No. _____

# In The
# Supreme Court of the United States

FLOM DISPOSAL, INC., a Minnesota corporation,

*Petitioner,*

v.

GOODHUE COUNTY, a Minnesota county; the GOODHUE COUNTY BOARD OF COMMISSIONERS, in their official capacities; and Red Wing, a Minnesota municipality,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

This Court has recognized a narrow exception from the dormant Commerce Clause's almost "'per se rule of invalidity,'" *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997) (quoting *Associated Industries of Mo. v. Lohman*, 511 U.S. 641, 647 (1994)), against laws that discriminate against out-of-state commerce: the rule does not apply if the allegedly burdened and the allegedly favored businesses are not in "actual or prospective competition," *id*. at 300. The question presented is:

> Are disposing of garbage by depositing it in a landfill and disposing of garbage—the same garbage from the same sources—by incinerating it, competitor businesses for purposes of the dormant Commerce Clause's antidiscrimination doctrine?

## PARTIES TO THE PROCEEDING

Petitioner, Flom Disposal, Inc., was a plaintiff in the district court proceedings and an appellant in the court of appeals' proceedings.

Respondents are Goodhue County, a Minnesota county; the Goodhue County Board of Commissioners, in their official capacities; and Red Wing, a Minnesota municipality. They were the defendants in the district court proceedings and the appellees in the court of appeals' proceedings.

Paul's Industrial Garage, Inc. was a plaintiff in the district court proceedings and an appellant in the court of appeals' proceedings, but is not a petitioner.

Countryside Disposal, LLC was a plaintiff in the district court proceedings, but was not an appellee in the court of appeals' proceedings and is not a petitioner.

## CORPORATE DISCLOSURE STATEMENT

Petitioner, Flom Disposal, Inc., a Minnesota corporation, has no parent corporation, and no publicly held company owns 10% or more of its stock.

## RELATED PROCEEDINGS

*Paul's Indus. Garage, Inc. v. Goodhue Cnty.*, 35 F.4th 1097 (8th Cir. 2022), United States Court of Appeals for the Eighth Circuit. Judgment entered on May 27, 2022.

**RELATED PROCEEDINGS**—Continued

*Paul's Indus. Garage, Inc. v. Goodhue Cnty.*, No. CV 20-2192(DSD/KMM), 2021 WL 2936693 (D. Minn. July 13, 2021), *aff'd*, 35 F.4th 1097 (8th Cir. 2022), United States District Court for the District of Minnesota. Judgment entered on July 14, 2021.

*Paul's Indus. Garage, LLC v. City of Red Wing*, CIV 06-4770 RHK/JSM, 2006 WL 3804243 (D. Minn. Dec. 22, 2006), United States District Court for the District of Minnesota. Judgment entered on December 22, 2006.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner, Flom Disposal, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in *Paul's Indus. Garage, Inc. v. Goodhue Cnty.*, 35 F.4th 1097 (8th Cir. 2022).

## OPINIONS BELOW

The Eighth Circuit's opinion affirming the district court's grant of summary judgment for Respondents and denial of summary judgment for Petitioner is reported at *Paul's Indus. Garage, Inc. v. Goodhue Cnty.*, 35 F.4th 1097 (8th Cir. 2022), and reproduced at App. 1-7. The opinion of the District Court for the District of Minnesota granting Respondents summary judgment and denying Petitioner summary judgment is unreported, but is available at *Paul's Indus. Garage, Inc. v. Goodhue Cnty.*, No. CV 20-2192 (DSD/KMM), 2021 WL 2936693 (D. Minn. July 13, 2021), *aff'd*, 35 F.4th 1097 (8th Cir. 2022), and is reproduced at App. 10-22.

## JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered final judgment on May 27, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## PROVISIONS OF LAW INVOLVED

This case arises under the Constitution's Commerce Clause, one of the clauses in article I, section 8 that enumerate Congress's powers:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. Const. art. I, § 8, intro., cl. 3.

Petitioner challenges, on dormant Commerce Clause grounds, the provisions of the Goodhue County Solid Waste Designation Ordinance that require that waste generated in Goodhue County be delivered to the City of Red Wing Solid Waste Campus, rather than to a private waste-disposal facility:

> **SECTION 3: APPLICATION OF ORDINANCE**
>
> This Ordinance shall govern all Persons who generate, collect, transport or dispose of Designated Waste, or contract for transportation or disposal of Designated Waste, generated within the geographical boundaries of Goodhue County.
>
> **SECTION 4: DESIGNATION**
>
> Except as otherwise provided herein, on and after the Effective Date all Persons, including commercial Haulers and Self Haulers, must deliver or cause to be delivered all quantities of Designated Waste exclusively to the Designated Facility, which is the City of Red Wing

Solid Waste Campus, 1873 Bench Street, Red Wing, Minnesota, 55066.

Goodhue County, Minn., Goodhue County Solid Waste Designation Ordinance §§ 3-4 (Aug. 18, 2020).

## INTRODUCTION AND STATEMENT OF THE CASE

This petition seeks review of an Eighth Circuit opinion that interpreted the nonsimilarly-situated-businesses exception from *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298-303 (1997) so broadly that the exception could swallow the dormant Commerce Clause's prohibition on discriminating against out-of-state businesses. A county's ordinance regulated the market of collecting garbage for final disposal to a single private entity eliminating the availability of an out-state entity to provide the same service but in a different manner; one entity provided a final destination by burning combustible garbage to create electricity, while the other entity had disposed of it at an out-of-state landfill site.

1. Petitioner, Flom Disposal, Inc., is a private waste hauler that, in exchange for fees, collects waste in Goodhue County, Minnesota. Until the ordinance being challenged in this case went into effect, Flom Disposal would dispose of the Goodhue County waste that it collected by delivering it to a Wisconsin facility owned by Paul's Industrial Garage, Inc. (PIG), a Wisconsin corporation, who would then arrange for the

waste to be deposited in a Wisconsin landfill. App. 11-12.

2. In 2017, Goodhue County enacted the Goodhue County Solid Waste Designation Ordinance, which requires that all persons disposing of waste originating in the county, including private trash haulers such as Flom Disposal, deliver waste from the county to "the City of Red Wing Solid Waste Campus," Goodhue County, Minn., Goodhue County Solid Waste Designation Ordinance § 4 (Aug. 18, 2020), a waste-disposal facility owned and operated by the City or Red Wing, Minnesota, App. 3. The city facility processes the delivered waste into refuse-derived fuel, which it then pays Northern States Power Company (a subsidiary of Xcel Energy, a Minnesota corporation) to dispose of by burning it. App. 2, 3, 3 n.2, 13. Xcel uses the fuel to generate electricity. App. 13.

The ordinance shut PIG out of the market for disposing of waste from the county. App. 14. The ordinance also affected Flom Disposal because the per-ton disposal fee that the city facility charges Flom Disposal is much higher than the per-ton fee charged at PIG's Wisconsin facility. App. 14.

3. Flom Disposal and PIG sued in the District of Minnesota to challenge the ordinance's constitutionality under the dormant Commerce Clause's antidiscrimination doctrine. App. 14. The plaintiffs explained that although the county could require waste to be delivered to a municipal facility, the scheme actually employed by the county made a Minnesota business (Xcel)

the true disposer of county waste and thus favored that business over out-of-state private waste-disposal businesses such as PIG. App. 4, 14.

The parties brought cross-motions for summary judgment, and the district court denied the plaintiffs' motion and granted the defendants' motion. App. 15, 21-22. The district court ruled for the defendants for two reasons. First, the court held that the plaintiffs and Xcel are not "similarly situated" under *Tracy* because Xcel burns refuse-derived fuel and the plaintiffs do not. App. 17-20. Second, the court held that, under *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330 (2007), the county may require delivery of waste to a municipal facility since the disposal of trash has been a traditional governmental function. App. 20-21.

4. The Eighth Circuit affirmed the district court decision on similar grounds. The appellate court, relying on *Tracy*, opined that because the plaintiffs do not convert garbage into refuse-derived fuel or burn the fuel to create electricity, there is an absence of actual or prospective competition between the alleged favored and disfavored entities in a single market relying. App. 6. "PIG isn't a relevant comparator to Xcel or the City Plant. . . ." App. 7 n.3 (Straus, J. concurring).



## REASONS FOR GRANTING THE PETITION

This issue is exceptionally important because the Eighth Circuit replaced *Tracy*'s different-markets test

with a different-capabilities test. Because no two business firms have exactly the same capabilities, this move by the Eighth Circuit risks expanding the nonsimilarly-situated-businesses exception to the point that it will swallow the dormant Commerce's Clause's prohibition on discriminating against interstate commerce.

Furthermore, the Eighth Circuit's opinion upholds an ordinance that, in practice, grants a governmental created monopoly to an in-state private waste-disposal company, something that this Court has characterized as impermissible under the Commerce Clause. *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 347 (2008) (citing *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994)).

### A. The Eighth Circuit's opinion inappropriately expands the nonsimilarly-situated-businesses doctrine to apply to competitors within the same market.

Although the Eighth Circuit decided the case against Petitioner and its fellow appellant PIG, the court's opinion characterized the relevant facts much as appellants themselves characterized them. *See* App. 2-4. The court forthrightly acknowledged what Goodhue County had done: in requiring that waste haulers deposit waste from Goodhue County at the City of Red Wing Solid Waste Campus, the county deprived private waste-disposal businesses, such as PIG, of participation in the market for disposing of waste from the county and hence of the opportunity to make money by

disposing of that waste. *See id*. And, crucially, the court acknowledged that the county makes net payments to Xcel for burning the refuse-derived fuel made from the Goodhue County waste that PIG could have been disposing had the county not enacted the ordinance. App. 3 n.2. The court thus acknowledged that Xcel is now in the waste-disposal business. *See id*.

In affirming the district court's opinion, the Eighth Circuit relied exclusively on one doctrine: the rule from this Court's opinion in *Tracy* that the dormant Commerce Clause antidiscrimination doctrine applies to only those laws that distinguish between "similarly situated," 519 U.S. at 299, in-state and out-of-state enterprises. App. 5-6.

In *Tracy*, General Motors, a large purchaser of natural gas for industrial purposes, challenged, on dormant Commerce Clause grounds, an aspect of Ohio's sales and use tax scheme. 519 U.S. at 281-282, 285-286. Ohio exempted from its sales tax natural gas purchased from Ohio closely regulated utilities, but did not exempt from its use tax natural gas purchased from other suppliers, *id*. at 281-283, 285, including the out-of-state suppliers from which General Motors purchased, *id*. at 285. General Motors challenged this difference in treatment between the in-state regulated utilities and the out-of-state independent suppliers. *Id*. at 281-282, 285-286.

This Court upheld Ohio's scheme because, in general, closely regulated utilities (including the in-state ones) and independent natural-gas suppliers

(including the out-of-state ones) served different markets. *Id*. at 298-303. The utility companies served "small, captive users, typified by residential consumers who" depended upon the utilities for a regular supply of small quantities of natural gas supplied in accordance with the bundle of special privileges enjoyed by, and restrictions imposed upon, closely regulated utilities. *Id*. at 301; *see also id*. at 294-297, 302. The independent gas marketers, on the other hand, were not regulated as utility companies and served the market created by large purchasers of natural gas for business purposes. *Id*. at 284, 293, 301-303.

In determining that the Commerce Clause's prohibition of discrimination against out-of-state businesses did not apply to Ohio's tax scheme, this Court emphasized that the purpose of the Commerce Clause antidiscrimination doctrine is to prevent favoring in-state competitors. *Id*. at 299-300. This Court held that the doctrine does not apply "in the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market." *Id*. at 300. This Court acknowledged that since some large industrial purchases of natural gas might purchase from utility companies, some competition between the utility companies and independent supplies might exist even though the two types of businesses served different "core" markets, *id*. at 302-303, but this Court refused to overturn Ohio's scheme out of deference to the state in regulating its public utilities, *id*. at 304-306. In other words, outside of the special area of state regulation of public utilities, *Tracy*'s

nonsimilarly-situated-businesses doctrine does not apply where an in-state and an out-of-state business might compete against each other. *See id*. at 299-306.

The Eighth Circuit's opinion rests a crucial conceptual error that resulted in the court misapplying *Tracy*: the court reasoned that because Xcel disposes of waste differently from other private-waste disposal firms, Xcel and other waste-disposers "are not competitors." App. 6. This reasoning is erroneous because the relevant market in this case is the market for disposal of waste originating in Goodhue County. If a firm accepts money for disposing of Goodhue County waste, then the firm participates in that market and competes with other firms in that market, regardless of how the different firms go about disposing of the waste. Burning Goodhue County waste—even after the waste has been converted into refuse-derived fuel—is not a different service from landfilling that same waste: burning and burying are just different ways of providing the same service, i.e., waste disposal.

In the ordinance's absence, Xcel could charge market rates for accepting waste, just as private waste-disposal companies do, and Xcel could then burn that waste, perhaps after converting it, or paying somebody to convert it, into refuse-derived fuel. Potential competition between Xcel and other waste-disposal companies thus exists.

Although relying on *Tracy* and caselaw applying *Tracy*, the Eighth Circuit actually applied a test drastically different from—and barely related to—the test

in *Tracy*. *See* App. 6. The court declared the "fatal flaw" in the plaintiffs' case to be that they do not "have the ability to burn refuse-derived fuel to create electricity." App. 6. But this reasoning replaces *Tracy*'s different-markets test, with a different-capabilities test.

That Xcel uses heat from incinerating the waste to generate electricity is interesting, but also irrelevant because the point remains that the county is paying Xcel to dispose of the waste. App. 3 n.2. Of course Xcel does provide the service of generating and distributing electricity, but that is a service that Xcel performs for its electricity customers—and for which it is paid by its electricity customers. In making net payments to Xcel to accept the refuse-derived fuel, the county is paying for waste disposal not electricity.

One of the circuit court opinions that the Eighth Circuit relied on interprets *Tracy* to make the antidiscrimination doctrine inapplicable where there is no evidence that consumers will substitute the allegedly advantaged in-state goods or services for the allegedly disadvantaged out-of-state good or services. *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 37 (1st Cir. 2007) (citing *Tracy*, 519 U.S. at 299), cited in App. 6.

Here there is not even any question that there has been a substitution effect. The Eighth Circuit acknowledged that Xcel is now paid to burn trash from Goodhue County, App. 3 n.2, and that private waste-disposal facilities—which previously made money accepting waste from the county—are now excluded from the market for the service of disposing of waste from the

county, App. 2, 3; *see also* App. 15 (district court opinion). The county has substituted Xcel for private waste-disposal facilities. Most of the waste that Xcel incinerates is waste that private waste-disposal facilities would be paid to dispose of in the ordinance's absence. The county has effectively granted Xcel a monopoly on the market for the disposal of Goodhue County waste, and has excluded other market participants. That is about as drastic of a substitution effect as is possible.

It is true that Xcel is a public utility (and is not a governmental entity), but by accepting refuse-derived fuel in exchange for payments, Xcel is acting like any other private waste-disposal business and not as a utility. Furthermore, the law challenged here is a county waste-disposal ordinance, not a state-level law regulating public utilities. The deference shown to Ohio's state-law schemed in *Tracy* would be misplaced.

Granting what is, in practice, a monopoly to an in-state private waste-disposal business is something that this Court has treated as impermissible under the dormant Commerce Clause's prohibition on favoritism to in-state business. *Davis*, 553 U.S. at 347 (citing *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994)).

### B. The question presented warrants this Court's review because the Eighth Circuit's reasoning expands the noncompetitor-businesses exception to such an extent that the exception threatens to swallow the rule.

No two business firms are exactly the same. In fact, two different businesses that compete within the same market might differ greatly across a wide variety of criteria. Perhaps most importantly for this petition, two competitors might differ greatly—even fundamentally—in how they provide the same type of good or service. And Petitioner has chosen its words carefully here because, to be competitors, businesses must provide the same type of good or service: they need not, and usually do not, provide the identical good or service. Coke and Pepsi are competitor brands of soda—and more specifically brands of cola—but they are not identical. And competitor products might differ in various ways, including their method of production or distribution, a whole lot more than Coke and Pepsi.

But under the Eighth Circuit's reasoning, any difference in how two business firms provide a good or service allows preferential treatment for an in-state business under the theory that some difference between the in-state business and out-of-state businesses triggers the noncompetitor-businesses exception to the dormant Commerce Clause nondiscrimination doctrine. The Eighth Circuit has interpreted what has traditionally been a narrow exception so broadly that it threatens to swallow the rule.

Here, the Eighth Circuit's opinion places no limit on what kinds of differences are relevant for determining which enterprises are similarly situated for purposes of the dormant Commerce Clause. On the contrary, the opinion suggests that any difference will do. *See* App. 5-6. With this reasoning, all that a state or unit of local government has to do to get away with discriminating in favor of local enterprise is to find some difference between the favored local enterprise and any out-of-state competitor that brings a dormant Commerce Clause challenge. *See id*. The state or local government can then point to the difference to invoke (successfully) the nonsimilarly-situated-businesses exception, perhaps declaring that, as a matter of public policy, the state or local government prefers the in-state enterprise's way of doing things.

The principled way to prevent this from happening is to limit the doctrine the way that it was limited in *Tracy*: the doctrine cannot apply, except "in the absence of actual or prospective competition" between the favored in-state enterprise and the burdened out-of-state enterprise. 519 U.S. at 300. In other words, the test is whether the different firms participate in the same market. *See id*. at 299-300. If they do, then differences between the firms are irrelevant; differences are relevant only to the extent that they evidence a lack of competition within the same market. *See id*.

In this case, the Eighth Circuit misapplied the doctrine to allow the county to grant a market monopoly to one enterprise and so to exclude all market competitors.

Just a few years ago, this Court reconsidered the dormant Commerce Clause antidiscrimination doctrine and decided to retain it, *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459-2461 (2019), despite the "vigorous and thoughtful critiques" that the doctrine had received from some Members of this Court, *id*. at 2460. If this Court does not stop the expansion of the nonsimilarly-situated-businesses doctrine from a very narrow rule to a very broad one, then this Court risks the antidiscrimination doctrine being overturned surreptitiously rather than forthrightly.

## CONCLUSION

To prevent the nonsimilarly-situated-businesses exception from swallowing the antidiscrimination rule, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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