commerce Clause. The Court concluded that the town law discriminated against interstate commerce because it prohibited out-of-state disposal facilities from competing for the waste. Now the Second Circuit has ruled that when the designated disposal facilities are government owned, a town's flow-control laws must be considered under a more lenient balancing test.



What Is the Proper Standard for Reviewing Flow-Control Restrictions on Solid Waste?

by Stephen D. Mossman

PREVIEW of *United States Supreme Court Cases*, pages 180–184. © 2007 American Bar Association.

Stephen D. Mossman is a partner in the Lincoln, Nebraska, law firm of Mattson, Ricketts, Davies, Stewart and Calkins and is presently the chair of the American Bar Association's Waste Management Committee. He has represented parties in reported cases involving the flow control of solid waste as well as reported dormant commerce clause cases in the areas of water and corporate farming restrictions. Mossman practices in the areas of natural resources, agricultural, solid waste, environmental, water and constitutional law. He can be reached at sdm@mattsonricketts.com or (402) 475-8433.

ISSUES

Is the per se prohibition against hoarding solid waste recognized in *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994), applicable when the preferred processing facility is owned by a public entity?

Even if viewed as nondiscriminatory, does the flow-control ordinance at issue in this case violate the Commerce Clause under the test articulated in *Pike v. Bruce Church*, 397 U.S. 137 (1970)?

FACTS

In 1988, the New York state legislature created the Oneida-Herkimer Solid Waste Management Authority (the Authority), the respondent in this long-running dispute. In the same year, New York passed the Solid Waste Management Act, which created a hierarchy of waste management methods in New York.

The next year, the Authority began entering into contracts to purchase, operate, construct, and develop facilities for solid-waste management. The challenged provisions, which required the delivery of all solid waste generated within the county borders to facilities designated by the Authority, were passed by Oneida County in December 1989 and Herkimer County in February 1990. The Authority required all solid waste generated in the two counties, with the exception of recyclables and waste incinerated at the Authority's incinerator, to be delivered to the Utica Transfer

UNITED HAULERS ASSOCIATION,
INC., ET AL., V. ONEIDA-HERKIMER
SOLID WASTE MANAGEMENT
AUTHORITY ET AL.
DOCKET NO. 05-1345

ARGUMENT DATE:
JANUARY 8, 2007
FROM: THE SECOND CIRCUIT



Station, a facility built under contract with the Authority. The solid waste was then ultimately disposed of in a landfill, also under contract with the Authority.

This suit originally commenced in 1995 when six solid-waste haulers and a trade association, United Haulers, filed suit in federal district court against both counties and the Authority. The suit alleged that the Authority's flow-control laws violated the dormant Commerce Clause under the Supreme Court's *Carbone* decision. The district court agreed, finding for the plaintiffs in their motion for summary judgment that:

These flow control laws are virtually indistinguishable from the laws examined and struck down in both *Carbone* and *SSC Corp.* ... As the Second Circuit recently summarized those holdings, "the ordinances in *Carbone* and *SSC Corp.* were found to be discriminatory because they required all waste within the town to be disposed of at the one favored local facility, to the exclusion of out-of-state competitors." ... Courts have considered it almost a foregone conclusion that flow control laws violate the dormant commerce clause.... Consequently, I find based on undisputed facts that the flow control laws are unconstitutional because they discriminate against interstate commerce.

The First Appeal: Second Circuit
On appeal, the Second Circuit reversed the district court's grant of summary judgment in favor of the haulers. The appellate court found that the "district court erred in its Commerce Clause analysis by failing to recognize the distinction between private and public ownership of the favored facility." *United Haulers v. Oneida-Herkimer Solid Waste Management Authority*, 261

F.3d 245 (2nd Cir. 2001). The court held, "[A] municipal flow control law does not discriminate against out-of-state interests in violation of the Commerce Clause when it directs all waste to publicly owned facilities. As such, the District Court should have analyzed the Counties' flow control laws under the Pike test to determine whether the laws' effects on interstate commerce substantially outweigh the local benefits." The Second Circuit based its conclusion, in part, on its reading of the concurring and dissenting opinions from *Carbone* and what it described as the Supreme Court's silence on the public/private distinction. The Second Circuit also analyzed other U.S. Supreme Court local processing cases as well as flow-control cases decided by lower courts. The court concluded that it found precedent for making the public/private distinction in:

(1) the consistent underlying facts of the local processing line of cases, a line in which the majority squarely placed *Carbone*, and (2) the opinions of four Supreme Court Justices, all of whom characterized the facility in *Carbone* as publicly owned, and therefore would have analyzed the challenged ordinance under the more lenient Pike test.

The Second Circuit admitted that it was tempted to apply the balancing test from *Pike* to the facts before it but instead remanded the case to the district court to conduct the analysis. *United Haulers'* first writ of certiorari was denied by the U.S. Supreme Court in 2002.

On remand, the parties conducted extensive discovery and filed cross-motions for summary judgment. The district court found that the "challenged laws do not treat similarly situated in-state and out-of-state business interests differently"

and did not impose any cognizable burden on interstate commerce. The district court granted the Authority's motion for summary judgment and found the ordinances constitutional without even applying the Pike balancing test.

The Second Appeal: Second Circuit
On appeal after remand, the Second Circuit first noted a distinction between a state's actions in regulating commercial activity, which are limited by the dormant Commerce Clause, and its actions as a participant in the marketplace, which are not. *United Haulers v. Oneida-Herkimer Solid Waste Management Authority*, 438 F.3d 150, 157 (2nd Cir. 2006). With respect to the ordinances being an export barrier because they prohibit articles of commerce generated within the counties from crossing intrastate or interstate lines, the court affirmed its decision in *United Haulers I*, holding that:

The Counties' flow control ordinances do not discriminate against interstate commerce because no private entity, whether local or non-local, has been disadvantaged vis-a-vis any other by the creation of the Authority's monopoly in waste processing.

The Second Circuit then applied the balancing test from *Pike*. The court reiterated its earlier holding that a municipality may impose a public monopoly on the activities of waste collection, processing, and disposal. When doing so, the Second Circuit found that a local government imposes only a limited burden on interstate commerce. Applying the *Pike* test, the Second Circuit concluded that "the local benefits of the flow control measures substantially outweigh whatever modest differential burden they may place on interstate commerce."

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In January 2006, the U.S. Court of Appeals for the Sixth Circuit affirmed a federal district court ruling that a Kentucky county's flow-control law was unconstitutional under the Commerce Clause, specifically rejecting the public/private distinction recognized by the Second Circuit's "surprising decision" in *United Haulers*. In [*Natl. Solid Wastes Mgmt. Ass'n v. Daviess County*, 434 F.3d 898 (6th Cir. 2006)], the Sixth Circuit firmly stated it "respectfully disagrees with the Second Circuit on the proposition that *Carbone* lends support for the public-private distinction drawn by that court."

To resolve this split between the Second and Sixth Circuits, the U.S. Supreme Court granted *United Haulers'* petition for a writ of certiorari on September 26, 2006.

CASE ANALYSIS

United Haulers and its amici, including the National Solid Waste Management Association, American Trucking Associations, Inc., National Association of Manufacturers, and two Virginia counties, have clearly characterized the Second Circuit's decision as an attempt to roll back the Court's opinion in *Carbone*. In particular, *United Haulers* argues that simply because public entities hold title to a facility, they should not be able to avoid the holding in *Carbone* that ordinances discriminatory against interstate commerce are per se invalid. *United Haulers* argues that there is no distinction between the Authority's ordinances and those at issue in *Carbone*, indeed arguing that the Authority has adopted a "virtually identical flow control ordinance." Further, *United Haulers* posits that the ordinances at issue have the same protectionist effect: forcing commercial haulers to purchase high-priced processing and disposal services from favored in-

state facilities rather than less costly out-of-state facilities.

With respect to the public-private distinction, the petitioners argue that finding such a distinction in *Carbone* was meaningless in that the facility at issue was publicly owned in all but the most formal sense. In addition, *United Haulers* believes that state and local laws have been repeatedly found to be protectionist and that local governments should not be allowed to shield their activities in the marketplace from interstate competition.

Finally, *United Haulers* argues that even if the Court were to find that a public-private distinction makes the ordinances nondiscriminatory, the ordinances still fail the *Pike* balancing test. Relying in part on Justice O'Connor's concurrence in *Carbone*, *United Haulers* contends that the burden on interstate commerce is clearly excessive in comparison to local interest.

Oneida-Herkimer, backed by a long list of amici, including many regional solid waste authorities, 28 states, groups representing all levels of local government, a few local solid-waste haulers, and an environmental group, argues that its flow-control scheme is a public system in which local government has assumed all responsibility for waste management. Relying on *Oregon Waste Systems v. Dep't of Envtl. Quality*, 511 U.S. 93 (1994), the Authority maintains that Commerce Clause discrimination only occurs if there is differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. In this case, *Oneida-Herkimer* maintains, there is no discrimination because the ordinances treat in-state and out-of-state waste providers the same and do not favor local private business interests. In particular, *Oneida-*

Herkimer draws a distinction from *Carbone* by arguing that the ordinances at issue in that case designated a private facility. In this case, the Authority posits that no local enterprise is favored because the designated facility is municipally owned.

Even if the Court finds that the ordinances have some incidental effect on interstate commerce, *Oneida-Herkimer* argues that the ordinances pass the *Pike* balancing test based on its substantial local benefits. The Authority maintains that three public purposes are served by the ordinances. First, the ordinances place the disposal decisions in public hands, ensuring environmental compliance. Second, the ordinances allow the Authority to reduce waste and maximize recycling. Third, the ordinances allow the Authority to manage waste in an integrated fashion. Citing historical roots to the public management of waste, *Oneida-Herkimer* draws a distinction between the regulations at issue in this case and those in *Carbone*, arguing that the ordinances adopted by Clarkstown in the *Carbone* case had solely a monetary goal.

Finally, the Authority argues that since all waste collectors are treated the same, the flow-control ordinances are not unconstitutional.

SIGNIFICANCE

In 1995, the same circuit court that decided *United Haulers* remarked that that the federal docket was "clogged with—of all things—garbage." *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 505 (2d Cir. 1995). Since *Carbone*, a large number of courts have struck down solid waste flow-control ordinances in reliance on the per se invalidity of such ordinances under the Court's Commerce Clause analysis. Indeed, the district court in this



case originally noted that courts have considered it almost a foregone conclusion that flow-control laws violate the dormant Commerce Clause. This foregone conclusion no longer rings true, at least in the Second Circuit.

If the Court agrees with the Second Circuit that there is a crucial distinction between public and private ownership of designated facilities, it could be expected that the federal docket will again be clogged with garbage cases. Indeed, United Haulers argues that principles of *stare decisis* control the case and that the Second Circuit's decision cannot be affirmed without overruling *Carbone*.

The *per se* invalidity tests articulated in *Carbone* and the *Pike* test are light years apart. In particular, the burden shifts from the municipality having to show that it has no other means to advance a legitimate local interest under *Carbone* to the challengers having to show that the burdens on interstate commerce exceed the putative local benefits under *Pike*. Adoption of the Second Circuit's reasoning in *United Haulers* would be a sea change in the burden of proof in flow-control cases.

The distinction between public and private ownership of solid waste facilities is not merely an academic one. The amicus brief authored by Nat'l. Solid Wastes Mgmt. Ass'n and others states that more than 60 percent of the nation's waste facilities are owned by public entities. If the public/private distinction is endorsed by the Court, it would be expected that decisions in many of the federal circuit courts that either explicitly [*Nat'l Solid Wastes Mgmt. Ass'n (NSWMA) v. Daviess County*, 434 F.3d 898 (6th Cir. 2006)] or implicitly [*Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3rd

Cir. 1995)]; *Waste Sys. Corp. v. County of Martin*, 986 F.2d 1381 (8th Cir. 1993)] rejected the distinction would no longer be good law. An exception to the general post-*Carbone* belief that flow-control laws are unconstitutional has been drawn by courts upholding the constitutionality of flow-control ordinances that explicitly exempt waste destined for out-of-state disposal. See, *On the Green Apartments L.L.C. v. City of Tacoma*, 241 F.3d 1235 (9th Cir. 2001); *Ben Ohrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1997). As this exception is not at issue in *United Haulers*, these cases should remain viable.

In general, this case highlights the tension between whether solid-waste collection, processing, and disposal are properly viewed as governmental functions or as functions of the marketplace. At its core, Commerce Clause jurisprudence is an attempt to balance these tensions as envisioned by the framers of the Constitution. Proponents of flow control portray all solid-waste activities as purely a governmental function and allege that the public health and environmental benefits of the government controlling the waste stream outweigh any burden on interstate commerce. Critics of flow control point to the use of the term "Balkanization" of the economy in many of the Commerce Clause cases and believe that the Constitution prohibits local governments from interfering with interstate commerce in solid waste. Critics further argue that the national marketplace for solid-waste disposal will be upended if the Second Circuit's view prevails.

The Court could reject the public/private distinction made by the Second Circuit while softening the *per se* invalidity language from

Carbone. If the Court does so, it may decide the case under the *Pike* balancing test. In that event, the Court will be called upon to balance the local benefits of the flow-control measures against the differential burden they may place on interstate commerce. The *Pike* balancing test has been performed by many federal district and circuit courts in solid-waste flow-control cases, usually in favor of local governments. How the Supreme Court balances the benefits versus burdens would provide substantial guidance to lower courts as to the proper weight to give each. While this guidance would be important, its significance would pale compared to the importance of a Supreme Court decision adopting the Second Circuit's public/private distinction in waste facility ownership.

In the alternative, the Court may merely remand this case for that balancing test to be done by a lower court without adopting the weight that the Second Circuit placed upon the public ownership of the waste facilities. In that event, the Supreme Court would be unlikely to grant further review. And, if that comes to pass, the 11-year litigation battle between United Haulers and the Oneida-Herkimer Authority might not materially alter the flow-control landscape.

ATTORNEYS FOR THE PARTIES

For Petitioner United Haulers Association, Inc., et al. (Mark Tager (202) 263-3000)

For Respondent Oneida-Herkimer Solid Waste Management Authority et al. (Michael J. Cahill (631) 588-8778)

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AMICUS BRIEFS

In Support of Petitioner United Haulers Association, Inc., et al.

American Trucking Associations, Inc., and National Solid Waste Management Association (David S. Biderman (202) 364-3743)

Sussex County, Virginia, and Charles City County, Virginia (Jonathan S. Franklin (202) 662-0460)

In Support of Respondent Oneida-Herkimer Solid Waste Management Authority et al.

Arkansas Association of Regional Solid Waste Management Districts et al. (Scott M. DuBoff (202) 393-1200)

Economic Development Growth Enterprises Corporation et al. (Gregory Joseph Amoroso (315) 733-0419)

Environmental Defense (Michael J. Bean (212) 505-2100)

Madison County, New York (Jeffrey B. Morris (718) 428-3507)

National Association of Counties et al. (Richard Ruda (202) 434-4850)

New York State et al. (Caitlin Joan Halligan (212) 416-8016)

Onondaga County Resource Recovery Agency et al. (Bruce Roger Braun (312) 558-5600)

Rockland Coalition for Democracy and Freedom et al. and Federation of New York Solid Waste Associations (Michael D. Diederich Jr. (845) 942-0795)

Rockland County Solid Waste Management Authority (Robert Bergen (212) 513-3200)