

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

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SUPREME COURT, U.S.  
WASHINGTON, D.C. 20540

CAPTION: C & A CARBONE, INC., ET AL., Petitioners v.

TOWN OF CLARKSTOWN, NEW YORK

CASE NO: 92-1402

PLACE: Washington, D.C.

DATE: Tuesday, December 7, 1993

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 C & A CARBONE, INC., ET AL., :

4 Petitioners :

5 v. : No. 92-1402

6 TOWN OF CLARKSTOWN, NEW YORK :

7 - - - - -X

8 Washington, D.C.

9 Tuesday, December 7, 1993

10 The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States at  
12 10:02 a.m.

13 APPEARANCES:

14 BETTY JO CHRISTIAN, ESQ., Washington, D.C.; on behalf  
15 of the Petitioners.

16 WILLIAM C. BRASHARES, ESQ., Washington, D.C.; on  
17 behalf of the Respondent.

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
BETTY JO CHRISTIAN, ESQ.	
On behalf of the Petitioners	3
WILLIAM C. BRASHARES, ESQ.	
On behalf of the Respondent	24
REBUTTAL ARGUMENT OF	
BETTY JO CHRISTIAN, ESQ.	
On behalf of the Petitioners	49

1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in No. 92-1402, C A Carbone, Inc., v.  
5 the Town of CLarkstown, New York.

6 Ms. Christian.

7 ORAL ARGUMENT OF BETTY JO CHRISTIAN

8 ON BEHALF OF THE PETITIONERS

9 MRS. CHRISTIAN: Mr. Chief Justice, and may it  
10 please the Court:

11 The issue in this case is whether the Commerce  
12 Clause prohibits a municipal ordinance that requires all  
13 trash, including trash that originated in other towns and  
14 other States, to be sent to a designated local facility  
15 for processing before it can be shipped to other States  
16 for disposal.

17 Petitioners operate a recycling facility in  
18 Clarkstown, New York. They receive trash from New Jersey  
19 and from points in New York outside of Clarkstown,  
20 separate it into recyclable and nonrecyclable components,  
21 process and bale or package both components, and then ship  
22 them to users or disposers in other States.

23 The Clarkstown ordinance permits them to ship  
24 the recyclables directly to users in other States.  
25 However, it prohibits petitioners from shipping the

1 nonrecyclable trash directly to waste energy plants or  
2 landfills in other States, and requires instead that they  
3 be sent to a designated transfer station in Clarkstown,  
4 which levies --

5 QUESTION: Ms. Christian, what sections of the  
6 ordinance are you attacking?

7 MRS. CHRISTIAN: We are primarily attacking  
8 section 5. The respondents have taken the position that  
9 this case is governed instead by section 3. To the extent  
10 that section 3 has any bearing on trash that originated  
11 outside of Clarkstown, we are attacking that section as  
12 well. But our challenge is limited to the trash that  
13 originated in towns outside of Clarkstown.

14 QUESTION: Thank you.

15 MRS. CHRISTIAN: The designated --

16 QUESTION: Excuse me. Why don't you have any  
17 objection to trash that's generated within Clark -- you  
18 don't have any objection to trash generated within  
19 Clarkstown?

20 MRS. CHRISTIAN: I think, from the standpoint of  
21 constitutional analysis, Justice Scalia, it is also  
22 invalid under this Court's prior decisions. But as a  
23 business matter in the lower courts --

24 QUESTION: You don't care.

25 MRS. CHRISTIAN: The -- precisely.

1 (Laughter.)

2 MRS. CHRISTIAN: The petitioners chose to  
3 challenge only the out-of-town trash, because that's what  
4 their business really consists of.

5 QUESTION: Well, now, Ms. Christian, you started  
6 to tell us how the ordinance applies. Now, does the city  
7 prohibit you from shipping the waste on out --

8 MRS. CHRISTIAN: Yes --

9 QUESTION: -- Or is it a matter of requiring  
10 you to pay the charge before you ship it out?

11 MRS. CHRISTIAN: The city prohibits petitioners  
12 from shipping the trash directly to out-of-State users or  
13 landfills.

14 QUESTION: But after it's sorted and in the  
15 city's facility, or processed in the city's facility, and  
16 if you pay the charge to the city, then can you ship what  
17 remains out?

18 MRS. CHRISTIAN: As -- as we understand the  
19 ordinance as it has been interpreted by the city, the  
20 petitioners are required, after they have processed and  
21 baled the trash, to deliver it to the designated transfer  
22 facility. That transfer facility levies the charge of \$81  
23 a ton, and then the transfer facility itself ships the  
24 trash to landfills in other States.

25 So that petitioners themselves are required --

1 instead of taking the trash directly to an out-of-State  
2 destination, petitioners are required to take it to the  
3 designated facility. The designated facility then  
4 performs whatever processing they perform, and the --

5 QUESTION: And the petitioners are in the  
6 business of disposing of waste and they can do it more  
7 cheaply if they don't have to submit it to the town  
8 processing. Is that --

9 MRS. CHRISTIAN: It is less expensive for the  
10 out-of-State customers of petitioners, and with respect to  
11 petitioners the Clarkstown ordinance, in effect, adds an  
12 expense of \$81 for every ton of nonrecyclable trash.

13 QUESTION: Now, does the town impose that if you  
14 pick up waste from another -- from outside the town and  
15 simply transport it through the town without any further  
16 treatment?

17 MRS. CHRISTIAN: Well, petitioners --

18 QUESTION: Does it apply to that?

19 MRS. CHRISTIAN: It apparently does not apply to  
20 that, but, in fact, petitioners do not do that.  
21 Petitioners are in the business of operating a recycling  
22 facility.

23 QUESTION: In the town.

24 MRS. CHRISTIAN: In the town. Now, the trash  
25 itself is brought to petitioners by haulers from other

1 towns or other States. Petitioners themselves are not  
2 picking up trash in the other towns or States. It is  
3 brought to them by private trucking companies, which bring  
4 the trash to petitioners. Petitioners then process and  
5 bale the trash, and then load it onto the trucks of  
6 independent trucking companies.

7 QUESTION: Okay, all right. Well, now the town  
8 treats everyone alike, whether you're inside or outside  
9 the town, I take it?

10 MRS. CHRISTIAN: But the -- that is correct, but  
11 the constitutional flaw is the export ban itself, the  
12 local processing requirement. The lower courts reasoned  
13 that there was no discrimination against interstate  
14 commerce because it applied the local processing  
15 requirement to local as well as out-of-town trash.

16 QUESTION: Well, are there some municipal  
17 functions that the municipality can undertake as a  
18 monopoly and impose its will on everyone, like sewage  
19 disposal or something of that kind?

20 MRS. CHRISTIAN: Certainly, Justice O'Connor.

21 QUESTION: Can a municipality have a monopoly?

22 MRS. CHRISTIAN: Well, a municipality certainly,  
23 if it wished to take on the job of trash collection  
24 itself, could take the trash wherever it wants to take it.  
25 And the municipality certainly can impose reasonable

1 health and safety and environmental requirements with  
2 respect to the handling of trash. They also have  
3 substantial power under the zoning laws to determine  
4 whether and to what extent trash facilities will be  
5 permitted in the town.

6 Now, in this particular case the town had  
7 initially denied petitioners' request for a permit to  
8 operate the recycling facility. That was appealed within  
9 the New York State courts. The courts ruled that the town  
10 had acted improperly in denying the permit, and directed  
11 the town to issue the permit, and the permit has now been  
12 issued.

13 QUESTION: In your view, if the city engaged in  
14 the hypothetical function that you were just discussing  
15 with Justice O'Connor, so that it owned the trash facility  
16 and collected it, could it enforce its monopoly by a  
17 criminal sanction? I mean like something like --  
18 approaching the Springfield ordinance.

19 MRS. CHRISTIAN: I think we have to draw a  
20 distinction between a city that merely operates the  
21 transfer station itself as a municipal facility, and a  
22 city that also collects the trash.

23 QUESTION: Assume the latter.

24 MRS. CHRISTIAN: If the city itself collects the  
25 trash, then it can take the trash wherever it wants. We

1 don't think that the city could prohibit petitioner, who  
2 holds a license to operate a recycling facility, from  
3 transporting trash outside the State.

4 QUESTION: Well, what if New York law changed  
5 the provision that allowed the petitioner to have a  
6 license, and New York law said that individual  
7 municipalities can operate monopoly trash disposal, or  
8 organizations?

9 MRS. CHRISTIAN: I think the issue there, Mr.  
10 Chief Justice, would be whether or not that is an  
11 appropriate subject for public utility regulation as a  
12 monopoly, and that would bring into play a totally  
13 different set of requirements. But that --

14 QUESTION: Well, that's not a constitutional  
15 question, is it?

16 MRS. CHRISTIAN: That would primarily be a  
17 question of State law. It conceivably, I would think,  
18 might involve some constitutional issues with respect to  
19 its effect on a facility such as petitioners', that  
20 previously held a license, but those would be entirely  
21 different issues and that's not this case.

22 QUESTION: Suppose in this case the city had  
23 advertised widely for bids for a transfer facility and  
24 awarded the transfer facility to an out-of-State company  
25 at an out-of-State site? So you have roughly this case,

1 except the transfer facility is out of State, would you  
2 then have a constitutional argument?

3 MRS. CHRISTIAN: I think that you would for this  
4 reason, because it would still prohibit the export of  
5 trash out of the State to any other point in interstate  
6 commerce, to any point other than the designated transfer  
7 facility.

8 QUESTION: Would you call that protectionism or  
9 simply the State exceeding its appropriate jurisdiction?

10 MRS. CHRISTIAN: I think I would call that  
11 protectionism, because it -- at least if, as in this case,  
12 the result is to confer a direct benefit on the town and  
13 its residents. In this case there is clearly a direct  
14 benefit to the town. At the time that the designated  
15 facility was constructed, the town entered into a  
16 take-or-pay agreement under which it guarantees the  
17 transfer facility a certain volume of trash. And if that  
18 guarantee is not met, then it has to pay for the lost  
19 revenues.

20 So that every ton of out-of-town trash that  
21 petitioners can be forced to send to the designated  
22 facility, instead of directly out of State, results in a  
23 reduction of the town's liability under the guarantee of  
24 \$81 a ton, and a direct benefit to the town's residents, a  
25 direct burden on interstate commerce. And I would think

1 it would make no difference if the facility happened to be  
2 located across the line in another State, as long as  
3 that --

4 QUESTION: Ms. Christian, I don't gather that  
5 the Commerce Clause permits a State to favor commerce with  
6 one State over commerce with other States.

7 MRS. CHRISTIAN: That would be our point  
8 exactly.

9 QUESTION: It's just a matter of favoring your  
10 own. You also can't say New York favors New Jersey, and  
11 we don't favor shipping to other States, you can't do  
12 that.

13 MRS. CHRISTIAN: I believe that this Court has  
14 struck down reciprocity requirements in the past that were  
15 limited in such a way that they are, in effect,  
16 prohibiting the export to any States other than the  
17 favored State.

18 QUESTION: Ms. Christian, did I understand your  
19 answer to Justice O'Connor was essentially that the town  
20 isn't doing enough to escape from this Commerce Clause  
21 check? That is if they handled the entire trash business  
22 you would have no complaint, but it's only because they  
23 don't haul the trash themselves that you can make this  
24 argument. Is that -- do I have it right?

25 MRS. CHRISTIAN: I don't think that's quite

1 correct, Justice Ginsburg. Let me see if I can clarify  
2 it.

3 Under the market participant doctrine, the town  
4 would be entitled to enter into the trash collection  
5 business as a participant in the market. And if it did  
6 that, it would be permitted, like any private business, to  
7 choose who it wanted to deal with. So in that  
8 circumstance, it could choose to take all of the trash  
9 that it collected to a private facility.

10 Now if, in addition to collecting trash itself,  
11 it also permitted the operation of petitioners' recycling  
12 facility, which is licensed by both the town and the State  
13 to conduct a recycling operation, then we do not believe  
14 that the town could compel petitioners to make use of the  
15 designated transfer facility. I was only suggesting that  
16 if the town wished to take on the function of collecting  
17 trash itself, then under the market participant doctrine  
18 it could take the trash that it collected wherever it  
19 wants to take it. It can deal with whoever it wants to  
20 deal with.

21 We believe that this case is essentially  
22 governed by the prior decisions of this Court in City of  
23 Philadelphia v. New Jersey and in Fort Gratiot Landfill v.  
24 Michigan. Those cases, of course, struck down laws  
25 barring the import of trash into a State.

1           There are basically only two fundamental  
2 differences between those cases and this case. The first,  
3 of course, is that this involves a restriction on the  
4 export of trash; those cases involved restrictions on  
5 import. But the Court explicitly pointed out in City of  
6 Philadelphia that the Commerce Clause prohibits the  
7 movement of the -- restrictions on the movement of goods  
8 into or out of a State. And second --

9           QUESTION: Because there was a discrimination in  
10 those cases too, wasn't there?

11           MRS. CHRISTIAN: There was a different treatment  
12 in those cases of local and out-of-town trash. But in  
13 this case, and in the -- as -- this case is like the local  
14 processing cases or the export ban decisions previously  
15 decided by this Court, in which you have a -- an overt  
16 restriction on the flow of interstate commerce itself.  
17 And as to cases in which you have an overt --

18           QUESTION: So you're really -- you're basically  
19 just making -- I shouldn't say just. You're basically  
20 making a burden argument, period.

21           MRS. CHRISTIAN: I think this is more of a  
22 burden on interstate commerce, yes, that is correct,  
23 Justice Souter. And the burden on commerce is created, as  
24 this Court has held in the local processing decisions, by  
25 the requirement that it undergo local processing at the

1 designated transfer facility before it can go out of  
2 State.

3 QUESTION: You don't --

4 QUESTION: And you don't think this is a  
5 discrimination case, then, huh? Is that what you're  
6 saying, you don't?

7 MRS. CHRISTIAN: I think it may be hard to draw  
8 the line between --

9 QUESTION: I'm sorry to hear that, because --

10 MRS. CHRISTIAN: -- Discrimination against and  
11 burden on interstate commerce. Certainly it is a burden  
12 on and --

13 QUESTION: I know -- you've said it's a burden.  
14 Do you think it's discrimination against interstate  
15 commerce?

16 MRS. CHRISTIAN: I think it's probably a  
17 discrimination against petitioners' out-of-State customers  
18 who are required to undergo additional processing after  
19 their trash has already been processed and baled, at the  
20 designated facility. But the principal focus of the  
21 attack has been on the burden that this statute creates on  
22 the free flow of interstate commerce.

23 QUESTION: Well why isn't it a discrimination  
24 against exporters?

25 QUESTION: Yeah.

1 MRS. CHRISTIAN: I think it is a discrimination  
2 against exporters. I think the -- the only sense in which  
3 you could say it is not a discrimination is that it  
4 discriminates against the export of trash by both local  
5 and out-of-town trash. But we would suggest that it  
6 discriminates against the exporters of trash and also is a  
7 burden on interstate commerce. Under either test, we  
8 believe it's invalid.

9 QUESTION: Do you --

10 MRS. CHRISTIAN: We think it falls within the  
11 category of laws that overtly block the flow of interstate  
12 commerce and therefore are virtually per se invalid.

13 QUESTION: You said a second ago as a factual  
14 matter something that I just didn't understand. You said  
15 that the -- the -- well, I may have you wrong. You said  
16 that those who export trash out of State must subject the  
17 trash to a further processing; is that what you said?

18 MRS. CHRISTIAN: That's correct, Justice Souter,  
19 as applied --

20 QUESTION: I don't understand that as a matter  
21 of fact. What does that consist of?

22 MRS. CHRISTIAN: Petitioners themselves process  
23 and bale the trash that is brought to them from outside  
24 the town. And when it's loaded onto trucks to leave  
25 petitioners' facility, it is then ready for transportation

1 to landfills or to waste energy plants. Nothing further  
2 is needed, and yet under this statute it is required to go  
3 to the designated transfer facility for additional  
4 processing at the transfer facility.

5 QUESTION: Okay. But the fact that your clients  
6 do bale their residue is not a requirement of the town  
7 ordinance. In other words, as I understand it, after they  
8 separate the recyclables that they take out from what is  
9 then going to be ultimately baled and exported, they could  
10 just bring that in bulk to the town transfer station, and  
11 it would be processed and baled there, wouldn't it,  
12 couldn't it?

13 MRS. CHRISTIAN: I think two points. First of  
14 all, as a practical matter you're talking about 150 tons  
15 of trash a week. The way that the processing is handled,  
16 when it comes off the conveyor belts after the recyclables  
17 have been separated out, it goes into the processing  
18 machines where the processing and the baling occurs. So  
19 as a practical matter --

20 QUESTION: But isn't that simply a function of  
21 the way your clients have set up their plant? Couldn't  
22 they set it up in such a way that they take out the  
23 recyclables and what is left gets dumped into a truck and  
24 the truck goes to the town transfer station where it's  
25 baled? Couldn't -- couldn't that happen?

1 MRS. CHRISTIAN: I'm not sure that that would be  
2 consistent with the permit under which they operate by New  
3 York State, or by the town itself. Under the permit, for  
4 example, the handling of trash is strictly regulated. One  
5 requirement, for example, is that all nonrecyclable trash  
6 that goes through petitioners' facility must be moved out  
7 within 24 hours. So you can't have trash piling up  
8 waiting to be picked up.

9 QUESTION: Uh-huh. In any case, I take it your  
10 case does not depend on -- really on the answer to my  
11 question.

12 MRS. CHRISTIAN: No, it does not, because even  
13 if under -- under this Court's local processing decisions,  
14 even if there were no local -- duplicate processing  
15 involved, it would still be an overt restriction on the  
16 flow of interstate commerce. And under that --

17 QUESTION: You made a point about the tipping  
18 charge, I think is what you called it.

19 MRS. CHRISTIAN: Yes.

20 QUESTION: That there was a considerable  
21 differential between what was --

22 MRS. CHRISTIAN: The tipping fee charge by  
23 petitioners is \$70 a ton. That charged by the transfer --  
24 designated facility is \$81 a ton. And this, of course, to  
25 petitioners amounts to an added expense that they are

1 required to bear with respect to the portion of their  
2 trash that constitutes nonrecyclables. That's an expense  
3 that would have to be added on and one which they could  
4 not bear. As a matter of fact, after the injunction in  
5 this case went into effect, petitioners were forced to  
6 temporarily shut down their operations.

7 QUESTION: Is there an explanation of the extra  
8 11 cents? Is it because eventually this plant will belong  
9 to the city, so that the --

10 MRS. CHRISTIAN: There is no explanation other  
11 than the fact that the town approved the fee of \$81 a ton.  
12 The town was required to approve the fee being charged by  
13 the designated facility. The petitioners set their own  
14 fee. That is the only explanation.

15 QUESTION: May I ask, to be sure I'm clear on  
16 one question -- do I correctly understand, you do not  
17 challenge the scheme insofar as it gives the town a total  
18 monopoly of the processing and distribution of trash  
19 generated within the town?

20 MRS. CHRISTIAN: In the lower courts,  
21 petitioners limited their Commerce Clause challenge to  
22 trash that originated outside the town, that is correct.

23 QUESTION: So that as a factual matter, what  
24 you're really complaining about is in order to stay in  
25 business you'd have to move outside the city limits?

1 Because then the ordinance wouldn't hurt you at all, if  
2 you were outside the city limits, would it?

3 MRS. CHRISTIAN: If we were not in Clarkstown,  
4 then the ordinance would not apply, because it only  
5 applies within the confines of Clarkstown.

6 QUESTION: It still would have an impact on you  
7 because you couldn't get any locally generated trash, but  
8 you don't object to that.

9 MRS. CHRISTIAN: We did not raise a Commerce  
10 Clause challenge. Quite candidly, we believe that as a  
11 matter of constitutional analysis, the ordinance also  
12 violates the Commerce Clause with respect to locally  
13 generated trash. But --

14 QUESTION: But that's not at issue.

15 MRS. CHRISTIAN: That is not at issue in this  
16 case, that's correct.

17 QUESTION: The only thing that's as issue is  
18 whether you can be compelled to move outside the city  
19 limits to continue receiving trash from other locations.  
20 That's really what -- I suppose that's what -- and if  
21 you're going to stay in business, you just have to move  
22 your plant.

23 MRS. CHRISTIAN: We are licensed by the town to  
24 operate the recycling facility in Clarkstown, that's  
25 correct.

1 QUESTION: But your license doesn't do you any  
2 good if you can't get any trash.

3 MRS. CHRISTIAN: Under this --

4 QUESTION: You could get the trash if you -- if  
5 you were located outside the -- outside the city.

6 MRS. CHRISTIAN: We could -- we could get the  
7 trash if we were willing to move our facility, but we  
8 submit that that is not an excuse to a violation of the  
9 Commerce Clause.

10 QUESTION: But that's the real burden that  
11 effects you.

12 MRS. CHRISTIAN: That would be a major burden on  
13 petitioners, since you cannot simply move a trash facility  
14 to --

15 QUESTION: Is this the only facility that they  
16 operate?

17 MRS. CHRISTIAN: I believe this is the only  
18 facility that the Carbone Company itself operates. There  
19 are some related companies located in other States, but C  
20 & A Carbone, Inc., I believe operates only the one  
21 facility.

22 Our basic point is that this is an overt  
23 discrimination against interstate commerce that could be  
24 justified only if the town could show that it is justified  
25 by a valid factor unrelated to economic protectionism, and

1 that that factor can't adequate serve -- be served by  
2 nondiscriminatory means. We believe that the out-of-town  
3 origin of the trash essentially eliminates most of the  
4 justifications that the town has sought to offer.

5 As far as health and safety or environmental  
6 justifications are concerned, petitioners are subject to  
7 exactly the same requirements as the designated facility,  
8 and the town can certainly add more stringent requirements  
9 if it thinks that's necessary.

10 There is no danger that this facility will be  
11 shut down in the absence of the flow control ordinance.  
12 The only danger is that the town might have to make good  
13 under its guarantee, and that is, by definition, economic  
14 protectionism.

15 QUESTION: One amicus brief has suggested that  
16 Congress, in other legislation, has basically directed  
17 this kind of a flow control ordinance.

18 MRS. CHRISTIAN: We think that's clearly not  
19 correct, Justice O'Connor. The only reliance -- the only  
20 citations that have been made have been to provisions of  
21 the RCRA statute, which refer not to flow control laws,  
22 but to long-term contracts. That they're not the same  
23 thing. And, as a matter of fact, we've suggested that one  
24 of the nondiscriminatory alternatives that might be  
25 pursued is long-term contracts.

1 Now, as a matter of fact, Congress has pending  
2 before it right now several bills that would authorize  
3 flow control laws in specific limited circumstances. The  
4 only action taken thus far has been to ask the  
5 Environmental Protection Agency to supply Congress with  
6 its views by September of 1994. But clearly nothing that  
7 Congress has done to date satisfies the very stringent  
8 test for a clear expression of the intent of Congress to  
9 authorize action that would otherwise violate the Commerce  
10 Clause.

11 QUESTION: But it is true that in -- I think  
12 it's the House committee report on that statute, they did  
13 specifically refer to this sort of restriction. I know  
14 the text of the statute itself doesn't, but one of the  
15 briefs quotes a portion of a House report that does.

16 MRS. CHRISTIAN: They're referring to these  
17 statutes. There was testimony that referred to these, but  
18 there is nothing in the statute itself --

19 QUESTION: That's right.

20 MRS. CHRISTIAN: That refers to flow control  
21 laws. And Congress -- this Court has made it clear that  
22 in order for Congress -- in order for a statute to be  
23 interpreted as authorizing action that would otherwise  
24 violate the Commerce Clause, there must be a clear  
25 expression of intent, and this falls far short of that.

1 position, We don't think that you need to reach the issue  
2 of nondiscriminatory alternatives at all, because there is  
3 nothing here other than economic protectionism. But  
4 simply to complete our point, it is apparent that even if  
5 there were some valid nonprotectionist purpose, those  
6 purposes could be met adequately by means that do not  
7 impose a burden on interstate commerce. might be the next

8 case. To begin with, there is the simple expediency of  
9 the transfer station, the designated facility, competing  
10 in the marketplace for trash. And in this connection, I  
11 think it's important to observe that, in the absence of  
12 flow control laws, there's no apparent reason why the  
13 designated facility would not be able to compete all  
14 successfully for trash in neighboring towns and States.

15 garbage. The amicus brief of the State of New Jersey, for  
16 example, reveals that the tipping fees in New Jersey are  
17 substantially higher than the \$81 charged by the  
18 designated facility. The reason that they are not  
19 permit -- able to compete for those now is that under New  
20 Jersey law, which also has a flow control law, trash is  
21 permitted to leave New Jersey for purposes of recycling,  
22 of separating into recyclable and nonrecyclable  
23 components, but only on condition that the nonrecyclables  
24 are brought back to New Jersey. DAN C. BRASHARS

25 Now, petitioners, of course, are placed in the

1 position, by this statute, of being literally unable to  
2 comply with the flow control laws of both New Jersey and  
3 Clarkstown, because Clarkstown directs that this identical  
4 trash must go to the designated transfer facility.

5 QUESTION: Why didn't you challenge the New of  
6 Jersey flow control laws?

7 MRS. CHRISTIAN: I think that might be the next  
8 case.

9 QUESTION: That's next. That's ---

10 MRS. CHRISTIAN: That may be the next case,  
11 Justice Scalia.

12 (Laughter.)

13 QUESTION: I must say, the spectacle of all  
14 States and municipalities wrestling for control over  
15 garbage is really quite wonderful.

16 (Laughter.)

17 MRS. CHRISTIAN: I think that this simply  
18 reflects the changed economics of trash disposal, Justice  
19 Scalia.

20 If the Court has no further questions, I'd like  
21 to reserve my remaining time for rebuttal.

22 QUESTION: Very well, Ms. Christian.

23 Mr. Brashares.

24 ORAL ARGUMENT OF WILLIAM C. BRASHARES

25 ON BEHALF OF THE RESPONDENT

1 MR. BRASHARES: Mr. Chief Justice, and may it  
2 please the Court:

3 I think the central concept of economic  
4 protectionism means the allocation of economic benefits  
5 among private parties engaged in commerce on the basis of  
6 political geography. I think the essence of economic  
7 protectionism is discrimination. It means that those who  
8 are protected, those who vote within the political  
9 process, receive benefits, and those who are outside the  
10 political process, who do not vote, do not receive  
11 benefits.

12 I would like to -- I make that statement because  
13 I think that concept reconciles, certainly, the  
14 Philadelphia Chemical Waste, Fort Gratiot, it reconciles  
15 the processing cases, it reconciles the so-called hoarding  
16 cases. It has to do with the discrimination between the  
17 haves, the represented, and the have-nots. And that  
18 principle applied in this case answers two questions.  
19 First of all, since there is no discrimination, we are  
20 outside of the universe of economic protectionism.

21 QUESTION: Mr. Brashares.

22 MR. BRASHARES: Yes.

23 QUESTION: I don't understand what you're  
24 saying. If one has a generous and nongreedy motive, it's  
25 okay to discriminate against interstate commerce? I mean,

1 if I am not getting anything personally out of -- out of  
2 discriminating against interstate commerce, it is not  
3 protectionism and therefore it's okay.

4 MR. BRASHARES: Well, Your Honor, I think this  
5 is what the Maine against Taylor case is probably all  
6 about. I think there is certainly a very strong  
7 presumption that when a State or local law discriminates  
8 on the basis of geography, that there is a protectionist  
9 purpose. I think what the Court has said is that that is  
10 rebuttable if you can show that there is not -- there is,  
11 in fact, a rational basis for the discrimination. And I  
12 think in Maine against Taylor, what the Court, in effect,  
13 did was to say, yes, there is a rational basis here.

14 But I think the absence of benefit does not  
15 necessarily make the discrimination condoned. There --

16 QUESTION: Well, but it has to be reasonable.  
17 It hasn't to be -- the point is not that it's not  
18 protectionist, but that it is reasonable, right?

19 MR. BRASHARES: Well --

20 QUESTION: I mean, I don't know that our  
21 Commerce Clause law says that the only invalid  
22 restrictions upon interstate commerce are those that are  
23 imposed for protectionist purposes.

24 MR. BRASHARES: Well, Your Honor, I think -- I  
25 think I am putting together, and I think appropriately so,

1 protectionism and discrimination on a geographic basis.  
2 What I am saying is that it is almost impossible,  
3 unthinkable to find a State or local law which allocates  
4 or regulates, on the basis of geography, those who are  
5 within the political process being treated one way and  
6 those outside another way, without there being some  
7 element of protectionism.

8 I would grant that there could be cases where  
9 discrimination did not have those benefits, but I  
10 think --or allocation. But I think here, if I can get to  
11 this case, first of all, we do not have a law which has a  
12 discrimination. We do not have a law which classifies on  
13 the basis of geography, on the basis of whether you're in  
14 or outside of the political process. The law here, which  
15 counsel has referred to as an export ban -- well, I  
16 suppose every law which regulates locally and has the  
17 effect of preventing a product from going out of the  
18 jurisdiction, in the same sense is an export ban.

19 And in that same sense, export bans have never  
20 been held, as such, to be unconstitutional, and that's why  
21 this case is not the flip side, as counsel has put it, of  
22 the New Jersey case. The key there is discrimination. Is  
23 a product kept out because it is from outside? Is it kept  
24 in because it's from inside, and is it kept in, in the  
25 case of the processing and hoarding and other cases, for

1 the benefit of local interests. to ship in interstate  
2 commerce. And I'd like to turn to the question -- if I can  
3 answer the question that Justice O'Connor asked the  
4 counsel, about is this city, is this town essentially  
5 capturing -- that word has been used in the papers of the  
6 petitioners. Is this town attempting to capture waste  
7 that is moving in interstate commerce? we been mixing the

8 Well, to suggest that there is a capturing it's  
9 conveys the idea that there is truck moving through town  
10 and the town is reaching out for its greedy purposes, --  
11 capturing the truck and making them pay a fee to pass of  
12 through. That is not at all what's going on. you have  
13 garbage. I need to remind -- I need to state that the own  
14 petitioners in this case have a permit to operate under  
15 New York law as a recycling center. They have a permit  
16 which states that 90 percent of the material they bring to  
17 their facility will be recyclable. In fact, in their by of  
18 permit application they say they are going to recycle  
19 cardboard. That means there would be 10 percent of that  
20 total material which would be discarded, worthless health  
21 garbage, as we put it. health reason why it has to be taken

22 to this p Now, they bring that material into their  
23 facility in Clarkstown. As the -- Mr. Carbone, your  
24 specifically testified, they put it on their floor, they  
25 separate it out into the recyclables which, as we know, so

1 they are permitted to sell and to ship in interstate  
2 commerce, and into the residue. And the issue in this  
3 case is that residue.

4 Mr. Carbone also acknowledged, in an affidavit  
5 in lower court, that that material and the local material  
6 is all fungible. And he said, in fact -- when he was  
7 concerned that the local town might have been mixing the  
8 out-of-town waste with the local waste, he said once it's  
9 commingled you can't tell which is which.

10 Now, what the town is saying to Mr. Carbone --  
11 and to everyone else in the town, no matter what kind of  
12 business they operate, the town is saying if you have  
13 garbage that is generated, meaning discarded, in our town,  
14 this is the way it needs to be handled. We believe it's  
15 in the interests of this community -- we've made the  
16 legislative judgment that this is the way it should be  
17 handled, just as the City of San Francisco and the City of  
18 Detroit did in 1905.

19 QUESTION: But all of these are legislative  
20 judgments. I mean what you're saying is not for health  
21 reasons. There's no health reason why it has to be taken  
22 to this particular plant, is there?

23 MR. BRASHARES: No, there certain is, Your  
24 Honor.

25 QUESTION: So somebody says I want to take it to

1 another plant; it's cheaper, it's out of State. And you  
2 say, no, you can't do that, you must take it to this  
3 plant.

4 MR. BRASHARES: Well, Justice --

5 QUESTION: Why is that not a discrimination  
6 against interstate commerce?

7 MR. BRASHARES: Well, Justice Scalia, first of  
8 all, there is no classification which in any way separates  
9 interstate commerce from local commerce. As I said, the  
10 material which is regulated --

11 QUESTION: Dean Milk establishes that that makes  
12 no difference. Just because you discriminate against  
13 other intrastate facilities does not enable you to  
14 discriminate against out-of-State facilities as well.

15 MR. BRASHARES: Yes, but, Judge, there's no --  
16 there's no city line or county line discrimination  
17 involved here. There is no reference to needing to deal  
18 locally with local facilities, except the city. And there  
19 is the classification in this case which brings into  
20 discussion the question of monopolization.

21 In, as I was going to say, the State of  
22 California -- in the case of California Reduction, which  
23 this Court decided in 1905 right at the beginning of the  
24 Lockner era, and the Gardner case, considered exactly this  
25 situation. The Court considered whether there was a --

1 not a rational basis, they went into a much more searching  
2 inquiry and determined that the town -- the city had a  
3 legitimate, indeed a pressing interest in regulating in  
4 the area of waste disposal. That the method they had  
5 chosen was appropriate in that they had set up a  
6 designated facility, they had franchised it. Indeed, in  
7 San Francisco, it was for 50 years.

8 QUESTION: Yes, but wasn't that just dealing  
9 with locally generated waste?

10 MR. BRASHARES: Well, Justice Stevens, the  
11 record in that case does not show that any waste was  
12 coming in from anywhere or was going out to anywhere.  
13 Interestingly, the district court in the -- in that case  
14 did note that these were articles of commerce because they  
15 were claimed to be of value. This was material which was  
16 going out to feed livestock.

17 QUESTION: Well, all I can suggest is if it  
18 doesn't tell us whether there was any nonlocally generated  
19 waste involved, the case really doesn't address the  
20 precise issue that your opponent is raising here.

21 MR. BRASHARES: Well, Your Honor, I think -- I  
22 think it does address it in this sense. If we don't have  
23 economic protectionism, if we don't have a discrimination,  
24 which I think I would submit we do not have here, but  
25 still -- but still the petitioners claim that the use of

1 this power by the city is wrong under the Constitution, I  
2 think that analysis is really not a Commerce Clause  
3 analysis. MR. BRASHARE: Well --

4 And let me make this point in connection with  
5 California Reduction. If you took California Reduction on  
6 its Fourteenth Amendment grounds and just as the Court was  
7 about to decide that case the petitioners or the  
8 plaintiffs in that case came in and said we wish to amend,  
9 we have just discovered that garbage is moving across into  
10 Nevada to a farm. And I make that hypothetical only to  
11 suggest how would that change the analysis? The fact that  
12 waste is moving out of the State of California would not  
13 change the Fourteenth Amendment analysis. all monopoly of

14 all local QUESTION: Well, it isn't the point that it's  
15 moving out. It's coming from a location that's not within  
16 the jurisdiction of the community. That's the -- that's  
17 the thing, the most troublesome point to me, is the lack of  
18 fact -- let me give you a little hypothetical I keep  
19 thinking about. gel framework of the city's has an

20 environment Supposing there's another processing plant right  
21 outside of town that will pay a tipping fee of \$75. And  
22 so the -- they've got three choices: \$81 to your which  
23 facility, \$71 if these people stay in business, or \$75  
24 outside. Now, if your ordinance is in effect and you fact  
25 drive these people out of business, the business will was

1 shift from a \$71 figure to a \$75 figure, and doesn't that  
2 burden commerce?

3 MR. BRASHARES: Well --

4 QUESTION: If you make the outside people pay  
5 more than they otherwise would pay.

6 MR. BRASHARES: Well, Your Honor, no, I don't  
7 think it -- I don't -- well, whether it's a burden --  
8 certainly, everything that raises the costs of parties  
9 operating in commerce is arguably a burden. Whether it is  
10 a burden that this Court would take into account and  
11 balance it, in the Pike jargon.

12 QUESTION: See, it can't be justified by your  
13 need to control and dispose -- have a total monopoly of  
14 all locally generated waste.

15 MR. BRASHARES: No, absolutely, Your Honor, I  
16 believe it can be justified by the -- the town's need.  
17 Now, Your Honor, I have -- I have failed to -- for lack of  
18 time and priorities here, to get into the point of why  
19 this overall legal framework of the city's has an  
20 environmental purpose.

21 Now, we have, of course, spelled it out at great  
22 length in our brief. You have 15 amicus briefs here which  
23 get into it in great detail. But the point is that, as a  
24 matter of State law, this facility resulted from the fact  
25 that this town operated a landfill for many years, it was

1 forced to close it down, and as part of that remedial  
2 action it was required to set up this transfer station in  
3 order to continue to have responsibility for local waste  
4 service.

5 QUESTION: Well, we'll agree with you that you  
6 had to close down the landfill for environmental purposes,  
7 but it doesn't follow that you have an environmental  
8 purpose for this restriction if you can accomplish the  
9 same purpose by health and safety regulations, and I  
10 thought you said a moment ago that you could.

11 MR. BRASHARES: Well, Justice Souter, I would  
12 submit that those are relevant questions to raise in the  
13 context of whether there's a rational basis for the  
14 regulation. And I submit that they would be raised in the  
15 context of whether this town is actually constitutionally  
16 permitted to regulate in this matter. But I think that is  
17 a due process -- substantive due process issue. I don't  
18 think it's a Commerce Clause issue.

19 QUESTION: Well, it's not a Commerce Clause  
20 issue unless you've got a justification for your burden,  
21 and this is your only justification. You're in exactly  
22 the same boat if you've got to justify your burden, even  
23 though it's a nondiscriminatory burden.

24 MR. BRASHARES: Well, Your Honor, if it is  
25 a -- if it is a regulation which has passed muster under

1 the -- under the Fourteenth Amendment, if it is deemed to  
2 have a rational basis, and the question then is does it,  
3 nevertheless, violate the Commerce Clause because of a  
4 burden that it imposes; I think when you get into weighing  
5 that burden against the legitimate purposes of the law,  
6 we're going back and reevaluating under the -- under the  
7 rational basis.

8 QUESTION: Well, I'm not sure we are. Every  
9 burden that passes due process muster because there is  
10 some rational basis is not necessarily going to pass a  
11 rational basis test for discrimination, is it?

12 MR. BRASHARES: I agree. I agree. That is the  
13 additional --

14 QUESTION: And I thought -- but I thought -- I  
15 thought you were assuming just the opposite in what you  
16 said a moment ago.

17 MR. BRASHARES: No, Your Honor, no. I agree  
18 completely with your statement. I think the next -- the  
19 Commerce Clause brings to the table the discrimination  
20 analysis. A law which is otherwise passing muster under  
21 the Fourteenth Amendment as rationally based, we then move  
22 to the Commerce Clause and then we then consider whether  
23 it is discriminatory. Because then we have the aspect of  
24 regulating the unprotected interests, which is the essence  
25 of economic protectionism.

1 analysis QUESTION: Uh-hum. at the difference --

2 MR. BRASHARES: We have the unprotected saying,  
3 interests, and they are not participating in the political  
4 process that produced that regulation, and therefore they  
5 should not be bound by the substantive due process Honor.  
6 determination that the Court has made in that case. But  
7 when the same parties who are protected then claim the  
8 burden -- which is this case, of course; Carbone is, of  
9 course, a local Clarkstown interest who is within the  
10 protected interest -- then there's no basis for the claim  
11 that we should now go back and reevaluate the burden on  
12 commerce in comparison to the local benefits. Arkatown --

13 QUESTION: I don't understand. You say because  
14 Carbone is in Clarksburg itself, this restriction can be  
15 imposed on Carbone. Does that mean you can -- elsewhere.

16 Does that MR. BRASHARES: Well, Your Honor -- tainly does,

17 and I fail QUESTION: -- You can prohibit your local if you  
18 citizens. Since they're part of the voting group, you can  
19 prohibit them from dealing in interstate commerce  
20 because -- I don't understand what you're arguing. ay, I

21 think -- MR. BRASHARES: No, no, Your Honor, I'm not ay  
22 saying that you can prohibit them. What I'm saying is, to  
23 though, if you are looking at the benefits and burdens of  
24 the law, you are not concerned about the burdens on the  
25 local people as much as you are -- in a discrimination

1 analysis you're concerned about the difference --

2 QUESTION: Why not? That's what you're saying,  
3 that you can prevent local people from dealing in  
4 interstate commerce. I don't know --

5 MR. BRASHARES: No, Your Honor. No, Your Honor,  
6 I'm not suggesting you can prevent local people from  
7 dealing in interstate commerce. Because, I mean, the  
8 question would be how -- what kind of law would you pass  
9 to prevent local people from dealing in interstate  
10 commerce? It would have to be some kind of a  
11 discriminatory law that says these people can engage in  
12 commerce and these people can't. What the Clarkstown --

13 QUESTION: Every local person has to buy at the  
14 Clarksburg shopping mall. All local people have to take  
15 their trade there. They can't -- they can't go elsewhere.  
16 Does that violate the Commerce Clause? It certainly does,  
17 and I fail to see why it makes much of a difference if you  
18 say all local people have to get their trash processed at  
19 this particular processing plant.

20 MR. BRASHARES: Well, Your Honor, if I may, I  
21 think -- I think the hypothetical of all people must buy  
22 at the local supermarket, I think that would never get to  
23 the Commerce Clause; that would fall under the Fourteenth  
24 Amendment.

25 I think the question of requiring -- this

1 requiring local processing -- see, that is what exactly --  
2 that is the label that the petitioners attempted to put on  
3 this case, and it just doesn't fit. The question is local  
4 processing is where a law states that before --- as in the  
5 shrimp cases, the Foster-Fountain case, before a product  
6 may leave this jurisdiction it must be processed by local  
7 processors. The sorting is on the basis of local require  
8 processors versus nonlocal processors. New York

9 facilities That's not what this law does. This law says  
10 the city is on one hand and all other participants are on  
11 the other hand, and this law says that this will be done  
12 by the city because we have legitimate police power the  
13 reasons to do so. So --

14 QUESTION: And one of the -- I think one of our  
15 problems is we're still not sure what those police power  
16 reasons are. And I think you deflected the question by  
17 saying well that's really a Fourteenth Amendment question,  
18 but -- QUESTION: This ordinance, or New York law does

19 not require MR. BRASHARES: No, no, Your Honor, I'm sorry, I  
20 didn't mean to -- as that are outside of its jurisdiction,

21 does it? QUESTION: -- We assume -- we all accept that  
22 the city gets an economic benefit. What are the other  
23 police power reasons that could not have been realized by  
24 health and safety regs. facilities to which the waste goes

25 from the MR. BRASHARES: Well, Your Honor, one of the

1 reasons is the ability to monitor -- monitor the waste.  
2 In this town, under State law there is a very elaborate  
3 requirement for recycling. There is mandatory local  
4 recycling. The town needs to have the ability to monitor  
5 whether the recycling is actually being done. There are  
6 concerns about traffic, as to how --

7 QUESTION: Wait a minute. Does New York require  
8 this town to monitor recycling in other New York  
9 facilities?

10 MR. BRASHARES: Your Honor, it requires the town  
11 to have recycling laws and it -- I don't believe it  
12 mandates a particular -- it certainly doesn't mandate the  
13 full control.

14 QUESTION: Well, but it doesn't mandate -- it  
15 doesn't mandate the town to go out and inspect other  
16 facilities other than its own, does it?

17 MR. BRASHARES: I'm sorry -- does it mandate?

18 QUESTION: This ordinance, or New York law does  
19 not require Clarkstown to monitor what happens to its  
20 trash in facilities that are outside of its jurisdiction,  
21 does it?

22 MR. BRASHARES: Well, the permit granted by the  
23 State to the Clarkstown transfer station requires it to  
24 make certain that the facilities to which the waste goes  
25 from the transfer station are properly permitted and

1 appropriate facilities. In that sense -- waste is being  
2 taken care of. QUESTION: Yes, but that can -- that can be  
3 handled by other facilities. So you don't need a local  
4 facility to accomplish the end that you're -- that you're  
5 addressing.

6 MR. BRASHARES: Well, Your Honor, the basic  
7 issue of is there an environmental justification for a  
8 city controlled, city monopolized transfer station, again  
9 I don't think -- I think if that judgment is made under  
10 the Fourteenth Amendment that there is a rational basis  
11 for the city to use that method to advance a legitimate  
12 interest in the environment, the local environment, then I  
13 don't -- I don't believe we go back and reevaluate that  
14 under the Commerce Clause.

15 But, nevertheless, I don't mean to avoid that  
16 with legal argument, and not talk about why there should  
17 be this program. It's the same reason for the program in  
18 San Francisco in 1905 and Detroit in 1905. It's the same  
19 reason that cities since -- I think it's 1658 in this  
20 country, in New Amsterdam, they had flow control laws.  
21 They wanted to make sure all the waste was taken care of  
22 in a particular way.

23 It's the entire idea of control. If we control  
24 it, if we know where it's coming from, where it's going,  
25 if we have the ability to actually monopolize and have

1 responsibility, then we will know that the waste is being  
2 taken care of. It's very --

3 QUESTION: Well, but our civilization has  
4 advanced to the point where garbage is valuable.

5 MR. BRASHARES: Your Honor --

6 (Laughter.)

7 MR. BRASHARES: That is a major point that the  
8 petitioners make, but it's wrong. Some garbage is  
9 valuable if it's the part of the garbage that can be  
10 pulled out and sold for recycling. But make no mistake  
11 about it, the waste that is left over after the valuables  
12 are removed, as they are allowed to be removed and shipped  
13 out anywhere under the Clarkstown ordinance, that garbage  
14 is worth less today than it's ever been worth, because the  
15 cost of getting rid of it is higher than it's ever been.

16 QUESTION: Well, do you rest your argument in  
17 part, then, on the notion that what is left, and what is  
18 at issue here, has no value and is not an article of  
19 commerce?

20 MR. BRASHARES: Well, Justice O'Connor, I don't  
21 rest on that, because I think that the economic  
22 protectionism analysis that I've been through I think  
23 suffices for an affirmance of this case. But I do think  
24 that those points need to be considered, about whether it  
25 is an article of commerce.

1           What I have suggested in the brief is that there  
2 are three doctrines which converge on that. The doctrine  
3 of basically is it in commerce when the local jurisdiction  
4 essentially has a separate transaction between the place  
5 where it's discarded and the place where it is -- comes to  
6 the transfer station

7           The second, I think the quarantine cases have  
8 application here, because the idea of the quarantine  
9 cases -- and it's a nondiscriminatory quarantine -- is  
10 basically to say this is something we consider dangerous  
11 to the local community. Certainly, garbage is dangerous  
12 if it's not properly attended to, and therefore we are  
13 going to take it out of the process of commerce.

14           And the third is from the Sporhase case, the  
15 argument that the Court has recognized, as it did in that  
16 case, that you will take into consideration what private  
17 rights the State has given to engage in a particular  
18 business such as the removal of groundwater.

19           For those reasons, I do urge the Court to  
20 consider whether one approach to this case is to consider  
21 that the effect of the city's monopolizing this business,  
22 taking over in effect, requiring the waste to be treated  
23 in this way is, in effect, removing it or withholding it,  
24 if you would, from commerce.

25           QUESTION: Can you help me with one factual

1 matter? I want to be sure I understand you correctly. Is  
2 it correct that there would be no violation of the  
3 ordinance if the petitioner separated out the recyclable  
4 garbage and shipped that out of State and made money out  
5 of that, so long as it took the nonrecyclable and shipped  
6 it over to your facility and paid \$81 a ton for that  
7 portion of it?

8 MR. BRASHARES: That's correct.

9 QUESTION: And they say there's some practical  
10 reason why they can't do it, some 24-hour limit and so  
11 forth. Is it practically feasible for them to do it and  
12 just pay a little more for that portion of the business?

13 MR. BRASHARES: Your Honor, there's nothing in  
14 the record which suggests it's not practically feasible.  
15 Indeed --

16 QUESTION: And as far as you're concerned,  
17 representing the town, that would be perfectly lawful if  
18 they were willing to do it?

19 MR. BRASHARES: Yes, yes.

20 QUESTION: And then do you draw the conclusion  
21 for that -- for that reason, after the garbage is  
22 separated you are entitled to look at the nonrecyclable  
23 residue as locally generated because it was generated  
24 within the town?

25 MR. BRASHARES: That's right.

1 based upon QUESTION: That's your theory.

2 Clarkstown MR. BRASHARES: That's right. Your Honor, let  
3 me give an example of that.

4 Under the Clarkstown law and under New York law,  
5 every business and every resident is now required to  
6 recycle. The city provides each resident, each business  
7 with bins in which they will put the different  
8 recyclables. And this is mandated. The city operates  
9 composting facilities. This is all part of the overall  
10 environmental plan that's involved here. It's not just a  
11 matter of a transfer station. The city picks up white  
12 goods, discarded refrigerators and so forth and so on.

13 And the point is that each business -- if you  
14 imagine an alley with three entrances and three cans. You  
15 know, one's a supermarket, one's a clothing store, and  
16 another is Carbone's recycling center, and each one of  
17 them is required to recycle and each one of them is  
18 required to put out the residues. And the city law says  
19 that when that happens, those residues will be handled in  
20 a particular way that we had determined to be  
21 environmentally appropriate. And that way is that it will  
22 be brought to a designated transfer station and that it  
23 will then be disposed of as we have arranged it.

24 It is no difference. In fact, if the Court were  
25 to say that the town needs to differentiate this waste

1 based upon the fact that it originated out of the town of  
2 Clarkstown, the Court would, in effect, be doing --  
3 requiring the city to do what it has struck down time and  
4 time again, as in Philadelphia. The Court would be  
5 requiring the town to impose a geographic classification.  
6 It would be a complete reversal of roles, even though it  
7 would be completely arbitrary and irrational.

8 There's no difference. As Carbone himself said,  
9 it's fungible, it's commingled, and yet if the -- if the  
10 argument were to be sustained that the town has to treat  
11 this waste differently, this would be, in effect, imposing  
12 a geographic classification --

13 QUESTION: But why is this case any different  
14 from Dean Milk. It's just Dean Milk in reverse, it seems  
15 to me. Suppose that the town in Dean Milk had said that  
16 all milk sold in the city, for health reasons has to be  
17 pasteurized, just as you're saying for health reasons this  
18 trash has to be disposed of, and it will all be  
19 pasteurized in a city-owned or city-contracted-for plant  
20 just outside the city?

21 MR. BRASHARES: Well, Your Honor, I think --

22 QUESTION: Would that be allowed anymore than --

23 MR. BRASHARES: If the law -- I believe -- I  
24 believe if the law said that the town has contracted for a  
25 plant --

1 QUESTION: To pasteurize milk.

2 MR. BRASHARES: To pasteurize. And if there is  
3 some rational basis for that action, to carry out some  
4 legitimate public purpose, then --

5 QUESTION: There is. Pasteurization certainly  
6 has a legitimate public purpose, right?

7 MR. BRASHARES: Absolutely.

8 QUESTION: And the city says we can be sure that  
9 the pasteurization is being done properly if it's being  
10 done in this plant which we will supervise.

11 MR. BRASHARES: That's right.

12 QUESTION: So you think that that's the only  
13 problem there, was with Dean Milk, that the --

14 MR. BRASHARES: Well, Your Honor, I think the  
15 problem with Dean Milk --

16 QUESTION: -- City didn't require it to be  
17 pasteurized in its own plant.

18 MR. BRASHARES: No, Your Honor, I think the  
19 problem with Dean Milk was that there was a sorting of  
20 private interest based upon the proximity to the city. In  
21 other words, that there was, in fact -- those who were  
22 within that protected area were able to do this business,  
23 those private economic interests, those who were outside  
24 of that area were not permitted to do that business, so we  
25 had a model of economic protectionism.

1 Now, the question in Dean Milk was was there  
2 some legitimate basis for that discrimination, and the  
3 answer was no, there was -- so I don't think that's the  
4 same case.

5 QUESTION: Mr. Brashares --

6 QUESTION: No, they -- they used the same kind  
7 of legitimate basis that you're trying to use. They said  
8 health interests, and we said, well, there are a lot of  
9 other ways to preserve those health interests without  
10 requiring that the milk be pasteurized within 5 miles of  
11 the city. And we said you have to, rather than  
12 discriminate against interstate commerce this way, use  
13 those other means.

14 MR. BRASHARES: Your Honor, if the Clarkstown  
15 law specified that all garbage had to be processed within  
16 5 miles of Clarkstown, it would be unconstitutional.

17 QUESTION: Mr. Brashares, before you -- your red  
18 light goes on, I wanted to be clear that, in bringing up  
19 what Justice O'Connor asked your opponent, you are not  
20 relying, as some of your amici have been, on congressional  
21 permission?

22 MR. BRASHARES: No, Your Honor. I think there  
23 is a -- there's an argument there. I think to meet the  
24 unmistakably clear standard is difficult, and I think it's  
25 a much less compelling argument than the other arguments

1 in this case.

2 I would like to close, if I may -- refer the  
3 Court to a case which we cited in our brief, an opinion by  
4 Judge Stapleton of the Third Circuit which -- and if I  
5 don't finish this by the red light, I invite the Court to  
6 finish. In the -- quote:

7 In the absolute sense, virtually all State  
8 regulation burdens interstate commerce. Where the burden  
9 on out-of-State interests is no different from that placed  
10 on competing in-State interests, however, it is a burden  
11 on commerce rather than a burden on interstate commerce.  
12 In such cases, nothing in Commerce Clause jurisprudence  
13 entitles out-of-State interests to more strict judicial  
14 review than that to which the in-State interests are  
15 entitled, i.e. arbitrary and capricious review under the  
16 Due Process Clause and rational basis review under the  
17 Equal Protection Clause, neither of which involves the  
18 kind of social value balancing that Norfolk Southern urges  
19 us to undertake.

20 And last, I'd like to urge the --

21 QUESTION: Well, what was -- what was that  
22 quotation from?

23 MR. BRASHARES: I'm sorry, Your Honor, that was  
24 from Norfolk Southern against Oberly, which is 822 Fed  
25 2nd, page 388. The quote is on page 406. I apologize.

1 It's referred to in our brief.

2 And last, we did not cite, and I would like to  
3 urge the Court to consider in this case the Bryard against  
4 City of Alexandria case in terms of the effect of a local  
5 regulation on an interstate business. There the Court  
6 said -- recognized, exactly as I urge it should recognize  
7 here, that the fact that an interstate business is  
8 involved does not remove the fact that the local activity  
9 that is being regulated is indistinguishable from the  
10 local activity of the same kind.

11 In that case the Court recognized that it made  
12 no difference whether the solicitor coming to the door was  
13 local or was from interstate commerce. The fact was that  
14 the evil, or the situation that the local legislation was  
15 attempting to deal with and which the Court felt was  
16 rationally based under the Fourteenth Amendment, that was  
17 the exact same problem presented by the local solicitor  
18 and the out-of-State solicitor, and the State and the  
19 local community had no obligation to differentiate on the  
20 basis of its regulation.

21 Thank you very much.

22 QUESTION: Thank you, Mr. Brashares.

23 Mrs. Christian, you have 4 minutes remaining.

24 REBUTTAL ARGUMENT OF BETTY JO CHRISTIAN

25 ON BEHALF OF PETITIONERS

1       processin MRS. CHRISTIAN: Mr. Chief Justice, and may it  
2       please the Court:       You don't violate the ordinance just  
3       by proces Respondents, in response to a question, have, I  
4       believe, admitted that this law would be invalid if it  
5       required that trash must be processed within 5 miles of  
6       the city limits of Clarkstown. It seems to me that is ping  
7       dispositive of this case. There is no difference, from a  
8       constitutional standpoint, from a Commerce Clause them \$81  
9       standpoint, between such a requirement and the requirement  
10      that we have in this case, which requires that it must be  
11      processed at the designated transfer station.

12               Now, beyond this --       We're objecting to the

13      restricti QUESTION: Because that transfer station is as  
14      within 5 miles of Clarkstown?       nated transfer facility, for

15      which the MRS. CHRISTIAN: It is within Clarkstown.

16               QUESTION: But may I ask a question?

17      MRS. CHRISTIAN: I believe there was a question  
18      to respondents if it would be valid if it -- if the law  
19      required processing within 5 miles of Clarkstown. I think  
20      this falls within that description.       know what they would

21      do when QUESTION: But is it correct that there -- that  
22      the processing itself violates the ordinance? I thought  
23      it was what you do with the residue after the processing  
24      that preempts the -- creates the problem.       at the \$81 a ton

25      doesn't MRS. CHRISTIAN: It is not what -- it is not the

1 processing done by -- with recyclable garbage?

2 QUESTION: You don't violate the ordinance just  
3 by processing it -- be shipped directly outside of -- out

4 of State. MRS. CHRISTIAN: No.

5 QUESTION: -- So long as you ship the residue  
6 over to their facility and pay them \$81 a ton as a tipping  
7 fee.

8 MRS. CHRISTIAN: That's right, and pay them \$81  
9 a ton, but for the processing.

10 QUESTION: So you're not objecting to -- you're  
11 not objecting to any restriction on process.

12 MRS. CHRISTIAN: No. We're objecting to the  
13 restriction that requires what they require -- regard as  
14 local processing at the designated transfer facility, for  
15 which they charge the \$81 a ton.

16 QUESTION: And that's --

17 MRS. CHRISTIAN: It is --

18 QUESTION: -- That's the disposal of the -- of  
19 the residue?

20 MRS. CHRISTIAN: We don't know what they would  
21 do when they receive it. It is the processing and the  
22 disposal of the residue.

23 Now, respondents have taken the position --

24 QUESTION: But am I correct that the \$81 a ton  
25 doesn't have any impact at all on the portion of your

1 business that deals with recyclable garbage?

2 MRS. CHRISTIAN: The ordinance itself permits  
3 the recyclables to be shipped directly outside of -- out  
4 of State. discarded in the city.

5 QUESTION: So you can continue to do that as  
6 long as you pay the \$81 on the residue? to apply to the

7 nonrecycl MRS. CHRISTIAN: That is correct. As long as we  
8 ship -- not discard in the city. Respondents --

9 QUESTION: They why isn't the residue locally you  
10 generated waste if it produced by the recycling that takes  
11 place within the community?

12 MRS. CHRISTIAN: For one specific reason. We do  
13 not discard the revenue -- the residue. Petitioners'  
14 business consists of the handling of trash. After they  
15 separate out the recyclables petitioners themselves  
16 process and bale the trash, and themselves ship it to  
17 landfills or waste energy plants which they pay to accept  
18 disposal of the nonrecyclables. So the fundamental  
19 difference is that petitioners never discard anything.  
20 They're in the business of handling the trash. limited to  
21 handling Now, we believe that this statute, as a matter  
22 of constitutional jurisprudence, would be unconstitutional  
23 even with respect to locally discarded trash. But the  
24 fact is petitioners never discard trash at all. They  
25 handle it, they dispose of it out of State.

1 QUESTION: Well, you -- The case is submitted.  
2 QUESTION: Yes, but -- m., the case in the  
3 above-ent QUESTION: -- You say the ordinance applies only  
4 to trash discarded in the city.

5 MRS. CHRISTIAN: No, that is not our position.  
6 The trash plainly has been interpreted to apply to the  
7 nonrecyclable residue of petitioners' operation, which  
8 they do not discard in the city. Respondents --

9 QUESTION: It applies to discarded trash and you  
10 say we don't discard. Is that what you're -- is that your  
11 point?

12 MRS. CHRISTIAN: Not quite, Justice O'Connor.  
13 We do not discard trash, but the ordinance nevertheless  
14 has been interpreted by the New York State courts as  
15 applying to our operation. A major distinction between  
16 trash handled by petitioners and the local trash to which  
17 respondents sought to draw an analogy is that we do not  
18 discard it.

19 A correction of one factual point. Respondents  
20 also said that under the permit petitioners are limited to  
21 handling trash that is no more than 10 percent  
22 nonrecyclable. There is no such limit.

23 CHIEF JUSTICE REHNQUIST: Thank you, Mrs.  
24 Christian.

25 MRS. CHRISTIAN: Thank you.

1 CHIEF JUSTICE REHNQUIST: The case is submitted.

2 (Whereupon, at 11:01 a.m., the case in the  
3 above-entitled matter was submitted.)  
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## CERTIFICATION

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

*C & A CARBONE, INC. ET AL V. TOWN OF CLARKSTOWN, NEW YORK*

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*CASE . 92-1402*

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

BY *Ann Marie Federico*

(REPORTER)

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