

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: FORT GRATIOT SANITARY LANDFILL, INC.,
Petitioner V. MICHIGAN DEPARTMENT OF
NATURAL RESOURCES, ET AL.

CASE NO: 91-636

PLACE: Washington, D.C.

DATE: March 30, 1992

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 FORT GRATIOT SANITARY LANDFILL, :

4 INC., :

5 Petitioner :

6 v. : No. 91-636

7 MICHIGAN DEPARTMENT OF NATURAL :

8 RESOURCES, ET AL. :

9 - - - - - X

10 Washington, D.C.

11 Monday, March 30, 1992

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:00 a.m.

15 APPEARANCES:

16 HAROLD B. FINN, III, ESQ., Stamford, Connecticut; on
17 behalf of the Petitioner.

18 THOMAS L. CASEY, ESQ., Assistant Solicitor General of
19 Michigan, Lansing, Michigan; on behalf of the
20 Respondents.

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1 PROCEEDINGS

2 (11:00 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 91-636, Fort Gratiot Sanitary Landfill v. the
5 Michigan Department of Natural Resources.

6 Mr. Finn, you may proceed.

7 ORAL ARGUMENT OF HAROLD B. FINN, III

8 ON BEHALF OF THE PETITIONER

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

11 Petitioner owns and operates a private landfill
12 in St. Clair County, Michigan. In 1988 Michigan amended
13 its Solid Waste Management Act --

14 QUESTION: That's up by Port Huron?

15 MR. FINN: Yes, sir. By adopting waste
16 importation restrictions, namely section 13(a) and
17 subsection (2) of section 30 of the act, which prohibit,
18 in the case of St. Clair County, the importation into the
19 country of municipal solid waste generated out-of-county
20 or out-of-state.

21 On its face this case presents the question of
22 whether these waste importation restrictions by
23 prohibiting the importation of out-of-state waste into
24 petitioner's landfill impermissibly discriminate against
25 out-of-state commerce by, because in-county municipal

1 waste is subject to no such constraint.

2 QUESTION: I take it this waste is not of the
3 kind that we were talking about in the last case?

4 MR. FINN: That's correct, sir. This is plain
5 garbage. This is not hazardous waste. This is not low-
6 level radioactive waste.

7 QUESTION: And garbage is your element of
8 commerce here, I guess?

9 MR. FINN: Yes, sir.

10 QUESTION: Is the waste, could it ever be said
11 to be hazardous to transport it?

12 MR. FINN: Under the regulations that have been
13 promulgated by the State of Michigan, the transportation
14 of municipal solid waste if it is moisture laden must be
15 transported in trucks that are sealed and not capable of
16 leaking. In the case of all other municipal solid waste
17 they must be covered and carried in a manner that does not
18 create a nuisance. The same would be true under the new
19 regulations that are --

20 QUESTION: Well, would that aspect of it
21 possibly bring it in the quarantine exception?

22 MR. FINN: In this case, Justice O'Connor, no
23 one has suggested that the quarantine cases are
24 applicable. In the first place there is nothing, in the
25 first place the regulations that have been promulgated by

1 Michigan make it clear that there is no risk of disease or
2 pestilence coming into the State, and the new regulations
3 that have been promulgated by the Federal EPA make it
4 clear that there need not be any risk of disease or
5 pestilence.

6 Indeed Michigan allows out-of-state waste to
7 come into Michigan now, albeit to a minor extent, from
8 neighboring states. So I don't think the quarantine cases
9 are applicable here, nor has Michigan suggested that they
10 are applicable.

11 One of the amicus has suggested that the
12 quarantine cases may be applicable, and it may well be.
13 In some states the regulations and laws are so lax as to
14 create risks, but that's not true in Michigan.

15 There is an even more important question,
16 however, at stake in this case, and that's whether or not
17 this Court is going to uphold the novel new constitutional
18 principle that was relied upon by the Sixth Circuit in
19 upholding the waste importation restrictions. That new
20 constitutional principle is that state legislation which
21 excludes foreign commerce from local areas within the
22 State does not discriminate against interstate commerce so
23 long as like commerce from elsewhere in the State is
24 subject to the same embargo.

25 Acceptance of that new principle would have

1 extraordinary consequences. By way of illustration, if
2 this principle were adopted by this Court a district
3 comprised of the southern, the counties of Southern
4 California could impose an embargo upon or a
5 discriminatory tariff upon goods coming from Arizona so
6 long as like commerce coming from Northern California were
7 subject to the same constraint or the same discriminatory
8 tariff.

9 That principle simply cannot be allowed to stand
10 by this Court. It is hopelessly inconsistent with the
11 prior decisions of this Court, it belies the basic
12 principles that underlie the Commerce Clause, and it would
13 eventually result in the evisceration of the negative
14 aspects --

15 QUESTION: Mr. Finn, I guess the Sixth Circuit
16 purported to apply the Pike v. Bruce Church test in this
17 case?

18 MR. FINN: Yes, it did, Justice Scalia --
19 Justice O'Connor.

20 QUESTION: And do you make the argument that it
21 was, that was the wrong test to apply, or that it was the
22 correct test to apply but they applied it wrong? What is
23 it you're arguing?

24 MR. FINN: There is no question in our mind that
25 the Sixth Circuit applied the incorrect test. In our

1 judgment once discrimination exists, this Court's
2 decision, decisions in the past have made it perfectly
3 clear that the strict scrutiny test should apply, and it
4 doesn't make any difference, as the State, the
5 respondents, seem to suggest, that it's local
6 discrimination versus statewide discrimination. Somehow
7 the Sixth Circuit made that distinction.

8 QUESTION: Well, what's the matter with it? You
9 attack it verbally, but will you explain why you think it
10 isn't consistent with our cases?

11 MR. FINN: Well, in Brimmer v. Rebman, which was
12 decided in 1891, in Dean Milk v. the City of Madison in
13 1954, and in Polar Ice Cream and Creamery Co., this Court
14 has held that it's immaterial for purposes of determining
15 whether there is discrimination against interstate
16 commerce that in-state commerce is subject to the same
17 constraint. And that, those decisions in Brimmer v.
18 Rebman, Dean Milk, and Polar Ice Cream and Creamery Co.,
19 they're consistent with and they're part of a line of nine
20 cases in which this Court has over the past 119 years
21 consistently and repeatedly held that embargoes against
22 foreign commerce, be they statewide or local, overt or
23 disguised, violate the Commerce Clause. This case does
24 not present a new concept.

25 QUESTION: Mr. Finn, isn't it really a little

1 unrealistic to say that what we're dealing with here is an
2 article of commerce called garbage? Isn't the article of
3 commerce landfill space? Isn't that what's being bought
4 and sold?

5 MR. FINN: Well, in this case it's the question
6 of --

7 QUESTION: Nobody wants garbage. What they want
8 is landfill space. And why should, why isn't that the
9 correct way to look at the case?

10 MR. FINN: The, there's no question but that the
11 landfill is itself engaged in commerce. What the landfill
12 wishes to do and what the people who wish to have waste
13 brought to the landfill wish to do is to engage in the
14 interstate commerce of bringing municipal solid waste into
15 that landfill.

16 QUESTION: But the landfill space is just in St.
17 Clair County, right?

18 MR. FINN: That's correct, Justice Scalia.

19 QUESTION: Now I suppose, I suppose St. Clair
20 County could impose an enormous tax upon any garbage
21 brought into this landfill space.

22 MR. FINN: That's, I agree with that, Justice
23 Scalia.

24 QUESTION: It would have the same result,
25 wouldn't it?

1 MR. FINN: It would not be discriminatory.
2 That's the infirmity in this statute.

3 QUESTION: Yes, but of course all the tax goes
4 into St. Clair County's own coffers, so as a matter of
5 fact it would not deter St. Clair County from using the
6 landfill. It would just deter everybody else from using
7 the landfill. That's precisely the same result.

8 MR. FINN: The discrimination is made against
9 the citizens and businesses of other states in this
10 instance who are prohibited from bringing municipal solid
11 waste into St. Clair County, whereas the citizens and
12 businesses of St. Clair County are free to put their waste
13 into the landfill without constraint.

14 QUESTION: Well --

15 MR. FINN: That discrimination is what's
16 impermissible.

17 QUESTION: So all you're making St. Clair County
18 do is to reduce its business taxes and impose an enormous
19 tax on taking stuff to the landfill.

20 MR. FINN: If they choose to do that, that would
21 be -- I can't address whether that would be permissible or
22 not. It would not violate my view of what I am arguing
23 here today.

24 QUESTION: But to the extent that the county
25 tried to do that and imposed the tax on its own citizens

1 as well, I imagine it wouldn't sit too well to be told
2 that the county was going to recoup some of the money.

3 MR. FINN: I think that is correct. I think
4 that's why the county is objecting to --

5 QUESTION: People who live there and who vote
6 there still have to get rid of their garbage, don't they?

7 MR. FINN: Yes, they do, Justice O'Connor.

8 QUESTION: And they want to do it at reasonable
9 rates, I suppose.

10 MR. FINN: Well, their alternative is not --

11 QUESTION: Let me ask you this. Do you think
12 that solid waste has today a commercial value in part?
13 Are there things included in solid waste today that make
14 it potentially a valuable item?

15 MR. FINN: To some extent municipal solid waste
16 as it starts from our respective homes or our respective
17 businesses contains materials that can be removed from the
18 solid waste, such as recyclables, plastics, aluminum, or
19 the like. I, when the municipal solid waste is brought to
20 the landfill it is not, we are not currently processing
21 municipal solid waste.

22 I think the problem with suggesting that
23 municipal solid waste is not an article of commerce, which
24 has not been suggested in the briefs but is implicit in
25 the questions, is where, what is the neutral principle

1 that would apply. Is it that when you reach the end of
2 usefulness it's no longer articles of commerce? That --
3 first of all, the neutral principle would likewise apply
4 to the dead, dead human beings, and that would make the
5 funeral home business or the cemetery business not being
6 engaged in commerce. In the same manner --

7 QUESTION: I dare say lots of people would think
8 they weren't.

9 (Laughter.)

10 MR. FINN: I think it's clear that Congress
11 would think that it had the power to regulate the funeral
12 home industry or the cemetery industry because it was
13 regulating a matter of interstate commerce.

14 Also, to suggest that this article of commerce
15 is not, rather that municipal solid waste is not an
16 article of commerce is to not, to deny reality. This is a
17 multi-billion dollar business, and to suggest that it's
18 not an article of commerce is to ignore reality.

19 QUESTION: Mr. Finn, could Michigan put together
20 a scheme whereby the counties could decide that they
21 wouldn't allow any private landfills, period, and that all
22 waste disposal would be at county-owned sites?

23 MR. FINN: Other than the problem of
24 expropriating the existing privately-owned landfills, I
25 think the county would have the power, the state would

1 have the power to prohibit the operation of private
2 landfills.

3 QUESTION: And if they did that and then said no
4 out-of-state waste, I guess you wouldn't win.

5 MR. FINN: Well, I wouldn't have a private
6 landfill in that case.

7 QUESTION: Right.

8 MR. FINN: But I don't, we don't question but
9 that the state can, through the market participant
10 doctrine, restrict out-of-state waste from coming into the
11 state, into the state-owned or county-owned landfills.

12 QUESTION: Mr. Finn, I think some of our cases
13 have said that when the motive of the state appears to be
14 protectionist, parochial favoring local industry, then
15 we're going to give it strict scrutiny. What is the local
16 industry that you think is being favored here?

17 MR. FINN: The citizens and businesses of the
18 county, of St. Clair County, have an opportunity to put
19 their municipal solid waste in petitioner's private
20 landfill whereas citizens and businesses out-of-county
21 don't have that opportunity.

22 QUESTION: That is the, that is the
23 protectionist aspect?

24 MR. FINN: Well, I think it's a broader --

25 QUESTION: It's certainly a good deal different

1 than a lot of cases that we've --

2 MR. FINN: It is true that this Court has talked
3 repeatedly in terms of economic protectionism, but it has
4 to be recognized that virtually of the nine embargo cases
5 that this Court has struck down over the past 119 years
6 involved the argument on the part of the state that their
7 statute was justified by some legitimate purpose. The
8 reason the statutes were struck down is that the embargo,
9 that is the means of achieving that purpose was
10 impermissible. It was, that was what was
11 unconstitutional.

12 QUESTION: But the Madison, the Dean Milk case
13 was a case where the, I think the City of Madison was
14 trying to assure that a particular local processing plant
15 got the business and not somewhere else, wasn't it?

16 MR. FINN: Well, it was also cited, the state,
17 or rather the city contended that they needed to have the
18 local requirement for processing of milk in order to be
19 able to adequately inspect.

20 QUESTION: Yes.

21 MR. FINN: But the Court did not buy that.

22 QUESTION: But you -- I don't see the same
23 protectionist element in this case as there was in the
24 Dean Milk case.

25 MR. FINN: Well, I --

1 QUESTION: They're not trying to protect a local
2 business.

3 MR. FINN: I think what they are trying to
4 protect is the need for local expenditures and to protect
5 citizens from competition. Let me illustrate, if I may.
6 It is clear from the briefs of the respondents and the
7 amici that landfills are not natural resources. They are
8 engineered and manufactured facilities which can be sited
9 anywhere, depending solely on cost. In other words, if
10 that, that being the case, these statutes are designed to
11 restrict the free flow of municipal solid waste into the
12 state and to reserve private landfills so as to enable the
13 state and the county to avoid the costs of creating new
14 landfills, and also to avoid the competition. What
15 they're trying to do is to take over, in effect, the
16 private landfill of petitioner and make it available for
17 the state use only.

18 QUESTION: So the New Jerseyans end up shipping
19 their garbage to St. Clair County, and St. Clair County
20 ends up shipping its garbage to South Dakota? I mean,
21 when the spaces are all gone in St. Clair County.

22 MR. FINN: St. Clair -- it's just a question of
23 creating space. St. Clair County or the State of Michigan
24 or any of the states can create the space. It's not a
25 natural resource. It is simply erecting and

1 manufacturing, in effect, a ship on the land that is safe
2 for the disposal of municipal solid waste. So it's not a
3 question of running out of space. It's a question of
4 incurring the cost to create the space, and that's what
5 the State doesn't want to do. And in fact they want to
6 protect themselves from having to incur that cost in the
7 future by preventing citizens from other states from
8 bringing their municipal solid waste into St. Clair
9 County.

10 QUESTION: Well, it's not just --

11 MR. FINN: I think that's the essence of
12 economic protectionism.

13 QUESTION: I assume that it also means that the,
14 that what you can charge the state today, or what any
15 existing landfill can charge the state or in-state
16 citizens or in-county citizens has to be lower, doesn't
17 it? I mean, if you could accept material from out-of-
18 state, presumably the price would go up, wouldn't it?

19 MR. FINN: There is no question about that,
20 Justice Scalia.

21 QUESTION: Well, that sounds like protectionism
22 to me.

23 MR. FINN: That's why we're here. We are unable
24 to accept the higher prices that are offered by out-of-
25 state citizens and businesses.

1 Mr. Chief Justice, I should also point out that
2 it's not just a question of whether or not there is or is
3 not economic protectionism. In the case of Maine v.
4 Taylor the Court found that the embargo was permissible
5 because the bait fish were likely to be infected with
6 parasites, but it nonetheless subjected the Maine statute
7 to the strict scrutiny test. The twofold test being one,
8 whether the statute serves a legitimate purpose, and two,
9 whether there is available a non-discriminatory means.
10 And in the case of the Maine bait fish statute the statute
11 passed that test.

12 I, we submit that in this case, this
13 legislation, the waste importations do not pass that
14 strict scrutiny test.

15 QUESTION: Because there is no threat from the
16 garbage.

17 MR. FINN: I don't think that the quarantine
18 cases present any threat. They haven't claimed that they
19 present any threat, and they would be hard pressed to do
20 so since they take it from out-of-state as it is, albeit
21 in limited quantities.

22 I'd like to return for a moment to the problem
23 of local regional discrimination. The problem as a matter
24 of constitutional principle about regional discrimination
25 is that it puts citizens of the region, of the preferred

1 region, on a different footing from citizens of all the
2 states. They will therefore tend, as James Madison said
3 about Connecticut's discriminatory tariff of 1784, to
4 beget retaliating regulations not less expensive and
5 vexatious in themselves than they are destructive of the
6 general harmony.

7 These regional discriminations, these regional
8 embargoes will enable the state to place itself in a
9 position of economic isolation and ultimately will lead to
10 an evasion of the strictures of the Commerce Clause.
11 That's exactly what Pennsylvania proposes to do with their
12 new legislation. The governor has proposed to divide
13 Pennsylvania up into four quadrants called waste sheds.
14 Each waste shed will be allowed to accept municipal solid
15 waste only from within the waste shed. The result will be
16 that every citizen and business in Pennsylvania will have
17 a place to put his or her municipal solid waste, but no
18 one from outside Pennsylvania will be able to bring
19 municipal solid waste into Pennsylvania.

20 QUESTION: What if the county in this case had
21 combined its embargo with a temporal limitation, let's say
22 5 years or 10 years, and had justified that, assuming it
23 could do so, on the ground that it takes that long to
24 engage in responsible planning and construction of further
25 facilities, so that it justified it essentially on the

1 basis of a planning purpose, expressly and overtly? Could
2 they do that?

3 MR. FINN: I don't think that this Court has
4 ever upheld discriminatory legislation which discriminates
5 against foreign articles of commerce or against foreign
6 citizens and businesses on the basis that it was a
7 temporary planning measure. There are some quarantine
8 cases --

9 QUESTION: No, but I mean in the classic sort of
10 case. That's not going to apply to the question whether
11 or not we ought to let in foreign milk. I mean it's
12 either going to be consumed or not consumed by the market.
13 That's going to take care of it. But in this case there,
14 I assume there is a legitimate argument to be made that
15 you can't in effect create a landfill overnight, and that
16 it is at least reasonable for people to take measures to
17 prevent having to send their garbage to South Dakota.
18 Would that (a) take it out of the category of heightened
19 scrutiny, and (b) would it be a reasonable basis on a
20 balancing test for allowing a, at least a temporal
21 limitation?

22 MR. FINN: Well, I don't think it would take it
23 out of the strict scrutiny test because the strict
24 scrutiny test is applied whenever discrimination is found.
25 It may be that you could subject it to the strict scrutiny

1 test and on your hypothetical conclude that the purpose
2 was legitimate and that there was no available
3 alternative. A finite period of time to decide how you're
4 going to handle this might well fall under that category.

5 This case, of course, does not fit into that
6 category. This is an, a forever ban. I don't think the
7 Pike test would ever be applicable in the hypothetical you
8 have described, but that doesn't mean that it couldn't
9 pass scrutiny.

10 Apparently recognizing that this Court is likely
11 to hold that the waste importation restrictions
12 discriminate against interstate commerce, the respondents
13 and the amici have suggested a number of novel theories
14 upon which they would have this Court distinguish City of
15 Philadelphia v. New Jersey or even overrule it, and they
16 would ask this Court to hold that the waste importation
17 restrictions do not violate or indeed are not even subject
18 to the Commerce Clause.

19 We have attempted to address these novel
20 arguments in our reply brief and to anticipate them to
21 some extent in our brief on the merits, and I do not
22 propose to do so here in oral argument.

23 I do think it appropriate to spend a moment
24 addressing the State's apparent principle claim that
25 Sporhase v. Nebraska justifies a different result.

1 Sporhase held that the, a state statute, the portion of a
2 state statute which prohibited the exportation of water
3 across the state line was unconstitutional. So rather
4 than help the State in this case, Sporhase dictates the
5 conclusion that a state statute which prohibits the
6 importation of municipal solid waste across state lines
7 violates the Commerce Clause.

8 Also, to the extent that Sporhase condoned a
9 discriminatory requirement, that exportation of water be
10 allowed only with a permit, it's irrelevant to this case.
11 In the first case a discriminatory permit is far less
12 onerous as a constitutional matter than an outright
13 discriminatory embargo. In the second place, there is no
14 permit available here. There is no means by permit that
15 one could obtain the right to bring municipal solid waste
16 into the county.

17 In addition, in Sporhase it doesn't even appear
18 that the permit requirement was discriminatory. The in-
19 state use was subject to extraordinary constraints.
20 Indeed a landowner in the district that was involved in
21 Sporhase couldn't even sell his water.

22 And finally, Sporhase, it has to be recognized,
23 involved a special scarce natural resource, water, which
24 has always been subject to special consideration in this
25 Court, whereas here we're dealing with an engineered and

1 manufactured facility which is capable of being sited
2 anywhere, depending solely on cost.

3 QUESTION: Well, not anywhere in the strictly
4 soil sense. You can't have a landfill just anywhere you
5 choose, can you? It has to be a particular kind of soil,
6 and that sort of thing. It has to be sited away from
7 certain other things.

8 MR. FINN: Well, I think it's clear from the
9 briefs of the respondents and the amici that that's no
10 longer necessary. You now are required, indeed if one
11 looks at the regulations that have been promulgated by the
12 EPA, to have liners in all new landfills that will avoid
13 the problem of having to choose particular soil. You
14 don't want to put it on an earthquake zone. I certainly
15 agree with that. But it is, as I have described, more
16 akin to building a ship on top of the land.

17 This Court has never before upheld a
18 discriminatory embargo except in the case of a necessary
19 quarantine. A quarantine, the quarantine cases aren't
20 applicable here, and there would be no principle basis for
21 the Court to uphold these discriminatory embargoes.

22 If there are no further questions I'd like to
23 reserve the remainder of my time.

24 QUESTION: Very well.

25 Mr. Casey.

1 ORAL ARGUMENT OF THOMAS L. CASEY

2 ON BEHALF OF THE RESPONDENTS

3 MR. CASEY: Mr. Chief Justice, and may it please
4 the Court:

5 In 1905 in the California Reduction Company
6 decision this Court said many of the questions involved in
7 municipal sanitation have proved to be difficult of
8 solution. 87 years later the problems are still with us,
9 and they are still difficult of solution. Michigan has
10 attempted to address these difficult problems by imposing
11 a comprehensive, mandatory, long range planning and long
12 range management process for solid waste which is to be
13 disposed of in each county in Michigan.

14 Petitioner's claim is that the Commerce Clause
15 exempts it from even participating in the planning
16 process. Petitioner asks this Court to extend its
17 decision in Philadelphia v. New Jersey and announce a rule
18 which would require every county in Michigan, presumably
19 every county across the Nation, to absorb as much out-of-
20 county waste as a landfill operator wanted to bring in,
21 with no ability for state or local governments to have any
22 control over volumes and regardless of the local
23 circumstances or the local consequences.

24 QUESTION: How -- I take it that the State
25 allows a county, however, to take out-of-state waste?

1 MR. CASEY: Yes.

2 QUESTION: And how many counties have in their
3 plan permission to do that?

4 MR. CASEY: Each county creates a plan. There
5 are 83 counties. I believe eight of them currently permit
6 importation of out-of-state waste.

7 QUESTION: And the, but none of the rest of
8 them?

9 MR. CASEY: The others do not currently contain
10 a specific provision permitting out-of-state waste to be
11 brought in.

12 QUESTION: And unless it does then the state law
13 forbids the importation?

14 MR. CASEY: That's correct.

15 QUESTION: So it's a state law that puts the
16 teeth in this arrangement?

17 MR. CASEY: A state law requires affirmative
18 action by each county before out-of-state waste can be
19 brought in.

20 QUESTION: And approval by the State.

21 MR. CASEY: Correct.

22 QUESTION: Yes.

23 MR. CASEY: There is a comprehensive process for
24 developing the plan with input from the local counties,
25 local planning agencies, votes by the municipalities

1 within a county, regional approval, and ultimately
2 approval by the director of the Department of Natural
3 Resources.

4 QUESTION: Mr. Casey, does the State take the
5 position that the transportation of solid waste presents
6 significant health or safety dangers?

7 MR. CASEY: Yes, it can. The solid --

8 QUESTION: Is that a position taken by the State
9 here to justify its position?

10 MR. CASEY: We are urging this Court -- this
11 case presents the opportunity for the Court to reexamine
12 the Philadelphia v. New Jersey decision. In that case the
13 Court found that solid waste was an article of commerce
14 and found that a specific New Jersey state violated the
15 Commerce Clause. As the dissent in that case indicates,
16 and as we have argued in our brief and in the amicus
17 briefs, there are unique characteristics of solid waste
18 which present strong arguments why solid waste should not
19 be considered within the Commerce Clause. If the Court --

20 QUESTION: Well, if we disagree with that and
21 leave the precedents on the books, then where are you?

22 MR. CASEY: We believe that the judgments below
23 can be affirmed without retreating whatsoever from
24 Philadelphia v. New Jersey. We do believe, however, that
25 there are unique aspects of the solid waste problem which

1 should urge this Court to exert great deference in
2 reviewing the state statute. I'd like to talk about those
3 in a moment, but I would like to mention at the outset the
4 very narrow and limited posture of this case before this
5 Court today.

6 In its original complaint in the district court
7 petitioner challenged the statute on its face. Count 2
8 challenged the statute as applied by St. Clair County, and
9 Count 3 alleged due process violations. In this Court,
10 however, they have abandoned everything except the facial
11 challenge. They have abandoned their claim that St. Clair
12 County's refusal to amend their plan was unconstitutional.
13 So the sole challenge in this Court is whether this
14 comprehensive statewide statute is unconstitutional merely
15 because it permits each county to consider local
16 circumstances in deciding whether to permit or to prohibit
17 out-of-state waste.

18 Under petitioner's view in this facial challenge
19 a county can never prohibit out-of-state waste regardless
20 of local circumstances or local consequences. Our
21 position is that a state may implement a planning process,
22 as we have done here, which permits counties to take into
23 consideration of local circumstances.

24 QUESTION: Well, do you think just because the
25 State operates through the county that it's off the hook?

1 You would be making the same argument if the State had a
2 law that says no solid waste from outside the State may
3 be, may come into this State?

4 MR. CASEY: We would be probably taking a
5 stronger position that Philadelphia v. New Jersey should
6 be overruled. We believe that our statute is
7 significantly different than the statute in Philadelphia
8 v. New Jersey. Michigan does, the Michigan statute does
9 permit counties to accept waste from out-of-state. Eight
10 of the counties do. Michigan also exports some waste to
11 other counties. Michigan --

12 QUESTION: Well, what if in this case, Mr.
13 Casey, the Michigan statute by name said these eight
14 counties shall be able to import waste and the others
15 shall not. Would that make it any different a case for
16 constitutional purposes?

17 MR. CASEY: In a facial challenge that would be
18 much more like the statute that was present in
19 Philadelphia v. New Jersey. If Philadelphia v. New Jersey
20 is still good law, then the statute in Michigan would
21 be --

22 QUESTION: It would be much more like it in the
23 sense that it was more like the Pennsylvania statute, or
24 the New Jersey statute there. But is that distinction
25 significant for constitutional purposes, is that

1 difference, the fact that the state, that it's the state
2 that decides whether or not a county will import garbage
3 rather than the county itself?

4 MR. CASEY: The key differences between our
5 statute and the statute in Philadelphia v. New Jersey is
6 that in that case there was an absolute prohibition. Our
7 statute does not contain an absolute prohibition. Our
8 statute sets up a comprehensive planning process for all
9 of the waste which is to be disposed of in a county to be
10 subjected to identification of sources, estimation of
11 volumes, because the key aspect of the Michigan statute is
12 that it imposes on each county the requirement that they
13 guarantee future disposal capacity for 20 years.

14 QUESTION: But you have to take responsibility
15 for what your counties do under your authorization, and in
16 fact it is a total prohibition with respect to some of the
17 counties. And they're doing that under your state power,
18 so it's a total prohibition into some areas of the state.

19 MR. CASEY: I would suggest to you that that
20 would be the analysis if this were a challenge to the
21 statute as applied in a particular circumstance. What the
22 petitioner is challenging is the mere fact that the state
23 statute permits counties to make this local evaluation.
24 If a county prohibited out-of-state waste and a petitioner
25 came in and challenged that as applied to if there would

1 be a Commerce Clause challenge there, we would depend on
2 local circumstances. We would get into a detailed factual
3 dispute as the Court had in Maine v. Taylor with an
4 extensive evidentiary record. This case was decided on
5 summary judgment with virtually no evidentiary record at
6 all.

7 And as it is postured in this case, the
8 petitioner framed the question he presented in the
9 petition, it is only a facial challenge. We submit the
10 question in this case is can a state ever permit local
11 units of government to evaluate local circumstances --

12 QUESTION: In such manner as to exclude out-of-
13 state garbage --

14 MR. CASEY: Yes.

15 QUESTION: -- while still receiving in-county
16 garbage.

17 MR. CASEY: Correct. That is the question. Can
18 a state, can any local circumstances ever justify a county
19 in excluding out-of-state waste?

20 QUESTION: Well, suppose there's an operator of
21 an amusement park in St. Clair County and the county, and
22 the state has a law like this that anybody, any county
23 that wants to keep amusement, to prevent amusement parks
24 from catering to out-of-state visitors may do so?

25 MR. CASEY: That would not be our position, no.

1 QUESTION: Well what, what's the difference?

2 MR. CASEY: This subject matter is fundamentally
3 different than the typical economic --

4 QUESTION: This amusement part operator wants to
5 do business with out-of-state visitors, and the state says
6 well, the county can keep them out, and the county has.
7 The county just doesn't like the traffic that is coming in
8 from out-of-state.

9 MR. CASEY: Under the traditional Commerce
10 Clause analysis you have to determine the nature and the
11 legitimacy of the local concerns. We submit in this case
12 this is not simply economic protectionism. As the Court
13 said in the Spohr decision --

14 QUESTION: Well, neither would this be in my
15 example.

16 MR. CASEY: Perhaps I didn't understand your
17 example. I understood the, your hypothetical to be that
18 they wanted to exclude out-of-county residents from using
19 this county --

20 QUESTION: They want to exclude, they want to
21 prevent the amusement park operator from doing business
22 with people from out-of-state.

23 MR. CASEY: That probably would not be a
24 sufficient justification for making the exclusion. What
25 you have to look at is the legitimacy of the local

1 purpose. What we have here is a purpose which is clearly
2 legitimate, protection of the public health and the
3 environment.

4 QUESTION: Well, the --

5 MR. CASEY: The key is the means that the state
6 has used to implement that legitimate purpose. We believe
7 the means that are used here in this statute are
8 reasonable. They are non-discriminatory, it is not an
9 absolute statewide prohibition. In this limited facial
10 challenge it cannot be said that the Commerce Clause
11 absolutely requires every county in Michigan to absorb
12 waste without limitation of volume from all sources
13 outside of the county.

14 QUESTION: We do have to have a sense, don't we,
15 even as you have posed the issue before us, of the kinds
16 of interest that, the kinds of local interest that it
17 would be legitimate to assert, that might reasonably be
18 asserted? One of them, or maybe the one that you have
19 just described to us, is a concern over public health.
20 And I'm not sure exactly, when you get beyond that, how
21 that concern is to be expressed. I take it you don't take
22 the position that it is impossible to run a landfill
23 without a threat to public health, do you?

24 MR. CASEY: To some extent landfills always pose
25 dangers to public health. This Michigan statute and the

1 Federal statutes do their best to minimize that danger,
2 but there is always going to be a danger.

3 QUESTION: All right, well how are we supposed
4 to kind of get our hands on the kind of public health
5 concern which you say at least facially, on a facial
6 challenge might justify the restriction? I mean, to be
7 candid with you, all we've got is kind of a slogan, public
8 health, protect public health, and I don't know where we
9 go when we get beyond that.

10 MR. CASEY: The cases in which the Court has
11 applied strict scrutiny in this Commerce Clause area deal
12 with simple economic protectionism. We don't have that.
13 We have different --

14 QUESTION: No, that may be, but how do you
15 articulate your public health interest? That's what I
16 want to know. I will assume that there is a public health
17 motivation, but I want to have some sense -- as you pose
18 the case to us, I want to have some sense of what the
19 legitimate concerns might be that therefore should be
20 allowed, the possibility of which should be allowed to
21 prevail over the facial challenge. What are they?

22 MR. CASEY: There are in the neighborhood of 180
23 million tons a year of municipal solid waste generated.
24 It has to go somewhere. Statutes on the Federal and state
25 level are trying to encourage other types of source

1 separation, recycling, composting, but the current
2 practical reality is there are going to be landfills for
3 the foreseeable future. Landfills pose dangers wherever
4 they're located.

5 Our position in this case is that because
6 Michigan has imposed on its county citizens the extreme
7 burden of guaranteeing future capacity for their own in-
8 county waste, because they have taken that burden on
9 themselves they therefore are entitled under the Commerce
10 Clause to have some limit in deciding their service area.

11 QUESTION: Well, it seems to me you have raised
12 two issues but you haven't answered the question. The
13 first issue is why does the decision of the State of
14 Michigan to impose this burden on their citizens make it
15 somehow affect the Commerce Clause analysis? And number
16 two, it still is an open question in my mind as to exactly
17 what the public health hazards are, given the present
18 state of solid waste technology, that we should consider
19 as at least possible justifications in response to a
20 facial challenge.

21 So you -- I still think you've got two
22 questions. Why is it at all relevant that Michigan has
23 allocated responsibility the way it has. And number two,
24 leaving that aside, what are the public health dangers
25 that we're supposed to consider as possibilities in

1 responding to this challenge?

2 MR. CASEY: Public health dangers in the form of
3 leachate, fluids that seep through the landfill and are
4 required to be pumped out and drained. Public health
5 dangers of methane gas which is produced by these, pest
6 animals, insects, noise --

7 QUESTION: Those are good arguments for saying
8 solid waste disposal sites are not desirable neighbors. I
9 mean, we'll accept that. They may be good arguments for
10 saying in a perfect world we wouldn't have them. But why
11 do, how do they rise to a point of clarity to allow us to
12 consider them in deciding this case?

13 MR. CASEY: Because of the volume of solid waste
14 which is created throughout the country, measures have to
15 be taken somewhere to provide proper disposal.

16 QUESTION: But this case is unlike the Taylor
17 and Maine case, because there the out-of-state character
18 of the item imported was itself the evil. Here the evils
19 that you have described apply in like measure to in-state
20 and out-of-state garbage. So I'm not sure how persuasive
21 your answer is to Justice Souter's question when he asked
22 you to specify for us the particular evil, other than
23 you're saying it's the sheer volume, but volume can be
24 measured by many ways other than in-state and out-of-
25 state discrimination.

1 MR. CASEY: Correct. But under the traditional
2 Commerce Clause analysis you look to the nature and
3 legitimacy of the public purpose which is served. You
4 look to the legislative ends and the legislative means.
5 The goal here is to minimize environmental damage and
6 minimize public health damage by landfills. St. Clair
7 County could have --

8 QUESTION: Is this law subject to strict
9 scrutiny?

10 MR. CASEY: No. We submit it --

11 QUESTION: What if it were?

12 MR. CASEY: It would still pass muster under
13 either the --

14 QUESTION: And why isn't it subject to strict
15 scrutiny?

16 MR. CASEY: Because it is not facially
17 discriminatory to the extent that the strict scrutiny
18 cases have applied that standard.

19 QUESTION: Mr. Casey, may I go back to one of
20 the questions that we have dangling here? Do you take the
21 position that Michigan's allocation of responsibility is
22 in anyway relevant to the Commerce Clause analysis?

23 MR. CASEY: I am not sure I understand.

24 QUESTION: Well, you began to answer a previous
25 question of mine by saying that somehow it is reasonable

1 to give the counties the kind of leeway that you want to
2 give them because the state has allocated to the counties
3 the responsibility for finding, or for establishing, I
4 guess, disposal sites for, at least for their own county
5 wastes. And my -- I think that's what you were telling
6 me.

7 And my question is isn't that a problem for the
8 State of Michigan? What has that got to do with the
9 Commerce Clause analysis?

10 MR. CASEY: The Commerce Clause analysis that
11 the petitioner has raised is that the statute is
12 discriminatory, it favors in-county residents. We submit
13 that when you look at the entire statute as a whole as it
14 operates it does not favor in-county residents. In fact
15 it burdens in-county residents. They are not permitted to
16 put their waste on trucks and send it someplace else.
17 They are required to guarantee for the next 20 years
18 adequate landfill capacity to take care of all of the
19 solid waste generated within that county.

20 QUESTION: Well, we don't care, we don't care if
21 you discriminate against county residents. That --

22 MR. CASEY: But in the, the point I'm --

23 QUESTION: You can be as unfair as you like to
24 your state citizens and the Federal Government doesn't
25 care. It's only when you're unfair to out-of-state

1 citizens, and that's the issue here.

2 MR. CASEY: I would analogize to the Sporhase
3 decision. There there was a statute regulating the
4 withdrawal and transfer of groundwater. The State of
5 Nebraska imposed restrictions on in-state transfers and it
6 imposed different restrictions on out-of-state transfers.
7 That was one of the factors the Court looked at in saying
8 that that portion of the statute was not facially
9 discriminatory, because it imposed burdens both on in-
10 state residents and out-of-state residents. We submit the
11 same principle applies here.

12 Significant burdens are imposed on in-county
13 residents, and the only burden that is imposed on out-of-
14 county residents, for out-of-county waste, is that they
15 participate in the planning process, but the counties,
16 because they have assumed the burden of disposing of their
17 own, are given some ability to limit their service area.

18 In a particular case if a county did not have
19 sufficient justification for excluding out-of-county
20 waste, a prohibition might be unconstitutional as applied.
21 We don't have that challenge in this case.

22 QUESTION: It isn't enough to impose some burden
23 on intrastate, on state residents. It has to be the same
24 burden, doesn't it? I can't say well, I'm taxing my state
25 residents and I don't tax out-of-state people, and

1 therefore I can do, you know, therefore I can prevent out-
2 of-state people from bringing their garbage into this
3 state.

4 MR. CASEY: If the burdens are comparable, then
5 the statute --

6 QUESTION: But they aren't comparable.

7 MR. CASEY: We submit they are.

8 QUESTION: How are they? Your county resident
9 can dispose of the trash in the county landfill. The out-
10 of-state resident can't.

11 MR. CASEY: That's correct, but the out-of-
12 state resident can satisfy -- the problem of solid waste
13 is a local problem. It's generated at a local level.
14 Some localities solve the problem by putting it on trucks
15 or trains and shipping it away. When Michigan has
16 undertaken the burden to dispose of its own waste, we
17 submit that the Commerce Clause does not compel it to
18 provide unlimited future landfill capacity for the rest of
19 the country as well.

20 QUESTION: The Commerce Clause says there's no
21 such thing as a local problem, doesn't it? Isn't that
22 basically what the Commerce Clause says?

23 MR. CASEY: No, I don't think so at all. I
24 don't think so at all. The Commerce Clause does not
25 elevate free trade above all other values. Where there

1 are legitimate public health purposes in this statute
2 protecting against the health hazards, and the State has
3 undertaken to address those problems and has burdened
4 itself with the duty to provide its own future landfill
5 capacity, we submit that by assuming that burden they can
6 therefore exercise some control.

7 QUESTION: Mr. Casey, you point out that in some
8 communities they put the garbage on trains or trucks and
9 ship it away. If every state in the United States had the
10 same law that Michigan had, would that still be possible?

11 MR. CASEY: If every state had a law like
12 Michigan's, every county would be required to dispose of
13 its own solid waste and we would not have an interstate
14 problem.

15 QUESTION: And if it found that it could do it
16 much more cheaply by putting it on a train and shipping it
17 to some area where the land is very cheap and there's a
18 lot of desert or something, they wouldn't be able to do
19 that, would they?

20 MR. CASEY: They could if the receiving state
21 accepted that burden. There is nothing in the statute
22 which prohibits any country from accepting waste. The
23 question here is does the Commerce Clause require them to
24 accept that burden when they are already assuming the
25 burden of guaranteeing --

1 QUESTION: Why does, why does St. Clair County
2 really want to forbid this private landfill operator from
3 processing or disposing of out-of-state waste?

4 MR. CASEY: Again, we have very little in the
5 way of evidentiary record here. The only record we have
6 is that the petitioner made a request to the county to
7 amend its plan to permit 1,750 tons per day of out-of-
8 county waste. A staff of the County Planning Commission,
9 staff group looked at that and concluded that that amount
10 of additional waste would use up all of the capacity which
11 the county had planned for within 6 years instead of 20.
12 And at that point --

13 QUESTION: Well, hadn't the operator been taking
14 out-of-state waste?

15 MR. CASEY: No.

16 QUESTION: This was going to be new business?

17 MR. CASEY: There had been litigation within the
18 State where they were trying to take out-of-county waste.

19 QUESTION: So this would just be new business
20 for the landfill operator?

21 MR. CASEY: Correct. Correct. The Fort Gratiot
22 Landfill is included within the county plan. The county
23 plan estimates all of the waste which will be generated
24 within the county, identifies the sources, estimates the
25 volumes. They are required to assure proper disposal for

1 a 20-year period, and they have included the Fort Gratiot
2 landfill in that.

3 QUESTION: It's still true, as I understand,
4 that if he could demonstrate that he could still handle
5 all the local garbage for the next 20 years the law would
6 still prohibit him from taking any out-of-state garbage.

7 MR. CASEY: If he could make that showing in a
8 challenge to the statute as applied --

9 QUESTION: No, I'm not, I'm not worrying about
10 constitutionality, just the way it would work. If he
11 could demonstrate that he has this tremendous capacity
12 that could handle both the out-of-state garbage and the
13 local garbage for the next 50 years, the statute would
14 still prohibit him from taking the out-of-state garbage.

15 MR. CASEY: Correct. But a challenge by him on
16 those facts could succeed. A similar challenge has
17 succeeded. We cited the Dafter Township opinion of the
18 Michigan Court of Appeals where precisely that situation
19 occurred. The Township sued a landfill operator who
20 wanted to bring in out-of-county waste which was not
21 included in the county plan. The landfill operator was
22 able to demonstrate that the, bringing in this additional
23 amount would not impair the county's capacity, and
24 therefore the injunction was denied.

25 QUESTION: Well -- go ahead.

1 QUESTION: What would happen under the statute
2 if he decided that he couldn't make a profit without
3 taking out-of-state garbage and he decided to close up the
4 dump entirely? What would the county do?

5 MR. CASEY: The county would have to find some
6 alternative method of assuring disposal.

7 QUESTION: I see.

8 MR. CASEY: That is the obligation --

9 QUESTION: He has no obligation to serve the
10 county for the next 20 years.

11 MR. CASEY: No. There are obligations in
12 closing --

13 QUESTION: So that if he rents his space to an
14 out-of-state customer it has the same impact on the county
15 as if he just closed up? The county still has to solve
16 the problem.

17 MR. CASEY: The county would still have to solve
18 the problem, yes.

19 QUESTION: Now I take it you agree with Mr. Finn
20 that the county could do that simply by prohibiting
21 landfills, or by going into the landfill business itself
22 and in that instance could prohibit out-of-state receipt?

23 MR. CASEY: I don't know if the county could do
24 that on its own because the statute requires them to
25 assure capacity --

1 QUESTION: Well, there's not comment that there
2 would be -- I assume you agree there would be no Commerce
3 Clause bar to its doing so if that were otherwise the
4 political disposition of the State?

5 MR. CASEY: Correct. Correct. The Commerce
6 Clause would permit the State of Michigan to say no
7 landfills anywhere.

8 QUESTION: Did this landfill operator, didn't he
9 offer to, didn't he undertake to satisfy the, all of the
10 county's --

11 MR. CASEY: In the proposal that he submitted he
12 said that, the county said -- the company said it would
13 guarantee the full 20-year capacity. The staff looked at
14 that same proposal and said no, there is only, there would
15 only be 6 years that would use it up. That's a fact
16 dispute. If they had pursued their as applied challenge
17 and he could show that St. Clair County impermissibly was
18 restricting out-of-state waste for protectionist purposes,
19 to hoard their own limited capacity, he might succeed on
20 an as-applied challenge.

21 But we have here, the simple question that's
22 before the Court today is where the county, or the State
23 of Michigan and its counties have assumed this burden of
24 taking care of their own waste, guaranteeing their own
25 future capacity for 20 years, does the Commerce Clause

1 require every county also to assume the burden of
2 disposing in the future of as much waste as the landfill
3 operator wants to bring in? We say it does not.

4 In the balancing of local interests and the
5 national interest in free markets, this statute is a
6 reasonable regulation. It is not an absolute prohibition.
7 It is, it applies even-handedly because --

8 QUESTION: Of course there wasn't an absolute
9 prohibition in the New Jersey case either, was there?

10 MR. CASEY: There were four very limited
11 exceptions, but --

12 QUESTION: But they were whatever exceptions the
13 agency wanted to allow, and they allowed for.

14 MR. CASEY: The governor or whoever the official
15 was passed a regulation with four exceptions, but the
16 Court said --

17 QUESTION: Just as here a county can allow out-
18 of-state garbage if it wants to. It's the same kind of
19 loophole if they want to take advantage of it, if the
20 government wants to take advantage of it.

21 MR. CASEY: In a facial challenge such as this
22 what we're saying is that it is permissible for a state
23 statute to let local governments evaluate local
24 circumstances. If the local circumstances are such that
25 they cannot accommodate out-of-state waste, then the

1 Commerce Clause does not require that county to accept the
2 out-of-state waste. That would require a challenge as
3 applied.

4 What we have here is a facial challenge, and the
5 question is can a state statute ever permit a county to
6 evaluate its own local circumstances and make its decision
7 based on those local circumstances and local consequences.
8 If a particular challenge was made a prohibition such as
9 St. Clair County's might be unconstitutional as applied in
10 a particular case, but on the facts that we have here and
11 the very narrow limited challenge it simply cannot be said
12 that the Michigan statute unreasonably impairs interstate
13 commerce.

14 QUESTION: The district court here granted
15 summary judgment to the respondents here, I mean to the
16 petitioner here?

17 MR. CASEY: No. The petitioner filed motions
18 for summary judgment. The court denied those and entered
19 judgments for the respondents on all counts. But there
20 was no trial.

21 QUESTION: So in effect it was giving you the
22 benefit, it was resolving all disputed facts against you,
23 I take it then?

24 MR. CASEY: That's correct. It was on a summary
25 judgment motion.

1 QUESTION: And then the Sixth Circuit sent it,
2 the Sixth Circuit upheld that?

3 MR. CASEY: Correct. Both the district court
4 and the court of appeals applied the Pike test, and in the
5 traditional application of the Pike test they found there
6 was no facial discrimination. We reject the petitioner's
7 characterization that there is some new principle being
8 espoused here. We submit there is not.

9 In summary we submit this is a reasonable
10 regulation that does not unduly interfere with interstate
11 commerce, but it does permit protection of the public
12 health.

13 If there are no further questions. Thank you.

14 QUESTION: Thank you, Mr. Casey.

15 Mr. Finn, you have 6 minutes remaining.

16 REBUTTAL ARGUMENT OF HAROLD B. FINN, III

17 ON BEHALF OF THE PETITIONER

18 MR. FINN: The section 13(a) and subsection (2)
19 of the act prohibit any public or private landfill in the,
20 in any county from accepting waste, municipal solid waste,
21 unless it is expressly authorized in the county plan. In
22 1988 at the time that the waste importation restrictions
23 were enacted and at all times thereafter the St. Clair
24 County plan did not permit the importation of municipal
25 solid waste from out-of-county. So the act at the moment

1 it was passed and at all times since has barred absolutely
2 the importation of municipal solid waste into St. Clair
3 County.

4 QUESTION: Is that a facial challenge to the
5 act, or is it a facial challenge to the act plus the St.
6 Clair implementation of the act?

7 MR. FINN: It is --

8 QUESTION: What are you facially challenging?
9 The Michigan --

10 MR. FINN: I am challenging the act as it
11 incorporates the St. Clair County solid waste management
12 plan as it was in effect at the time.

13 QUESTION: So yours is not just a facial
14 challenge to the whole Michigan statute, it's a facial
15 challenge to the Michigan statute with the St. Clair
16 ordinance implementing?

17 MR. FINN: That is correct. It is on its face
18 by incorporating the St. Clair County solid waste
19 management plan, or in effect in either case the result is
20 the same.

21 The suggestion that there is a safety concern, I
22 don't -- it is not in the briefs, it is not in the record.
23 Obviously one wants to handle municipal solid waste in a
24 manner that doesn't create a safety problem. And I think
25 in the case of Michigan their regulatory and legislative

1 scheme prevents there from being any safety problem so
2 long as it's handled in accordance with the requirements
3 of the act and the regulations.

4 I also want to point out that under the new EPA
5 regulations there is no need for there to be any safety
6 problem. Indeed the new regulations specifically state
7 that the minimum national criteria prescribed therein
8 insure the protection of human health and the environment.

9 With respect to the suggestion that Michigan is
10 in a special place because it's bearing a burden, I want
11 to call the Court's attention to the decision of this
12 Court in Edwards v. California. There California
13 attempted to impose criminal sanctions upon anyone who
14 brought indigents into the State of California, and
15 California contended that during the period of the
16 Depression when indigents coming into the state would put
17 the state to extraordinary strains, they should be allowed
18 to avoid this burden, and this Court, as you all know,
19 rejected that contention on Commerce Clause grounds.

20 I also want to point out that every state bears
21 the burden of other by-products of other states. For
22 example, Connecticut bears the burden of the soot and
23 smoke and pollution that comes out of Michigan's
24 factories. No one would suggest that we can take
25 retaliatory steps in Connecticut to prevent Michigan by

1 way of preventing Michigan products from coming into
2 Connecticut, or otherwise to alleviate our burden. Here
3 Michigan seeks to impose the burden that it believes it is
4 undertaking --

5 QUESTION: This garbage is coming all the way
6 from Connecticut to Michigan?

7 MR. FINN: No garbage is coming to this
8 landfill. None is allowed in.

9 QUESTION: But I mean that was the proposal, to
10 bring garbage in --

11 MR. FINN: There was a proposal to bring it, as
12 I recall, from the New York area.

13 I finally want to point out that if Michigan or
14 the other states believed that this, that the Commerce
15 Clause causes them burdens that they find unacceptable,
16 that's a political question. There are 21 states who have
17 joined as amici with Michigan, and that creates 22 states
18 or 44 senators who have the power to do something about
19 this. As Justice McKenna said in *West v. Kansas Natural*
20 *Gas*, if there is to be any turning backward it must be
21 done by the authority of another instrumentality than a
22 court. That is Congress has the responsibility to act in
23 this matter, and it hasn't chosen to do so.

24 QUESTION: Well, a state -- we had this problem
25 in the last case. The state legislatures don't elect

1 their senators anymore.

2 MR. FINN: I would hope that the states can
3 exert a sufficient influence either through their
4 populace, which seems to be the one that's, the populace
5 seems to be objecting more than anything to the placement
6 of landfills, and they are the ones that elect the
7 senators. And if they don't like it I think they can
8 exert the political pressure to get a political change.

9 If there are no further questions, thank you
10 very much.

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Finn.

12 The case is submitted.

13 (Whereupon, at 11:58 a.m., the case in the
14 above-entitled matter was submitted.)
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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. 91-636 - FORT GRATIOT SANITARY LANDFILL, INC., Petitioner

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, ET AL.

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

BY Michelle Sanders

(REPORTER)