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SUPREME COURT, U. S.  
WASHINGTON, D. C. 20543

In the

Supreme Court of the United States

City Of Philadelphia, et al.,

Appellants,

v.

State Of New Jersey, et al.,

Appellees,

No. 75-1150

Washington, D. C.  
November 3, 1976

Pages 1 thru 50

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IN THE SUPREME COURT OF THE UNITED STATES

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: CITY OF PHILADELPHIA, et al., :  
: Appellants, :  
: v. : No. 75-1150  
: STATE OF NEW JERSEY, et al., :  
: Appellees. :  
----- :

Washington, D. C.,

Wednesday, November 3, 1976.

The above-entitled matter came on for argument at  
1:50 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice  
LEWIS F. POWELL, JR., Associate Justice  
WILLIAM H. REHNQUIST, Associate Justice  
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

HERBERT F. MOORE, MOORE, PESKIN & SPICER, 19 Chancery Lane, Trenton, New Jersey 08618; on behalf of the Appellants.

STEPHEN SKILLMAN, ESQ., Assistant Attorney General of New Jersey, State House Annex, Trenton, New Jersey 08625; on behalf of the Appellees.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 1150, City of Philadelphia against the State of New Jersey.

Mr. Moore.

ORAL ARGUMENT OF HERBERT F. MOORE, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. MOORE: Mr. Chief Justice, and may it please the Court:

My name is Herbert F. Moore, and we represent -- the appellants that we represent are two municipal corporations, namely the City of Philadelphia and Glen Cove, Long Island, three rather large solid waste disposers located in the State of New Jersey, and one very large solid waste collector, also operating out of the State of New Jersey.

The purpose of our being here of course is to test the constitutionality against the commerce clause of a statute enacted in New Jersey, which is entitled, "An Act to prohibit any person from bringing into this State any solid and liquid waste which originated or was collected outside of the State."

I feel compelled to explain, before I proceed into the legal arguments, some peculiarities of the present posture of the case, that lends it a certain uniqueness.

And that is that we started this out in the Superior Court, Law Division, in New Jersey with a complaint that had,

I think, close to 20 counts, all of which were constitutional questions.

But, in the interest of efficiency and on keeping the court calendar reasonably unclogged, we proceeded through the summary judgment procedure on an issue which did not contain any disputed facts of material significance.

And it was on that basis that Judge Schoch ruled, in our favor, that the statute was unconstitutional, on the grounds that it discriminated against interstate commerce; and it was on that basis that the appeal was taken by the State of New Jersey to the appellate division.

QUESTION: Under his view, what was the commerce? The substance or the service?

MR. MOORE: I believe, Your Honor, it was both, the subject and the service. He relied somewhat on the cases in the Third Circuit, which was United States vs. Pennsylvania Refuse Haulers Association, which was a case under the Sherman Antitrust Act, in which the Third Circuit held that the transportation -- the service and the disposal should be looked at together as a unit, and they clearly were an item of interstate commerce.

And then, I believe, he also considered the substance itself as an item of commerce, because, as we know, there are many, many items of solid waste that are traded, sold and used.

Recently this Court decided the case of Hughes vs.

Alexandria, which dealt with automobile hulks. And this Court clearly accepted the fact that automobile hulks were items of commerce, or legitimate items of commerce.

Does that answer your question, sir?

QUESTION: Well, I hear you.

MR. MOORE: Okay.

Well, I think your question was, did the lower court consider this to be --

QUESTION: I wondered where you thought he rested his weight.

MR. MOORE: Well, he decided it on the basis -- it was my understanding -- that the statute in New Jersey discriminated against interstate commerce, and that was it.

And the other court, in the companion case, which was decided by Justice Schrieber, and who is now on the New Jersey Supreme Court -- he decided that on the same basis, that it was discrimination against interstate commerce, and therefore must fall.

Now, that's a little different case, and of course we were not involved in that case. That's a totally different factual situation.

Now, I feel it's extremely important that we keep in the foremost of our mind this statute of New Jersey. Fortunately it's a very short statute. I don't intend to read it, but I would like to point out some aspects of it.

The first section of the statute is a legislative finding, in which the Legislature determines that there has been a large volume of solid waste that has to be disposed of, both in New Jersey and out-of-State, and that it presents a threat to the environment, and appropriate landfill sites are being rapidly diminished, and that the treatment on disposal of wastes collected out of the State creates a public health, safety and welfare nuisance, and also it is against it; and it absolutely prohibits the treatment and disposal within New Jersey of all waste generated out of the State.

So we have, in the finding close, an absolute prohibition.

Now, when we get to the actual statute itself, or the legislative determination, very interestingly, it starts off with "No person shall bring into this State ... any solid or liquid waste which originated or was collected outside of the State", except garbage to be fed to swine, which of course is a solid waste, as we all know, until the Commissioner shall determine that such action -- and the action, obviously, has to be: go back to the "bring in". That's what the statute is talking about. -- can be permitted without endangering the public health.

Now, we have approached this with the understanding that this statute paints with a very, very broad brush. This statute is not directed against any particular type of disposal

-- and, incidentally, disposal in New Jersey includes treatment and processing and storage of solid or liquid wastes. But this statute deals with prohibiting the entry into the State any item -- which I will go into in a moment -- legitimately in commerce that is designated as solid or liquid waste.

Now, the first question, of course, when any statute is tested against the commerce clause, is to determine whether or not it is in fact commerce. Because if it's not commerce, you know, we're not in the ballgame at all.

Now, in this particular instance, solid and liquid waste, as I mentioned just a moment ago in answer to the Chief Justice's question, I pointed out that automobile hulks are obviously solid waste. Traditionally and historically, all the byproducts of industry, many of them have commercial value. You have your scrap metals, your scrap glass, and demolition material, and many, many other items, that are used by various people, and various concerns where it is processed and treated. All of which are prohibited by this statute.

Now, in the case of United States vs. Pennsylvania Refuse, which went to the Third Circuit and I believe certiorari was denied, that case dealt specifically with actually what we are dealing with here, with the movement of solid waste collected in Pennsylvania into New Jersey, to be disposed of in New Jersey.

And the question came up, because the refuse haulers

were being charged with criminal conspiracy -- the question came up, you know, "Well, you cannot -- you do not have jurisdiction under the Sherman Antitrust Act to prosecute us, these collectors, because we are engaged in dealing with a worthless commodity, a worthless item, and therefore it's not of any commercial value, it's not commerce."

And, of course, as we all realize, that the jurisdiction of the Sherman Antitrust Act depends upon the commerce clause --

QUESTION: But the Supreme Court of New Jersey distinguished that case, didn't they, saying that their congress had affirmatively exercised its power, whereas here you are relying simply on the negative implications of the constitutional provisions.

MR. MOORE: Yes. Yes, Justice Rehnquist. They came up with that type of a reasoning, which we do not agree with. I don't quite fully understand it, because the Sherman -- if it's not commerce for the purpose of enforcing anything under the Sherman Antitrust Act, then it's not commerce for any purpose.

Now, if it is commerce under that Act, then at least it is recognized as an item in commerce. Now, I think where the confusion develops, perhaps, is that there is a general body of law and understanding that when you are dealing with the police powers of States, and they are dealing with public

health questions, the -- this Court and the Constitution has gone to a great length to support police power actions in the public domain, as long as certain tests and standards are met.

But to say that automobile hulks, for example, is not commerce, is begging the question, and it just is not a truism.

You have another aspect of this which is also very interesting and very important, in that the people who are disposing in New Jersey at the present time, of solid and liquid wastes, some or all of it coming from out of State, are private enterprise. They are public utilities, as legislated by the State of New Jersey. And being -- and the collectors and the disposers are public utilities.

They are dealing in a legitimate enterprise, and they are depending, for the source of their material to keep them in a commercial business, on items that flow in interstate commerce.

QUESTION: Mr. Moore, --

MR. MOORE: Yes, sir?

QUESTION: -- could Congress pass a statute prohibiting the States from enacting this kind of legislation?

MR. MOORE: You say did they or could they?

QUESTION: Could they?

MR. MOORE: Oh, absolutely.

QUESTION: And would it be constitutional?

MR. MOORE: I believe it absolutely would, sir.

QUESTION: You mean if a State, by first processes of inquiry, the usual legislative inquiry, determined that in a given number of years all of their available space for the disposal of solid wastes would be used up, and that the rate -- at the rate the State itself produced that waste, that they could not say: We're going to save the New Jersey space for New Jersey waste, and no other State may deposit waste here; is that what you're telling us?

MR. MOORE: In effect, I am, Your Honor. Because the New Jersey Supreme Court, in its handling of the case, classified landfills as natural resources; and they did that on three separate occasions in their opinion.

And when we look at the Oklahoma gas cases, and the Pennsylvania-West Virginia gas cases, where the States, saying that, "Look, we're going to run out of this natural resource and our people aren't going to have, be able to have heat for their homes, and the other purposes that natural gas is put to, we're going to curtail the exportation of this natural resource to protect ourselves", this Court very clearly upheld that that was an imposition upon interstate commerce, in the famous lines that have been often quoted: That we sink or swim together in this country, and the Northeast will keep its timber and -- et cetera.

QUESTION: You equate the export and the import as

being the same for purposes of the commerce clause?

MR. MOORE: I think it is, because it's -- what is happening here -- yes, I think very definitely it is. It is just that -- for example, if RCA, which is a manufacturer in New Jersey, if New Jersey, in order to increase its labor market -- increase employment, rather -- said that RCA can only use transistors that are manufactured in New Jersey, and nobody else can come in, then obviously it would be unconstitutional: interference in interstate commerce.

And that's what is happening here. But we have to keep going back to the statute. And this statute goes way beyond landfills. This statute --

QUESTION: Mr. Moore, let me come back at you this way: Could Philadelphia and the City of New York make a deal with your people that -- to accept untreated sewage from those cities?

MR. MOORE: No. The States unquestionably have the right to regulate items that are inherently dangerous to them. And New Jersey has adopted, in this instance, the DEP regulations which are among the most strict in the United States, just to avoid public health hazards.

QUESTION: And those regulations, you say, are valid?

MR. MOORE: Very valid. And in our Appendix we quote from an affidavit of Mr. Darnay, who is one of the head administrators of the DEP in Washington, and he recognizes that.

And, as a matter of fact, if I can call the Court's attention to the solid waste management plan, which the New Jersey Supreme Court took judicial notice of in its opinion.

That solid waste management plan which was adopted by the DEP in New Jersey says, on page 2, there is no technological reason why we cannot dispose of solid waste with minimal environmental harm. On page 78, it said, The Bureau of Solid Waste Management still has Chapter 8 of the State Sanitary Code with which to regulate and assure nuisance-free operation of disposal sites in conformance with good practice and health standards.

QUESTION: One last question and I'll stop.

You wouldn't read the New Jersey statute as, in effect, being a State regulation of land use?

MR. MOORE: No, sir.

The regulations have overtones of that, because the regulations require a keeping of data as to the -- how these landfills have been used up. But, in talking about landfills, and to get back to the commercial -- whether it's an item of commerce: Most any landfill that I've ever heard of or been connected with -- and I've been representing these people for, this industry, for a good 18 or 20 years -- involves land that has no real market value. It's really marginal and submarginal land, and is being reclaimed by landfill operations.

And you can just look around, and I assume can take

judicial notice of the Sport Complex in New Jersey, which they announced was built on a landfill.

QUESTION: Assuming you're right on the commerce point, Mr. Moore, is there any economic benefit that is conferred on any special group in New Jersey, as a result of what you claim is a discrimination?

MR. MOORE: Yes, very definitely, sir.

In our society today, solid waste, though not being an exciting subject of conversation, is a very essential one. And no industry can exist, or commercial enterprise can exist without creating solid waste. That has to be disposed of some way, either by burning it or burying it or putting it in the air; those are the only three places you can dispose of anything.

QUESTION: Well, some of them carry it out to sea, don't they?

MR. MOORE: You're right. Well, that's the ocean. I'm sorry, I left one out. You're absolutely right, Mr. Chief Justice.

And it is a distinct economic advantage to industry not to have to haul too far their waste to dispose it.

QUESTION: So you say, then, that it's New Jersey industrial disposers who are the economic beneficiaries of the New Jersey law?

MR. MOORE: They are economic beneficiaries. I am

not saying they are the exclusive economic beneficiaries of the New Jersey law, but they certainly are economic beneficiaries.

As a matter of fact, a very high percentage of all solid waste is not the waste that you and I think of when we think of garbage, which we associate with it, because, you know, we have homes and we see what is put out. That's the putrescible type of waste.

But that's the waste that they are feeding to swine. There is a clear economic discrimination practically there, I suppose.

Now, but --

QUESTION: The discrimination is between New Jersey disposers and disposers from other States?

MR. MOORE: Yes.

QUESTION: The former being able to use New Jersey fills and the latter not being able to use them?

MR. MOORE: That's right. And Philadelphia -- and when I say Philadelphia I am obviously not just confining it to the municipal government, because all the commercial activities in Philadelphia, industrial activities, many of them use the Philadelphia collection system, although some of them admittedly have their own trucks.

The question is, it's very, very costly to move refuse. And if you have to move it more than twenty miles,

the costs escalate very, very dramatically.

Now, as a matter of fact, the New Jersey Supreme Court made a comment, in trying to belittle that type of point, saying that, Well, it would only cost Yonkers, I think it was five dollars a ton, to go to the Croaton Landfill site, which is in New York State some place.

But when you think of five dollars a ton, and multiply that against the tonnage we're talking about, we're talking about very large sums of money.

QUESTION: Well, frequently in some of these commerce cases, like the Madison Milk case, public health gloss is put on the statute, and when you get behind it you see it's actually the local producers that got behind the Legislature or their Common Council to enact it.

Is there any suggestion here that New Jersey industrial disposers played kind of an active part in getting this thing enacted so they could benefit from it?

MR. MOORE: No, unfortunately, they -- I don't think they, to be honest with you, I don't think they knew anything about it. I know how the statute originated, and it didn't originate that way. It was a political situation.

"New Jersey shall be a Garden State and not a Garbage State" became a political cry of some politicians.

QUESTION: Well, if that were literally true, you still say that the commerce clause controls?

MR. MOORE: Absolutely, sir. I think the controls for these reasons -- you mean that it is commerce, and an item in commerce, and fits within that definition, so that we can apply the commerce clause.

I assume that -- or have we gotten beyond that point? I think we got beyond that point.

I think I have satisfied everyone that it is an item in commerce.

QUESTION: But that doesn't --

MR. MOORE: No, that doesn't finish the argument at all, no.

QUESTION: You don't prevail by that --

MR. MOORE: No way, absolutely not.

QUESTION: -- just on that alone. I suppose you would agree that a -- certainly under the Twenty-first Amendment -- a State could exclude from its borders entirely any or various kinds of alcoholic beverages, even though they are, of course, items of commerce?

MR. MOORE: Well, yes. So I guess that one case, what was it, Bowman vs. the railroad, where they stopped it. But I think that was before that Amendment.

QUESTION: Well, you may know better. But, apart from the Twenty-first Amendment, could the State exclude the importation into its territory of slot machines, for example?

MR. MOORE: Yes. And they could -- once you define

and make the determination that the item is intrinsically evil, which was never done here -- no place is it done by the Legislature here --

QUESTION: Well, how free is a State -- how free is a State to declare by legislative fiat that an item is intrinsically evil, or --

MR. MOORE: Well, they have done it many times.

QUESTION: Well, how free is a State to do it? You would agree that it could do it with respect to slot machines? Could it do with respect to onions or potatoes?

MR. MOORE: They can do it, but it can always be contested, because it's got to be reasonable. They can't make an arbitrary determination that --

QUESTION: It's got to apply to its own citizens first.

MR. MOORE: Absolutely. And the -- sure, I mean, a lot of States -- that's why we've been having, you know, these cases -- over the years have made those kinds of determinations to protect their milk and their shrimp and the peat case that was recently decided by this Court, which Justice Brennan wrote the opinion on. I mean, that was a type of situation I think the Supreme Court --

QUESTION: You say that a law excluding from importation has to be linked with a law that prohibits the existence in the State, as a product or in the possession of

its own citizens of the same item; is that it?

MR. MOORE: I don't quite follow your question, I'm sorry, sir.

QUESTION: Well, I think that was suggested by my brother White's question. A State can lawfully exclude from importation into the State slot machines, if, and only if, it prohibits its own citizens from possessing or manufacturing or operating slot machines. Is that it?

MR. MOORE: Well, you're getting to dealing with the matter even-handedly, I think.

QUESTION: Well, isn't that part of --

MR. MOORE: Which is the Huron type of case.

QUESTION: Well, isn't that part of your case, that this discriminates --

MR. MOORE: Well, my part of the case that this very clearly discriminates, yes --

QUESTION: Yes.

MR. MOORE: -- I haven't got to develop those points yet, but that's what I was going to get into next, sir.

QUESTION: All right.

MR. MOORE: Right.

Next we have to consider the tests that have been developed, and I guess Pike vs. Bruce Church and Madison are the cases where it's best synthesized and brought together, and the test, very -- I shouldn't say "very simply", because

it isn't that. But the test says, of course, that when a statute regulates even-handedly to effectuate a legitimate local purpose, and the effects upon interstate commerce are incidental, the statute will be upheld. Unless the burden is excessive.

Then it goes on to state -- then it quotes Huron and cites Huron at that point in the opinion, then it goes on to say that if the legitimate local purpose found, then the -- if the legitimate local purpose is found, pardon me, then the extent of the burden is going to be weighed and then, after that, we're going to look into a couple of items. One is, Is there a reasonable alternative available that would have a lesser effect upon interstate commerce?

And then we come to the Madison doctrine, which, frankly, I am not exactly too sure in my mind how it fits into this, because that doctrine says "unless there is a non-discriminatory alternative available".

I take the position that in this case that we are dealing with, the Legislature of New Jersey clearly has not treated in an even-handed fashion an item of commerce. It has said that this item of commerce is going to be discriminated against, because of its source of origination, for example, whether it be Pennsylvania, New York or Delaware. In other words, if people in Delaware want to ship in automobile hulks into New Jersey, they cannot do it.

And that's a point of discrimination, of an item legitimately in commerce, as to its source.

And then they said to the people, the private enterprise in New Jersey that are recognized public utilities, they said to them, You can only get the material to use in your business from New Jersey, you cannot import it from out of State.

And that's in effect what they are saying.

And, as the affidavits will show, two of these appellants, virtually their entire business depends upon the disposal of solid waste from Philadelphia. Which, incidentally, is not putrescible waste. The putrescible waste from Philadelphia goes under the exception to the --

QUESTION: You say the economic beneficiaries of this are the professional landfill people, the people who specialize in disposing of waste?

MR. MOORE: Well, there are --

QUESTION: They are among the beneficiaries?

MR. MOORE: They are among the beneficiaries. They benefit, plus the -- ostensibly, at least, New Jersey tries to say we want to save the landfill spaces.

QUESTION: Well, the professionals don't benefit, do they? They are prevented from handling as much business as they want.

MR. MOORE: Well, that's -- then I misunderstood the

question. I'm very sorry.

QUESTION: But the available places in New Jersey are reserved for them?

MR. MOORE: No, this is private enterprise. They can go out --

QUESTION: That's what I mean.

MR. MOORE: -- as long as it's zoned properly.

QUESTION: That's right.

MR. MOORE: And the -- then, I'm sorry, I don't --

QUESTION: But the out-of-State companies are forbidden -- cannot take advantage of the New Jersey landfills?

MR. MOORE: Well, neither can a New Jersey company that collects out-of-State, and one of these does.

QUESTION: What if you have a Pennsylvania company --

QUESTION: Well, I know, but the New Jersey landfill company at least has a place -- if it's dealing in New Jersey solid waste, can use a New Jersey landfill.

MR. MOORE: Well, that's true. But, as a matter -- that's true, but it can't go into Pennsylvania.

QUESTION: Oh, I understand that.

QUESTION: But if you had -- suppose you had a Pennsylvania disposal company that wants to come over and contract with a New Jersey industrialist to dispose of waste in New Jersey? The Pennsylvania company can do that, can it?

MR. MOORE: Absolutely. It's not directed at that. It's directed at the entry of an item in commerce. And it doesn't make any difference whether it's disposed in a landfill, it cannot be put into an incinerator. And the State has admitted there's no qualitative difference between refuse in Pennsylvania and refuse in New Jersey; no qualitative difference whatsoever.

Yet, does it make sense to say that you cannot bring waste from Pennsylvania into New Jersey and put it into an incinerator?

QUESTION: Is there any question in the record about the nonavailability of this land?

I mean, for example, if the only places that could handle landfill would be serviced by New Jersey, couldn't New Jersey say, Well, that's it; we can't let anybody else in because we don't have holes enough.

MR. MOORE: No, I don't --

QUESTION: That's not in this case at all, is it?

MR. MOORE: No, it isn't. See, unfortunately, this case did not come up with a record because of the -- it came up in the summary fashion on those points. And so those questions, which should have been developed if, you know, if the -- it went back to a lower court, why, they would be developed by proper testimony.

QUESTION: Mr. Moore, is there any question about the

finality of the judgment from which you are appealing?

Because the case does go back for trial, doesn't it?

MR. MOORE: Yes -- well, we were forced into this situation, which I explained in our brief. The way it happened, we argued the matter on this summary judgment position. The Supreme Court of New Jersey, as you know from the opinion, created a record for itself, by taking judicial notice of certain things, and I immediately, when the opinion came out -- I immediately, when the opinion came out, went to see the Chief Justice of New Jersey, and Mr. Skillman came with me, and pointed out that there were many other matters in this complaint that had been dealt with.

And, frankly, they were a little surprised, to be honest with you, and so they gave us additional time to develop memorandum on those points. And then, I think it was about three weeks, and we both did, and then they came out with three different orders, which are in the Appendix. And the orders said that you can go back without any restraints, and we won't retain jurisdiction, but you can go back to the lower court to see if there's any other appropriate relief available.

Well, after the way the New Jersey Supreme Court wrote this opinion, there's no lower court judge that is going to be able to do much. And so an order was entered dismissing all the other counts under those circumstances, and this was

the final judgment.

QUESTION: Did you agree to that order?

MR. MOORE: I think I'm running out of time, I'm not sure.

QUESTION: Wasn't that your order you're talking about?

MR. MOORE: I beg your pardon, sir?

QUESTION: Wasn't that your order, the one that dismissed all the other counts?

MR. MOORE: It was an order that was entered into by consent with the State of New Jersey.

QUESTION: Well, did you not, thereby it, agree to deny this Court jurisdiction?

MR. MOORE: We agreed --

QUESTION: Did you? Didn't you?

MR. MOORE: We agreed to -- to do what, sir?

QUESTION: To deny this Court jurisdiction.

MR. MOORE: No. Because we dismissed all the other counts. All the other counts have been dismissed. The only count left was the one that the New Jersey Supreme Court decided on, that's the commerce clause.

QUESTION: And that's the one that has to go back?

MR. MOORE: No, no. Nothing has to go back. The interstate --

QUESTION: Now nothing goes back?

MR. MOORE: Well, it depends -- we have asked for alternate relief on the interstate commerce clause. We have barred ourselves, by dismissing all the other counts. The only count that we are here on is the interstate commerce clause question.

All right?

MR. CHIEF JUSTICE BURGER: You are out of time now.

MR. MOORE: All right. Thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Skillman.

ORAL ARGUMENT OF STEPHEN SKILLMAN, ESQ.,

ON BEHALF OF THE APPELLEES

MR. SKILLMAN: Mr. Chief Justice, and may it please the Court:

The subject matter of this appeal is the disposal of solid waste.

In New Jersey and elsewhere, government, in the discharge of its responsibilities to provide for the health, the welfare and the safety of its people, makes provision for the disposal of waste, either by performing the service itself, or by supervising and regulating private contractors who perform the service.

The case thus involves that the performance of a necessary public service -- it is also clear, though, that the State and its people pay a social cost for providing this public service.

At the present time, the only viable method of solid waste disposal, with a few exceptions, is through landfills. This means that landfills are necessary. However, they are, at best, a necessary evil.

In New Jersey, virtually all landfills will produce leachate, which is a highly noxious and polluted liquid that pollutes both ground and surface waters.

Landfills also generate methane gas, such as is used for cooking, and thus fires at landfills may occur even decades after a landfill has been closed out.

Therefore, the disposal of waste is like crime. If we could wish away the problem or legislate away the problem, we would. But we can't. We cannot simply say "no more waste in New Jersey", we have to take care of the problem somehow. So provision is made by the State for the disposal of waste. It allows the use of its land for this purpose, even though substantial and serious harm is caused to the land and to the environment from this particular form of land use.

The question presented by this appeal is whether, when a State such as New Jersey authorizes this use of its land, it must also, under the commerce clause, make available the use of its land to other States and their political subdivisions for the same purpose.

I think it should be made clear at the outset, because the point was perhaps somewhat blurred in the presentation of

the appellant, that the New Jersey statute being considered in this case, taken in tandem with the implementing regulations adopted pursuant thereto, prohibits the -- solely the entry into New Jersey of solid waste intended for disposal in sanitary landfills.

I would direct the Court's particular attention to page 96A of the Appendix, which is a regulation adopted by the State Commission of Environmental Protection to become effective prior to the effective date of the statute, which excludes from the purview of the prohibition upon entry into New Jersey solid waste which is intended for any productive use. It excludes garbage to be fed to swine. It excludes solid waste to be processed into secondary materials. It would exclude, for example, -- there's been a lot of talk about the automobile hulks, and the analogy between this case and the Hughes case decided by the Court last term.

Well, under subsection (c), if 70 -- if there is -- if automobile hulks are reprocessed and, as were the facts in the Hughes case, then, assuming that 70 percent of the material in the car is reprocessed, which, as I understand is a matter of industry practice, is the fact, then that reprocessing would fall within exception (c).

So -- it also should be noted that the parties involved in this case, the City of Philadelphia and the sanitary landfill operators, who are the appellants, are engaged

solely in disposal in landfills. So that any mention of recycling or automobile hulks and so forth, (a) is not within this case, not within the facts of this case, not within the method of business operation of the appellants; and (b) is expressly excluded from the ban by the implementing regulation adopted by the New Jersey Commissioner of Environmental Protection.

QUESTION: In the Alexandria Scrap case, the hulks, the very movement of the hulks was to take them off the road and deliver them to a compressing plant which compressed them and sold them for scrap steel, was it not?

MR. SKILLMAN: That's my recollection of the facts, Your Honor.

QUESTION: So that it was not something that was to be disposed of by burying it or burning it or otherwise getting rid of it.

MR. SKILLMAN: That is correct. And I think that that is also the practice in New Jersey.

For example, I understand that there is a very large automobile reprocessing plant in Jersey City, which is close by to New York City, and that facility receives automobile hulks not only from the State of New Jersey but also from New York City, and that reprocessing operation does not fall within the statutory ban which is the subject of this case. This statutory ban, taken in tandem with the implementing regulation,

has to do solely with disposal in landfills, putting garbage into the ground, with all of the attendant environmental problems.

QUESTION: It has to do with the importation of wastes that are -- whose destiny is that.

MR. SKILLMAN: Is that. That is correct, Your Honor.

QUESTION: But all New Jersey produced waste, these disposers may use the landfills in New Jersey. All New Jersey produced waste.

MR. SKILLMAN: All waste originating within the State, yes, Your Honor; that is correct.

QUESTION: To that extent, I gather the New Jersey producers of the waste benefit by this statute, do they not? If they had difficulty because of the quantity being imported in from Philadelphia in disposing of theirs, they now have less difficulty since only their waste may be picked up by New Jersey disposers; is that right?

MR. SKILLMAN: I think that's a theoretical possibility, whether or not --

QUESTION: Are these filled up?

MR. SKILLMAN: Well, as a practical matter, in the northern part of the State, we are fast running out of landfill capacity. Until we reach the point of running out of landfill capacity, I don't think it makes too much difference in terms

of what it costs, for example, to put garbage into the ground, whether there is additional garbage coming from New York City or not. The rates charged by a landfill are regulated by the State Public Utilities Commission on a public utility base, rate base, rate of return, and so forth.

Where the additional cost comes in is when we reach the point, in the not too distant future, where our landfill capacity, particularly in that part of the State, is simply exhausted, and it means that municipalities and others producing solid waste in the northern part of the State --

QUESTION: Are the rates disposers have to pay the producers regulated?

MR. SKILLMAN: The rates that are charged by the landfills to the collectors are regulated by the State Public Utility Commission, since 1970, Your Honor, on a rate base, rate of return, same as any other public utility.

So that the only way that the additional cost would come in is when we reach the point where all the landfill capacity in the northern part of the State is exhausted, which seems to be a real genuine likelihood at this point, and then, if the people in the northern part of the State have to transport their waste to the further extremes of the State, out into western New Jersey, Sussex County, or southern New Jersey, Burlington County, then that additional distance of transportation, to that limited extent there would be, yes, an

additional cost at that point.

QUESTION: Unless it's closer to take it over to Pennsylvania.

MR. SKILLMAN: Well, as a practical matter, we can't do that, because of the laws of Pennsylvania.

QUESTION: So Pennsylvania is keeping you out, too?

MR. SKILLMAN: Well, Pennsylvania is keeping out Philadelphia.

QUESTION: Right. Right.

MR. SKILLMAN: Pennsylvania has very restrictive legislation. They do not recognize landfills as being public utilities. And any municipality in Pennsylvania, which wants to keep out waste originating in another municipality, can do that. And apparently the great majority of municipalities immediately surrounding Philadelphia have done just that.

And that is what has caused Philadelphia to come over to New Jersey, which has, since 1970, legislation which prohibits municipalities from having these kinds of restrictive policies. So, in a sense, we're the victim of our own forward-looking legislation within the State.

QUESTION: Do you rely at all on the federal statute in answering the commerce argument?

MR. SKILLMAN: Well, Your Honor, --

QUESTION: Or on any federal statute as expressly leaving the matter to the States?

MR. SKILLMAN: Your Honor, it's not mentioned anywhere in the briefs, and it just came to my attention on Monday and was confirmed today, that the President signed, only twelve days ago, a new statute dealing with solid wastes, which, I think, for the first time, substantially -- I don't know how substantially, but I think substantially federalizes the subject matter of solid waste.

That statute is entitled, "The Resource Conservation and Recovery Act of 1976", and it's Public Law 94-580.

QUESTION: Does it have any bearing on the question? I mean, were it in effect when all this happened, would it negate this --

MR. SKILLMAN: I think we would still have this case, Your Honor, and I think it only comes in very indirectly, in the sense that there have been parenthetical references, at least, in the briefs to federal statutes that remotely bear on this subject matter, where --

QUESTION: Does this, as my brother White suggested, say anything about what States may do with these wastes?

MR. SKILLMAN: Let me just briefly summarize what I think the statute does -- and I must say that I am at a disadvantage, of having only come across this, having the statute brought to my attention the first time on Monday, and having read through it once.

What it does is confer substantial power on the

federal environmental protection administrator, to set guidelines for the States in formulation of regional plans for solid waste recovery and/or disposal; and it imposes an obligation on the States to formulate regional plans. And those plans may, after appropriate consultation and cooperation and so forth between the Governors involved, have interstate components to them.

Now, the teeth in the legislation -- I shouldn't say that it compels the States to do anything, because there are no -- this is a carrot rather than a stick type piece of legislation. The carrot is that if the States want federal money for purposes of resource recovery, capital projects, and other solid waste activities, they must have plans which conform with the federal guidelines.

But I think that the --

QUESTION: Well, what's the negative -- say, a State says, "Awfully sorry; we don't want any of your money", what's the negative implication from the federal statute, that it's up to the State?

MR. SKILLMAN: On the first reading, I don't see that. I think it's -- there is strict -- on a first reading, I don't see the stick in the legislation. I think it's strictly voluntary --

QUESTION: Well, I know, but that isn't what -- is the negative implication, if the State doesn't want federal

money, that Congress intends to leave the matter entirely up to the State?

MR. SKILLMAN: Yes, I think the answer is yes, Your Honor.

QUESTION: Well, then, why doesn't that have some relevance here, if that's so?

MR. SKILLMAN: I think it does have some relevancy.

QUESTION: It will have new relevance on the interstate commerce, I imagine, wouldn't it?

MR. SKILLMAN: It certainly has relevancy in the sense that we have sought, throughout this litigation, to draw a very sharp distinction between what the commerce clause, standing alone and without congressional legislation, automatically prohibits, and what Congress can do under the commerce clause if it perceives a social problem, which has some -- which impacts in some fashion upon the interstate commerce.

QUESTION: And your brother answered a question by my brother Blackmun during the course of his argument, to the effect that he thought that Congress could legitimately, under its commerce power, enact legislation that would prohibit, affirmatively prohibit the States from doing what the State of New Jersey has done in this case.

But, conversely, it's suggested, I think, that in its recent legislation Congress has, under its commerce power,

enacted legislation which would seem to permit the States to do what New Jersey has done. And certainly Congress could explicitly enact that kind of legislation, couldn't it?

MR. SKILLMAN: I have little doubt but that Congress could enact such legislation.

QUESTION: Do you have any doubt?

MR. SKILLMAN: I don't have any doubt, no.

I also am very reluctant to make too many representations as to what this new legislation provides, having just had the benefit of having read through it once.

QUESTION: It was enacted -- or signed by the President twelve days ago, or something?

MR. SKILLMAN: October 21st was the date it was signed by the President.

QUESTION: Unh-hunh. Do you take issue, since I've already interrupted you, with the appellants' basic question, basic proposition, that liquid and solid waste is an article of commerce?

MR. SKILLMAN: I take very sharp issue with that, Your Honor. And I think that the problem is that -- the old problem of one word having many meanings, depending upon what the context is.

I have no doubt that solid waste, or the service of providing for disposal of solid waste is interstate commerce, in the sense that --

QUESTION: Of course, if it moves interstate, then it's interstate commerce.

MR. SKILLMAN: -- the court took note of the congressional action in antitrust laws in the Pennsylvania Refuse case that they have cited.

However, that does not mean that it is commerce in the sense that it falls within the zone of free trade protected by the commerce clause, even in the absence of congressional action.

QUESTION: Are you familiar with the case that came from Los Angeles, the Meat Drivers case, involving commerce in grease that was discarded by restaurants in Los Angeles, that was a government antitrust case, brought to break up an alleged conspiracy in restraint of trade in grease discarded by restaurants?

MR. SKILLMAN: I am not familiar with that case, Your Honor.

It sounds like it may be similar to the Pennsylvania Refuse case, that has been relied upon by the appellants.

QUESTION: It was assumed in that case that that item was an item in commerce. It was then sent overseas, as I remember it. After having been reprocessed.

MR. SKILLMAN: In drawing the distinction between what commerce means in the context of authorizing congressional action and what it means in the context of what it prohibits

the States from doing, even absent congressional action, the Court has developed a doctrine on what they call illegitimate items of commerce. These are items such as diseased animals, other items that are --

QUESTION: Contraband, I suppose, would fall in that category, wouldn't it?

MR. SKILLMAN: I would think that it would.

QUESTION: Well now, how free is a State to define contraband? Can it define potatoes as contraband?

MR. SKILLMAN: Absolutely not. I think that there must be -- that certainly a party who wishes to challenge such a characterization by a State Legislature has the right to do so. And there may be certain --

QUESTION: What would the criteria be to measure the State's power?

MR. SKILLMAN: Well, we start off, I think, with a presumption that the legislative characterization is an accurate one.

QUESTION: Right. That's the basic presumption of constitutionality, I suppose.

MR. SKILLMAN: That's the basic presumption. And then it's a matter of the attacking party developing a record to show that the factual premises of the legislation are not valid premises.

Now, here --

QUESTION: Well, let's say you had a majority of the State Legislature who were vegetarians, and they just prohibited the importation of any meat into the State. It would be very reasonable from the point of view of the majority of the Legislature, wouldn't it?

And they declared all meat contraband. Would they have the power constitutionally to do that?

MR. SKILLMAN: And also prohibited any meat --

QUESTION: Yes.

MR. SKILLMAN: -- from within the State?

QUESTION: Yes.

MR. SKILLMAN: Perhaps. I think it a difficult --

QUESTION: They probably wouldn't be re-elected.

MR. SKILLMAN: -- a difficult and very philosophical sort of question. I think the issues in that case would be much more than simply commerce clause issues.

QUESTION: Unh-hunh.

MR. SKILLMAN: There would be certainly --

QUESTION: Due process issues, and other issues.

MR. SKILLMAN: -- people who wish to eat meat would have some arguments, I'm sure, but I don't think they would be issues under the commerce clause.

QUESTION: When you were discussing Administrative Order No. 40, that you cited us to on Appendix 96, I took it that you were telling the Court that all legitimate commerce

is protected by the exceptions that are listed here. Is that substantially what you were saying?

MR. SKILLMAN: Absolutely.

QUESTION: Well, --

MR. SKILLMAN: And if there are any other --

QUESTION: -- if it has any value like the hulk of an automobile, like garbage that can be fed or used for fertilizer or whatever, then it's not covered; there's no prohibition of that kind of interstate commerce.

MR. SKILLMAN: That's correct.

And if anyone were in a position to show us that those four exceptions listed in the regulation are not exhaustive of the types of things one can do with waste that are legitimate and productive, we could certainly at that point adopt further exceptions to the ban.

The object of the statute is disposal in landfills, and only that. Now, I mean I can conceive that if other showings could be made -- for example, some recycling process was helping us get rid of waste, and was producing an article of commerce, but at the same time was blowing off tremendous amounts of air pollution, we might have an argument there also. But that's just not the present State regulation before the Court.

QUESTION: You say that landfill has no value?

MR. SKILLMAN: Excuse me?

QUESTION: Landfill has no value?

MR. SKILLMAN: Oh, certainly, certainly a landfill has value.

QUESTION: I mean that big thing you've got up there in the northern area there is a little valuable.

MR. SKILLMAN: No question about that, Your Honor. A landfill is valuable for its intended purpose, --

QUESTION: Well, how do you get --

MR. SKILLMAN: -- which is the disposal of waste. Valuable for that purpose.

QUESTION: Isn't it also to fill in land?

MR. SKILLMAN: In some instances. That all depends on what the other alternatives are, and what you plan to do with the land --

QUESTION: A good part of this city is filled land, as I understand it.

QUESTION: Well, half the State of Florida is.

MR. SKILLMAN: Well, it may be fill, but it isn't necessarily filled with garbage. If you want to --

QUESTION: Well, --

[Laughter.]

MR. SKILLMAN: If you want to construct something -- if you want to construct something --

QUESTION: But this isn't garbage.

MR. SKILLMAN: Yes, it is, Your Honor.

QUESTION: Well, I thought some of it, at least, you'd feed it to pigs.

MR. SKILLMAN: Some of the garbage is fed --

QUESTION: It's another kind of refuse.

MR. SKILLMAN: Most of what we're talking about is garbage, Your Honor.

QUESTION: Is it?

MR. SKILLMAN: It's garbage.

QUESTION: Well, what are the mechanics of this? Who pays what to whom and why? In this area, this landfill.

MR. SKILLMAN: I may not be the --

QUESTION: Does the landowner make the payment, or does he receive a payment, or how does it work?

MR. SKILLMAN: The landowner receives a payment, in this case, from the City of Philadelphia. They have entered into a long-term contract --

QUESTION: Permitting Philadelphia to dump its refuse on that land.

MR. SKILLMAN: -- to dump X number of tons per day. I think it's --

QUESTION: Rather than the landowner who owns a swamp paying the dealer in refuse to fill his land, fill his swampland. It doesn't work that way?

MR. SKILLMAN: It doesn't, as a practical matter. Because of the fact that you can't just dump garbage in a swamp.

The whole area of landfilling is very tightly regulated as to location, for example, in swamps you get horrible water pollution problems.

QUESTION: So the payment in this case goes from the person who wants to dispose -- in this case Philadelphia -- who wants to dispose of its refuse, just pays the landowner for the privilege of dumping its refuse on the landowner's land; is that it?

MR. SKILLMAN: That's correct.

So that there's no question but that there is a financial transaction there; but I think it's clear under the Clason case, and the quarantine, the diseased animal quarantine cases, that the mere fact that you find somebody selling somebody a service in connection with the disposal of waste or something doesn't mean that you have, quote unquote, "legitimate commerce" that falls within the free market principles of the commerce clause.

QUESTION: As a general thing, getting in upstate New Jersey, when you -- the difference between this garbage for swine, you remember up there we had trouble with the swine up near Newark, and now we got rid of that and we've got a Sports Stadium up there.

Now, what was the difference?

MR. SKILLMAN: Well, in the --

QUESTION: You allow them to have the garbage for

swine.

MR. SKILLMAN: Well, the Sports Stadium -- and this is an interesting point and I think comes up as to what the use is of the garbage in terms of land reclamation.

QUESTION: Yes.

MR. SKILLMAN: When you want to build something as heavy as a stadium, what they had to do was come in and take all the garbage off that land and move it elsewhere, because if they tried to build that Sports Stadium on top of landfill, it would have been sagging and swaying.

[Laughter.]

MR. SKILLMAN: I mean, in other words, garbage --

QUESTION: I see. I thought --

MR. SKILLMAN: -- garbage is not good for land reclamation, until you're talking about a light use, such as a golf course, which is the classic use of --

QUESTION: My only point was that in the northern area, when you drive by, it smells better.

MR. SKILLMAN: It smells better, that's true.

QUESTION: It could smell worse.

QUESTION: Mr. Skillman, could I just get a very simple point straight in my mind? The City of Philadelphia may have a contract with a large landowner within New Jersey to dump tons and tons of its waste on that land. The statute would require cancellation of that contract, but it would

permit the owner of that land to enter into an identical contract the next day with the City of Trenton?

MR. SKILLMAN: That is correct.

QUESTION: Now, how -- what is the environmental interest being served, then?

MR. SKILLMAN: The environmental interest is that any landfilling within the State of New Jersey brings about environmental harm, causes leachate to develop, methane gas, fires, --

QUESTION: But isn't there the same environmental harm from Trenton waste as there is from Philadelphia waste?

MR. SKILLMAN: Yes, but if we add Philadelphia waste to Trenton waste, we have more of that harm.

In other words, we have to do something with our own waste. We can't float it into outer space, no matter what --

QUESTION: Does the record show that all waste which originates in New Jersey is deposited in New Jersey?

Is there any possibility of cross-hauling?

MR. SKILLMAN: There apparently is one city in western New Jersey which has, at times in the past -- and we are not even sure of the present, but the city apparently at times in the past has used a disposal site in the State of Pennsylvania. But essentially New Jersey takes care of its own waste disposal problems.

QUESTION: If we should agree with the trial court

and not the Supreme Court of New Jersey, and hold this statute unconstitutional, would that holding permit New Jersey cities to take -- would that also invalidate the various Pennsylvania restrictions that you say now prohibit the New Jersey cities from dumping in Pennsylvania?

MR. SKILLMAN: I don't know the answer to that question, because the restrictions in the State of Pennsylvania are quite different from the statute that we're defending here. Those -- the Pennsylvania legislative scheme permits local municipalities to keep out all solid waste originating outside of the boundaries of the municipality, including waste originating in other Pennsylvania municipalities.

QUESTION: Including that from other States.

MR. SKILLMAN: Excuse me? And including that originating in other States.

And what a ruling of this Court affirming the trial court -- what impact that would have upon such a statutory scheme, I think I'd have to read the opinion to know -- it would depend on the exact rationale.

QUESTION: Well, in so far as it excluded out-of-State material, it would be quite relevant, wouldn't it?

MR. SKILLMAN: Yes, it might be relevant. I would just say that it is a different statutory scheme, and that the arguments might be different, and I don't think that --

QUESTION: Do you think the price of these various

contracts, price per ton that's deposited and the distance hauled, would be different if there was complete freedom to go across State lines in dumping, as opposed to every State having its own restriction? Do you think this could have any impact on the market price for this combination of commodity and service?

Do we have an authorization problem?

MR. SKILLMAN: For the most part, no. I think that the most relevant factor in the cost of disposal is distance. I suppose for an individual municipality, if they can find some disposal site across a State boundary that is closer than the one that they could find within their own State, then, under those particular circumstances, there might be a lesser cost in going across the State line.

But, as an over-all general matter, I think my answer to your question is no.

QUESTION: It just occurred to me that perhaps in the long run the small State might be better off having greater flexibility as to where it could dispose of this material, whereas -- I know you mentioned New Jersey may exhaust its own landfill eventually. Unlikely Pennsylvania would do so as rapidly.

I'm just wondering if your position is in the best interests, in the long run, of your client.

MR. SKILLMAN: I don't have any doubt, Your Honor,

but that the type of position that's being urged by Pennsylvania -- by Philadelphia here is one that is inconsistent with the long-range best interests of the State of New Jersey, in the sense that you don't get true regional planning by a party in the position of the City of Philadelphia, just going out into the marketplace and trying to find somebody and paying enough money.

If there are problems where we need regional planning, they really have to come in one of two ways: either by cooperative action between the States, or by regional planning under the auspices of the federal government.

And it is, you know, in that sense, I suppose, that we come back to the recently enacted federal legislation.

What we're talking about here is not the free open economy, what we're really talking about here is inter-governmental relations. And because that's the nature of the problem, if Philadelphia has a problem at all. It's a problem that is not susceptible to resolution under the commerce clause's negative implications, it's a problem that has to be dealt with by governments, between the two States, through mutual consultation and agreement, or if that proves unavailing, then pursuant to the enactment of appropriate legislation by Congress.

QUESTION: I gather, Mr. Skillman, that the producer of these wastes in New Jersey doesn't have something to sell,

he has something he wants to get rid of.

QUESTION: Yes.

MR. SKILLMAN: Absolutely.

QUESTION: And he pays somebody to haul it away for him.

QUESTION: That's it.

MR. SKILLMAN: That is correct.

QUESTION: And it's that chap who has the arrangements with the owner of the land in which the stuff is dumped.

QUESTION: The middleman.

MR. SKILLMAN: Well, there's --

QUESTION: Or he may be the owner of the land himself, I don't know.

MR. SKILLMAN: Well, there -- that's right. There's a middleman, a collector from the private home, in some instances; in other instances the municipality may do the collection work directly itself and take it to the disposer.

QUESTION: What's the price that you told us is regulated?

MR. SKILLMAN: Excuse me?

QUESTION: What is the price that you told us earlier is regulated by a utility type commission?

MR. SKILLMAN: Well, they actually regulate -- the one I told you about was the price charged by the landfill site to the collector.

QUESTION: Right.

MR. SKILLMAN: But there is also regulation of the price charged by the collector to the people whose waste he collects.

QUESTION: Who wants to get rid of it.

In other words, --

MR. SKILLMAN: This whole industry is regulated now --

QUESTION: In other words, the service for the chap that wants to get rid of the waste, it costs him something, and that cost is regulated by the commission.

QUESTION: Yes.

MR. SKILLMAN: That is also regulated. It's regulated at both steps, at both the collection, the collection rate and the disposal rate.

QUESTION: Unh-hunh.

MR. SKILLMAN: Thank you.

MR. CHIEF JUSTICE BURGER: Very good.

You have a minute left, counsel, if you have something you can tell us in a minute.

REBUTTAL ARGUMENT OF HERBERT F. MOORE, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. MOORE: Yes, in just a moment.

I think New Jersey is being shortsighted, as the question raised, in this type of legislation, because it is

possible that north Jersey is running out of landfill space. Upper New York State is far closer to New Jersey for disposal of solid waste. North Jersey, that is, than South Jersey.

The big problem in cost involved. it would absolutely be economically unthinkable to haul waste from Bergen County down to Burlington County with the congestion in New Jersey. Whereas it would be much cheaper to go into New York State -- and there's no problem going into New York State. There's no New York statute that says we can't go in.

QUESTION: Well, you are now talking about the economic and really political realities and social --

MR. MOORE: Well, the question was raised here, and I just wanted to clarify that, that it is a great advantage. And this type of statute does seriously interfere with the commercial future for New Jersey.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:51 o'clock, p.m., the case in the above-entitled matter was submitted.]

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