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In the

Supreme Court of the United States

CITY OF PHILADELPHIA,
ET AL.,

Petitioners,

v.

NEW JERSEY, ET AL.,

Respondents.

NO. 77-404

Washington, D.C.
March 27, 1978

Pages 1 thru 43

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Washington, D. C.

Monday, March 27, 1978

The above-entitled matter came on for argument at
10:04 o'clock, a.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 P. STEVENS, Associate Justice

APPEARANCES:

HERBERT F. MOORE, ESQ., 19 Chancery Lane, Trenton,
New Jersey, 08618, for the Petitioners.

STEPHEN SKILLMAN, ESQ., Assistant Attorney General,
State House Annex, Trenton, New Jersey 08625,
for the Respondents.

C O N T E N T S

<u>ORAL ARGUMENT OF:</u>	<u>PAGE</u>
Herbert F. Moore, Esq., for the Petitioners	3
Stephen Skillman, Esq., for the Respondents	22

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in City of Philadelphia against New Jersey.

Mr. Moore.

ORAL ARGUMENT OF HERBERT F. MOORE, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is back on a remand. We were here about a year ago, I guess. The case concerns the constitutionality of a New Jersey statute that is known as Public Law 1973, Chapter 363. And we are weighing this statute against the -- its validity under the Commerce Clause as well as under the Supremacy Clause.

I will try to divide my time as equally as possible, so I can cover both of the very important subjects and would like to reserve five minutes also for rebuttal.

The statute in New Jersey bans the disposal of solid waste that originated out of New Jersey -- in New Jersey. That is the first section of the statute. The second section is also a very small paragraph and that bans the transportation of solid waste from -- that originated out of New Jersey -- into and through New Jersey.

Now, the first question, of course, that we have to be faced with in considering a Commerce Clause situation is: Is the

subject matter and the activity legitimate in interstate commerce so that the Commerce Clause would even apply. Here, we are dealing with a subject matter that is very broad by definition of the New Jersey statute. It covers every type of conceivable waste, both solid and liquid. We should not fix in our minds rubbish or garbage, as such, being the sole object of the statute because it is not. This covers automobile hulks, which this Court recognized in the Hughes v. Alexandria Motor case not so long ago as being a legitimate item in interstate commerce. It includes demolition material. It includes the scraps from industry in commerce and hotels and restaurants, as well as, of course, residential scraps.

Then, in addition to the subject matter which we contend is legitimate because there are two industries that depend upon this subject matter for their economic survival. One is the collection industry or the transporters of this waste and the other is the disposers of the waste which are basically, in New Jersey, the solid waste landfill, sanitary landfill operators.

QUESTION: Would the existence of these companies in that kind of business alone give them any special status. Suppose, for example, instead of taking it over to New Jersey, they decided to haul it out to sea a little distance and drop it; would there be a barrier to enforcing restraints against that for environmental purposes?

MR. MOORE: No, I don't believe so, Your Honor, because

we are not arguing here that New Jersey does not have the right to deal evenhandedly in protecting its environment and the health, that they definitely do. The question is are they dealing in an evenhanded, nondiscriminatory fashion in doing this?

The State has admitted that there is no qualitative difference between waste originating in another State and waste originating in New Jersey. And, as I develop my argument, I will point out how there is -- actually, this is a facade -- there is no environmental harm, no degradation to the environment in a properly regulated and operated sanitary landfill. And that has been recognized by the Congress as well as in New Jersey.

And so, I do not believe in any way the fact that the item in commerce may be of value to only a very few people detracts from its legitimacy as an item of commerce.

Now, what is it that the disposers, the sanitary landfill operators do? What function do they perform? They are selling something. They are selling, really, a product, in a sense. They are selling space in a sanitary landfill for the permanent interment of solid waste. It is very much similar to a warehouseman selling space on a short-term basis. He is not particularly concerned with the intrinsic value of the item that he rents space for. And, likewise, the sanitary landfill operator, other than the requirements of meeting the environmental standards, is not concerned with the intrinsic worth of the

item going into his landfill. But he is performing a function of selling something. And he is selling space.

QUESTION: Is it kind of like a cemetery?

MR. MOORE: Yes, I was going to mention that and it is exactly what it is like. We could imagine a situation, Justice Rehnquist, of New York City which has been running out of cemetery spaces, as you well know. Anybody who has driven through there is well aware of that. And New York put a ban that dead bodies could not be moved in unless they died while residents of the State of New York. I, for myself, recognize that as being rather ludicrous. But that's the exact type of thing. The cemetery sells permanent interment space. And that is what a sanitary landfill does.

QUESTION: Is that the way it always worked, that the owner of the land is the seller and the depositor of the refuse is the buyer? What if a person has land that he wants filled, it is to his advantage to have it filled; does he ever pay to have somebody dump on his land?

MR. MOORE: Well, in New Jersey, it is so strictly regulated, nobody can have land filled, unless they have registered with the State of New Jersey, filed an engineering design --

QUESTION: Complied with all the --

MR. MOORE: Complied with all the laws and obtained a registration statement.

QUESTION: And made something of a capital investment

to comply with regulations.

MR. MOORE: Environmental controls are extremely strict in New Jersey, so you just can't, if you have a hole in your back yard, decide you want to have it filled.

QUESTION: So the owner of the land is always the seller?

MR. MOORE: That is correct. He could be a leasee.

QUESTION: I mean you pay to put the garbage there.

MR. MOORE: That is right.

QUESTION: And are not paid for putting it there.

MR. MOORE: No, no. You pay him. It is a very large industry in New Jersey. And the environmental controls that the State exacts are extremely high and extremely expensive to install. And that, in itself, supports a lot of peripheral industries that supply the environmental machines, mechanics and things like that, your tremendously heavy compactor units and bulldozers, etcetera, that go into operating the sanitary landfills.

Now, the Federal courts in United States v. Pennsylvania Refuse Haulers has recognized, for the purposes of the Sherman Antitrust Act, transportation and disposal of waste to be a legitimate subject of interstate commerce.

The Congress in the House Report on the Resource Conservation Recovery Act, Report Number 94-1491, at several sections in their Committee Report, but I'll just read one of them, on page 9, states that "Most of our discarded materials

have at some time entered the flow of interstate commerce, if not as waste itself, then in the form of products which will, at some future time, constitute waste.

The fact that waste, itself, is in interstate and inter-municipal commerce has raised a number of problems. Several jurisdictions, including some States, have attempted to prohibit the importation of waste. So it has been recognized by Congress, it has been recognized by the Federal courts and it is recognized by New Jersey that the transportation and disposal are legitimate businesses. They are engaged in intrastate commerce in New Jersey. They are public utilities in New Jersey, the collectors and the disposers.

Now, under the Commerce Clause, of course, the test as to whether a State statute can legitimately co-exist in this field and regulate commerce there, has to meet certain tests and standards which this Court has developed over the years that are recited in Pike v. Bruce Church and many of the others, the Great Atlantic & Pacific Tea Co. v. Cottrell, and all the way down. And, basically, it is that the State statute must deal in an evenhanded, nondiscriminatory manner, it must serve a legitimate local purpose and not be a burden on interstate commerce. At least, it must not be an excessive burden. If it turns out to be somewhat of a burden, then, of course, we go into the balancing of the national interest against the local interest.

The New Jersey statute discriminates, in that New Jersey

says -- and they have stated this -- The Acting Governor when the bill was enacted made this statement, "that we are wont to preserve this as a natural resource" -- meaning the sanitary landfills -- "for the benefits of the residents of the State of New Jersey."

They are, in effect, hoarding a resource. It's very much like the natural gas cases in which that was attempted as a conservation measure by those States, to hoard the natural gas for the benefit of the citizens of those States. And this Court struck that down.

QUESTION: Would you say that a one-acre zoning limitation enacted by a town in New Jersey or, perhaps, a five-acre zoning limitation for a single-family dwelling, was a hoarding of natural resource as to Levitt who wanted to build on quarter-acre lots?

MR. MOORE: It could be, I think, stretched into that sense, yes. But in New Jersey the sanitary landfill locations are also controlled by local zoning.

QUESTION: But would you say that any State regulation which required more space to be used or prevented space to be used that an out-of-State developer wanted to use was a hoarding of a natural resource, and thereby violated the Commerce Clause?

MR. MOORE: Well, you get to the point of are you taking private property from someone? Remember these are not -- the fact that they are public utilities -- they are privately owned.

They are not operated by the State and very rarely by municipalities and very rarely by counties. The bulk of the landfills in New Jersey are privately owned. And you get to a point whether hoarding or reserving a natural resource becomes a taking.

QUESTION: Yes. Let's assume that point hasn't been reached in my hypothetical. So that your only complaint is the Commerce Clause.

MR. MOORE: Well, then I don't quite get your question.

QUESTION: Well, you say that a State may not, quote, "hoard," close quote, its natural resources, and I am asking you if a zoning ordinance which, as applied to someone who wants to build houses on quarter-acre lots insists that the minimum requirement is a five-acre lot, is guilty of hoarding?

MR. MOORE: No. I do not think that's guilty of hoarding at all, because you have a Due Process Clause coming in to protect that type of situation. As long as the regulation is reasonable and deals with the subject matter in an even-handed fashion and is not arbitrary or capricious then it's not a hoarding type of limitation.

Also, this New Jersey statute in discrimination, it says to the operators of landfills in New Jersey, "You may sell your space in an unlimited way to anybody who is in New Jersey whose waste originated in New Jersey, but you cannot sell any space, whatsoever, to someone, a business outside of

New Jersey whose waste originates outside of the State of New Jersey."

Now, I think that is a very blatant example of the discrimination.

Now, the health and environment aspects, the findings of the New Jersey Legislature at the beginning of this statute, indicated that they are leaning on health and environment to justify this incursion of the Commerce Clause by the State of New Jersey. And, just briefly, the State itself -- Grant Walton who, when he was Director of the Division of Environmental Quality of the Department of Environmental Protection of the State of New Jersey, in a published talk that he gave which is also in our brief on page 9, he stated that "the health hazard, water and air pollution methane gas problems, commonly associated with landfills can be eliminated through proper design and operation of the facility. Properly done, abandoned surface mines become parks, playgrounds and golf courses."

This is the head of that department in New Jersey who, himself, recognized that New Jersey standards were sufficiently high that there was no threat to the environment, no threat to the health of the public in the operation of a sanitary land fill.

The New Jersey Supreme Court, in its opinion, in this case, gave judicial notice to the New Jersey solid waste management plan. And that plan states that there is no technological

reason why we cannot dispose of solid waste with a minimal of environmental harm --

QUESTION: But under whose control?

MR. MOORE: Under the State's control. Absolutely under the State's control.

And went on to say that the regulations in New Jersey with which to regulate and insure a nuisance-free operation and disposal site in conformance with good practices and health standards.

Interestingly, the Solid Waste Management Act -- If I may just pause here for a moment -- The Act that we are weighing here is called Waste Control Act. And that is just a prohibitory piece of legislation. New Jersey also has another Act called the Solid Waste Management Act which is not before this Court, but that is the piece of legislation that is very broad and very pervasive and it has to do with the regulation of sanitary landfills and any type of waste disposal and transportation. When that statute was originally enacted around 1970, they used the word "crisis," and they said that New Jersey was facing a crisis because of the manner in which landfills were being operated. When they amended that statute here about a year ago, they left the word "crisis" out. So, apparently, the New Jersey Legislature, itself, does not recognize today that there is a crisis as there was several years ago, at least they thought there was at that time.

Now, the Resource Conservation and Recovery Act, again, in the Committee Report to start with, has recognized that disposal of solid waste at a sanitary landfill is not a threat to the environment or the health. It stated that the legislative standard -- this is on page 37 of the report -- "the legislative standard for the Administrator to determine a sanitary landfill is a disposal site of which there is no reasonable chance of adverse effects on health and the environment from the disposal of discarded material."

This, in the definition in 42 U.S.C. 6944 of the Resource Conservation Recovery Act. Congress has stated, in defining a sanitary landfill, that there is no reasonable probability of adverse effect on health and environment from disposal of solitary waste at such a facility, meaning a sanitary landfill.

Now, I noticed in reading a case that was decided here last week, Ray v. Atlantic Richfield, an interesting comparison there. There the Court said, in dealing with the oil tankers in Puget Sound, "The Supremacy Clause dictates that the Federal judgment that a vessel was safe to navigate U.S. waters prevails over a contrary State judgment."

Now, in the Resource Conservation Recovery Act, there is a Federal judgment. The Federal judgment is that these landfills can be operated safely with no threat to the environment of the public health. Now, it seems to me, with that same line of reasoning then, it must follow that there is no reasonable

probability of adverse effect on the public health. And this must prevail over a contrary State judgment.

Now, the local interest that is being served -- I believe we must discount health and environment because I think even though -- let me just stop a moment -- we all recognize that there are problems associated with the improper handling and treatment and disposal of solid waste. There is no question about that. And we've gone into that in great detail in our briefs. These problems are absolutely controllable, as has been recognized by the Congress of the United States. It has been recognized by the Department of Environmental Protection, actually, of the State of New Jersey.

So, the local benefit really is an economic benefit. And this has been stated. When Acting Governor Bealson signed this first statute into law -- Governor Cahill was away -- he made a public statement that "This is going to preserve for New Jersey residents these landfill areas for their use because there is tremendous cost involved in hauling waste long distances." And that really is what it boils down to. New Jersey wants to gain the advantage of having these sanitary landfills kept to New Jersey only for their use, so that industry and private people will not be subjected to the expense of hauling greater distances.

QUESTION: On the other hand, I suppose it might be reasonably said that Pennsylvania wants to make use of the nearby

space of New Jersey rather than using the much greater land area which Pennsylvania has, because of the cost. What's the comparison of the size of the two States, roughly? What's the comparison? Pennsylvania is twice as big, three times as big?

MR. MOORE: At least. Pennsylvania -- and, of course, New York is the same thing. It is an economic situation. Philadelphia is facing today a tremendous disaster, should New Jersey statutes become operative. They just have not been able to develop a location at which it is economically feasible and socially feasible to transport this waste in the huge large quantities and volumes that is generated there.

QUESTION: Well, what you are saying and perhaps it could be suggested that Philadelphia and other places in Pennsylvania want to use New Jersey space because it is more expensive to use Pennsylvania's own space when there is a competition, ultimately, for the finite amount of space available.

MR. MOORE: This same thing, Mr. Chief Justice, is happening in New Jersey today with large segments of the chemical industry. There is no place in New Jersey for this industry to dispose of its solid waste. We have several affidavits from the leading companies that are household words in the United States, that they must transport their wastes out of New Jersey and into Pennsylvania.

And if this statute were ever to become operative, as we know, Pennsylvania has a retaliatory piece of legislation

and New Jersey would be forever barred from disposing of its wastes --

QUESTION: You don't have any more favorable Seacaucus areas, do you?

MR. MOORE: No, that's pretty much been closed up. That used to be -- and I think what gave rise really to a lot of this, because that was really a mess up there for many, many years.

QUESTION: Why, as a matter of economic fact, does Philadelphia want to go to New Jersey and New Jersey companies want to go to Philadelphia, in a kind of a high-cost operation like this? Why wouldn't you pick the place nearest at hand?

MR. MOORE: New Jersey does not go to Philadelphia. They go to other sections of Pennsylvania. The northwest border of New Jersey. They are not going to Philadelphia.

QUESTION: Well, why doesn't Philadelphia find places in Pennsylvania?

MR. MOORE: The problems attending that are -- they are trying to develop a rail-haul project which has received a lot of newspaper notoriety to fill the strip mines in Western Pennsylvania, and there are a lot of technological problems in that operation which they are trying to work out. And we have affidavits in the Appendix that explain all that. But the configuration of Philadelphia, if you look on a map, is such that west of Philadelphia is heavily populated. You have tremendous

traffic problems in moving any type of vehicle. New Jersey right across the river, and there are several bridges, is relatively farmland and rural. It has always been traditionally a natural waste shed for the Delaware Valley area, both New Jersey and Philadelphia.

Incidentally, this morning -- to give you an example of what we are talking about -- a very interesting thing happened on the way to Court. We were in traffic and in front of us was stalled a garbage truck. And we were held up for a while and the thought occurred to me -- it brought back to mind a conversation I had at the EPA a while back when we were discussing this statute. There are no landfills in the District of Columbia. The District of Columbia depends entirely upon Virginia and they depend upon the State of Maryland. Now, what would happen if Maryland and Virginia enacted a statute like New Jersey. You know, you would be over this roof in solid waste in the District of Columbia.

I want to just close quickly so I can pass a little bit onto the other aspect of the Supremacy Clause, because I see my time is getting short here.

There are many nondiscriminatory alternatives that New Jersey has available to it to accomplish -- if we say the legitimate local purpose is the preservation of land, a natural resource. There are many nondiscriminatory alternatives, none of which they've ever mentioned. They could require by

legislation heavier and improved compaction equipment to reduce the volume of waste. They could require all sanitary landfills to install shredding equipment which shreds the waste so that it can be compacted greater and reduce the volume. They could enact an evenhanded ban on nonreturnable beverages. They could have state subsidies encouraging recycling, much like Hughes in Maryland did.

QUESTION: You are putting all of these burdens on New Jersey. How about the people who are importing this stuff into New Jersey? Why can't they take some of these steps?

MR. MOORE: It's New Jersey that wants to ban it. And, as I understand the Commerce Clause, New Jersey must deal in an evenhanded fashion in accomplishing this. Now, I suppose, Virginia --

QUESTION: You first have to decide that it's true commerce, don't you?

MR. MOORE: Yes, sir. And that's why I pointed out what was said by Congress, by the State of New Jersey in recognizing it as commerce, by the auto hulk situation which is a part of solid waste under definition in New Jersey.

QUESTION: Mr. Moore, could New Jersey, constitutionally, put in a statute slowing down the importation of waste from all sources, so that both New Jersey producers and Philadelphia producers would be equally affected. Would that be Constitutional?

MR. MOORE: If they did it in an evenhanded fashion, I would say that it would be. It is interesting to note also that New Jersey talks about running out of landfill space. New Jersey, to this day, and we have affidavits to this effect that have never been countered, has yet to this day made a survey of the State of New Jersey to determine what type of acreage is available to it and to the users for solid waste disposal. New Jersey has thousands -- hundreds and hundreds -- I guess, thousands of acres of abandoned clay mines. It used to be the clay center, the ceramic center, Trenton used to be for years. The reason was because of natural clay deposits. Abandoned sand and gravel pits all throughout the State. They make perfect sanitary landfills for land reclamation purposes, to restore land for use by the public. New Jersey has never to this day made such a survey whatsoever.

QUESTION: Don't you have legislative findings in the Act?

MR. MOORE: The finding is that they are running out of landfill space, meaning the existing landfills. That's true. Every time you put something in a landfill you are running out of that particular landfill space. But how can you have a crisis of a lack of land if you don't even know how much is available? You can't.

QUESTION: Of course, everything you say about New Jersey is equally true of Pennsylvania on a larger scale.

MR. MOORE: And of every State in the Country. That is true. And we find that this pertains to any type of an economic enterprise. New Jersey is a highly industrialized State. Look at the thousands and millions of cans of Campbell's soup that are sent to Pennsylvania from New Jersey every day and become waste in Pennsylvania. New Jersey doesn't want to let the very waste they created come back into New Jersey.

QUESTION: Well, that's waste that Pennsylvanians create. They consume it.

MR. MOORE: Yes, sir.

In Hunt v. Washington Apple Commission, which is another very recent case, this Court stated that -- and in that particular case they said that discrimination was spatially neutral. I submit in this case the discrimination is quite clear and abundant and blatant. They said that where there is a clear discrimination -- and the Court ultimately found that there was in that case a clear discrimination -- "the burden falls on the State to justify it (that statute) in terms of local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to protect the local interest."

The State has never made any effort to offer any non-discriminatory alternatives sufficient to protect the local interests. I have read off a few of them. There are many, many more. As a matter of fact, the Resource Conservation Recovery Act offers, itself, many nondiscriminatory alternatives, and New

Jersey, by this statute, wants to bar itself from taking part in that program.

MR. CHIEF JUSTICE BURGER: You are now consuming the finite amount of rebuttal time that you have.

MR. MOORE: I am going to have to chance it, Mr. Chief Justice, and consume it then, because I would like to pass on for the moment to the Supremacy Clause.

The Resource Conservation and Recovery Act which was enacted a few days prior to the last time I appeared here and argued. And that is why we are back now. It is a very comprehensive piece of legislation. I think it is a case, actually, of first impression for this Court in the sense that I don't recall reading a helping hand or carrot and stick type of Federal legislation, wherein you were presented with the problem: Can that type of Federal legislation preempt a State statute?

The New Jersey State statute we are talking about is both prohibitory and discriminatory. Most of the -- as I break down the Supremacy Clause cases, they dealt with primarily State statutes that were regulatory in nature, as opposed to a Federal piece of regulation, or prohibitory and a couple of them were both prohibitory and discriminatory. Douglas v. Seacost Products was that type case.

Now, I need not go into the discrimination aspect or the fact that actually the legitimate local purpose here is highly suspect, because I have covered that already.

MR. CHIEF JUSTICE BURGER: Your time has expired, Mr. Moore.

MR. MOORE: Thank you, very much.

MR. CHIEF JUSTICE BURGER: Mr. Skillman.

ORAL ARGUMENT OF STEPHEN SKILLMAN, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

This case involves the disposal of waste onto the land. Waste is not a product which New Jersey has chosen or elected to manufacture. Rather, it is what the name implies. It is the useless byproducts of human existence.

If we could eliminate the generation of all waste, we would. However, we can't do that. Human beings, in their day-to-day existence, create waste. And so long as waste continues to be created, we must find a way to dispose of it.

The only generally feasible means of disposing of common household wastes and commercial wastes at the present time is by dumping the waste onto the land. However, such --

QUESTION: Or incinerating it, isn't that true?

MR. SKILLMAN: You can incinerate, Your Honor. It is not done that much at the present time. And one of the reasons is that it's very difficult to do that without creating a different environmental problem, i.e., air pollution from the environmental problems that are created with landfills, which

I'll get into in just a moment.

You also can dump into the ocean. Again, another whole set of environmental problems. So the prevailing mode of disposal of household and commercial waste in this country today is landfilling, not the exclusive one. There is some incineration. I think there is still a limited amount of dumping into the ocean. But each one of those creates environmental and health risks.

I'd like to briefly go through what those environmental and health risks are with respect to landfilling.

One of the primary effects of landfilling is the creation of leachate. As all of the various products go into the landfill, water also comes in, either by rain or by tidal flow or one other way. And when the landfill becomes saturated it starts to produce this highly polluted liquid called leachate which can run off into both ground water and into surface waters, and ultimately can pollute the water which we use for drinking. So there is very substantial environmental danger from the leachate produced by landfills.

A second environmental danger from landfills is the creation of methane gas. It is quite common in landfills, and even those where they are using modern techniques of landfilling, for gasses to get produced in sufficient concentrations under the ground, for fires to break out as a result of a concentration of methane gas.

QUESTION: Mr. Skillman, what, ordinarily, is the

number of acres taken by a typical landfill?

MR. SKILLMAN: They run a full gamut. You may have small municipal landfills that take just the waste from an individual municipality, that may be just five-ten acres.

QUESTION: And they vary in depth, do they?

MR. SKILLMAN: Yes.

QUESTION: And yet I gather what you are telling us about leachate is common to all landfills whatever size, is that right?

MR. SKILLMAN: It is common to all landfills in the State of New Jersey. Whether or not there are landfill locations in some of the more arid Western States where it is possible to avoid that problem, I don't know. But no one has pointed out to us any landfill location in the State of New Jersey where this isn't a problem.

QUESTION: What's the number presently registered of landfills?

MR. SKILLMAN: The total number of landfills in New Jersey, presently, is over 300. And about, I think, between 50 and 100 of those are large commercial landfills.

QUESTION: And a large commercial landfill would run to what size?

MR. SKILLMAN: Again, it can run 50-100 acres. It can vary quite a bit, but it's --

QUESTION: Are they pretty well scattered up and down

the State?

MR. SKILLMAN: Well, I think, as Your Honor knows, there have been, historically, a fairly heavy concentration of landfills in the Hackensack-Meadowlands region, but there are others scattered throughout the State, yes. Of course, the problems are greatest in the most congested areas.

QUESTION: The commercial type, are they largely in the Hackensack area?

MR. SKILLMAN: Not the only locations. There are some very large commercial ones in the Hackensack-Meadowlands area, but there are others in Middlesex County, around New Brunswick. There are others in the Trenton area. The particular landfills that are involved in this case are, I think, mostly in Burlington County, the Appellants in this case. So they are not limited to the Hackensack-Meadowlands, but that is one prime location, and the location that has probably been the one of greatest concern to environmentalists in the State of New Jersey.

QUESTION: Since I was born that has been true.

MR. SKILLMAN: And I think it's only recently that people have really begun to appreciate the extent of the dangers of putting garbage into an area which is periodically inundated by the tide.

QUESTION: What are you going to do with the garbage?

MR. SKILLMAN: What are we going to do with the garbage, Your Honor?

QUESTION: What is anybody going to do with it? You say you can't dump it, can't burn it and you can't eat it.

MR. SKILLMAN: I think the long-run direction is to try to go towards resource recovery --

QUESTION: As of right now, what do we do?

MR. SKILLMAN: As of right now, we are going to continue to dump it into the land and pay the environmental price.

QUESTION: Not if you can help it.

MR. SKILLMAN: We are going to go ahead -- we don't have any choice but to go ahead and dump into land the waste that is generated within the State of New Jersey. The intent of this legislation is not to increase the size of an already great problem by forcing the State of New Jersey, not only to accommodate its own waste --

QUESTION: What's Philadelphia going to do?

MR. SKILLMAN: Well, I think that the primary problem that Philadelphia has is one of Pennsylvania law. Pennsylvania law permits a municipality in the State of Pennsylvania to enact an ordinance which will prohibit the disposal in that municipality of waste originating in other municipalities. The municipalities that immediately surround Philadelphia have enacted ordinances which prohibits the disposal in those municipalities of waste originating in Philadelphia.

So the answer as to what Philadelphia is going to do, what they should do, they should go to the Pennsylvania

Legislature and get the Pennsylvania Legislature to enact legislation that has the practical effect of overriding these ordinances --

QUESTION: Well, you don't have any complaint against a landfill as being the only feasible method as of now?

MR. SKILLMAN: We have a complaint against it in the sense that we do pay a price. We do have these environmental problems, but absent another feasible alternative, that's the way we are going to go ahead and take care of --

QUESTION: You don't have any other one?

MR. SKILLMAN: We don't have any that are practically feasible on a wide-scale basis.

QUESTION: I take it your argument is you don't want to take on Pennsylvania's problems in addition to the problems New Jersey already has.

MR. SKILLMAN: Precisely, Your Honor. It is a matter of increasing the magnitude of something that's a problem in any event.

QUESTION: I thought, Mr. Skillman, that the record showed that, although leachate was and is a problem with most if not all of the landfill operations in New Jersey and elsewhere, nonetheless, techniques were available which at the appropriate cost could be applied to not only mitigate but solve this problem.

MR. SKILLMAN: I don't think the record shows that, Your Honor. I think that --

QUESTION: I've read affidavits in the record -- maybe in this Appendix, maybe they were not introduced.

MR. SKILLMAN: There is some debate among sanitary engineers as to whether or not it is possible to construct a sanitary landfill where you will reduce to a great minimum or eliminate problems of leachate disposal.

QUESTION: Like everything else, it's a matter of cost.

MR. SKILLMAN: Well, it is a matter of cost and it is a matter of academic dispute as to whether it is possible, also.

QUESTION: There are sworn affidavits here from experts saying that it is possible.

MR. SKILLMAN: Some experts think it is possible. There are some experts who think it isn't possible.

QUESTION: Was there a judicial finding?

MR. SKILLMAN: The finding of the Supreme Court of New Jersey is that landfills cause serious environmental problems.

QUESTION: Let's assume, for a moment, these alternatives are available. Are they not equally available to both States?

MR. SKILLMAN: Both States can try. That's right. Whatever the techniques are to mitigate environmental harms -- and there are techniques to mitigate those harms, there is no question. But this is a matter of degree. They are equally available whether the landfill is located on the Pennsylvania side of the Delaware River or the New Jersey side.

QUESTION: Mr. Skillman, you said the Supreme Court of New Jersey made findings. That's unusual. What about the Superior Court? We have two cases here, do we not, the Hackensack and the --

MR. SKILLMAN: That's correct.

QUESTION: Well, did either of the Superior Courts, on this issue that my brother Stewart raised, did they make a finding?

MR. SKILLMAN: Both of the lower courts found this law to be unconstitutional.

QUESTION: No, no. On leachate, whether you can or cannot minimize it.

MR. SKILLMAN: I am getting to that. They both found it unconstitutional on the discrimination theory and did not get into that kind of a factual finding. Such a factual finding was made, based upon the record, by the Supreme Court of New Jersey, also made by the New Jersey Legislature that landfills cause environmental harm. So you've got findings by both the New Jersey Legislature and by the Supreme Court of New Jersey, generally, on the finding that landfills pose serious environmental and health dangers. And I would add that those findings are supported by numerous affidavits in the record and they are supported by scholarly literature, they are supported by reports

QUESTION: I mean the elimination of leachate, was there

a finding based on conflicting affidavits by the New Jersey Supreme Court?

MR. SKILLMAN: No, I can't say there was a specific finding on the debate in the scientific community whether it was possible to construct the ideal landfill that eliminates leachate. But I think that under the existing cases it is clear that the mere possibility that a landfill may be able to be constructed somewhere, some day, where the problems will be eliminated, doesn't prevent the New Jersey Legislature from taking other constructive steps to mitigate an existing harm in light of the fact that every existing landfill anyone can point out does pose these problems. And whether or not it's possible to construct that ideal landfill is a subject of much debate.

QUESTION: What you are saying is certainly relevant to the valid and legitimate exercise of what has compendiously come to be called the police power by the State of New Jersey. But that doesn't go to the -- certainly doesn't resolve the commerce question which is a matter of, an issue of constitutional law as the issue before us.

MR. SKILLMAN: It doesn't resolve it, but it goes very much to the Commerce Clause question. This Court has recognized in its most recent Commerce Clause decision, in the Raymond Transportation Company case, that the key consideration in terms of commerce, or a key consideration is the nature of the State regulatory concern. So, in that sense, it goes very

directly to the Commerce Clause point.

QUESTION: Mr. Skillman, could I ask you, to be sure I have your theory, if you are correct, I suppose every State could have a similar law. Every State could ban the importation of waste.

MR. SKILLMAN: I think, as a practical matter, almost every State does in one way or another.

QUESTION: What do you do with a problem of an area, such as the District of Columbia? I suppose your answer to that is well, it would just be terribly, terribly expensive to take some real estate within the District for disposal purposes, but that's that locality's problem. Is that the way you look at it?

MR. SKILLMAN: Well, I would think that were such a problem to exist in the District and there were not another feasible means of resolving that problem, I would have little doubt but that Congress would address itself --

QUESTION: To make the example fair, assume the District were just a State, like every other area, say, a very crowded State, like Delaware, Rhode Island, Connecticut --

MR. SKILLMAN: New Jersey.

QUESTION: Or even New Jersey. That it would just be terribly costly for that particular State. You say that is a matter of indifference. Each State has to bear its own cost in this area, and interstate commerce is to be disregarded. There should be no interstate market for waste disposal, is your

basic position?

MR. SKILLMAN: Yes, it is our position that this is not an area that's within the free market principles of the Commerce Clause.

QUESTION: If you are right, why would you suggest that Congress could solve the problem, or do you suggest that?

MR. SKILLMAN: I don't have any doubt, Your Honor, but that Congress has the power --

QUESTION: Under the Commerce Clause?

MR. SKILLMAN: -- under the Commerce Clause.

QUESTION: To regulate commerce in waste.

MR. SKILLMAN: That's correct. And, in fact, it has done so. It has enacted comprehensive legislation, the Resource Recovery and Conservation Act, which --

QUESTION: You are conceding this is an article of interstate commerce, then?

MR. SKILLMAN: I am conceding that for purposes of the exercise of power by Congress that it would constitute commerce.

QUESTION: What would?

MR. SKILLMAN: The sale of -- how do you characterize it -- sale of space in New Jersey for landfill.

QUESTION: At least you say it would affect commerce.

MR. SKILLMAN: It would affect commerce sufficiently to provide a foundation --

QUESTION: How about the transportation of waste? That surely is commerce, isn't it?

MR. SKILLMAN: Similarly.

QUESTION: Similarly -- that is commerce, isn't it?

MR. SKILLMAN: Surely. But this Court has recognized the power of Congress to deal with subjects such as prostitution, kidnapping, in terms of Congress' power under the Commerce Clause. And the mere fact that Congress has the power to deal with the subject matter under the Commerce Clause does not mean that the Commerce Clause, by its own force, prevents a State from dealing with that same subject matter in the fashion that New Jersey --

QUESTION: Are you arguing in this case, by the way, not only that the Federal statute doesn't preempt New Jersey's effort, doesn't foreclose the statute, but that Congress has given affirmative consent to New Jersey to do what it has done?

MR. SKILLMAN: Congress has not spoken directly to this type of statute, Your Honor.

QUESTION: What if it had said, "We know this is commerce, but we think that State laws should be the ones to control it." And that's all Congress said.

MR. SKILLMAN: I think it has come close to saying that with respect to State laws, generally.

QUESTION: Well, then, you are arguing that Congress has not only not preempted, but it has affirmatively recognized -- and even if it is interstate commerce, it has subjected it to

reach of State law.

MR. SKILLMAN: I think that Congress' findings and approach in the Resource Conservation Recovery Act, at least, supports the conclusion that the New Jersey Legislature is not prohibited by the Commerce Clause. We do not rely on that alone, but it certainly seems to be moving in the same direction, i.e., of recognizing that problems of solid waste disposal and management are essentially a local province to be governed at the State and local levels.

QUESTION: I gather you are saying, at the very least, Congress hasn't prevented New Jersey from doing what New Jersey has done. On the contrary, the Federal statute encourages New Jersey to do what it has done.

MR. SKILLMAN: That's precisely my point, Your Honor.

QUESTION: Let me take you back to the effort to analogize the District of Columbia to a State. Isn't there a difference in the unique posture of the District of Columbia that Congress, in fact all of the people of the United States, no matter what the cost may be to take care of the waste disposal problem for the District of Columbia, but New Jersey can't tax anybody except the people of New Jersey for that purpose.

MR. SKILLMAN: That's true, but I don't think it is basic to the reason that New Jersey has enacted this statute. New Jersey's basic reasons for enacting the statute are environmental.

QUESTION: It is relevant to any possible analogy between the District of Columbia, with its very limited land space, and any one of the other 50 States.

MR. SKILLMAN: I think that the District is sui generis in a great many respects, Your Honor, that being only one of them. But the fact remains that the reason, the basis for the enactment of this legislation by the State of New Jersey is not one having to do with costs. It was one having to do with environmental harm. In agreement with Your Honor, I don't want to indicate anything to the contrary on that point.

QUESTION: Congress would have the power, would it not, to go over to Virginia or Maryland and condemn a large tract of land and take it for a Federal purpose?

MR. SKILLMAN: I have no doubt.

QUESTION: New Jersey has no such power, or Pennsylvania, to do that with reference to another State, has it?

MR. SKILLMAN: No, it does not.

QUESTION: It is protected only by the Commerce Clause.

MR. SKILLMAN: That is correct.

QUESTION: Mr. Skillman, in the extent to which Congress has said New Jersey can do what it has done, has it drawn a distinction between hazardous and other wastes?

MR. SKILLMAN: Yes.

QUESTION: I mean does New Jersey have less, as far as Congress is concerned. Congress has reached in and said, "Now

we will take care of most of the hazardous waste problem."

It is the rest of it that we need in New Jersey. Is that right?

MR. SKILLMAN: Yes, the Resource Conservation and Recovery Act basically leaves solid waste disposal planning and management to the States. One major exception to that is in the area of hazardous wastes. And in that area, the Federal Government has taken -- I don't know whether to characterize it as a preemptive posture, but certainly a very active --

QUESTION: To that extent, then, your statute cannot apply to hazardous waste?

MR. SKILLMAN: We have no problem with hazardous wastes for --

QUESTION: Yes, but on its face, it applies to, your statute applies to it.

MR. SKILLMAN: No.

QUESTION: It doesn't?

MR. SKILLMAN: Perhaps, the statute --

QUESTION: I thought you started out and said it covers all wastes known to man.

MR. SKILLMAN: Our regulations, which are at page 89 of the Appendix, Section D, specifically excludes hazardous wastes which are disposed of through a disposal facility, other than by disposal on or in the land. And New Jersey presently does not register any landfill for the disposal of hazardous wastes in the land. The only circumstances under which we will

presently register a facility for the disposal of hazardous waste is by a processing or treatment facility. And a processing or treatment facility does not fall within the statute as qualified and modified by the implementing regulations on page 81 of the Appendix.

QUESTION: You say the hazardous issue isn't even here then.

MR. SKILLMAN: The concept at the present time with respect to hazardous wastes --

QUESTION: Well, the issue isn't even here.

MR. SKILLMAN: It also isn't here for another reason. There is no indication in this record that the City of Philadelphia is generating hazardous waste. There is no indication that any of the Appellant landfills receive hazardous waste. What we are talking about here is not hazardous waste, we are talking about common household waste. So whatever possible problems there may be of collision between the hazardous waste provisions of the new Federal Act and legislation similar to New Jersey's are just not --

QUESTION: Not here in this case.

MR. SKILLMAN: -- here in this case.

QUESTION: The State of New Jersey is not contending that Congress could not, if it wanted to, preempt the State from doing what it's done?

MR. SKILLMAN: No, Your Honor, no. I think you asked

me the same question last time and it's the same, we do not take that position.

QUESTION: Mr. Skillman, let me try one situation that seems to me somewhat analogous on you. Supposing the New Jersey Legislature made a finding that there was a great deal of air pollution caused by power companies, electric utilities, and therefore, to reduce the environmental hazard associated with production of power, it passed a statute that said power could only be produced for consumption within New Jersey. Would that be permissible?

MR. SKILLMAN: I think that would be a much more difficult kind of a situation. I think that case would come much closer to the natural resource cases, because what you would be talking about there is not the simple disposal of waste, but rather the manufacture of a product in which there is a recognized and established national market. There also are elements of particular States being in a better position than others to produce that particular product.

QUESTION: Isn't that precisely the point here? There is an interstate market for waste, some States can dispose of it more cheaply than others. Why is that any different? I mean each case is a byproduct of environmental harm, one is methane gas the other is smoke.

MR. SKILLMAN: I don't agree that some States can dispose of the waste more cheaply than others, for any reasons

other than the legal situation in Pennsylvania that I alluded to before which is certainly not the type of difference that --

QUESTION: Don't you think land cost -- the availability of large amounts of land -- would have something to do with the cost of disposing in it?

MR. SKILLMAN: It may, although I don't think --

QUESTION: The hypothesis before was that it is cheaper to dispose of it in New Jersey than in the District because real estate is much more expensive and very scarce here. Isn't it a function of the availability of vacant land?

MR. SKILLMAN: I don't think that that point could be established in the Philadelphia area, that the land is cheaper on the Jersey side than on the Pennsylvania side.

QUESTION: If the issue is vacant land, there is a lot more vacant land in Pennsylvania than there is in New Jersey, is there not?

MR. SKILLMAN: In the entire State there is. In terms of areas that are sufficiently proximate to Philadelphia, I don't know if there is more, but I don't think there is any less.

QUESTION: It may cost Philadelphia more to get it off in the Poconos Mountains, or some place, and they might run into a lot of problems about that, but at least there is more of it available than New Jersey has.

MR. SKILLMAN: I think that for the State, as a whole, there certainly is more of it. Whether or not, I don't want to

say that within proximate distance of Philadelphia --

QUESTION: Excuse me. Is there anything in the record on this? Because it worries me. It is my understanding that all of the land around Philadelphia is very high-priced land. The Main Line, etcetera. Is there anything in there on value, on land values around, either in Philadelphia, around Philadelphia, or on the Jersey side, or are we just surmising on this?

MR. SKILLMAN: I think that the topic is alluded to in one affidavit, Your Honor, but the record is pretty scant. The record is not good on that particular point.

QUESTION: Even the land in the Poconos is not the cheapest land in the country.

MR. SKILLMAN: We don't have any cheap land in New Jersey, Your Honor. It's all pretty expensive.

QUESTION: In a certain sense, Mr. Skillman, if your proponent's argument is bought, a State which does not, itself, have any large cities in it, but which has neighboring States that have large cities on its borders, is going to be subjected to a certain degree of servitude in that the State without any large cities can simply -- cannot under the Commerce Clause ban the disposal of refuse from other States without banning disposal of its own. Whereas, the State with the large cities in it, can simply ban all disposal of refuse and force its own cities to look elsewhere.

MR. SKILLMAN: That, as a practical matter, is the

situation we have today. Pennsylvania, as I mentioned before -- these surrounding communities have ordinances that say, "We don't want Philadelphia waste."

QUESTION: "And we won't take New Jersey waste, either," and therefore they don't violate the Commerce Clause, but they simply make Philadelphia go elsewhere.

MR. SKILLMAN: That's correct, those particular municipalities take only their own, won't take either Philadelphia or New Jersey.

I think that the case that really comes closest to this case --

QUESTION: One question on that, Mr. Skillman, does the record tell us whether most of these large areas are within the boundaries of municipalities or are some of them out in rural areas? Pennsylvania is where the municipalities have taken up all of the existing territory.

MR. SKILLMAN: We have large sprawling municipalities in our rural areas. I don't think we have such a thing as an area that's not part of a municipality and subject to the ordinances of a municipality.

QUESTION: It allows each municipality to preempt it for itself, and therefore the whole State becomes unavailable for anyone else.

MR. SKILLMAN: Well, if not the whole State, at least what is the prime area, which is those communities that are

immediately surrounding Philadelphia. I can't speak to the whole State.

QUESTION: You mention prime area. What factor makes it a prime area? Just proximity?

MR. SKILLMAN: Yes.

QUESTION: Does land value have anything to do with it?

MR. SKILLMAN: No, I think that the main variable is hauling distance from point of origin to point of disposal. You are talking about tremendous volume when you are talking about ordinary household waste, and it has to be within some reasonable hauling distance, whether it is 60 miles, 70 or 100 miles. It can't be 250 miles away when it's that kind of waste. When it is more complicated, hazardous waste that's in smaller quantities, then we can have disposal half way across the country, for example, radioactive waste.

I think the case that comes closest to this case, in terms of the Commerce Clause issue, is the case of Clason v. State of Indiana, which the Court decided in 1939. The Court in that case upheld an Indiana statute which, in practical effect prohibited the interstate transportation of animal carcasses not slaughtered for food. We would submit that there is no significant difference, in Commerce Clause terms, between the disposal of dead animals and the disposal of waste. And that the Clason case, therefore, provides very direct and very strong

support for the position of the State of New Jersey that its prohibition upon the disposal, within New Jersey, of waste originating out of State is consistent with the Commerce Clause.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:03 o'clock, a.m., the case in the above-entitled matter was submitted.)

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