

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

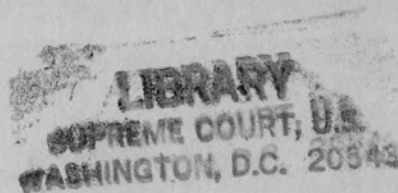
CAPTION: CHEMICAL WASTE MANAGEMENT, INC., Petitioner  
V. GUY HUNT, GOVERNOR OF ALABAMA, ET AL.

CASE NO: 91-471

PLACE: Washington, D.C.

DATE: April 21, 1992

PAGES: 1 - 51



ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

1                   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - - X

3   CHEMICAL WASTE MANAGEMENT,                   :

4       INC.,   :

5                   Petitioner                               :

6               v.   :   No. 91-471

7   GUY HUNT, GOVERNOR OF                               :

8       ALABAMA, ET AL.                                       :

9   - - - - - X

10   Washington, D.C.

11   Tuesday, April 21, 1992

12               The above-entitled matter came on for oral  
13   argument before the Supreme Court of the United States at  
14   12:58 p.m.

15   APPEARANCES:

16   ANDREW J. PINCUS, ESQ., Washington, D.C.; on behalf of the  
17       Petitioner.

18   EDWIN S. KNEEDLER, ESQ., Assistant to the Solicitor  
19       General, Department of Justice, Washington, D.C.;  
20       United States, as amicus curiae, supporting  
21       Petitioner.

22   BERT S. NETTLES, ESQ., Birmingham, Alabama; on behalf of  
23       the Respondents.

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
ANDREW J. PINCUS, ESQ.	
On behalf of the Petitioner	3
EDWIN S. KNEEDLER, ESQ.	
On behalf of United States,	
as amicus curiae supporting Petitioner	19
BERT S. NETTLES, ESQ.	
On behalf of the Respondents	27
REBUTTAL ARGUMENT OF	
ANDREW J. PINCUS, ESQ.	
On behalf of the Petitioner	49

1 PROCEEDINGS

2 (12:58 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in No. 91-471, Chemical Waste Management, Inc. v. Guy  
5 Hunt, Governor of Alabama.

6 Mr. Pincus.

7 ORAL ARGUMENT OF ANDREW J. PINCUS

8 ON BEHALF OF THE PETITIONER

9 MR. PINCUS: Thank you, Chief Justice Rehnquist,  
10 and may it please the Court:

11 The question in this case is whether Alabama's  
12 waste disposal tax, which is levied only on waste  
13 generated outside that state, discriminates against  
14 interstate commerce in violation of the Commerce Clause.

15 Petitioner Chemical Waste Management operates,  
16 owns and operates a hazardous waste disposal facility near  
17 Emelle, Alabama. This facility is authorized to operate  
18 under both Federal and state law, and virtually every  
19 aspect of its operations are closely regulated by both the  
20 Federal Environmental Protection Agency and the Alabama  
21 Department of Environmental Management. That regulation  
22 is designed to minimize to the greatest degree possible  
23 any threat to public health and the environment.

24 The statute challenged in this case levies a \$72  
25 per ton tax on waste disposed of at the Emelle facility



1 that is generated outside Alabama. Waste generated within  
2 Alabama is not subject to the tax. The trial court  
3 declared this statute invalid under the Commerce Clause on  
4 the ground that it impermissibly discriminates against  
5 interstate commerce. The Alabama Supreme Court disagreed,  
6 holding that because the overall purpose of the tax was to  
7 protect public health and the environment, the Commerce  
8 Clause's antidiscrimination principle did not apply.

9 We submit that the unconstitutionality of this  
10 provision is clear under long-settled Commerce Clause  
11 principles. A law that discriminates on its face against  
12 interstate commerce violates the Commerce Clause unless it  
13 advances a legitimate local purpose that cannot be  
14 adequately served by reasonable non-discriminatory  
15 alternatives. The Court has never found this test  
16 satisfied by a discrimination tax, save in one  
17 circumstance where the tax in fact is not economically  
18 discriminatory because it precisely compensates for an  
19 identical levy that is limited to in-state commerce.

20 QUESTION: Mr. Pincus, if there were no Federal  
21 legislation governing this area do you suppose the State  
22 of Alabama could just ban any importation of hazardous  
23 waste into the state?

24 MR. PINCUS: If there were no Federal  
25 legislation --

1 QUESTION: Right.

2 MR. PINCUS: -- at all, then that would come  
3 very close to resembling the kinds of statutes that this  
4 Court upheld in the quarantine cases.

5 QUESTION: Exactly.

6 MR. PINCUS: Of course, as your question points  
7 out, there are two distinctions here. One, this is not a  
8 quarantine. It's a tax. And two, there is the Federal  
9 legislation.

10 QUESTION: Well, do you suppose instead of a ban  
11 they could just knowingly impose a tax at such a level  
12 that it would discourage the importation?

13 MR. PINCUS: We think not, Justice O'Connor,  
14 because we think the local purposes underlying those two  
15 types of statutes are very different. In the quarantine  
16 cases the local interest that the Court identified was an  
17 interest in preventing any additional items of the  
18 particular good into the state at all. The state's  
19 interest was in reducing it to the minimum degree  
20 possible.

21 Here that is not Alabama's interest. That's not  
22 what the statute does, and in fact that's not the interest  
23 that respondents assert in their brief. Here they assert  
24 that Alabama's health and safety interest is in reducing  
25 volumes, keeping volume to some, what they regard as an

1 acceptable level. And if volume is the question, then  
2 there is no, the out-of, the state of origin makes no  
3 difference. If they're willing to have 600,000 tons, or  
4 whatever the volume is, then that volume, wherever it  
5 comes from, the risk will be the same and they have no  
6 interest in discriminating.

7 QUESTION: Well, I don't know that that follows.  
8 It seems to me rather cruel to say that the less  
9 solicitous of her sister states Alabama is, the more we're  
10 going to punish her. I mean, instead of saying we're not  
11 going to allow any states to dump anything here, they're  
12 saying well, you know, there may be some of our sister  
13 states that have real problems, and if they're really, you  
14 know, if it's that serious that they're willing to pay  
15 this amount per ton we'll let them do it. Why isn't that  
16 a reasonable solution? And it could be based on the same  
17 desire not to have any of this noxious material within  
18 Alabama.

19 MR. PINCUS: But again, Justice Scalia, that's  
20 not the interest that's underlying their statute. I mean,  
21 that's really two interests. One is an interest in  
22 reducing volumes, and the other is an interest in insuring  
23 that Alabama generators are completely taken care of and  
24 then leaving something over for the rest of the generators  
25 in the country.

1 QUESTION: Oh, but they do want Alabama  
2 generators totally taken care of.

3 MR. PINCUS: I know they do.

4 QUESTION: Of course, because they're a  
5 responsible state. They don't want to dump this on other  
6 states. The same solicitude for their sister states that  
7 causes them to set a high fee for stuff from other states  
8 but not to ban it entirely, causes them to say we'll take  
9 care of our own waste. That's the kind of state we are.  
10 Why isn't that thoroughly admirable?

11 MR. PINCUS: Well, Your Honor, the problem is  
12 they're not taking care of it. Chemical Waste Management  
13 is. If they decided to make the investments and construct  
14 and own and operate a hazardous waste disposal facility,  
15 make the technological investments, hire the people, the  
16 market participant doctrine that this Court has recognized  
17 would allow them to discriminate. But that's not what  
18 they're doing here. They're saying even though you're a  
19 private entity we want you to take care of Alabama's  
20 problem and we don't want you to be accessible, except to  
21 some very limited degree, to the rest of the national  
22 economy. And that they can't do.

23 QUESTION: Mr. Pincus, whereabouts in Alabama  
24 is Emelle?

25 MR. PINCUS: Emelle is located on the border



1 with Mississippi, sort of toward the middle of the state.

2 QUESTION: Thank you.

3 MR. PINCUS: We think that the question whether  
4 this, the interest that Alabama asserts here are  
5 sufficient to justify upholding the first discriminatory  
6 tax outside of the compensating tax area is answered by  
7 this Court's decision in City of Philadelphia, and the  
8 answer is no. The Court held in City of Philadelphia that  
9 New Jersey could not ban the disposal of out-of-state  
10 waste because there was no --

11 QUESTION: But there you didn't have the  
12 hazardous waste problem, Mr. Pincus.

13 MR. PINCUS: Well, Your Honor, New Jersey's, the  
14 rationale that New Jersey relied upon was precisely the  
15 same protection of the public health and the environment  
16 that Alabama is relying on here, and the Court expressly  
17 said we're not saying that New Jersey is wrong about the  
18 fact that the statute will protect that interest. We're  
19 just saying that there's no reason, that interest doesn't  
20 justify the discrimination. And in fact that statute,  
21 excuse me, did cover all kinds of solid waste. And the  
22 Court's opinion --

23 QUESTION: But the, what was actually being  
24 transported was simply garbage, which I suppose has some  
25 dangers inherent, but I don't believe it's the same as the

1 hazardous waste.

2 MR. PINCUS: Well, as I say, Your Honor, the  
3 Court did not, did not go off on some kind of level of  
4 hazard. It assumed for the purpose of its decision that  
5 New Jersey had a legitimate public health interest and  
6 just said it could not promote that interest in this  
7 discriminatory way because there were less discriminatory  
8 means available to it. And we think that's precisely true  
9 of the situation here. Alabama has less discriminatory  
10 means.

11 It can impose a reasonable even-handed cap. It  
12 can say you can only dispose of X hundred thousand tons,  
13 whatever level they are comfortable with, providing it  
14 means other, whatever other applicable constitutional and  
15 statutory requirements there are, or they can impose an  
16 even-handed tax. They just --

17 QUESTION: Could Alabama impose a requirement  
18 that provided for the least possible transportation of  
19 that stuff within Alabama?

20 MR. PINCUS: Alabama could try and enact an  
21 entirely different statute that did regulate  
22 transportation, and then we'd have to see precisely what  
23 it did, whether --

24 QUESTION: What if it said only hazardous waste  
25 generated within 100 miles of the Emelle facility can be

1 brought there?

2 MR. PINCUS: May be disposed of there?

3 QUESTION: May be disposed of there.

4 MR. PINCUS: Well, we think that that statute  
5 would be unconstitutional for the very reasons we are  
6 urging here. That statute doesn't regulate  
7 transportation. Waste could be transported anywhere,  
8 into, out of, through Alabama. That would just regulate,  
9 that would be a disposal regulation.

10 QUESTION: Yes, but you could lose that case and  
11 still win this one.

12 MR. PINCUS: We could certainly lose that case,  
13 Justice White, and still win this one because Alabama has  
14 not done that, and it hasn't purported to do anything  
15 about transportation.

16 QUESTION: Well, Mr. --

17 QUESTION: You -- I'm sorry.

18 QUESTION: Mr. Pincus, do you suppose Congress  
19 has indicated its affirmative consent to this kind of a  
20 scheme in Alabama?

21 MR. PINCUS: We don't think so, Justice  
22 O'Connor. First of all I should say preliminarily that  
23 Alabama does not rely on any congressional authorization  
24 here. It didn't preserve those arguments below. They  
25 were never raised in the Alabama Supreme Court.

1 QUESTION: The EPA has approved a similar state  
2 tax scheme for South Carolina. Is that right?

3 MR. PINCUS: Well, we -- let me just, I'm sorry  
4 -- in addition to the procedural problem, we don't think  
5 Congress has authorized discrimination here. This Court's  
6 precedents make clear that congressional authorization  
7 must be unambiguous, and there's just nothing in these  
8 statutes that are pointed to by the amici that constitutes  
9 unambiguous authorization.

10 One provision is a savings clause similar to the  
11 one that the Court found insufficient in Wyoming against  
12 Oklahoma and a number of other cases. The other is a  
13 statute that authorizes EPA to review state programs, and  
14 if it finds them consistent with the Federal program,  
15 authorize the states to, EPA will withdraw and essentially  
16 the states will be the hazardous waste regulator in the  
17 state.

18 Now, that says, that's a limitation on state  
19 authority because what that statute says is that state  
20 regulation must be consistent with the Federal scheme.  
21 And it's in implementing that statutory mandate that EPA  
22 reviewed the South Carolina discriminatory tax and found  
23 that it did not violate the consistency requirement. Now,  
24 EPA, as I say the statutory scheme and the regulation  
25 don't give South Carolina the authority to discriminate.



1 Second of all, EPA did not purport to be applying the  
2 Commerce Clause. It purported to be applying a completely  
3 different requirement that may or may not be overlapping.

4 We think that the way the schemes fit together  
5 is clear. The Commerce Clause exists as a free-standing  
6 limit on state authority, and EPA has apparently  
7 determined, or at least in that case determined that  
8 something that might, that whether or not something  
9 violated the Commerce Clause was irrelevant for its  
10 decision whether the state program was consistent. But we  
11 don't think that has anything to do with the Commerce  
12 Clause challenge we have brought in this case.

13 QUESTION: Mr. Pincus, suppose it could be shown  
14 that what Alabama had in mind was it wanted to be sure  
15 that there were private facilities available within  
16 Alabama to dispose of dangerous materials in Alabama,  
17 which is certainly a substantial state interest. So it  
18 allowed Alabama residents to dispose of them at private  
19 facilities. It also found that these facilities would not  
20 be cost efficient, could not be supported without  
21 accepting some out-of-state waste. So they put, they  
22 adopted the statute they have here. You can bring it from  
23 out-of-state but you have to pay a lot more.

24 Why wouldn't that be a reasonable, thoroughly  
25 reasonable state scheme based upon the state's interest in

1 disposing of dangerous materials and keeping out as much .  
2 dangerous material as possible, consistent with managing  
3 their own wastes?

4 MR. PINCUS: Well, Your Honor, I think the  
5 problem with the hypothetical is that it's focusing on the  
6 state as the market. And what the Commerce Clause, what  
7 the framers decided is that the Nation is the economic  
8 market, and Alabama can't set up --

9 QUESTION: Not for dangerous goods. The states  
10 can be the markets for dangerous goods. Can't they?  
11 Haven't, don't our cases say that, that they can keep out  
12 dangerous materials from other states?

13 MR. PINCUS: In think your cases say that if  
14 there was a quarantine statute, a flat ban on any  
15 importation, and if the state proves the kind of danger  
16 that was established in those cases, that those kinds of  
17 statutes will be upheld. Not because there is some  
18 dangerous items exception to the Commerce Clause, but  
19 because in that particular situation that's the least  
20 discriminatory means effectuating a particular state  
21 interest.

22 QUESTION: All or nothing at all. You have to  
23 keep it out entirely or else you can't take any account of  
24 the dangerousness.

25 MR. PINCUS: Well, you cannot take account of it

1 in -- if the state doesn't have that interest, then it's  
2 not entitled to discriminate because it's interest is by  
3 definition less. I mean, we're just looking at what's the  
4 state's interest here. Alabama has said we're willing to  
5 tolerate X tons. Now, it also says we'd really like, we  
6 want this facility to take care of all Alabama people  
7 first, to put them first in line essentially. But that  
8 kind of argument would sweep much too broadly, as we set  
9 out some hypotheticals in our brief, if that were true.

10 This Court's decision in the New England Power  
11 case that there could be discrimination because it would  
12 be nice for the low cost energy that was generated by  
13 hydroelectric plants within the state to be accessible to  
14 the state residents should have come out differently. The  
15 state held that wasn't a legitimate state interest because  
16 the state doesn't have an interest in discriminating,  
17 essentially, and that's the interest that Alabama is  
18 asserting here. It sort of, the very interest is  
19 inconsistent with what underlies the Commerce Clause.

20 QUESTION: Of course if Alabama could prove that  
21 there was no safe way to dispose of this stuff you would  
22 lose, wouldn't you?

23 MR. PINCUS: If Alabama --

24 QUESTION: Because then you'd be in the same,  
25 you'd be in the same category as the quarantine cases.

1 MR. PINCUS: If Alabama had enacted a quarantine  
2 statute which indicated that that was its interest, and if  
3 it showed that in fact allowing additional items such as  
4 this into the state, yes, then I think we'd lose. But as  
5 I said earlier, we think that they haven't done either.  
6 They haven't enacted a quarantine statute. They haven't  
7 said that that's their interest. They have said their  
8 interest is in limiting volumes. They said that would  
9 take care of the public health risks that they see. And  
10 we think that if that's their interest there is a non-  
11 discriminatory way to do it.

12 QUESTION: So in effect you're saying, as I  
13 guess you did to Justice Scalia, that it's got to be an  
14 all or nothing rule?

15 MR. PINCUS: I think that's right. And I should  
16 say in this context I'm not sure that even if they adopted  
17 the all, the quarantine, that they could meet the standard  
18 for establishing that there is the threat of imminent  
19 massive danger that was present in the quarantine cases  
20 because there is a very, very comprehensive Federal and  
21 state regulatory scheme here. The Federal statute defines  
22 these substances as hazardous if they are not properly  
23 managed. But they are properly managed. There is a  
24 management scheme in place.

25 In the quarantine cases what the states were



1 saying is there was no intermediate regulatory scheme that  
2 limited the hazards that were posed by the weevils or the  
3 infected cows. The question was can we keep them out.  
4 Here we have a regulatory scheme --

5 QUESTION: Well, it seems to me that you're  
6 conceding that noxious wastes of this kind cannot be  
7 distinguished from quarantine if a quarantine law is  
8 passed. I thought --

9 MR. PINCUS: No, Your Honor, that's what I was  
10 just saying is I think this case is different because  
11 these regulatory schemes are in place, and I think Alabama  
12 would have difficulty making a showing of uncontrollable  
13 danger that was, that the states had to make in those  
14 cases to justify their quarantines precisely because there  
15 is here a regulatory scheme that covers transportation,  
16 every facet of these wastes' handling and disposal is  
17 covered in a way that very, very significantly lessens the  
18 danger.

19 QUESTION: Is one way to characterize that  
20 circumstance of the law to say that there is a commerce in  
21 waste, but that there was not a commerce in the noxious  
22 products that were the subject of the quarantine cases?  
23 That's something of a legal conclusion, but --

24 MR. PINCUS: I think many of the quarantine  
25 cases do state that those items are not items of commerce

1 because they are so objectionable, because they threaten  
2 the state, the very existence of life and the environment  
3 within the state, and we don't think -- and therefore the  
4 legal conclusion was they are not commerce, and because of  
5 the state of the court's jurisprudence at the time the  
6 state can regulate them.

7 Here we think we fit within that paradigm,  
8 although the court's jurisprudence has moved away so it's  
9 not necessary to hold that these things, whether -- the  
10 court has concluded that everything is commerce because it  
11 hasn't found the states --

12 QUESTION: And it seems to me the quarantine  
13 cases might be distinguishable on that basis.

14 MR. PINCUS: Well, I think that's right. I  
15 think that those items were found to be noxious and poses  
16 uncontrollable risk, and the Federal scheme eliminates to  
17 a large part that risk. We don't -- maybe not entirely,  
18 maybe there's some risk, just as there's a risk of flying,  
19 when you get into a plane Federal regulation --

20 QUESTION: But I'm not sure that the existence  
21 of state regulation is what controls whether there is a  
22 commerce in waste or not. That's where I don't follow  
23 you.

24 MR. PINCUS: Well, there is, there certainly is  
25 a business in waste and in the transportation and

1 disposal --

2 QUESTION: And there was not that finding in the  
3 quarantine cases?

4 MR. PINCUS: There certainly was not, Your  
5 Honor, and that is an important distinction also.

6 QUESTION: So if someone wants to go into the  
7 business of shipping diseased cattle from one state to  
8 another, does that diseased cow become an item of  
9 commerce?

10 MR. PINCUS: The diseased cattle would be an  
11 item of commerce, and I think that follows exactly from  
12 what the Court said in City of Philadelphia where it says  
13 everything is an item of commerce. It would not  
14 necessarily -- the ability of the state to regulate would  
15 turn on whether it could show that its regulation advanced  
16 the legitimate local purpose that could not be satisfied  
17 by reasonable non-discriminatory means. And it may be for  
18 diseased cows the state could show that the only way for  
19 it to protect itself was to impose an import ban, and so  
20 therefore the ban could be upheld. Here there is no  
21 import --

22 QUESTION: So it's the same test in any event  
23 as --

24 MR. PINCUS: It's exactly the same test. That's  
25 what I'm saying.

1           If the Court has no further questions I'll  
2   reserve the remainder of my time for rebuttal. Thank you.

3           QUESTION: Thank you, Mr. Pincus.

4           Mr. Kneedler, we'll hear from you.

5           ORAL ARGUMENT OF EDWIN S. KNEEDLER

6           ON BEHALF OF UNITED STATES

7           AS AMICUS CURIAE SUPPORTING PETITIONER

8           MR. KNEEDLER: Thank you, Mr. Chief Justice, and  
9   may it please the Court:

10          The very purpose of the Commerce Clause was to  
11   establish an area of free trade among the states and not  
12   to permit a multiplication of isolated trade zones within  
13   each of the separate states. And the Commerce Clause has  
14   been consistently construed by this Court to, of its own  
15   force in a self-executing manner to prohibit barriers  
16   imposed by the states to the free movement of commerce  
17   among the states. In particular where a statute  
18   discriminates against interstate commerce, that statute  
19   can be sustained only if it serves a legitimate local  
20   purpose and if there is no available, excuse me, non-  
21   discriminatory means to accomplish it.

22          Beyond that in the special area of taxation,  
23   which we have here, the only discriminatory taxes that  
24   have been sustained have been ones that are in fact not  
25   discriminatory because they are designed to equalize a tax



1     burden, excuse me, to compensate for a tax imposed on  
2     in-state interest.

3             Now those purposes are present entirely in this  
4     current situation. Hazardous wastes are generated as the  
5     by-product of essential industries in interstate commerce,  
6     petrochemicals, petroleum refining, others. To exempt an  
7     in-state industry from, generator of hazardous wastes,  
8     from the payment of a fee that out-of-state waste  
9     generators have to pay is exactly the sort of  
10    discrimination in favor of local industries against out-  
11    of-state industries that the Commerce Clause was designed  
12    to prohibit.

13            Beyond that --

14            QUESTION: You could say the same thing about  
15    diseased cattle. To allow in-state ranches to have  
16    diseased cattle, but not to allow any out-of-state ranches  
17    to ship diseased cattle into the state is, you know --  
18    it's the same thing. It does discriminate in favor of  
19    in-state people in a way.

20            MR. KNEEDLER: It does, but there are several  
21    ways to look at the quarantine cases. One of them is  
22    that, as the response to the Chief Justice illustrated a  
23    short time ago, in fact the quarantine cases are a subset  
24    of the category in which the state interest could not be  
25    served by any non-discriminatory manner. But there's

1 another element of the quarantine cases which simply is  
2 not present here but I think is an essential element, and  
3 that is the element of imminence of the risk, urgency of  
4 the risk. A quarantine is an emphatic and swift remedy  
5 for a perceived urgent problem.

6 In fact in the Hannibal and St. Joseph Railroad  
7 case on which Alabama relies, the Court described the  
8 quarantine cases as essentially grounded in self-defense.  
9 And one of the essential elements of self-defense is  
10 imminence. You are only entitled to take that action if  
11 there is an imminent harm. And in Clason, for example,  
12 one of the cases cited, it was pointed out that the  
13 animals would begin to decay and cause harm within 24  
14 hours.

15 None of that is present here in particular. The  
16 hazardous wastes, as Mr. Pincus described, are subject to  
17 a comprehensive cradle to grave Federal regulatory scheme.  
18 From the time of generation through storage through  
19 transportation through treatment and disposal they are  
20 subject to a uniform minimum set of standards which can be  
21 supplemented by the states precisely to guard against  
22 those sorts of imminent risks.

23 QUESTION: Mr. Kneedler, what if the state  
24 decided to start all over again from scratch and it could  
25 prove that in fact there was no safe way to handle the

1 stuff, that in-state, out-of-state, it was all a health  
2 hazard regardless of what the Federal Government was  
3 saying. Does the fact that the Federal Government has  
4 enacted this comprehensive scheme for regulating  
5 transportation and treatment, or would that fact in effect  
6 bar us from considering the state's proof? In other  
7 words, has the congressional action in effect said this  
8 material is going to be treated, must be treated for  
9 Commerce Clause purposes as an article of commerce which  
10 is not subject to the quarantine rules.

11 MR. KNEEDLER: I don't know whether it would be  
12 an absolute bar. I think Alabama's burden would be  
13 weighty indeed, because Congress has, by taking this  
14 problem firmly in hand and by treating what might  
15 otherwise be a local activity such as the generation of  
16 waste in the same way that raising cattle might ordinarily  
17 be local, but by taking it entirely in hand in this  
18 Federal regulatory scheme and including the transportation  
19 of waste, Congress has really treated it as a national  
20 problem.

21 And as a consequence of that there has been a  
22 national interstate industry growing up around the various  
23 aspects of hazardous waste. As we point out in our briefs  
24 there are, as a consequence of the Federal statute and  
25 amendments to it there are important incentives to adopt

1 treatment of hazardous waste before they can be disposed  
2 in land disposal sites. And those treatment requirements  
3 are often capital intensive, and it would be duplicative  
4 at best and counter-productive at worst to require a  
5 landfill in every state in fact to require the various  
6 types of disposals of hazardous wastes in all of the 50  
7 states.

8 As we point out in our brief, every state in the  
9 Union exports some hazardous waste, and the average state  
10 exports to 19 other states to take advantage of at least  
11 12 disposal or treatment sorts of technologies. So what  
12 has grown up partly under the impetus of the regulatory  
13 scheme which has become much more complex since the time  
14 this Court considered RCRA in the background of  
15 Philadelphia v. New Jersey has been one that treats this  
16 problem as a national problem.

17 And so we would, the Federal Government and EPA  
18 would be quite concerned about the reintroduction of  
19 attempts by the states to as it were try to improve on  
20 that system. If the states believe that additional  
21 incentives are required, if certain states now sited with  
22 land disposal facilities believed that certain incentives  
23 are required for other states to develop additional sites  
24 that would not be redundant, then the proper course is to  
25 take that to Congress, which can authorize through



1 authorizing taxes, even discriminatory taxes, or other  
2 incentives, can take steps that are necessary to make sure  
3 the adequate capacity is present.

4 But that has not happened here, and Alabama  
5 instead has tried to take matters into its own hands by  
6 adopting what it thinks is a proper regulation of what is  
7 after all interstate commerce, by imposing a tax at a  
8 level it thinks is appropriate to regulate, as it were,  
9 the movement of goods from one state to another. That's a  
10 function that's assigned to Congress under the Commerce  
11 Clause, not to the states.

12 And I think that gets to the reason why a tax  
13 rather than a ban, even though it may seem lesser  
14 included, doesn't survive on the quarantine theory. It's  
15 because the state, the state's interest is much more  
16 indirect. The point that was pointed out in the Baldwin  
17 case, Baldwin v. Seelig, that said if there is a, if there  
18 is the sort of state interest that requires that kind of  
19 immediate action it calls for an immediate response, not  
20 the kind of indirect regulation that a tax will do.

21 QUESTION: You wouldn't allow a total ban  
22 either, I gather from what you said before.

23 MR. KNEEDLER: Well, it would be subject to  
24 separate standards. First of all there may be a question  
25 as to whether RCRA would allow a total ban. But if there

1 was a total ban there would be a question to what extent  
2 that was consistent with the state's interest. If the  
3 total ban was premised on the kind of imminent danger,  
4 clear and present danger that the quarantine cases have  
5 been premised on, if the state could make that factual  
6 showing, then it might bring itself within the quarantine  
7 cases.

8 The difference here is that Alabama is not  
9 trying to regulate against imminent harm. Quite the  
10 contrary. Most of the harms that Alabama cites in here  
11 are ones that are 20, 30, 40 years down the road and  
12 speculative at that. And in trying to regulate to serve  
13 those purposes the State is essentially second guessing  
14 RCRA and the surplus scheme that have been set up by  
15 Congress to do the best that Congress can on the basis of  
16 current knowledge in the area to guard against and impose  
17 financial requirements to insure against long-term damage  
18 to local economies and the local environment.

19 So I think that the, Alabama's effort to bring  
20 this case within the quarantine rationale is fundamentally  
21 misguided. In fact it's Philadelphia v. New Jersey which  
22 answers this case. There the Court did not disturb the  
23 New Jersey Supreme Court's conclusion that the statute  
24 there furthered important environmental concerns and in  
25 fact hazardous wastes were embraced by the New Jersey

1 statute. But the Court said that the ultimate purpose of  
2 the New Jersey statute was irrelevant if in furthering  
3 that purpose the state engaged in the sort of  
4 discrimination that the Commerce Clause would otherwise  
5 prohibit. And that's exactly what New Jersey did in that  
6 case by discriminating against out-of-state commerce.

7 And that is not some new fangled notion that  
8 came up in Philadelphia v. New Jersey. It goes back as  
9 far as Guy v. Baltimore, which we quote on page 25 of our  
10 brief. There the Court acknowledged the --

11 QUESTION: You don't agree with Mr. Pincus then  
12 that the Commerce Clause jurisprudence has changed?

13 MR. KNEEDLER: I think the labels or the  
14 categories in which the Court has described Commerce  
15 Clause analysis has changed, but I think that the  
16 essential truth of what the Court has been driving at in  
17 the cases has really not changed. That in the quarantine  
18 cases, in saying that a state can impose a quarantine the  
19 Court used to say that those are not legitimate items of  
20 commerce. I think now the analysis would be that a  
21 quarantine is valid if it's the only measure that can be  
22 taken to advance the state interest.

23 QUESTION: Thank you, Mr. Kneedler.

24 MR. KNEEDLER: Thank you, Mr. Chief Justice.

25 QUESTION: Mr. Nettles, we'll hear from you.

1 ORAL ARGUMENT OF BERT S. NETTLES

2 ON BEHALF OF THE RESPONDENTS

3 MR. NETTLES: Thank you, Mr. Chief Justice, and  
4 may it please the Court:

5 Modern Commerce Clause concepts have never been  
6 previously confronted in this Court with a hazardous waste  
7 police power control case, and as we consider that I would  
8 suggest there are three key factors in this case to  
9 consider. One, that hazardous wastes are inherently  
10 dangerous to human safety and to the environment and to  
11 the health. There is just simply no safe way to  
12 permanently landfill hazardous waste, and the record in  
13 this case is full of documentation on that issue.

14 Now, as such, considering the imminent and the  
15 inherent dangers and also the fact there is no safe way to  
16 permanently landfill hazardous waste, do the Commerce  
17 Clause, the typical Commerce Clause protections inure to  
18 toxic items of this type? Second factor, at the very  
19 least the unique problems of hazardous waste and the  
20 landfilling of hazardous waste should be considered if the  
21 Alabama statute is subjected to the usual balancing test  
22 or the strict scrutiny test. And the third factor we  
23 would submit is that the national interest would be better  
24 served by upholding Alabama's differential fee. And I --

25 QUESTION: Do you think anything you have said



1 has suggested anything else than that Alabama could keep  
2 out all out-of-state hazardous waste?

3 MR. NETTLES: Your Honor, that would be a more  
4 serious test. I think a ban under these facts --

5 QUESTION: I don't know. I would think it would  
6 be easier. I think it would be easier under your  
7 rationale. If there's all this hazard that can never be  
8 cured, why wouldn't you just keep them all out?

9 MR. NETTLES: Your Honor, this is a modified  
10 type Commerce Clause case. It's the volumes. It's the  
11 volumes of the hazardous waste that present the problem.  
12 One barrel of outside hazardous waste doesn't contain  
13 germs that are going to set off an epidemic, but when you  
14 get to 40,000 truck loads in one year, as in 1989, 85 to  
15 90 percent of that from out-of-state, being permanently  
16 buried --

17 QUESTION: Well, why don't you just, why don't  
18 you just limit the amount of outside waste that can come  
19 in?

20 MR. NETTLES: Well, that is one of the purposes  
21 of the statute. The primary purpose was to reduce this.

22 QUESTION: One of the purposes is also to make  
23 some money off of outside waste.

24 MR. NETTLES: Your Honor, we would --

25 QUESTION: Isn't that right? I mean --

1 MR. NETTLES: That's one of the factors. Reduce  
2 the volumes, control under Alabama's inherent police power  
3 tradition, and number two, compensation for the burdens  
4 that are being transferred from North Carolina, from other  
5 exporting states, most of the states in the country, some  
6 48 other states, that transfer of risk that they are  
7 sending into Alabama, to ask them to share in the burden.  
8 And that --

9 QUESTION: You don't think the same thing would  
10 apply to just plain trash?

11 MR. NETTLES: No, sir. No, sir. That's the  
12 difference in this and the City of Philadelphia case. I  
13 would cite one instance, the question has been raised as  
14 to possible preemption and the City of Philadelphia case  
15 did hold that they, the Court agreed with the New Jersey  
16 court that the state law had not been preempted by the  
17 Federal law, which in that case was RCRA. That state law,  
18 the traditional police power concept, still has room to  
19 operate.

20 To give an illustration as to the volume problem  
21 we have in Alabama, consider the Chicago flooding. The  
22 question would be would the Chicago River have burst  
23 through the retaining wall had only 11 percent of the  
24 volume been in the Chicago River rather than the full 100  
25 percent. See, this is the problem that Alabama has. It

1 does have an imminent and present threat, whether we have  
2 a tornado that may swoop down in these open trenches  
3 tomorrow or an earthquake.

4 We have there these millions of tons of  
5 hazardous waste already in place and they're going to be  
6 there forever, and that's the very nature of the problem  
7 that differs from the typical quarantine case. And that's  
8 why Alabama has approached this in a way of trying to be a  
9 responsible market player, but trying to address the  
10 tremendously increasing volumes that may in themselves  
11 have changed the very nature of the risk, as in the  
12 Chicago flooding case, because --

13 QUESTION: Well, I guess Alabama could impose a  
14 uniform tax on all waste, in-state and out.

15 MR. NETTLES: And that is done under a base fee.  
16 And it's interesting and reflective of Alabama's problem  
17 to address this across the board, that the same statute  
18 now under attack raised the base fee that applies to all  
19 in-state interest and the results of that in the 18 months  
20 of operation, 17.5 months, is that the ratio of out-of-  
21 state waste to in-state waste has actually slightly  
22 increased, going from an average of 85 to 90 percent to 89  
23 percent hazardous waste still coming in from out-of-state.  
24 We're still dealing with tremendous volumes.

25 QUESTION: So you're defending a scheme that's

1 ineffective?

2 MR. NETTLES: No, sir. The effect of it has  
3 been to reduce the volumes, to reduce the volumes of  
4 hazardous waste coming in at a staggering proportion,  
5 almost 800,000 tons that had been increased over 200  
6 percent in the years, immediate years preceding this. And  
7 the second is to compensate Alabama for the total problems  
8 that would result from both the short range, financial  
9 problems, of health, safety concerns, and regulating, and  
10 in monitoring, and in the eventual remediation, clean up,  
11 and abatement that will be involved.

12 QUESTION: But if the fee is so successful it  
13 seems to me that then everyone should have to pay it.  
14 Then you have simply a blatant discrimination with no  
15 purpose.

16 MR. NETTLES: Well, the purpose we have --

17 QUESTION: Well, your purpose could be precisely  
18 served, as you have just demonstrated it seems to me, by  
19 having a fee that's the same for in-state and out-of-  
20 state.

21 MR. NETTLES: Well, the purpose there --

22 QUESTION: Now we have a simple Commerce Clause  
23 case.

24 MR. NETTLES: But, Your Honor, we would submit  
25 that this is a police power case in the sense that Alabama



1 is one of a handful of states that happen to have a  
2 hazardous waste landfill in operation at the time of RCRA,  
3 and that since RCRA was adopted and since the amendments  
4 to RCRA in 1980 there have been no further hazardous waste  
5 facilities with one exception permitted.

6 The difficulty is because the national scheme  
7 has failed, and we are told simply do, sit back and do  
8 nothing, because EPA has done nothing and they talk about,  
9 the EPA problems have been addressed and of course the  
10 General Accounting Office Manual of June 1980, the report  
11 to Congress on the hazardous waste long-term problems that  
12 EPA had not addressed. And the record itself contains  
13 complete documented findings of the trial court as  
14 affirmed by the Alabama Supreme Court that these problems  
15 are already very real, not just the threats, but there is  
16 the imminent danger already resulting from leakage. The  
17 facility there is already leaking into the settlement  
18 chalk. And this was a finding of the trial judge in  
19 stating that that was the apparent weight of the evidence,  
20 and found that to be the case. And in this --

21 QUESTION: So you're going to cure that just by  
22 raising the price of out-of-state waste?

23 MR. NETTLES: By reducing the volumes. What  
24 we're doing there is addressing what we fear to be the  
25 change in the very nature of the risk, and that's what

1 distinguishes out-of-state waste from in-state waste, the  
2 tremendous volumes coming in from outside. Because this  
3 could be, we fear, a synergistic or compounding effect.

4 QUESTION: Well, your in-state wastes are  
5 contributing to the whole problem too, aren't they?

6 MR. NETTLES: But to a much lesser extent, and  
7 this, Alabama's --

8 QUESTION: Well, I don't know. I don't know.  
9 That still doesn't explain why you're charging somebody  
10 from outside twice what you're charging inside.

11 MR. NETTLES: What we're doing is attempting to  
12 approach --

13 QUESTION: Does it? I don't --

14 MR. NETTLES: -- approach this on a balancing  
15 bit. We are not saying we are going to isolate ourselves  
16 from the national problem. We're not attempting a total  
17 ban. What we have done is saying we want to be a  
18 responsible player, but one thing we want to take less of  
19 this short and long-term risk by controlling the volumes,  
20 and we have substantially reduced the volumes although  
21 they are still coming in at over 250,000 tons a year. And  
22 the second is to compensate us.

23 QUESTION: Well, I can't think of an interstate  
24 Commerce Clause case where the out-of-state burden was  
25 greater than the in-state burden just by share of numbers.

1 MR. NETTLES: Your Honor --

2 QUESTION: You'd have to talk about trucking,  
3 traffic, whatever it is. It's always the out-of-state  
4 that causes the problem. But the point is you can't  
5 discriminate.

6 MR. NETTLES: That's the uniqueness of this  
7 case, we submit. This is a police power case. This is a  
8 modified quarantine case. It's an extension of Maine v.  
9 Taylor in the sense that a total ban Alabama felt was not  
10 appropriate or possibly not necessary, possibly Alabama  
11 felt could not be as well defended as addressing a more  
12 balanced reasonable approach not removing us from the  
13 market.

14 Now, the City of Philadelphia situation was  
15 quite different. Not only do we have hazardous waste here  
16 and the inherent nature and problem of the problem of  
17 hazardous waste, we also did not have a total ban. There  
18 is, we submit, the record shows that this is not an  
19 economic protection case in the sense that we are still  
20 allowing hazardous waste to come in. What we have, too,  
21 is the fact that there can be, we fear, a distinguishing  
22 factor with respect to the amounts that, the volumes that  
23 Alabama in its findings of fact in the legislative  
24 pronouncement, the trial court having held that these  
25 legislative findings of fact were substantiated by the

1 evidence, that these findings substantiate the concern of  
2 volumes changing the very nature of the risk. And you  
3 have this intersection of police power with Commerce  
4 Clause cases.

5 QUESTION: Mr. Nettles --

6 MR. NETTLES: Yes, sir.

7 QUESTION: It's a very sensible way to allocate  
8 the limited portion of your landfill that you want to go  
9 to out-of-state hazardous waste to use the rationing  
10 mechanism of price. It has been found to be very .  
11 efficient, and indeed the out-of-state people who most  
12 need it would use it if you use a high price.  
13 Unfortunately that rationing mechanism runs a real risk of  
14 being abused, and maybe we should adopt a Commerce Clause  
15 principle that if you wanted to exclude it entirely,  
16 that's okay, or even if you wanted to place a certain  
17 tonnage limit on out-of-state, that might be okay. But  
18 here you've used price, and as far as we know you may just  
19 be doing this just to milk out-of-staters, just as has  
20 been done in other Commerce Clause cases.

21 MR. NETTLES: But no hazardous waste situation,  
22 Your Honor, no record in any of those tax cases or highway  
23 transportation cases, any that approach the concern or  
24 even talk about police power considerations that are  
25 involved here with the protection of health and safety and



1 the environment. And that this --

2 QUESTION: All we know for sure is that you're  
3 making a lot of money on it and imposing substantial costs  
4 on out-of-state industries which your own industries don't  
5 have to bear. We know that for sure. Whether it's going  
6 to reduce volume or not, you know, it may a little bit.

7 MR. NETTLES: But Alabama industries are there.  
8 They're going to be there for the eventual abatement,  
9 remediation, and clean up. They'll be there if the  
10 disaster strikes in the interim, if there is a further  
11 earthquake, if there is a tornado. And the Justice  
12 Department says well, these are threats. Well, threats  
13 alone can be sufficient to and are held to be sufficient  
14 to warrant police power protection of state law as  
15 evidenced in Maine v. Taylor and also in Reid v. Colorado,  
16 the case cited by the petitioner.

17 And that's what we have here, not only the  
18 threat but also the very real present problems. We've got  
19 a national situation that hasn't worked. There is no  
20 effort being made by EPA to get other facilities to be  
21 brought on-line. There has been talk in the brief about  
22 the NIMBY syndrome, the not in my backyard syndrome.  
23 That's what Alabama has been fighting.

24 And the problem here is the fact that under the  
25 present plan that if this type of situation, the position

1 of the Justice Department and EPA and petitioner are  
2 upheld, then any state looking at the problem rather than  
3 going forward and trying to take a responsible position  
4 and permitting, allowing the citing of a hazardous waste  
5 facility within their own state would think again, because  
6 to do so you would lose control. You would have again the  
7 threat of out-of-state swamping wherever it's located,  
8 whether in Maine or North Carolina or any of these other  
9 states.

10 But to approve the concept, and that's all we're  
11 talking about here, the amount of the fee has never been  
12 challenged in the courts below. It's just the concept  
13 that we can't do anything differently with respect to out-  
14 of-state waste. And because of that we have the very real  
15 problem that there is no relief in sight, and if we did  
16 nothing, no matter what we did whether it was a ban or --

17 QUESTION: But Mr. Nettles, isn't it true that  
18 you do have a cap on the amount of waste that, altogether?

19 MR. NETTLES: Yes, sir. And that has helped  
20 bring down the volumes, but it still doesn't --

21 QUESTION: Well, why do you need an additional  
22 means to bring it down?

23 MR. NETTLES: Because of the fact that we still  
24 have the volume of over 250,000 tons of out-of-state  
25 hazardous waste coming in. Ideally --

1 QUESTION: Is that your limit, the 250,000 tons?

2 MR. NETTLES: No. Yes, sir, it's closer to  
3 300,000 tons across the board. It's interesting again  
4 that the --

5 QUESTION: But the cap doesn't differentiate  
6 between in-state and out-of-state waste?

7 MR. NETTLES: No, sir, it does not.

8 QUESTION: So if you've got a cap that  
9 apparently you can handle, why then do you have to charge  
10 some waste more than others?

11 MR. NETTLES: Because the problem is still  
12 there. Eventually it's going to leave. Now, that has  
13 been the finding of all the --

14 QUESTION: Yeah, but does the cap keep it from,  
15 I mean, does the additional, the \$72 tax make it less than  
16 the cap, or just another way is making sure nobody  
17 violates the cap?

18 MR. NETTLES: The more waste you put into that  
19 river of toxins there at Emelle --

20 QUESTION: But you can't put in more than the  
21 cap, can you?

22 MR. NETTLES: No, sir, but you still have, even  
23 with the cap in place, that's left us with 250, more than  
24 250,000 tons of out-of-state waste coming in.

25 QUESTION: But you're going to have that 250,000

1 tons no matter whether you've got this tax or not.

2 MR. NETTLES: And the point is then you look at  
3 the compensatory nature of it, the fact that this is a  
4 transfer of risk, of actual risk from out-of-state into  
5 Alabama of very dangerous toxins that are involved in  
6 this, unlike anything else. It's a very unique situation.

7 QUESTION: Do you ship any hazardous waste out  
8 of the state yourselves?

9 MR. NETTLES: Yes, sir. And we would have no  
10 problem with the concept --

11 QUESTION: If they prohibited that, that Texas  
12 wouldn't take that.

13 MR. NETTLES: We would have no problem with the  
14 fact that other states who accommodate our waste water  
15 situation, we have an agreement set up that they charge a  
16 differential fee to accommodate Alabama in that respect,  
17 just as we are accommodating other states who are  
18 transferring their problems to us.

19 QUESTION: I thought we overruled such  
20 reciprocal arrangements in the Katrell case.

21 MR. NETTLES: But that, Your Honor, we submit  
22 was not a police power hazardous waste case. Again, this  
23 is a very --

24 QUESTION: You say police power. I can't think  
25 of anything that isn't the police power. Everything is



1 the police power.

2 MR. NETTLES: Not where the health and safety  
3 and welfare of the people are involved and environmental  
4 concerns.

5 QUESTION: I can't think of any law that's not  
6 for the health, safety, and welfare of the people. It's a  
7 question of degree.

8 MR. NETTLES: Well, the degree here is certainly  
9 accentuated and it is set out in the record that we have  
10 here the documentation not only of the trial in Alabama,  
11 4-day trial and the depositions that went on before then,  
12 but we have the General Accounting Office's own report  
13 that shows that there is just no long range planning by  
14 EPA, has been none to plan beyond 30 years. And yet  
15 everybody concedes that landfilling is totally  
16 undesirable. It's the least desirable form of disposing  
17 of hazardous wastes because it's going to be with us  
18 forever and there is just no way to keep it from leaking.

19 The problem again is the volumes, where you have  
20 these large volumes of out-of-state hazardous waste coming  
21 in and have been coming in and are continuing to come in.  
22 Then the threat is that that changes the very nature of  
23 the risk, just as again the Chicago River situation.

24 QUESTION: What do they mean by sanitary waste  
25 disposals?

1 MR. NETTLES: Your Honor --

2 QUESTION: Do you think that's an oxymoron or  
3 something?

4 MR. NETTLES: Yes. There's just no way you can  
5 do it, and that's the finding of the General Accounting  
6 Office. That's the testimony. This stuff is already out  
7 there. The debate in the trial court was how long will it  
8 take before it leaks out into the groundwater, before it  
9 leaks out into the surface water, and the debate, during  
10 that debate it was brought out that there are unmapped  
11 faults and fractures in the settlement chalk.

12 QUESTION: You've asked about the Chicago River,  
13 do you suppose it would have helped if they had tried to  
14 keep the Wisconsin water out of the river and the Michigan  
15 water and just let Illinois water up the river? I don't  
16 understand the analogy. I really don't.

17 MR. NETTLES: The volumes there.

18 QUESTION: Sure, but you've got a control on the  
19 volume here.

20 MR. NETTLES: But it's not sufficient in and of  
21 itself to say that those volume controls of the cap will  
22 cure the problems. They don't. We have the facility  
23 there for, obviously it was there before. We have Alabama  
24 waste being generated, but a very, very small proportion  
25 of it. What is significant is the threat of the

1 synergistic effect, the compounding effect of these  
2 tremendously large volumes coming in from out-of-state.  
3 We would --

4 QUESTION: But those findings that detail, and  
5 they are detailed in the legislature and in the trial  
6 court, do not indicate, unlike the Maine against, the  
7 Maine case with the fish inspection, that there's any  
8 difference at all between the out-of-state waste and the  
9 locally generated waste in terms of the hazard.

10 MR. NETTLES: Well, again, the volumes, the  
11 findings, the first two or three specific findings of the  
12 legislature address the volumes coming in from out-of-  
13 state.

14 QUESTION: Right.

15 MR. NETTLES: Secondly, there was testimony in  
16 the trial court from Tom Joiner, a former state geologist  
17 and also from Sue Robinson, official with the Alabama  
18 Department of Environmental Management, that the volumes  
19 were the problem. And the inference to be drawn from that  
20 is the synergistic problem of compounding that we face  
21 here, just as the Maine case was a threat that some of  
22 these power sites may cause some kind of harm to the Maine  
23 fishing industry.

24 QUESTION: But Mr. Nettles, I think Justice  
25 Stevens asked you wasn't there a finding that there was no

1 difference in toxicity as between local waste and -- or  
2 did the court not find any difference in toxicity between  
3 local waste and out-of-state waste. That's a question  
4 that could be answered yes or no.

5 MR. NETTLES: The trial court found there was no  
6 difference in the, to distinguish in-state waste from out-  
7 of-state waste. The difficulty that the trial court did  
8 not address was the fact of the compounding effect of all  
9 of the volumes of hazardous waste coming in from the  
10 outside. And to go further with the distinctions we have  
11 here as opposed from the City of Philadelphia case is the  
12 fact that we have unlimited, practically unlimited  
13 capacity there at the Emelle facility.

14 Further, there are facilities under the  
15 restrictions, under these oxymoron restrictions or  
16 whatever that are promulgated by the Government, there is  
17 this testimony in the court below from the petitioner's  
18 own expert witness was that every state could come up with  
19 a facility, a hazardous waste facility to take care of its  
20 own waste. The difficulty is no other states have done  
21 so. No other states have stepped forward in this  
22 situation other than the one facility appropriately named  
23 at Last Chance, Colorado.

24 The situation here is such that unless, unless  
25 there is an effort by Alabama to do, to protect its



1 health, safety of its citizens and the environment, then,  
2 and to receive compensation for the transfer of the risks  
3 that are coming in. Unlike City of Philadelphia there  
4 was, that was an outright ban case with no transfer of  
5 risk. Here we have the transfer of risk of the problems  
6 from these other states into Alabama. And we submit  
7 Alabama, through its police power, has a right to control  
8 the volumes through the additional fee and also to receive  
9 compensation.

10 QUESTION: Just as long as you get paid enough  
11 you can increase the risk to your people?

12 MR. NETTLES: No, sir, because --

13 QUESTION: Well, what is it then? You're  
14 getting paid for transferring the risk, and the risk is  
15 being transferred, you say in large volume.

16 MR. NETTLES: The threat is the large volumes.  
17 It's the threat.

18 QUESTION: Well, all right. All right. But  
19 here you keep letting in the, you keep accepting this out-  
20 of-state waste and all, and the reason is, apparently, is  
21 that you, that they're willing to pay the price you  
22 charge.

23 MR. NETTLES: But, Your Honor, this is the thing  
24 that has brought the volumes down, that has reduced the  
25 threat of the compounding --

1 QUESTION: Well, that still means that as long  
2 as they pay enough you'll let them transfer the risk.

3 MR. NETTLES: Well, sir, because we have --

4 QUESTION: Is that right?

5 MR. NETTLES: Again, we submit that that is the  
6 appropriate way to address this, the reasonable way, and  
7 still remain a player in the national marketplace, not to  
8 isolate ourselves from the problem. And that's what  
9 happened with New Jersey in the City of Philadelphia case.  
10 That was the --

11 QUESTION: So suppose you charge what the  
12 traffic will bear?

13 MR. NETTLES: Again, Your Honor, the question  
14 was --

15 QUESTION: From outside. You will charge what  
16 the market will bear and what people from outside the  
17 state are willing to charge, willing to pay.

18 MR. NETTLES: In this instance it's established  
19 that the ratio has remained constant. But again, the  
20 reasonableness of the difference has not been challenged  
21 in this case. That was not raised in the court below.

22 QUESTION: Well, maybe if you charged a higher  
23 price to your locals they would be more careful about  
24 generating solid, hazardous waste.

25 MR. NETTLES: And we did increase the price to

1 the locals.

2 QUESTION: Well, I know, but not to \$72.

3 MR. NETTLES: No, sir. But at the same time the  
4 locals are going to be there to be confronted with the  
5 short and long-term health hazards there within their own  
6 State of Alabama.

7 QUESTION: Well therefore I would think they  
8 ought to -- if they're going to consistently and for over  
9 the long-term contribute to this risk, they, why shouldn't  
10 they have to pay what others do?

11 MR. NETTLES: Because, Your Honor, it's the  
12 nature of the risk, we submit, is the compounding, the  
13 synergistic effect of the tremendous volumes, the threat  
14 of that coming in from out-of-state. And this is the  
15 problem that we wouldn't, I think inference can be drawn  
16 that Alabama wouldn't be confronted with, and certainly  
17 not to the same extent.

18 QUESTION: No, but isn't it perfectly clear if  
19 we just apply the laws of economics, if you raise the tax  
20 to your locals to \$72 a ton, or whatever it is, you would  
21 have less waste generated in Alabama? Wouldn't that be a  
22 desirable thing to have happen?

23 MR. NETTLES: But that overlooks, Your Honor, we  
24 submit, the key distinction here. That is that the origin  
25 of the volumes, the tremendous volumes of hazardous waste,

1 the 89 percent, continuing to come from out-of-state, and  
2 that this again represents a unique situation, a transfer  
3 of risk into Alabama. And what is going to happen if the  
4 Court submitted the fact that if the Court -- that it  
5 would be in the national interest for the Court to uphold  
6 Alabama's differential fee, because if it's not upheld, if  
7 this is struck down, then the states like Alabama are  
8 really going to have to be thinking long and hard before  
9 they subject their people to the problems that would  
10 result from their locating a hazardous waste landfill  
11 within their own, within their own district, because the  
12 difficulty, again, is something unique.

13 And this is a problem that can be distinguished  
14 from any of the tax cases, any of the highway cases that  
15 have been cited in petitioner's brief, that this is really  
16 not a Commerce Clause case, we submit, so much as a police  
17 power case. And that in this instance the record, so  
18 totally different from the New Jersey case, shows an  
19 effort by Alabama to do the two things, one, to reduce the  
20 large quantities of hazardous waste coming in from out-  
21 of-state which in part has been accomplished, and then,  
22 and then to compensate for the transfer of risk.

23 QUESTION: I take it that, from what you just  
24 said that you have some doubt about your being able to  
25 satisfy the normal Commerce Clause test where there is a



1 discrimination.

2 MR. NETTLES: Your Honor --

3 QUESTION: Do you or do you not?

4 MR. NETTLES: We -- no, sir, we don't, in the  
5 sense that there is, we submit, still the difference,  
6 the --

7 QUESTION: So you think you really have to go to  
8 another rationale, namely an expansion of the quarantine  
9 cases?

10 MR. NETTLES: That, Your Honor, that coupled  
11 with the difference, the threat in difference and the  
12 nature of the risk because of the fact that the volumes  
13 change them.

14 QUESTION: So your answer is yes. Yes, you have  
15 to go to another rationale other than --

16 MR. NETTLES: No, sir.

17 QUESTION: You just said you couldn't satisfy  
18 the normal Commerce Clause test.

19 MR. NETTLES: Well, because what we're showing  
20 is that on its face it may be discriminatory, but in the  
21 practical effect it is not. Practical effect would take  
22 into consideration, and that's of course, as I understand  
23 it, the test that was applied in Wyoming v. Oklahoma.

24 QUESTION: So you're saying that you can satisfy  
25 the normal Commerce Clause test?

1 MR. NETTLES: We would submit we could, Your  
2 Honor, because the practical effect of what Alabama --

3 QUESTION: Well, why isn't there a non-  
4 discriminatory way of controlling the volume of hazardous  
5 waste that you're willing to put up with in your state?

6 MR. NETTLES: We respectfully submit that this  
7 is in its practical effect not discriminatory because of  
8 the fact that the nature of the risk is different because  
9 of the tremendous volumes coming in from out-of-state, and  
10 you have a balancing test, we submit, that would be the  
11 more, that has been recognized and would be appropriate in  
12 this instance where you balance the risk and burdens to  
13 Alabama as opposed to the risk and burdens of outside.

14 And I would suggest this. That the approach  
15 being taken by Alabama is something that is certainly, the  
16 credibility of it is certainly strengthened by the fact  
17 that you have the National Governors' Association, the  
18 National Council of State Governments, and the five other  
19 national, state, and municipal organizations which have  
20 joined together.

21 QUESTION: Thank you, Mr. Nettles.

22 Mr. Pincus, you have 2 minutes remaining.

23 REBUTTAL ARGUMENT OF ANDREW J. PINCUS

24 ON BEHALF OF THE PETITIONER

25 MR. PINCUS: Thank you, Mr. Chief Justice.

1 First of all, the reliance on volumes from out-of-state is  
2 a complete red herring. This is a per ton tax. If there  
3 are greater volumes from out-of-state, out-of-staters will  
4 pay more because the tax is imposed on every ton.

5 Second of all, respondents argue again that  
6 they're being responsible in taking care of their own. On  
7 that theory a state should be able to restrict access to  
8 hospitals within the state to its own citizens because it  
9 would prefer to take care of its own health problem and  
10 other states should take care of all. That argument has  
11 been consistently rejected in City of Philadelphia and all  
12 of this Court's Commerce Clause cases.

13 Basically the claim here is that the national  
14 solution, the national process hasn't worked. Then  
15 Alabama can go to Congress and pass, get relief the way  
16 that the states with nuclear disposal sites did and got  
17 the Low Level Radioactive Waste Act passed.

18 Finally, this compensation argument that the  
19 amount of the tax can be balanced against risks is again  
20 totally baseless in this Court's jurisprudence. If that  
21 were right, a state that had a manufacturing facility  
22 could impose an export tax on the theory that its  
23 residents bore the burdens of air and water pollution, but  
24 the out-of-staters didn't, so that it shouldn't, its  
25 residents shouldn't have to pay the tax but the out-of-

1     staters should. That would destroy the national union  
2     that the framers wanted and lead each state to impose  
3     these disparate economic burdens in order to achieve some  
4     rough parity, and that's not what the Commerce Clause is  
5     about.

6             Thank you, Your Honor.

7             CHIEF JUSTICE REHNQUIST: Thank you, Mr. Pincus.

8             The case is submitted.

9             (Whereupon, at 1:58 p.m., the case in the above-  
10     entitled matter was submitted.)



## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents and accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

NO. 91-471 - CHEMICAL WASTE MANAGEMENT, INC., Petitioner V.  
GUY HUNT, GOVERNOR OF ALABAMA, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Michael Sander  
(REPORTER)

RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE

'92 APR 28 P1:13