

No. 16-0748

In the Supreme Court of Texas

CITY OF LAREDO, TEXAS,
Petitioner,

v.

LAREDO MERCHANTS ASSOCIATION,
Respondent.

On Petition for Review from the
Fourth District Court of Appeals, San Antonio, Texas

BRIEF OF TEXAS AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

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To the Honorable Supreme Court of Texas:

INTEREST OF *AMICUS CURIAE*

Texas submits this brief as *amicus curiae* to offer additional meaning to the Legislature’s directives about the management of municipal solid waste in Texas. No party has paid a fee in connection with this brief.

STATEMENT OF FACTS

For purposes of this brief, Texas incorporates by reference, and substantially adopts, the Statement of Facts provided by the Laredo Merchants Association in its Brief on the Merits filed May 24, 2017. Additional facts relied upon by Texas are provided throughout the brief.

SUMMARY OF THE ARGUMENT

Most of us never think twice about the garbage we throw away. But because that waste must end up somewhere within our scenic borders, all Texans, whether they realize it or not, share an interest in efficient and effective municipal solid waste (“waste”) management. That means this case is not just about Laredo. It’s about Texas, because waste management is a statewide issue.

Cognizant of the larger impact of waste, and our limited landfill capacity, the Legislature enacted the Texas Solid Waste Disposal Act (“Act”) to efficiently use the land we set aside for waste

and require local governments to prudently manage waste. The Act asks municipalities to reduce the amount of waste sent to landfills through recycling, composting, and other methods. But the Act specifies that municipalities *cannot* manage waste by banning or taxing containers or packages, because bans and taxes pass the burden of waste management to consumers. In short, municipalities must manage *waste*, not people.

When the Act became law, it was no secret that some municipalities wanted to ban containers and other consumer goods. Containers and packaging comprise the largest percentage of waste,¹ so many view banning containers or packages, *i.e.*, bags, as an easy fix to the challenge of complying with the Act. But the Legislature wanted municipalities, not consumers, to find ways to efficiently manage waste. Therefore, the Legislature included requirements in the Act that prohibit local governments from passing the burdens of waste management to consumers, rather than employing serious efforts towards recycling, composting, source reduction programs, and the like.

¹ U.S. Env'tl. Protection Agency ("EPA"), *Advancing Sustainable Materials Management: 2014 Fact Sheet Assessing Trends in Material Generation, Recycling, Composting, Combustion with Energy Recovery and Landfilling in the United States* 9 (Nov. 2016), available at https://www.epa.gov/sites/production/files/2016-11/documents/2014_smmfactsheet_508.pdf.

Notwithstanding the clear language of the Act, Laredo (“the City”) did what the Legislature prohibited: it banned bags. Laredo, Tex., Ordinance No. 2014-O-064 (2014) (“Ordinance”); Pet. Br. Tab F. The City claims the purpose of the Ordinance is to “protect[] local wildlife,” among other things, by reducing litter. But that is immaterial. The effect of the Ordinance is that a source of waste is managed out of existence. Though the City employs “magic words” to circumvent the Act’s preemptive effect, municipalities cannot conceal the true effect of an unlawful ban through superfluous, precatory language. And this concern is not limited to the City, as more than ten different municipalities enacted ordinances like the one at issue. *See* Pet. Br. Tab M.

Texas must be empowered to enforce its statewide solution of waste disposal. To give full meaning to the Legislature’s directive about the management of waste, the Court should clarify that municipalities cannot pass waste management duties onto consumers by banning packaging or containers.

ARGUMENT

I. Banning or Taxing Sources of Waste Is Managing Waste.

Texas law prevents a municipality from taxing² or banning “the sale or use of a container or package” for “solid waste management purposes.” Tex. Health & Safety Code § 361.0961(a). And measures (like the Ordinance) that outright prohibit the creation of waste, by definition, accomplish “solid waste management purposes.”

Under the Act, “[m]anagement” is “the systematic control of the activities of generation, source separation, collection, handling, storage, transportation, processing, treatment, recovery, or disposal of solid waste.” *Id.* § 361.003(18). As the Fourth Court made clear, “management” is a broad term, and it includes measures that prevent the creation of waste in the first place.³ Thus, if a municipality limits the impact of waste, it is “manag[ing]” waste, which the Act controls. This means that “solid waste management” includes litter prevention, contrary to the City’s

² While taxation is not the focus of this case, some municipalities also violated the Act’s prohibition on “assess[ing] a fee or deposit on the sale or use of a container or package.” Tex. Health & Safety Code § 361.0961(a)(3); *see, e.g.*, Agreed Final J. of Dismissal, *Texas v. City of Brownsville, et al.*, No. 2016-DCL-06794-E (Dist. Ct. of Cameron Cty., 357th Jud. Dist. May 15, 2017); City of Kermit, Tex., Code § 98.04 (2013).

³ *Laredo Merchs. Ass’n v. City of Laredo*, No. 04-15-00610-CV, 2016 WL 4376627, at *6 (Tex. App.—San Antonio Aug. 17, 2016, pet. filed) (quoting Tex. Health & Safety Code §§ 361.003(18), (34)).

contention. Pet. Br. 10, 21, 39, 44–45.

Bag bans, like the Ordinance, exercise “systematic control” over, at least, the “generation, . . . collection, handling, transportation, processing, . . . recovery, [and] disposal of solid waste.” Tex. Health & Safety Code § 361.003(18). Indeed, reasonable arguments can be made that a container or package ban fits within *all* of the markers of the Act’s definition of “management.” But the Court need not analyze them all. At a bare minimum, banning packaging or containers that may become litter controls the “generation” of waste. Bag bans, like the City’s, manage waste and are unlawful because they defy the Act’s express preemption against impeding consumers’ access to and use of packages and containers.

A. “Magic Words” Do Not Change the Waste Management Effect of the Ordinance.

Employing “magic words” does not mask the waste management effect of bag bans. Here, for example, the City claims the Ordinance “promote[s] the beautification of the City.” Pet. Br. 43. But as the Court of Appeals correctly held, the Ordinance manages waste, irrespective of the professed reasons for its enactment. *Laredo Merchs. Ass’n*, 2016 WL 4376627, at *6–7.

In analyzing the Ordinance’s purposes, the Court of Appeals misapplied *Southern Crushed Concrete, LLC v. City of Houston*, 398

S.W.3d 676 (Tex. 2013). In *Southern Crushed Concrete*, Houston argued that the purpose of its ordinance is to “regulate land use” and not the preempted category of “air quality.” 398 S.W.3d at 679. While this Court acknowledged Houston’s purpose-oriented argument, it did not conclude (contrary to the Court of Appeals’ suggestion here) that a municipality’s stated policy goal can or should be dispositive of a preemption analysis. *Id.* Rather, the Court recognized the clear dangers associated with heeding unwarranted attention to the professed purpose of a troubling ordinance—that “a city could almost always circumvent [Texas law] . . . by merely passing an ordinance that purports to regulate something other than [the preempted subject].” *Id.*

Here, focusing on a municipality’s stated purpose functionally authorizes the unlawful circumvention of the Act’s preemptive effect by any number of “magic words”—something the Court has not favored in myriad contexts.⁴ And the gaping loophole created in the Act through a “magic words” analysis will surely be abused by

⁴ See, e.g., *Hysaw v. Dawkins*, 483 S.W.3d 1, 8 (Tex. 2016) (“In [construing testamentary instruments], we have favored a holistic and harmonizing approach and rejected mechanical rules of construction . . . or requiring the use of magic words.”); *Texas Dep’t of Pub. Safety v. Bonilla*, 481 S.W.3d 640, 643 (Tex. 2015) (analyzing evidence sufficient to establish good-faith element of a derivative immunity defense); *In re Deepwater Horizon*, 470 S.W.3d 452, 460 (Tex. 2015), *reh’g withdrawn* (May 29, 2015) (“We do not require ‘magic’ words to incorporate a restriction from another contract into an insurance policy”); *City of Hous. v. Williams*, 353 S.W.3d 128, 145 (Tex. 2011) (“the agreement need not state ‘third-party beneficiary’ or any similar magic words.”).

additional, growing numbers of municipalities. *See infra* Section II.B.3.

This concern is not hypothetical. The City argues that one purpose of the Ordinance is the “Protection of Wildlife,” Pet. Br. 42–46, and it does this specifically to avoid the preemptive strictures of the Act. *See* Pet. Br. 46 (arguing because “the Ordinance was not adopted for ‘solid waste management purposes,’ the Ordinance does not fall within the scope of Section 361.0961(a)(1)’s preemption”). Thus, according to the City, the Ordinance’s use of magic words avoids the requirements of the Act, no matter the size or nature of the Ordinance’s waste management footprint.

This problem is not limited to the City. The “magic words” of municipal bag bans are designed to circumvent preemption by the Act, including, for example:

- “The proliferation of single use carryout bags presents a unique and pernicious problem for Austin’s citizens, environment, and wildlife.” City of Austin, Tex., Ordinance No. 20120301-078 (2012), *available at* http://www.baglaws.com/assets/pdf/texas_austin.pdf.
- “The City of Brownsville has a substantial interest in protecting its natural environment, including its resacas, lakes, rivers, plants, and wildlife” and “single-use checkout plastic bags have negative effects on the natural environment” City of Brownsville, Tex., Ordinance No. 2017-911-G (2017), *available at* <http://www.cob.us/AgendaCenter/ViewFile/Item/448?fileID=1557>, pp. 158–60.
- Mimicking the City of Austin, the City of Sunset Valley justifies its ban because “the proliferation of single use carryout bags presents a unique and pernicious problem for

Sunset Valley’s citizens, environment, and wildlife.” City of Sunset Valley, Tex., Ordinance No. 130219-C (2013), *available at* http://www.baglows.com/assets/pdf/texas_sunset_valley.pdf.

These examples highlight the danger of affirming a “magic words” approach, as advocated by the City. Pet. Br. 42–46. For if municipalities need only declare that package or container bans are “[t]o promote the beautification of the City,” *id.* at 43, “prevent flooding,” *id.*, “protect[] local wildlife,” *id.* at 45, or any other purpose, the preemptive language of the Act is rendered functionally meaningless. But “courts are to avoid interpreting a statute in such a way that renders provisions meaningless.” *City of Waco v. Lopez*, 259 S.W.3d 147, 153 (Tex. 2008). Thus, the Court should determine that the Ordinance has a waste management purpose based solely on its effects: eliminating a source of waste.

B. Environmental Protection Is a Component of Waste Management.

Even if “magic words” matter, and the Court pays heed to the City’s stated purposes, those purposes nevertheless evince the City’s “management” of waste, as defined by the Act. *See* Tex. Health & Safety Code § 361.003(18). Environmental issues are among the Legislature’s primary concerns in managing waste. Moreover, all of the professed environmental and aesthetic harms identified by the Ordinance, and other municipalities, arise from litter. But reducing litter “manage[s]” waste.

In the Act, the Legislature sought to “safeguard the health, welfare, and physical property of the people and to *protect the environment* by controlling the management of solid waste.” *Id.* § 361.002(a) (emphasis added). While the City postures its “protect[ion of] local wildlife” purpose as an unqualified good, Pet. Br. 45, the debate on the environmental value of bag bans is far from settled. While there are those that claim bag bans have ecological value,⁵ some research concludes that bag bans increase food-borne illnesses, while having little effect on litter.⁶ Indeed, multiple environmental arguments exist *against* bag bans.⁷

But this policy decision, and its consequences, belongs to the Legislature. Though some may disagree with the Legislature’s choice, as is the case with any legislative enactment, there can be no debate that the Legislature included “protect[ing] the environment” and “enhance[ing] the quality of air, land, and

⁵ See, e.g., Center for Biological Diversity, Single-Use Plastic Bag Facts, http://www.biologicaldiversity.org/programs/population_and_sustainability/expect_more_bag_less/facts.html (last visited June 6, 2017).

⁶ See, e.g., *Grocery Bag Bans and Foodborne Illness*, U. of Penn., Inst. for Law & Econ. Research Paper No. 13-2 (Jan. 28, 2013), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2196481 (finding a 25% spike in hospitalization and death from food-borne illness that occurred as bag bans went into effect); Reason Found., *How Green is that Grocery Bag Ban?*, Policy Study 437 (June 2014), available at http://reason.org/files/how_green_bag_ban.pdf (finding that plastic bags make up less than 1% of litter).

⁷ See, e.g., *The Effect of Plastic Bags on the Environment*, BAGTHEBAN.COM, available at <http://www.bagtheban.com/learn-the-facts/environment> (last visited June 7, 2017).

waters” of Texas in its decision making process, Tex. Health & Safety Code § 361.002(a), (b). Moreover, the Legislature is within its sovereign prerogative to determine that bag and container bans are inappropriate forms of environmental protection and waste management.

Therefore, there is no distinction between waste management and environmental protection. Under the Act, they are one in the same.

C. “Source Reduction” Does Not Involve Bans.

Reducing materials before they become waste is a form of waste management known as “source reduction.” Source reduction is not merely a designated tactic in the Legislature’s overall strategy to protect the environment through the Act, *see id.* §§ 361.421–361.445, but “[s]ource reduction is the primary goal of the state in implementing this policy to minimize the impact of pollution in order to *reduce risk to public health and the environment and continue to enhance the quality of air, land, and waters of the state* where feasible” *Id.* § 361.502(b) (emphasis added). Thus, because “source reduction” is part of the Act’s overall environmental aims, *id.* § 361.502(a), (b), container or package bans enacted in the name of “source reduction” are preempted in the same manner as bans to “protect[] local wildlife.” Pet. Br. 45. But even if “source reduction” was not part of the Legislature’s

environmental strategy, the Ordinance would still not survive preemption because “source reduction,” properly understood, does not involve banning sources of waste.

“Source reduction” is a well-known term of art that predates the Act. “Source reduction” envisions reducing certain forms of waste, but not eliminating them. In other words, “source reduction” is aimed at making products or services available, but with less of an environmental footprint. This understanding was adopted by the Legislature:

“Source reduction” means an activity or process that avoids the creation of municipal solid waste in the state by *reducing* waste at the source and includes:

(A) redesigning a product or packaging so that *less material* is ultimately disposed of;

(B) changing a process for producing a good or providing a service so that *less material* is disposed of; or

(C) changing the way a material is used so that the amount of waste generated is *reduced*.

Id. § 361.421(9) (emphases added). Note the absence of any ban-oriented language, *to wit*: eliminate, eradicate, erase, exclude, oust, annihilate, expel, abolish, negate, excise, prohibit, remove, etc. By contrast, the Ordinance does not merely seek to “reduce” or “less[en]” bags within its jurisdiction, but makes “unlawful” and “discontinue[s]” bags altogether. Ordinance §§ 33-455, 33-456; Pet. Br. Tab F.

The regulations subsequently adopted by the Texas

Commission on Environmental Quality (“TCEQ”) affirm that “source reduction” does not include banning materials:

Source reduction--Has the meaning assigned by the federal Pollution Prevention Act of 1990, Publication Law 101-508, § 6603, 104 Stat. 1388. The term “source reduction” means any practice which:

(A) *reduces* the amount of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise released into the environment (including fugitive emissions) prior to recycling, treatment, or disposal; and

(B) *reduces* the hazards to public health and the environment associated with the release of such substances, pollutants, or contaminants. The term includes equipment or technology modifications, process or procedure modifications, reformulation or redesign of products, substitution of raw materials, and improvements in housekeeping, maintenance, training, or inventory control.

30 Tex. Admin. Code § 335.471 (emphasis added).⁸

In other words, “source reduction” does not involve outright bans, but merely seeks to reduce the environmental impact the product or service. Were “source reduction” a synonym for bans, such elaborate definitions and understandings, by TCEQ and others, would hardly be necessary.

⁸ See also David J. Abell, *Emergency Planning and Community Right to Know: The Toxics Release Inventory*, 47 SMU L. Rev. 581, 582 (1994) (explaining source reduction as “redesigning production processes, substituting inputs, and enhancing efficiency.”). Additionally:

[t]he term “source reduction” does not include any practice which alters the physical, chemical, or biological characteristics or the volume of a hazardous substance, pollutant, or contaminant through a process or activity which itself is not integral to and necessary for the production of a product or the providing of a service.

42 U.S.C. § 13102(5)(A).

The non-banning nature of “source reduction” goes beyond Texas. According to the EPA, “[s]ource reduction, or waste prevention, is designing products to *reduce* the amount of waste that will later need to be thrown away and also to make the resulting waste *less* toxic.”⁹ This does not involve banning categories of products.¹⁰ The Federal Trade Commission likewise defines the advertisement of “source reduction” as representing “that a product or package has been *reduced* or is *lower* in weight, volume, or toxicity.”¹¹ No matter the authority—federal, state, or

⁹ EPA, Municipal Solid Waste (last updated Mar. 29, 2016) (emphasis added), *available at* <https://archive.epa.gov/epawaste/nonhaz/municipal/web/html/>.

¹⁰ As examples of the non-banning nature of “source reduction,” the EPA suggests the following as reasonable measures of source reduction for the public:

- Buy used. You can find everything from clothes to building materials at specialized reuse centers and consignment shops. Often, used items are less expensive and just as good as new.
- Look for products that use less packaging. When manufacturers make their products with less packaging, they use less raw material. This reduces waste and costs. These extra savings can be passed along to the consumer. Buying in bulk, for example, can reduce packaging and save money.
- Buy reusable over disposable items. Look for items that can be reused; the little things can add up. For example, you can bring your own silverware and cup to work, rather than using disposable items.
- Maintain and repair products, like clothing, tires and appliances, so that they won’t have to be thrown out and replaced as frequently.
- Borrow, rent or share items that are used infrequently, like party decorations, tools or furniture.

EPA, Reducing and Reusing Basics (last updated Apr. 23, 2017), *available at* <https://www.epa.gov/recycle/reducing-and-reusing-basics>.

¹¹ U.S. Fed. Trade Comm’n, Guides for the Use of Environmental Marketing Claims (“Green Guides”) § 260.17 (2012) (emphasis added), *available at* <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguides.pdf>.

administrative—source reduction is never defined or understood in terms of bans or absolutist measures.

To be sure, bag bans seek an end approximating source reduction, but they go too far under the Act. Tex. Health & Safety Code § 361.0961(a). Banning sources of waste, rather than reducing them, is not source reduction. While the Legislature wanted to encourage the reduction of waste at the source, it expressly prohibited the blunt force instrument of container and package bans as a shortcut to that end. *Id.*

By claiming its Ordinance is an acceptable form of “source reduction,” Pet. Br. 30–31, the City not only ignores operative definitions, it misconstrues the longstanding essence of the term. The Ordinance is not a valid form of source reduction.

II. Preemption of Local Bans on Containers and Packages Is Necessary for Texas’s Waste Management.

A. Management of Waste Is a Statewide Issue.

State control and orchestration of waste is crucial. At the time Texas adopted the Act, many states were suffering from the failure to implement a statewide waste strategic plan.¹² Recognizing the failures of other states, the Legislature declared that “the problems of solid waste management have become a matter of state concern

¹² See, e.g., Jonathan P. Meyers, *Confronting the Garbage Crisis: Increased Federal Involvement as a Means of Addressing Municipal Solid Waste Disposal*, 79 Geo. L.J. 567, 569 n.10 (1991).

and require state financial assistance to plan and implement solid waste management practices that encourage the safe disposal of solid waste and the recovery of material and energy resources from solid waste.” Tex. Health & Safety Code § 363.003(11); 73d Leg., R.S., ch. 1045, § 11, 1993 Tex. Sess. Law Serv. 1045 (S.B. 963). Thus, the Legislature devised “an important strategy in state-local waste management policy.” 73d Leg., R.S., ch. 1045, § 1, 1993 Tex. Sess. Law Serv. ch. 1045 (S.B. 963).

The Act began Texas’s effort to preserve and efficiently utilize the limited landfill space that remains. *See Meyers, supra* note 11, at 574–75. Thus, the Act declared “[i]t is this state’s policy and the purpose of this chapter to safeguard the health, welfare, and physical property of the people and to protect the environment by controlling the management of solid waste, including accounting for hazardous waste that is generated.” Tex. Health & Safety Code § 361.002.

1. Landfill Space in Texas Is Limited.

Even in Texas, landfill space is finite. By their very nature, landfills are limited in both size and lifecycle, being permitted only for the “life of the site.” 30 Tex. Admin. Code § 330.63. Texas has already filled and closed approximately 4,200 known municipal

landfills.¹³ Thus, Texas must manage landfill space carefully.

The need for conscientious landfill management is amplified against the demand for landfills. Texas has approximately 5,147 active local governments—the second most in the country.¹⁴ This includes 254 counties (more than any other state) and about 1,214 municipalities (second most to Illinois).¹⁵ And yet, as of March 2017, Texas has only 189 landfills for waste.¹⁶ Of these, 70 are “arid exempt” and limited in how much waste they can accept each year.¹⁷ Thus, Texas has only 119 landfills operating year-round. This equates, roughly, to 27 to 43 local governments sharing a single landfill at any given point in time. Therefore, there is not unlimited space for waste and the ultimate responsibility for managing waste, and our finite landfill space, belongs to Texas.

¹³ See, e.g., TCEQ, Inventory of Closed Municipal Solid Waste Landfills (last modified Jan. 27, 2017), <https://www.tceq.texas.gov/assets/public/permitting/waste/msw/msw-closed-facilities-texas.xls>; <https://www.tceq.texas.gov/assets/public/permitting/waste/msw/msw-unum-texas.xls>; https://www.tceq.texas.gov/permitting/waste_permits/waste_planning/wp_closed_lf_inv.html.

¹⁴ See U.S. Census Bureau, Individual State Descriptions: 2012 (Sept. 2013), <https://www2.census.gov/govs/cog/2012isd.pdf>; U.S. Census Bureau, 2012 Census of Governments, The Many Layers of American Government (July 2013), https://www2.census.gov/govs/cog/2012/2012_cog_map.pdf.

¹⁵ See *supra* n.14; Municipalities Listed by County, TEXAS MUNICIPAL GUIDE 2016-2017 2–54 (Content Providers, LLC, Austin, TX), available at <http://www.tx-municipalities.com/publication/?m=28139&l=1>.

¹⁶ See, e.g., TCEQ, Active Municipal Solid Waste Landfills in Texas (Mar. 2017), <https://www.tceq.texas.gov/assets/public/permitting/waste/msw/msw-landfills-active.pdf>.

¹⁷ *Id.*

2. Many Factors Impact Where Texas Locates Landfills.

TCEQ regulates the existence and operation of landfills, and the management of waste disposal. Tex. Health & Safety Code §§ 361.002, 361.011. Thus, Texas, not individual municipalities, oversees and manages the statewide space available for waste.

In making landfill siting decisions, not just any open space will suffice. Myriad considerations impact whether land can receive waste. And landfills only come into operation after an exhaustive, state-controlled permitting and registration process. *See, e.g.*, 30 Tex. Admin. Code §§ 330.53–330.73 (TCEQ, Permit & Registration Application Procedures).

Among other things, TCEQ “shall consider water pollution control and water quality aspects and air pollution control and ambient air quality aspects,” Tex. Health & Safety Code § 361.011, as well as “assess the impact of the proposed facility on local land use in the area, including any relevant land use plans in existence.” *Id.* § 361.0871; *see also* 30 Tex. Admin. Code § 106.534. Moreover, Texas must manage public sentiment about landfills, which are rarely a popular neighbor. Landfill permit applications are open for public comment, 30 Tex. Admin. Code § 330.69,¹⁸ and NIMBYism (a “not in my backyard” attitude) oftentimes thwarts new landfill

¹⁸ *See also* TCEQ, Offer Your Comments (last updated May 1, 2017), <https://www.tceq.texas.gov/about/comments.html>.

proposals. See *BFI Waste Sys. of N. Am., Inc. v. Martinez Env'tl. Grp.*, 93 S.W.3d 570, 573 (Tex. App.—Austin 2002, pet. denied) (“As cities grow, area landfills reach capacity. Attempts to obtain new landfill space, although necessary, are always unpopular with nearby landowners.”); Meyers, *supra* note 11, at 572.

B. The Act Asks Municipalities to Better Manage Waste.

The Ordinance misses the mark on what the Act challenges Texas cities to do—manage waste. In short, a “manager” by definition cannot manage something that is banned and does not exist. But cities can promote concerns about plastic bags in several ways without running afoul of the Act, including public information campaigns and recycling, Tex. Health & Safety Code § 361.421; 30 Tex. Admin. Code § 335.471,¹⁹ just to name a few.

Additionally, under the Act, municipalities retain some latitude to reasonably oversee packages and containers within their midst. If a city, for example, learned that a particular type of plastic bag used by retailers was manufactured with carcinogens and posed an unacceptable health risk to consumers, an ordinance to cease the use of that particular brand of plastic bag may not run

¹⁹ In 2011, Texas became the third state to join the www.abagslife.com plastic bag recycling program. See, e.g., Recycling Today Staff, *Plastic Bag Recycling Program Adopted in Texas*, RECYCLINGTODAY.COM, Feb. 15, 2011, available at <http://www.recyclingtoday.com/article/texas-bag-recycling-life/>.

afoul of the Act. In this hypothetical, the municipality is not banning plastic bags altogether. Nor is the municipality managing waste by reducing prospective sources of litter because other non-carcinogenic plastic bags are presumably available for use.

Alternatively, a municipality may choose to voluntarily follow the Buy American Act of 1933, 41 U.S.C. § 8302, and encourage that the plastic bags provided within its city limits be manufactured by Americans, or even Texans. Again, in this instance, the municipality isn't banning bags *per se*, or otherwise imposing an unlawful reduction in the volume of waste created by containers or packages.

An evaluation of the legality of these examples, of course, does not turn on the purposes stated by the municipality, *see supra* Section I.A., but the effect. If the effect of a municipal law involving containers and packages does not manage waste, it will survive scrutiny under the Act. The Ordinance, on the other hand, holds no such promise. The Ordinance manages waste and improperly bans outright a source of waste. The effect of the Ordinance is an unwarranted burden on consumers and retailers—something the Legislature expressly prohibited.

- 1. Managing Waste Requires Municipal Effort, Not Bans.**

Motivating the Act was what the Legislature called “the

improper management of solid waste.” Tex. Health & Safety Code § 363.003. And by its definitions, the Legislature understood that managing waste means treating different forms of waste differently—not banning waste from the jurisdiction. *Id.* §§ 363.004(20) (“Solid waste management”), (21) (“Solid waste management system”), (22) (“State solid waste management plan”). Generally, a municipality can do several things beyond just sending waste to landfills or burdening residents (or visitors) with bans. For example, some items can be recycled, while others can be composted. *See, e.g., id.* § 361.421.

Once municipalities exhaust legally-permissible management options, the remaining waste comprises the “municipal solid waste stream.” 1993 Tex. Sess. Law Serv. ch. 1045 (S.B. 963). The “municipal solid waste stream”—created by the municipality, not consumers—is then transported to landfills for disposal. *Id.*; Tex. Health & Safety Code § 361.422. At this point in the process, the Legislature was specific on what it wanted. It did not direct municipalities to reduce waste streams *by any means necessary*. Rather, it encouraged “the reduction of waste [streams] through environmentally and economically sound waste management incentives and the use of source reduction, reuse, recycling, composting, and resource recovery processes.” 1993 Tex. Sess. Law Serv. ch. 1045 (S.B. 963).

2. **Bag Bans Dump Waste Management on Citizens and Retailers.**

In creating the new strategy to manage Texas's waste, the Legislature also addressed the costs and burdens. Importantly, the costs and efforts of the new waste disposal initiative, as impacting containers and packages, were *not* to burden citizens or retailers. Tex. Health & Safety Code § 361.0961. Rather, waste managers were incentivized to innovate by bearing the costs of the waste that they put into the waste streams. 1993 Tex. Sess. Law Serv. ch. 1045 (S.B. 963). But the Ordinance passes some of the burden of waste management to consumers by banning the containers and packages they use to carry goods.

It is no surprise that municipalities, like the City, opted to ban bags to decrease the stream of waste they create. If containers and packaging comprised a municipality's largest percentage of waste,²⁰ then banning containers is a tempting option to reduce waste. Thus, without engaging in recycling, composting, source reduction, or other innovative waste management measures, a municipality can claim to do its part through a simple ban. But not only is that not what the Legislature intended—the Legislature expressly prohibited it. The Legislature instructed municipalities to be better *managers* of waste, not *banners* of waste. Thus,

²⁰ Compare *supra* note 1 with *supra* note 6.

municipalities cannot just ban from existence their potentially largest source of waste—they must manage it.

Adversely impacting the availability of fee-free packaging and containers for consumers was never an aim of the Act. And to avoid any confusion, the Legislature made that clear in section 361.0961’s preemption provision. The thrust of the Act is to regulate the *managers* of waste—municipalities. 1993 Tex. Sess. Law Serv. ch. 1045 (S.B. 963). Thus, the costs and burdens of reducing the size of waste streams were not to be dumped on residents, but borne by the municipalities and their waste management agents—those that create the waste streams and determine what does, and does not, go to landfills. Rather, they must compost, recycle, engage in proper forms of source reduction, and take other innovative and proactive steps to reduce the stress on landfills. *Id.* Instead of improving the *management* of waste, bag bans shift costs of waste management to consumers and retailers.

3. Upholding the Ordinance Initiates a Slippery Slope.

The Act is clear that waste is to be effectively managed without disrupting consumer choice and market forces (at least as far as packages and containers go). The Legislature was rightfully concerned about unforeseen consequences that accompany restrictions on consumer products. And these so-called “bag bans,”

like the Ordinance, are no exception to the law of unintended consequences. Beyond the obvious harms to consumer convenience and freedom, the debate on the value of bag bans is far from settled. *See supra* Section I.B.

If the Ordinance is permitted to remain, the ban of containers or packages that may become or produce waste possesses no logical end. What comprises a “container or package” is so broad that with ordinance after ordinance, and ban after ban, municipalities can continue to shift more and more of the responsibilities of waste management to consumers and retailers until waste is hardly generated.²¹ Thus, the Court should uphold the law preventing municipalities from shifting the waste management burden to retailers and consumers.

PRAYER

Texas respectfully requests that the Court affirm the Fourth District Court of Appeals. In addition to clarifying that a municipality’s stated purposes for an ordinance are not dispositive of its substantive effect, Texas asks the Court to hold that the

²¹ If the City’s argument is accepted, Texas municipalities may next seek to ban all Styrofoam coolers, *see, e.g.*, Douglas Hanks, *Styrofoam coolers would bring \$100 fine at Miami-Dade parks under proposed crackdown*, MIAMI HERALD, June 6, 2016, *available at* <http://www.miamiherald.com/news/local/community/miami-dade/article82130412.html>, or maybe even all plastic cups and plates, *see, e.g.*, Sophie Eastaugh, *France becomes first country to ban plastic cups and plates*, CNN.com, Sept. 20, 2016, *available at* <http://www.cnn.com/2016/09/19/europe/france-bans-plastic-cups-plates/index.html>.

Ordinance, and similar measures that ban or restrict the use of containers or packages, *per se* manage waste and are, thus, preempted by the Act.

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In compliance with Texas Rule of Appellate Procedure 9.4(i)(2), this brief contains 5,191 words as reported by Microsoft Word, excluding the portions of the brief exempted by Rule 9.4(i)(1).

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