

THE URBAN TUMBLEWEED: AN ANALYSIS OF SINGLE-USE PLASTIC BAG REGULATIONS AND THE BATTLE OVER LOCAL CONTROL

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I. INTRODUCTION: THE PROBLEM OF PLASTIC AND CARRYOUT BAGS¹

Americans use approximately 100 billion single-use carryout plastic bags each year.² Of those, only a small fraction get recycled.³ Most of the plastic bags end up in landfills or are littered, resulting in several negative environmental and financial consequences.⁴ The thin, light-weight bags blow easily in the wind and migrate toward water.⁵ Furthermore, plastic is not biodegradable; it photodegrades.⁶ Photodegradation means plastic requires sunlight to break down, and in water plastic will “resist degradation for years, decades or even centuries.”⁷ Eventually, plastic will break down into tiny pieces that microorganisms eat.⁸ Fish then eat the microorganisms, and humans ultimately eat the fish.⁹ Humans, essentially, eat the plastic they threw away.¹⁰

Additionally, littered plastic bags can wreak havoc on cities, costing states and local governments millions of dollars.¹¹ Plastic bags get caught and clogged in storm drains and create a risk of dangerous flooding.¹² In Texas, plastic bags have a more unique, negative impact than they do in some other states.¹³ In West Texas, when the wind blows, plastic bags get caught in cotton crops, damaging farmers’ machinery used to harvest crops because

1. In this Comment, unless otherwise stated, the term “plastic bag” refers to single-use carryout plastic bags; the term “carryout bags” refers to both single-use plastic carryout bags and single-use paper carryout bags; and the terms “plastic bag regulations” or “plastic bag ordinances” refer to single-use carryout plastic bag ordinances, regulations, and laws adopted by state and local governments.

2. See Rebecca L. Taylor & Sofia B. Villas-Boas, *Bans vs. Fees: Disposable Carryout Bag Policies and Bag Usage*, 38 APPLIED ECON. PERSPS. AND POL’Y 351, 354–55 (2016).

3. See *Advancing Sustainable Materials Management: 2014 Fact Sheet*, U.S. ENVTL. PROT. AGENCY, 8 (Nov. 2016), https://www.epa.gov/sites/production/files/2016-11/documents/2014_smm_factsheet_508.pdf (showing that, in 2014, only 9.5% of plastic waste generated was recycled).

4. See *id.* (showing that, in 2014, 75.5% of plastic waste generated ended up in landfills).

5. See *What Is Plastic Photodegradation?*, POLLUTION SOLUTIONS (Aug. 19, 2015), <https://www.pollutionsolutions-online.com/news/waste-management/21/breaking-news/what-is-plastic-photo-degradation/35801>.

6. See *id.*

7. *Id.*

8. See *id.*

9. See Matthew Savoca, *The Bad News Is that Fish Are Eating Lots of Plastic. Even Worse, They May Like It*, WASH. POST (Sept. 4, 2017), https://www.washingtonpost.com/national/health-science/the-bad-news-is-that-fish-are-eating-lots-of-plastic-even-worse-they-may-like-it/2017/09/01/54159ee8-8cc6-11e7-91d5-ab4e4bb76a3a_story.html?utm_term=.84f72a9f7ce3.

10. See *id.*

11. See Taylor & Villas-Boas, *supra* note 2, at 355 (“[M]unicipalities nationwide spend between \$3.2 to \$7.9 billion per year to clean up plastic bags.”); see also *Austin Disposable Plastic Bag Ban Takes Effect*, NACS (Mar. 5, 2013), <http://www.convenience.org/Media/Daily/Pages/ND0305136.aspx#.WmuYa6inFPY> (reporting that plastic bags cost the City of Austin at least \$850,000 in annual trash cost).

12. See *Plastic Shopping Bags & Environmental Impact*, REUSETHISBAG.COM, <https://www.reusethisbag.com/articles/plastic-shopping-bags-environmental-impact.php> (last visited Feb. 2, 2018).

13. See Brief of Amici Curiae Tex. Cotton Ginners’ Ass’n Billy Joe Easter in Support of the City of Laredo, Tex. at 6–12, *City of Laredo v. Laredo Merchs. Ass’n*, (No. 16-0748), 2017 WL 3723158, at *6–12 (Tex. Aug. 23, 2017).

the machinery picks up the plastic bags caught by the cotton.¹⁴ Livestock mistake the plastic bags as food and eat the plastic bags and often die.¹⁵

In an attempt to reduce the number of plastic bags used, several cities, counties, and states across the United States have proposed and adopted ordinances and legislation regulating the use of plastic bags.¹⁶ This Comment discusses the legality and effect of municipal plastic bag ordinances in Texas. Part II provides background information on plastic bag regulations across the United States and Texas.¹⁷ Part III analyzes Texas cities' authority to adopt plastic bag regulations and discusses *City of Laredo v. Laredo Merchant Ass'n*, pending Texas Supreme Court case (at the time of this writing) that addresses the issue of a municipality's authority.¹⁸ Part IV recommends how the Texas Supreme Court should rule and suggests legislation the state should enact regardless of how the Court decides.¹⁹ Part V discusses the effectiveness of plastic bag ordinances and the effect they have on non-regulated carryout bags.²⁰ Lastly, Part VI concludes by stressing the impact plastic has on the environment and the need for local control.²¹

II. BACKGROUND

Before the plastic-bag ban movement started in the United States, other countries regulated plastic-bag usage.²² In 2002, Ireland imposed a \$0.15 tax per plastic bag used.²³ Over the past ten years, attempts to reduce the amount of plastic littering streets, drains, fields, beaches, and oceans have led several local governments across the United States to adopt ordinances and legislation to regulate plastic bags.²⁴ There are two main ways to regulate

14. *See id.* at 6–8.

15. *See id.* at 8–12.

16. *See, e.g.*, AUSTIN, TEX., CODE OF ORDINANCES ch. 15-6, art. VII, § 15-6-122 (2012) (prohibiting businesses from providing single-use carryout bags); *see also* CAL. PUB. RES. CODE §§ 42281–42284 (West 2016) (imposing a statewide ban on single-use carryout bags, and imposing a fee on reusable grocery bags, recycled paper bags, or compostable bags). *See generally* *Find Bag Legislation in Your Area*, BAG THE BAN, <http://www.bagtheban.com/in-your-state> (last visited Apr. 1, 2018).

17. *See infra* Part II.

18. *See infra* Part III.

19. *See infra* Part IV.

20. *See infra* Part V.

21. *See infra* Part VI.

22. *See* Taylor & Villas-Boas, *supra* note 2, at 355 n.10 (stating that several less-established countries in the global south banned plastic bags, and then, in 2002, Ireland became the first industrialized country to tax plastic bags); *see also* Jennie R. Romer & Leslie Mintz Tamminen, *Plastic Bag Reduction Ordinances: New York City's Proposed Charge on All Carryout Bags as a Model for U.S. Cities*, 27 TUL. ENVTL. L.J. 237, 241 (2014).

23. *See* Bridget M. Warner, *Sacking the Culture of Convenience: Regulating Plastic Shopping Bags to Prevent Further Environmental Harm*, 40 U. MEM. L. REV. 645, 663 (2010).

24. *See* Taylor & Villas-Boas, *supra* note 2, at 355–56; The Times Editorial Bd., *Stop Banning Plastic Bag Bans*, L.A. TIMES (Jan. 12, 2017, 5:00 AM), <http://www.latimes.com/opinion/editorials/la-ed-bag-preemption-2017012-story.html>.

plastic bags: (1) impose a bag ban, or (2) impose a bag fee or tax.²⁵ The goal of a bag ban is “to regulate behavior directly.”²⁶ The goal of a bag fee or tax is “to incentivize individuals to change their own behavior.”²⁷ A bag ban is similar to municipalities prohibiting the sale of alcohol within city limits; it directly prohibits consumers from buying alcohol in the city.²⁸ A bag fee or bag tax is similar to “sin taxes” that states impose to deter certain behaviors that are bad for consumers or society.²⁹ Every state in the United States and the federal government imposes taxes on cigarettes and alcohol.³⁰ The goal of these taxes is to deter consumers from smoking and drinking alcohol.³¹

A. The Fight against Bags: History of Carryout Bag Regulations in the United States

In March 2007, San Francisco was the first city in the United States to adopt plastic bag regulations.³² Initially, San Francisco tried to impose a user tax on plastic bags, but state law preempted a user-tax-based plan.³³ As a result, San Francisco revised its user-tax-based plan to an outright ban and adopted an outright ban of plastic bags on large retailers.³⁴ After San Francisco adopted its ordinance, several cities across California and the United States also adopted plastic bag regulations.³⁵ Approximately “132 other cities and counties in [eighteen different] states and the District of Columbia” adopted similar regulations.³⁶

In 2014, California became the first state to pass a statewide plastic bag regulation.³⁷ The law was scheduled to take effect starting July 1, 2015 and aimed to prohibit certain stores from providing plastic bags to customers at

25. See Taylor & Villas-Boas, *supra* note 2, at 351–52. Compare D.C. CODE ANN. § 8-102.03 (West 2018) (establishing a fee for each disposable carryout bag provided at retail establishments), with AUSTIN, TEX., CODE OF ORDINANCES ch. 15-6, art. VII, § 15-6-122(c) (2012) (prohibiting businesses from providing single-use carryout bags).

26. Taylor & Villas-Boas, *supra* note 2, at 351–52.

27. *Id.*

28. See *Wet and Dry Counties*, TEX. ALCO. BEV. COMM’N, https://www.tabc.state.tx.us/local_option_elections/wet_and_dry_counties.asp (last visited Apr. 16, 2018) (listing the six counties in Texas that prohibit the sale of any alcoholic beverages within the county).

29. See, e.g., TEX. TAX CODE ANN. § 154.021 (West 2018) (imposing a tax on cigarettes); see also Lisa Minton, *How Texas Taxes ‘Sin’*, TEX. COMPTROLLER (Nov. 2015), <https://comptroller.texas.gov/economy/fiscal-notes/2015/november/sintax.php> (discussing sin taxes imposed in Texas).

30. See Minton, *supra* note 29.

31. See *id.*

32. See Jennie Reily Romer, *The Evolution of San Francisco’s Plastic-Bag Ban*, 1 GOLDEN GATE U. ENVTL. L.J. 439, 439 (2007).

33. See *id.*

34. See *id.*

35. See *Do Plastic Bag Bans Work?*, SCI. AM., <https://www.scientificamerican.com/article/do-plastic-bag-bans-work/> (last visited Apr. 16, 2018).

36. *Id.*

37. See S.B. 270, 2014 Leg., Reg. Sess. (Cal. 2016).

the point of sale.³⁸ Stores could provide reusable grocery bags that met certain requirements or recycled paper bags³⁹ for a minimum \$0.10 fee per bag.⁴⁰ However, opponents of plastic bag regulations halted the legislation from taking effect by challenging California's new law and sending the legislation to a referendum.⁴¹ In the November 2016 election, California voters upheld the statewide ban on plastic bags.⁴² The new law took effect in November 2016—two years after the California Legislature passed the legislation.⁴³

B. Challenges against Local Plastic Bag Ordinances

Other states do not want to be like California.⁴⁴ Several states have taken the opposite approach, passing preemptive legislation to prevent local governments from adopting ordinances that ban plastic bags.⁴⁵ For example, Florida was the first state to adopt preemptive legislation.⁴⁶ In 2008, as part of the Energy, Climate Change, and Economic Security Act, Florida directed its Department of Environmental Protection (DEP) to analyze “the need for new or different regulation of auxiliary containers, wrappings, or disposable plastic bags used by consumers to carry products from retail establishments.”⁴⁷ The analysis was to “evaluate the efficacy and necessity of . . . local regulation[s], . . .” and the DEP was instructed to “submit a report with conclusions and recommendations to the legislature no later than

38. See *id.* (defining “single-use carryout bag” as “a bag made of plastic, paper, or other material that is provided by a store to a customer at the point of sale and that is not a recycled paper bag or a reusable grocery bag that meets [certain] requirements”).

39. See *id.* (defining “recycled paper bag” as “a paper carryout bag provided by a store to a customer at the point of sale that meets . . . the following requirements:” made from at least forty percent postconsumer recycled materials or, for smaller paper bags, at least twenty percent postconsumer recycled materials; recyclable in a majority of household curbside recycling programs; and labeled with the name of the manufacturer, the country where it was manufactured, and the minimum percentage of post-consumer content).

40. See *id.*

41. See Joshua Emerson Smith, *Nation's First Statewide Plastic-bag Ban Now in Effect across California*, SAN DIEGO UNION-TRIB. (Nov. 13, 2016, 8:30 AM), <http://www.sandiegouniontribune.com/news/environment/sd-me-plastic-bags-20161111-story.html>.

42. See *Statement of Vote: November 8, 2016 General Election*, CAL. SECRETARY OF ST. 12 (2016), <http://elections.cdn.sos.ca.gov/sov/2016-general/sov/2016-complete-sov.pdf> (listing the results of Proposition 67: Ban on Single-use Plastic Bags as: yes: 53.3%, no: 46.7%); see also Smith, *supra* note 41 (reporting the referendum results of California's statewide plastic bag ban).

43. See CAL. PUB. RES. CODE §§ 42281–42284 (West 2016); see also Smith, *supra* note 41 (reporting on the first statewide plastic bag ban that went into effect).

44. See The Times Editorial Bd., *supra* note 24.

45. See ARIZ. REV. STAT. ANN. § 9-500.38 (2018); FLA. STAT. ANN. § 403.7033 (West 2018); IDAHO CODE ANN. § 67-2340 (West 2018); IND. CODE ANN. § 36-1-3-8.6 (West 2018); MICH. COMP. LAWS ANN. § 445.592 (West 2018); MO. ANN. STAT. § 260.283 (West 2017); WIS. STAT. ANN. § 66.0419 (West 2018); see also The Times Editorial Bd., *supra* note 24 (listing states that have preemption laws, and explaining their motivation).

46. See FLA. STAT. § 403.7033.

47. *Id.*

February 1, 2010.”⁴⁸ The DEP submitted its report on February 1, 2010.⁴⁹ However, under the Florida statute, local governments are preempted from adopting any “rule, regulation, or ordinance regarding use, disposition, sale, prohibition, restriction, or tax of such auxiliary containers, wrappings, or disposable plastic bags” *until* the Florida Legislature adopts the recommendations of the DEP.⁵⁰ The Florida Legislature has not adopted any of the DEP’s recommendations.⁵¹ Thus, local governments are still preempted from regulating plastic bags.⁵²

Despite Florida’s legislation preempting local governments from regulating the use of auxiliary containers, in 2017, the City of Coral Gables was the first Florida city to adopt plastic bag regulations.⁵³ In 2016, prior to adopting its plastic bag ordinance, Coral Gables adopted an ordinance banning the use of Styrofoam.⁵⁴ The Florida Retail Federation sued, claiming that the Styrofoam ban violated state laws.⁵⁵ The trial court granted the city’s motion for summary judgment and ruled that the state statutes were unconstitutional.⁵⁶ The trial court not only held that the city could regulate Styrofoam, it also held that Florida’s plastic bag preemption in § 403.7033 was unconstitutional.⁵⁷ The Florida Retail Federation appealed the trial court’s decision, and the case is still pending review at the time of this writing.⁵⁸

Coral Gables is not the only Florida city desiring to regulate plastic bags.⁵⁹ Palm Beach also seeks to ban plastic bags in Florida.⁶⁰ However, it is waiting for the appellate court decision in *Florida Retail Federation v. City of Coral Gables* before passing an ordinance.⁶¹ Palm Beach was also “one

48. *Id.*

49. See FLA. DEP’T OF ENVTL. PROT., RETAIL BAGS REPORT FOR THE LEGISLATURE (2010); Sun Sentinel Editorial Bd., Editorial, *Plastic Bag Ban: Let’s Not Get Carried Away*, SUNSENTINEL (Mar. 25, 2017, 1:35 PM), <http://www.sun-sentinel.com/opinion/editorials/fl-editorial-plastic-bags-ban-20170324-story.html>.

50. See FLA. STAT. § 403.7033; Sun Sentinel Editorial Bd., *supra* note 49.

51. Aleese Kopf, *Palm Beach Waiting on Court Ruling before Passing Plastic Bag Ban*, THE SHINY SHEET PALM BEACH DAILY NEWS (June 13, 2017, 8:00 AM), <http://www.palmbeachdailynews.com/news/local/palm-beach-waiting-court-ruling-before-passing-plastic-bag-ban/oetpIxt7xF0m54WJwv6u8I/>.

52. See FLA. STAT. § 403.7033.

53. See Sun Sentinel Editorial Bd., *supra* note 49.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. Lance Dixon, *Coral Gables Approves Florida’s First Plastic Bag Ban*, MIAMI HERALD (May 9, 2017, 4:24 PM), <http://www.miamiherald.com/news/local/community/miami-dade/coral-gables/article-149542714.html>.

59. See Kopf, *supra* note 51.

60. See *id.*; Appellant State of Florida’s Reply Brief, (No. 3017-562), 2017 WL 5574470 (Fla. Dist. Ct. App. Oct. 13, 2017).

61. See *id.*

of more than two dozen Florida communities to urge” Florida lawmakers to give local governments the power to regulate plastic bags.⁶²

C. Don't Mess with Texas: Texas's Position in the Fight against Plastic Bags

1. Texas Legislation: Senate Bill 103

Some Texas legislators are opposed to granting local governments the authority to adopt plastic bag ordinances.⁶³ Since 2009, state senators and representatives have introduced bills every legislative session attempting to preempt plastic bag ordinances.⁶⁴ In the 2017 legislative session, Senator Hall authored and introduced S.B. 103, “relating to the provision of bags to customers of a business at the point of sale.”⁶⁵ Section 205.002 of the bill explicitly preempts municipalities from adopting carryout bag regulations:

A municipality may not adopt or enforce an ordinance or regulation that purports to restrict or prohibit a business from, require a business to charge a customer for, or tax or impose penalties on a business for providing to a customer at the point of sale of a bag or other container made from any material.⁶⁶

On March 14, 2017, the Senate Committee on Business and Commerce heard public testimony.⁶⁷ Eleven members of the public came to testify to the Senate committee.⁶⁸ A majority of the people testifying were opposed to S.B. 103.⁶⁹ Among the opponents of the bill were activists arguing that plastic bags are a terrible nuisance along the Gulf Coast.⁷⁰ A rancher from Freer, Texas also testified about catching his sheep eating plastic bags and about fellow ranchers who have lost livestock because the cows ate several plastic bags and suffocated.⁷¹ A representative from the Texas Public Policy

62. *Id.*

63. See Sanya Mansoor, *At Capitol, Bill Targeting Plastic Bag Bans Draws Strong Opposition*, TEX. TRIB. (Mar. 14, 2017, 6:00 PM), <https://www.texastribune.org/2017/03/14/bag-ban/>.

64. See, e.g., Tex. S.B. 103, 85th Leg., R.S. (2017); Tex. S.B. 1806, 84th Leg., R.S. (2015); Tex. S.B. 1550, 84th Leg., R.S. (2015); Tex. H.B. 2416, 83d Leg., R.S. (2013); Tex. H.B. 1877, 82d Leg., R.S. (2011); Tex. H.B. 3236, 82d Leg., R.S. (2011); Tex. S.B. 908, 82d Leg., R.S. (2011); Tex. H.B. 1361, 81st Leg., R.S. (2009); Tex. H.B. 3427, 81st Leg., R.S. (2009); Tex. S.B. 338, 81st Leg., R.S. (2009).

65. Tex. S.B. 103, 85th Leg., R.S. (2017).

66. *Id.*

67. See *Senate Committee on Business & Commerce (Part I)*, TEX. SENATE STREAMING VIDEO PLAYER (Mar. 14, 2017) [hereinafter *Senate Committee Video Part I*], http://tlcsenate.granicus.com/MediaPlayer.php?view_id=42&clip_id=11861.

68. *See id.*

69. *See id.*

70. *See id.*

71. *See id.*

Foundation (TPPF) testified in support of S.B. 103.⁷² The TPPF representative referenced *Laredo Merchants Ass'n v. Laredo* and argued that the Fourth Court of Appeals already ruled that the local plastic bag ordinances are in violation of state law.⁷³ The bill was left pending in the Senate Committee on Business and Commerce, and therefore did not become law.⁷⁴

2. Texas Municipalities: Plastic Bag Regulations in Texas

Currently, twelve Texas cities have single-use carryout bag regulations.⁷⁵ In 2010, Brownsville was the first Texas city to adopt an ordinance regulating “plastic checkout bags.”⁷⁶ Brownsville’s ordinance prohibits businesses from “providing plastic checkout bags.”⁷⁷ Brownsville’s ordinance initially allowed businesses to provide plastic checkout bags to customers for a \$1.00 fee per transaction, and the business was then required to remit the fee collected to the city.⁷⁸ However, in 2016, Texas Attorney General Ken Paxton sued the City of Brownsville claiming that the city’s ordinance violated § 361.0961(a)(3) of the Texas Health & Safety Code and §§ 321.101 and 321.103 of the Texas Tax Code.⁷⁹ Paxton dropped the lawsuit against Brownsville when the city agreed to repeal the provisionary \$1.00 fee for plastic bags.⁸⁰ The current ordinance in effect in Brownsville is a straight ban on plastic checkout bags with no fees imposed.⁸¹

Of the twelve cities with plastic bag regulations, four are coastal cities, four are South Texas cities near or on the border with Mexico, two are rural

72. *Id.*

73. *Id.*; *Laredo Merchs. Ass'n v. City of Laredo*, No. 04-15-00610-CV, 2016 WL 4376627 (Tex. App.—San Antonio Aug. 17, 2016, pet. granted).

74. See Tex. S.B. 103, 85th Leg., R.S. (2017).

75. See AUSTIN, TEX., CODE OF ORDINANCES ch. 15-6, art. VII, §§ 15-6-121–124 (2012); BROWNSVILLE, TEX., CODE OF ORDINANCES ch. 46, art. II, §§ 46-47–50 (2017); CORPUS CHRISTI, TEX., CODE OF ORDINANCES ch. 22, §§ 22-1, 22-10 (2014) (banning only plastic bags at city facilities and events); EAGLE PASS, TEX., CODE OF ORDINANCES ch. 16, art. II, §§ 16-85–90 (2016); FT. STOCKTON, TEX., CODE OF ORDINANCES ch. 12, art. I, §§ 12-1, 12-9 (2010); FREER, TEX., ORDINANCE No. 2012-05 (Dec. 10, 2012); KERMIT, TEX., CODE OF ORDINANCES ch. 98, §§ 98.01–98.06, 98.99 (2013); LAGUNA VISTA, TEX., ORDINANCE No. 2012-23 (Sept. 11, 2012); LAREDO, TEX., CODE OF ORDINANCES ch. 33, art. VIII, §§ 33-501–508 (2015); PORT ARANSAS, TEX., CODE OF ORDINANCES ch. 10, art. II §§ 10-26–30 (2014); S. PADRE ISLAND, TEX., CODE OF ORDINANCES ch. 12, §§ 12-30.0–30.3 (2011); SUNSET VALLEY, TEX., CODE OF ORDINANCES ch. 93, §§ 93.60–63 (2013).

76. See BROWNSVILLE, TEX., CODE OF ORDINANCES ch. 46, art. II, §§ 46-47–50 (2017).

77. *Id.*

78. See Jim Malewitz, *Paxton Sues Brownsville over Fee on Plastic Bags*, TEX. TRIB. (Oct. 12, 2016, 6:00 PM), <https://www.texastribune.org/2016/10/12/paxton-sues-brownsville-over-buck-bag-policy/>.

79. See Kiah Collier, *AG Paxton Drops Brownsville Lawsuit over Plastic Bag Fee*, TEX. TRIB. (May 11, 2017, 6:00 PM), <https://www.texastribune.org/2017/05/11/texas-ag-drops-lawsuit-against-brownsville-over-plastic-bag-fee/>; see also TEX. HEALTH & SAFETY CODE ANN. § 361.0961(a)(3) (West 2017); TEX. TAX CODE ANN. § 321.101 (West 2017).

80. See Collier, *supra* note 79.

81. See BROWNSVILLE, TEX., CODE OF ORDINANCES ch. 46, art. II, §§ 46-47–50 (2017).

West Texas cities, and two are urban cities.⁸² All of the city ordinances utilize the bag-ban approach, prohibiting businesses from providing carryout bags to customers, rather than utilizing the bag-fee approach.⁸³ Four cities—Austin, Sunset Valley, Laredo, and Eagle Pass—ban both single-use plastic bags and paper bags.⁸⁴

The City of Dallas previously had an ordinance that required businesses to charge a \$0.05 fee per plastic bag provided to customers.⁸⁵ However, Dallas's ordinance did not last long.⁸⁶ The ordinance went into effect on January 1, 2015, and on June 3, 2015, the Dallas City Council voted to repeal the ordinance.⁸⁷ After a coalition of plastic bag manufactures and recyclers filed a lawsuit against the City of Dallas, the city council proposed two options: (1) amend the ordinance to completely ban single-use plastic bags and repeal the \$0.05 fee, or (2) repeal the entire ordinance altogether.⁸⁸ The city council voted 9–5 against a complete ban of single-use plastic bags and voted 10–4 to fully repeal the ordinance.⁸⁹

In 2013, Laredo adopted a checkout bag reduction ordinance.⁹⁰ Laredo's ordinance prohibits businesses from providing checkout bags to customers.⁹¹ The ordinance defines “checkout bag” as “a plastic one-time-use carryout bag that is provided by a commercial establishment to

82. The twelve cities are Austin, Brownsville, Corpus Christi, Eagle Pass, Fort Stockton, Freer, Kermit, Laguna Vista, Laredo, Port Aransas, South Padre Island, and Sunset Valley. *See* GOOGLE MAPS, <https://www.google.com/maps/@31.3491963,-100.3251082,6.3z> (last visited Apr. 16, 2018) (use the search box to locate a specific city). Corpus Christi, Laguna Vista, Port Aransas, and South Padre Island are the four coastal cities. *See id.* Brownsville, Eagle Pass, Freer, and Laredo are the four cities in South Texas cities near the Texas-Mexico Border. *See id.* Fort Stockton and Kermit are the two rural cities. *Id.* Austin and Sunset Valley are the two urban cities. *See id.*

83. *See* AUSTIN, TEX., CODE OF ORDINANCES ch. 15-6, art. VII, §§ 15-6-121–124 (2012); BROWNSVILLE, TEX., CODE OF ORDINANCES ch. 46, art. II, §§ 46-47–50 (2017); CORPUS CHRISTI, TEX., CODE OF ORDINANCES ch. 22, §§ 22-1, 22-10 (2014); EAGLE PASS, TEX., CODE OF ORDINANCES ch. 16, art. II, §§ 16-85–90 (2016); FT. STOCKTON, TEX., CODE OF ORDINANCES ch. 12, art. I, §§ 12-1, 12-9 (2010); FREER, TEX., ORDINANCE No. 2012-05 (Dec. 10, 2012); LAGUNA VISTA, TEX., ORDINANCE No. 2012-23 (Sept. 11, 2012); LAREDO, TEX., CODE OF ORDINANCES ch. 33, art. VIII, §§ 33-501–508 (2015); PORT ARANSAS, TEX., CODE OF ORDINANCES ch. 10, art. II, §§ 10-26–30 (2014); S. PADRE ISLAND, TEX., CODE OF ORDINANCES ch. 12, §§ 12-30.0–30.3 (2011); SUNSET VALLEY, TEX., CODE OF ORDINANCES ch. 93, §§ 93.60–63 (2013).

84. *See* AUSTIN, TEX., CODE OF ORDINANCES ch. 15-6, art. VII, §§ 15-6-121–124 (2012); EAGLE PASS, TEX., CODE OF ORDINANCES ch. 16, art. II, §§ 16-85–90 (2016); LAREDO, TEX., CODE OF ORDINANCES ch. 33, art. VIII, §§ 33-501–508 (2015); SUNSET VALLEY, TEX., CODE OF ORDINANCES ch. 93, §§ 93.60–63 (2013).

85. *See* Elizabeth Findell, *Update: Dallas City Council Votes to Repeal 5-Cent Bag Fee; Bags Free Starting Monday*, DALL. MORNING NEWS (June 2015), <https://www.dallasnews.com/news/dallas-city-hall/2015/06/03/dallas-city-council-debates-5-cent-bag-fee>; Merrill Hope, *Dallas Trashes the Plastic Bag Ban*, BREITBART (June 4, 2015), <http://www.breitbart.com/texas/2015/06/04/dallas-trashes-the-plastic-bag-ban/>.

86. *See* Findell, *supra* note 85; Hope, *supra* note 85.

87. *See* Findell, *supra* note 85; Hope, *supra* note 85.

88. *See* Findell, *supra* note 85; Hope, *supra* note 85.

89. *See* Findell, *supra* note 85; Hope, *supra* note 85.

90. *See* LAREDO, TEX., CODE OF ORDINANCES ch. 33, art. VIII, §§ 33-501-508 (2015).

91. *See id.*

a customer at the point of sale or elsewhere in the commercial establishment, and is less than four (4) mils thick, . . . or a single-use paper bag.”⁹² A checkout bag “does not include plastic or paper bags used in the sale and distribution of food stuffs such as meat, poultry, produce, laundry, newspaper, waste bags, pharmaceutical bags, veterinarian bags, restaurant bags, and bags used in charity and fundraising events.”⁹³

The Laredo Merchants Association sued the City of Laredo claiming that its ordinance violated § 361.0961 of the Texas Health & Safety Code.⁹⁴ The Webb County District Court granted the city’s motion for summary judgment, and held in favor of the city.⁹⁵ The Laredo Merchants Association appealed.⁹⁶ The Fourth Court of Appeals reversed the trial court’s grant of summary judgment in favor of Laredo and held that its ordinance was preempted by state law.⁹⁷ Laredo filed a petition for review to the Texas Supreme Court.⁹⁸ The Court granted review on September 1, 2017 and heard oral arguments on January 11, 2018.⁹⁹ The case is still pending at the time of this writing.¹⁰⁰

III. STATE OF TEXAS VERSUS MUNICIPALITIES: LOCAL AUTHORITY TO REGULATE CARRYOUT BAGS

In Texas, cities and towns are either home rule cities or general law cities.¹⁰¹ Home rule cities and general law cities may adopt ordinances as long as they are not inconsistent with state law.¹⁰² The legislature may adopt statutes that preempt cities from adopting certain regulatory ordinances; however, to be preemptive, the statute must be enacted with “unmistakable clarity.”¹⁰³

92. *Id.* § 33-504.

93. *Id.*

94. *See* Laredo Merchs. Ass’n v. City of Laredo, No. 04-15-00610-CV, 2016 WL 4376627, at *1 (Tex. App.—San Antonio Aug. 17, 2016, pet. granted).

95. *See id.* at *2.

96. *Id.*

97. *Id.* at *7.

98. *See generally* Petition for Review Filed on Behalf of City of Laredo, City of Laredo v. Laredo Merchs. Ass’n, (No. 16-0748), 2016 WL 6681154 (Tex. Nov. 7, 2016).

99. *See* Paul Cobler, *Texas Supreme Court Hears Oral Arguments in Plastic Bag Ban Case*, TEX. TRIB. (Jan. 11, 2018, 11:00 AM), <https://www.texastribune.org/2018/01/11/texas-supreme-court-hears-oral-arguments-plastic-bag-ban-case/>.

100. *See id.* The City of Port Aransas suspended its ordinance pending the result of *Laredo Merchs. Ass’n*. Jane Caffrey, *Port Aransas Suspends Plastic Bag Ban*, KRISTV.COM (Sept. 16, 2016, 7:52 PM), <http://www.kristv.com/story/33115196/port-aransas-suspends-plastic-bag-ban>.

101. *See* TEX. CONST. art. XI, §§ 4–5. As of the 2012 census, there are 1,214 cities in Texas, 862 are general law cities, and 352 are home rule cities. *Cities in Texas*, BALLOTPEDIA, https://ballotpedia.org/Cities_in_Texas (last visited Apr. 16, 2018).

102. *See* TEX. CONST. art. XI, § 5(a); TEX. LOC. GOV’T CODE ANN. §§ 51.012, .032, .051 (West 2017).

103. *BCCA Appeal Grp., Inc. v. City of Hous.*, 496 S.W.3d 1, 7–8 (Tex. 2016) (quoting *Dall. Merchs. & Concessionaire’s Ass’n v. City of Dall.*, 852 S.W.2d 489, 491, 494 (Tex. 1993)); *Laredo Merchs. Ass’n*

A. Solid Waste Disposal Act

The two main arguments against plastic bag regulations in Texas are that: (1) municipalities lack the authority to adopt such ordinances because of the Solid Waste Disposal Act, and (2) if municipalities require businesses to charge for carryout bags, they impose an impermissible tax.¹⁰⁴ Section 361.0961(a) of the Solid Waste Disposal Act (SWDA) preempts local governments from adopting regulations on containers or packages for solid waste management purposes:

[a] local government or other political subdivision may not adopt an ordinance, rule, or regulation to:

- (1) prohibit or restrict, for solid waste management purposes, the sale or use of a container or package in a manner not authorized by state law;
- [or] . . .
- (3) assess a fee or deposit on the sale or use of a container or package.¹⁰⁵

The first step in determining whether SWDA preempts municipalities' plastic bag regulations is to determine whether a plastic bag is a "container or package."¹⁰⁶ Because the SWDA does not define the terms "container" or "package," courts look to their ordinary meaning.¹⁰⁷ Texas's Fourth Court of Appeals in San Antonio determined that a "checkout bag" as defined in Laredo's ordinance is a "container or package" under § 361.0961.¹⁰⁸ The court relied on a Texas Attorney General opinion, prior Texas cases, and the natural meaning of "bag."¹⁰⁹

v. City of Laredo, No. 04-15-00610-CV, 2016 WL 4376627, at *3 (Tex. App.—San Antonio Aug. 17, 2016, pet. granted).

104. See *Laredo Merchs. Ass'n*, 2016 WL 4376627, at *1 (analyzing a lawsuit over whether the city's ordinance is preempted by § 361.0961); see also Plaintiffs' Original Petition for Declaratory and Injunctive Relief at 6–7, *Hilex Poly Co. v. City of Dall.*, (No. DC-15-04967), 2015 WL 3609122, at *6–7 (Dist. Ct., Dall. County, Tex. May 1, 2015) (litigating a suit filed by a plastic bag manufacture seeking declaratory judgment that the City of Dallas's \$0.05 bag fee "is preempted by state law . . . because it conflicts with . . . § 361.0961," and that the ordinance "imposes an impermissible tax"); Malewitz, *supra* note 78 (reporting that the Texas Attorney General sued the City of Brownsville for imposing an "illegal sales tax").

105. TEX. HEALTH & SAFETY CODE ANN. § 361.0961(a) (West 2017).

106. See *id.*; *Laredo Merchs. Ass'n*, 2016 WL 4376627, at *5–6 (analyzing whether plastic bags are considered containers or packaging under § 361.0961(a)); see also Tex. Att'y Gen. Op. No. GA-1078 (2014) (responding to a request letter that asked whether § 361.0961 prohibits municipalities from banning or imposing fees on plastic bags).

107. See *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011) ("Undefined terms in a statute are typically given their ordinary meaning.").

108. *Laredo Merchs. Ass'n*, 2016 WL 4376627, at *6.

109. See *id.* at *5–6 ("[A] 'single-use plastic bag is a container within the meaning of [§] 361.0961 of the [SWDA].'" (quoting Tex. Op. Att'y Gen. No. GA-1078 (2014)) (citing *Davis v. State*, 202 S.W.3d 149, 156–57 (Tex. Crim. App. 2006); *Yamaha Motor Corp. v. Motor Vehicle Div.*, Tex. Dep't of Transp., 806 S.W.2d 233, 228 (Tex. App.—Austin 1993, writ denied); *Furr's Supermarkets, Inc. v. Arellano*, 492 S.W.2d 727, 728 (Tex. Civ. App.—El Paso 1973, writ ref'd n.r.e.)).

Of course, different city ordinances vary on what type of bag they regulate and how they define the regulated bags.¹¹⁰ For example, Brownsville's amended ordinance explicitly states that the bags regulated by the ordinance "[do] not include any bag, container, or package to be used for solid waste management purposes."¹¹¹ Brownsville likely included this provision in response to the Fourth Court of Appeals decision in *Laredo Merchants Ass'n*.¹¹² However, even with these provisions excluding containers or packages for solid waste management, a court is still likely to determine that the regulated plastic bags are containers or packages within the meaning of § 361.0961 because the "plain language of [§] 361.0961 does not limit the types of containers or packages to which it applies"—it only limits the application of the statute to ordinances adopted for solid waste management purposes.¹¹³

The second step in determining whether SWDA preempts plastic-bag regulations is to determine if the purpose for the ordinance is "for solid waste management purposes."¹¹⁴ The SWDA defines "solid waste" as "garbage, rubbish, refuse, . . . and other discarded material" and "[m]anagement" as "the systematic control of the activities of generation, source separation, collection, handling, storage, transportation, processing, treatment, recovery, or disposal of solid waste."¹¹⁵

The Fourth Court of Appeals in *Laredo Merchants Ass'n* determined that "by prohibiting the sale and use of bags to prevent them from becoming litter, [Laredo's Ordinance] is regulating the generation of litter."¹¹⁶ Preventing something from *becoming* solid waste, however, is not the equivalent of controlling the generation of solid waste.¹¹⁷ The Texas Commission on Environmental Quality (TCEQ), the regulating agency in charge of enforcing SWDA, defines "[g]enerator" as "[a]ny person . . . that produces solid waste to be shipped to any other person, or whose act or process produces a solid waste or first causes it to become regulated."¹¹⁸

110. Compare BROWNSVILLE, TEX., CODE OF ORDINANCES ch. 46, art. II, § 46-47 (2017) (stating that "checkout bags" does not include containers for solid waste management), with AUSTIN, TEX., CODE OF ORDINANCES ch. 15-6, art. VII, §§ 15-6-121 (2012) (leaving open the issue of whether the bags regulated includes containers for solid waste management).

111. BROWNSVILLE, TEX., CODE OF ORDINANCES ch. 46, art. II, § 46-47 (2017).

112. See *id.* (amended in June of 2017); *Laredo Merchs. Ass'n*, 2016 WL 4376627, at *1.

113. See Tex. Att'y Gen. Op. No. GA-1078 (2014).

114. See TEX. HEALTH & SAFETY CODE ANN. § 361.0961(a)(1) (West 2017); *Laredo Merchs. Ass'n*, 2016 WL 4376627, at *6-7 (analyzing whether Laredo's ordinance was adopted for solid waste management purposes).

115. TEX. HEALTH & SAFETY CODE § 361.003(18), (34).

116. *Laredo Merchs. Ass'n*, 2016 WL 4376627, at *7.

117. See TEX. HEALTH & SAFETY CODE § 361.003(18); 30 TEX. ADMIN. CODE § 330.3(18) (2018); see also Petitioner City of Laredo's Corrected Brief on the Merits at 28, *City of Laredo v. Laredo Merchs. Ass'n*, No. 16-0748, 2017 WL 1318131, at *28 (Tex. Apr. 5, 2017) (arguing that plastic bags provided at the point of sale are not yet solid waste, and solid waste management means "transportation, storage, and disposal of materials that are already solid waste").

118. 30 TEX. ADMIN. CODE § 330.3(58) (2018) (Tex. Comm'n on Env'tl. Solid Waste).

Additionally, the SWDA only discusses the generation of solid waste in relation to “‘sludge’ or other commercial hazardous waste created as a by-product of industrial processes.”¹¹⁹ Therefore, the legislature intended solid waste management to mean the control of materials that are *already* solid waste, not the control of materials that may ultimately become solid waste.¹²⁰ Otherwise, § 361.0961 would prohibit municipalities from regulating anything within the ordinary meaning of a container or package that could one day become solid waste in the future.¹²¹

Cities adopt plastic-bag ordinances for different purposes.¹²² Whether a city’s ordinance violates § 361.0961 depends on the municipality’s intent and is determined on a case-by-case basis.¹²³ Generally, the main goal when cities adopt these ordinances is to reduce the number of plastic bags littered.¹²⁴ However, some cities state other reasons for adopting plastic-bag ordinances.¹²⁵ For example, some cities adopt such ordinances to maintain the city’s sewer systems, to prevent flooding, to protect the water supply, or to protect life and wildlife.¹²⁶

Additionally, § 361.0961 of the SWDA must make “unmistakably clear” that the legislature intended to prevent municipalities from regulating plastic bags.¹²⁷ The legislature was not “unmistakably clear” that plastic bags are always considered a container or package for solid waste management purposes, regardless of whether the bags are disposed of.¹²⁸ The fact that legislators have introduced subsequent bills that explicitly preempt municipalities from regulating carryout bags shows that § 361.0961 of the SWDA is ambiguous and does not unmistakably prevent cities from adopting

119. See Petitioner City of Laredo’s Corrected Brief on the Merits, *supra* note 117, at 27 (citing TEX. HEALTH & SAFETY CODE §§ 361.003(12), (16), (18-a), (33) (2016)).

120. See *id.* at 27–28; see also 30 TEX. ADMIN. CODE § 330.3(58) (2018) (Tex. Comm’n on Env’tl. Solid Waste); TEX. HEALTH & SAFETY CODE ANN. § 361.003(33) (West 2016).

121. Petitioner City of Laredo’s Corrected Brief on the Merits, *supra* note 117, at 27.

122. See generally Tex. Op. Att’y Gen. No. GA-1078 (2014).

123. See generally *id.*

124. See LAREDO, TEX., CODE OF ORDINANCES ch. 33, art. VIII, §§ 33–501 (2015).

125. See, e.g., FREER, TEX., ORDINANCE 2012-05 (Dec. 10, 2012) (to protect wildlife); FT. STOCKTON, TEX., ORDINANCE No. 10–117 (Aug. 24, 2010) (“[T]o reduce the cost to the city of solid waste disposal, and to protect the environment”); LAGUNA VISTA, TEX., ORDINANCE No. 2012–23 (2012) (to “protect[] the marine environment”); LAREDO, TEX., CODE OF ORDINANCES ch. 33, art. VIII, §§ 33-501 (2015) (to reduce costs and protect life and property).

126. See LAREDO, TEX., CODE OF ORDINANCES ch. 33, art. VIII, §§ 33–501 (2015).

127. BCCA Appeal Grp., Inc. v. City of Hous., 496 S.W.3d 1, 7–8 (Tex. 2016) (quoting Dall. Merchs. & Concessionaire’s Ass’n v. City of Dall., 852 S.W.2d 489, 491, 494 (Tex. 1993)); Laredo Merchs. Ass’n v. City of Laredo, No. 04-15-00610-CV, 2016 WL 4376627, at *3 (Tex. App.—San Antonio Aug. 17, 2016, pet. granted); see also Isabelle Taft, *Laredo’s Bag Ban Becomes Flashpoint in Debate over Local Control*, TEX. TRIB. (June 26, 2016), <https://www.texastribune.org/2016/06/28/laredos-bag-ban-becomes-flashpoint-debate-over-loc/> (reporting on *Laredo Merchants Ass’n*).

128. See TEX. HEALTH & SAFETY CODE ANN. § 361.0961 (West 2017). The legislature did not define “package” or “container” in the statute. See *id.*

plastic bag regulations.¹²⁹ If § 361.0691 were unmistakably clear, then the more explicit subsequent bills would not need to be introduced.¹³⁰

Finally, regardless of whether the Court determines that § 361.0691(a)(1) governs carryout bags provided at the point of sale, § 361.0961(a)(1) only prohibits the sale or use of carryout bags “in a manner not authorized by state law.”¹³¹ Thus, if another state statute provides municipalities with the authority to adopt the regulating ordinance, then the exception in § 361.0961(a)(1) applies and the ordinance is not preempted.¹³² One example of this is a municipality’s statutory authority to regulate and maintain utility systems.¹³³ If a city adopts an ordinance to prevent plastic bags from clogging sewer drain pipes, then it is exercising its authority to maintain and regulate its utility system.¹³⁴ Furthermore, municipalities can be liable for damage caused by the backup of its sewer systems.¹³⁵ If the Court affirms the appellate court’s decision in *Laredo Merchants Ass’n*, then municipalities could be held liable for damages caused by plastic bags clogging sewer systems, while at the same time barred from adopting regulations to prevent liability.¹³⁶

B. Show Me the Money: Cities’ Authority to Impose a Charge on Carryout Bags

Some carryout-bag regulations require a business to charge a customer a fee or tax before providing bags.¹³⁷ The terms “tax” and “fee” are often used interchangeably, but they sometimes mean different things.¹³⁸ A “tax” is “[a] charge . . . imposed by the government . . . to yield public revenue.”¹³⁹ A “fee” is “[a] charge or payment for labor or services”¹⁴⁰ Courts apply the “‘primary purpose’ test” to determine whether a charge is a

129. See generally Tex. S.B. 103, 85th Leg., R.S. (2017); Tex. S.B. 1806, 84th Leg. R.S. (2015); Tex. S.B. 1550, 84th Leg., R.S. (2015); Tex. H.B. 2416, 83d Leg., R.S. (2013); Tex. H.B. 1877, 82d Leg., R.S. (2011); Tex. H.B. 3236, 82d Leg., R.S. (2011); Tex. S.B. 908, 82d Leg., R.S. (2011); Tex. S.B. 338, 81st Leg., R.S. (2009); Tex. H.B. 3427, 81st Leg., R.S. (2009); Tex. H.B. 1361, 81st Leg., R.S. (2009).

130. See generally Tex. S.B. 103, 85th Leg., R.S. (2017); Tex. S.B. 1806, 84th Leg. R.S. (2015); Tex. S.B. 1550, 84th Leg., R.S. (2015); Tex. H.B. 2416, 83d Leg., R.S. (2013); Tex. H.B. 1877, 82d Leg., R.S. (2011); Tex. H.B. 3236, 82d Leg., R.S. (2011); Tex. S.B. 908, 82d Leg., R.S. (2011); Tex. S.B. 338, 81st Leg., R.S. (2009); Tex. H.B. 3427, 81st Leg., R.S. (2009); Tex. H.B. 1361, 81st Leg., R.S. (2009).

131. TEX. HEALTH & SAFETY CODE § 361.0961(a)(1).

132. See *id.*

133. See TEX. LOC. GOV’T CODE ANN. §§ 552.001–.002 (West 2017).

134. See *id.*

135. See *id.* at § 552.912(a); TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(9), (32) (West 2017).

136. See TEX. CIV. PRAC. & REM. CODE §§ 101.0215(9), (32); TEX. LOC. GOV’T CODE § 552.912(a); TEX. HEALTH & SAFETY CODE § 361.0961.

137. See *Romer & Tamminen*, *supra* note 22, at 241.

138. See *id.* at 247.

139. *Tax*, BLACK’S LAW DICTIONARY (Bryan A. Garner ed., 10th ed. 2014).

140. *Fee*, BLACK’S LAW DICTIONARY (Bryan A. Garner ed., 10th ed. 2014).

tax or a regulatory fee.¹⁴¹ If the purpose of the charge is to raise public revenue, then it is a tax.¹⁴² If the purpose is to raise funds to regulate, then it is a regulatory fee.¹⁴³ A fee imposed may sometimes be considered a tax if some or all of the money goes to the government and its purpose is to raise public revenue.¹⁴⁴ If a fee is imposed and the business gets to keep all the revenue, then it is not a tax or a regulatory fee because the government is not receiving any of the revenue.¹⁴⁵

In Texas, municipalities have the authority to assess and levy taxes that are authorized by state law.¹⁴⁶ Various state statutes authorize municipalities to impose certain types of taxes.¹⁴⁷ Opponents of plastic bag regulations argue that a plastic bag tax imposed on the customer at the point of sale is an impermissible sales tax.¹⁴⁸ A municipality is authorized to impose sales taxes under § 321.101(a) of the Texas Tax Code.¹⁴⁹ A municipal sales tax is a tax imposed on tangible personal property sold within a municipality at a rate between 0.125% to 2.0%.¹⁵⁰ To adopt or repeal a sales tax, a municipality must hold an election and a majority of the voters must vote in favor of imposing the tax.¹⁵¹

Opponents argue that municipal plastic-bag fees are impermissible sales taxes because the cities did not hold elections allowing a vote on the issue and because the revenue collected from the plastic-bag fees exceeds the

141. *Gatesco Q.M. Ltd. v. City of Hous.*, 503 S.W.3d 607, 616 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (citing *Lowenberg v. City of Dall.*, 261 S.W.3d 54, 57–58 (Tex. 2008)).

142. *Id.*

143. *Id.*

144. *See Lowenberg v. City of Dall.*, 261 S.W.3d 54, 58 (Tex. 2008) (holding that a fire-registration fee was an unlawful occupation tax because the fee was intended to raise money to “cover all costs of fire prevention, . . . shifting that burden off the taxpayers”); *Romer & Tamminen*, *supra* note 22, at 241.

145. *See Romer & Tamminen*, *supra* note 22, at 241.

146. *See* TEX. CONST., art. XI §§ 4–5.

147. *See, e.g.*, TEX. TAX. CODE ANN. § 302.001 (West 2017) (authorizing with municipalities the power to impose property taxes). Section 302.101 authorizes municipalities to impose and collect occupation taxes. *See id.* Section 351.002 authorizes municipalities to impose hotel occupancy taxes. *See id.* § 351.002. Section 321.101 authorizes municipalities to impose sales and use taxes. *See id.* § 321.101.

148. *See* Plaintiffs’ Original Petition for Declaratory and Injunctive Relief, *supra* note 104, at 6–7; Plaintiff’s Original Petition for Declaratory Judgment, Application for Permanent Injunction, and Request for Disclosure at 7–8, *Texas v. City of Brownsville*, (No. 2016-DCL-06794) (357th Dist. Ct., Cameron Cty., Tex. Oct. 12, 2016) [hereinafter Plaintiff’s Original Petition for Declaratory Judgment]; *AG Paxton Commends City of Kermit for Repealing Its Unlawful Sales Tax on Plastic Bags*, ATT’Y GEN. TEX.: KEN PAXTON (June 21, 2017) [hereinafter *AG Paxton Commends City of Kermit*], <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-commends-city-of-kermit-for-repealing-its-unlawful-sales-tax-on-p> (discussing the repeal of plastic bag ordinances).

149. *See* TEX. TAX. CODE § 321.101(a) (“A municipality may adopt . . . a sales . . . tax . . . at an election in which a majority of the qualified voters of the municipality approve the adoption . . .”).

150. *See id.* § 321.103(a). Section 321.103(a) defines a municipal sales tax as “as a tax on the receipts from the sale of retail of taxable items within the municipality at any rate that is an increment of one-eighth of one percent . . . that [does] not . . . exceed[] [two percent.]” *Id.* The rate may be reduced in one or more increments of one-eighth of one percent to a minimum of one-eighth of one percent or increased in one or more increments of one-eighth of one percent to a maximum of two percent, or the tax may be abolished. *See id.*

151. *See id.* § 321.101(a).

maximum sales-tax rate of two percent.¹⁵² However, a plastic bag tax is not an impermissible sales tax, it is an impermissible excise tax.¹⁵³ An excise tax is “[a] tax imposed on the manufacture, sale, or use of goods, or an occupation or activity.”¹⁵⁴ Excise taxes are usually imposed on specific products, as opposed to sales taxes which are imposed on generally all tangible personal property.¹⁵⁵ Additionally, excise taxes are typically a fixed tax amount, and sales taxes are a percentage of the sales price.¹⁵⁶

The only excise tax municipalities are authorized to impose is an occupation tax.¹⁵⁷ Therefore, although a plastic bag fee is an excise tax and not a sales tax, it is an impermissible tax nonetheless because no state law authorizes a tax on carryout bags.

In other states, some local governments might be able to impose a charge if the business keeps the proceeds of the fees.¹⁵⁸ If the government is not yielding any public revenue for the charge imposed, then it is not a tax.¹⁵⁹ However, requiring that the business keep the revenue from the bag fee would not work in Texas because the SWDA prohibits a municipality from adopting an ordinance that assesses “a fee or deposit on the sale or use of a container or package.”¹⁶⁰ Unlike § 361.0961(a)(1), the prohibition of assessing fees or deposits is not limited to purposes for solid waste management.¹⁶¹ Thus, because a plastic bag is considered a container or package under § 361.0961, a court will probably hold that municipalities are preempted from assessing fees on plastic bags, regardless of the purpose.¹⁶²

There are no longer any Texas cities that impose a bag fee or tax.¹⁶³ Kermit previously imposed a \$0.10 charge on paper bags, but it repealed its bag charge provision when the Texas Attorney General gave Kermit a sixty-day ultimatum to either repeal the bag fee or be sued.¹⁶⁴ Dallas and Brownsville also imposed bag fees in the past, but both did away with the

152. See Plaintiffs’ Original Petition for Declaratory and Injunctive Relief, *supra* note 104, at 6–7; Plaintiff’s Original Petition for Declaratory Judgment, *supra* note 148, at 7–8; *AG Paxton Commends City of Kermit*, *supra* note 148.

153. See *Excise*, BLACK’S LAW DICTIONARY (Bryan A. Garner ed., 10th ed. 2014); see also *What Is Excise Tax and How Does It Differ from Sales Tax?*, ACCURATETAX (Sept. 10, 2015) [hereinafter *What is Excise Tax*], <https://www.accuratetax.com/blog/what-is-excise-tax/> (explaining the difference between a sales tax and an excise tax).

154. *Excise*, BLACK’S LAW DICTIONARY (Bryan A. Garner ed., 10th ed. 2014).

155. See *What Is Excise Tax*, *supra* note 153.

156. See *id.*

157. See TEX. TAX CODE ANN. § 302.101 (West 2017) (“The governing body of a municipality . . . may impose and collect occupation taxes.”).

158. See *Romer & Tamminen*, *supra* note 22, at 241.

159. See *id.*

160. See TEX. HEALTH & SAFETY CODE ANN. § 361.0961(a)(3) (West 2017).

161. See *id.*

162. See *Laredo Merchs. Ass’n v. City of Laredo*, (No. 04-15-00610-CV), 2016 WL 4376627, at *1 (Tex. App.—San Antonio Aug. 17, 2016, pet. granted); see also Tex. Att’y Gen. Op. No. GA-1078 (2014).

163. See *AG Paxton Commends City of Kermit*, *supra* note 148.

164. See *id.*

fees after being sued for imposing an illegal tax.¹⁶⁵ However, none of these lawsuits went to trial because the municipalities elected to repeal the bag fee rather than fight the lawsuits.¹⁶⁶

It is unfortunate that Texas state law preempts municipalities from adopting bag fees.¹⁶⁷ The goal of a bag fee or bag tax is to encourage consumers to use reusable bags and deter them from using single-use carryout bags.¹⁶⁸ Evidence shows that bag fees effectively reduce plastic-bag litter.¹⁶⁹ In Washington, D.C., the use of plastic bags had a reduction-rate between 50% to 70%, and bag litter in the Anacostia River was reduced when a \$0.05 tax on plastic bags was implemented.¹⁷⁰ Additionally, municipalities can generate significant revenue to contribute to clean-up expenses.¹⁷¹ Before Brownsville repealed the fee for plastic bags, the city collected approximately “\$71,000 per month in bag fees, totaling nearly \$3.8 million through January [2016].”¹⁷²

C. Future of Bag Regulations: Impact of Laredo Merchants Ass’n v. City of Laredo

The Texas Supreme Court’s decision in *Laredo Merchants Ass’n v. City of Laredo* will have an immediate statewide impact, especially for cities that already have plastic bag ordinances.¹⁷³ If the Court affirms, then the eleven other local plastic bag ordinances will likely be challenged and could be held to be preempted by § 361.0961 of the SWDA.¹⁷⁴ Because the primary purpose for regulating plastic bags is to prevent litter, courts will likely hold that the ordinances are preempted by § 361.0961, even though some of the cities state additional reasons (for example, protection of wildlife) beyond litter prevention for regulating carryout bags.¹⁷⁵ However, cities may still be

165. See Collier, *supra* note 79; Findell, *supra* note 85.

166. See *AG Paxton Commends City of Kermit*, *supra* note 148; Collier, *supra* note 79; Findell, *supra* note 85.

167. See TEX. HEALTH & SAFETY CODE ANN. § 361.0961(a)(3) (West 2017).

168. See Taylor & Villas-Boas, *supra* note 2, at 352.

169. See Romer & Tamminen, *supra* note 22, at 247.

170. See *id.*

171. See Malewitz, *supra* note 78.

172. *Id.* Additionally, the State of Texas receives billions of dollars each year from other excise taxes. See Minton, *supra* note 29 (reporting that, in 2015, Texas sin tax collections totaled at over \$3.8 billion—over \$1.1 billion from alcoholic beverage taxes; over \$1.5 billion from cigarette and tobacco taxes; and over \$1.1 billion from gambling taxes).

173. See Andrew Burger, *Paxton Files Amicus Brief with Supreme Court Regarding Laredo’s Plastic Bag Ban*, SE TEXASRECORD (June 28, 2017, 10:45 AM), <https://setexasrecord.com/stories/511133030-paxton-files-amicus-brief-with-supreme-court-regarding-laredo-s-plastic-bag-ban>.

174. See *id.*

175. See *Laredo Merchs. Ass’n v. City of Laredo*, No. 04-15-00610-CV, 2016 WL 4376627, at *1 (Tex. App.—San Antonio Aug. 17, 2016, pet. granted) (holding that Laredo’s city ordinance is preempted even though the ordinance stated other reasons for adoption other than litter prevention).

able to adopt plastic bag regulations, as long as it is clear in the ordinance that the purpose is not to prevent litter.¹⁷⁶

Regardless of how the Court decides, there will likely be arguments for statewide legislation.¹⁷⁷ If *Laredo Merchants Ass'n* is affirmed, Texas legislators opposed to local ordinances will have incentive to enact legislation explicitly preempting municipal bag bans in the 2019 legislative session to prevent cities from adopting ordinances with magic words that avoid § 361.0961.¹⁷⁸ Affirmance will leave gaps in the law because the Court is only deciding if Laredo's ordinance was adopted for the purpose of solid waste management.¹⁷⁹ Courts will have to analyze each city ordinance regulating bags to determine whether it was adopted for solid waste management purposes.¹⁸⁰ The Texas Attorney General's Office said that plastic bag regulations adopted to protect animal life are not adopted for the purpose of solid waste management.¹⁸¹ However, those cities sought to protect animal life by preventing littering of plastic bags—a form of solid waste.¹⁸² Laredo also adopted its ordinance for the purpose of protecting animal life, yet the court of appeals held that the ordinance was for solid waste management purposes.¹⁸³ Accordingly, city ordinances will have to be reviewed on a case-by-case basis, and various jurisdictions will likely rule differently.¹⁸⁴ Opponents will point to this as a stronger reason for enacting a statewide law that explicitly preempts plastic bag bans, even if the Texas Supreme Court rules in favor of Laredo Merchants Association.¹⁸⁵

Conversely, if affirmed, supporters of plastic bag bans will advocate for legislation that overrules the decision and provides municipalities the authority to adopt plastic bag regulations.¹⁸⁶ On the other hand, if *Laredo Merchants Ass'n* is reversed, and Laredo's ordinance is not preempted by § 361.0961, then opponents will continue to propose legislation that explicitly preempts all municipalities from adopting bag bans.¹⁸⁷

176. See Tex. Att'y Gen. Op. No. GA-1078 (2014).

177. See *Senate Committee Video Part I*, *supra* note 67.

178. See *id.* (relying on *Laredo Merchs. Ass'n* to support enacting a law prohibiting bag bans).

179. *Laredo Merchs. Ass'n*, 2016 WL 4376627, at *1; see also Tex. Att'y Gen. Op. No. GA-1078 (2014) (explaining that adopted city ordinances will have to be reviewed on a case-by-case basis).

180. Tex. Op. Att'y Gen. No. GA-1078 (2014).

181. See *id.*

182. See FREER, TEX., ORDINANCE No. 2012-05 (Dec. 10, 2012); LAGUNA VISTA, TEX., ORDINANCE No. 2012-23 (Sept. 11, 2012).

183. *Laredo Merchs. Ass'n*, 2016 WL 4376627, at *1; LAREDO, TEX., CODE OF ORDINANCES ch. 33, art. VIII, §§ 33-501–508 (2015).

184. See Tex. Att'y Gen. Op. No. GA-1078 (2014).

185. See *id.*

186. See *Senate Committee Video Part I*, *supra* note 67 (relying on *Laredo Merchs. Ass'n* to support enacting a law prohibiting bag bans).

187. See, e.g., Tex. S.B. 103, 85th Leg., R.S. (2017); Tex. S.B. 1806, 84th Leg. R.S. (2015); Tex. S.B. 1550, 84th Leg., R.S. (2015); Tex. H.B. 2416, 83d Leg., R.S. (2013); Tex. H.B. 1877, 82d Leg., R.S. (2011); Tex. H.B. 3236, 82d Leg., R.S. (2011); Tex. S.B. 908, 82d Leg., R.S. (2011); Tex. S.B. 338, 81st Leg., R.S. (2009); Tex. H.B. 3427, 81st Leg., R.S. (2009); Tex. H.B. 1361, 81st Leg., R.S. (2009).

IV. PAPER OR PLASTIC: THE EFFECTIVENESS OF BAG REGULATIONS

Plastic bag regulations have not been around long enough to determine whether they are effective.¹⁸⁸ However, there is evidence that shows that plastic bag regulations reduce the number of plastic bags used.¹⁸⁹ For example, after San Jose, California adopted plastic bag regulations in 2011, plastic litter was reduced by “approximately [89%] in the storm drain system, [60%] in the creeks and rivers, and [59%] in [c]ity streets and neighborhoods.”¹⁹⁰ A reduction in the number of plastic bags used is certainly a good result when it comes to reducing the amount of plastic litter.

There is also evidence that plastic bag regulations lead to increased use in paper bags.¹⁹¹ Paper bags are also harmful to the environment, and some even say worse than plastic.¹⁹² Paper bags are heavier, and paper bag production leaves a larger carbon footprint than plastic bag production.¹⁹³ However, the impact of paper bags is spread across the entire population, and specific local governments feel the environmental impacts of plastic bags,¹⁹⁴ which is therefore why local governments desire to regulate plastic bags more than paper bags.¹⁹⁵ Additionally, if municipalities regulated both plastic and paper bags, fewer paper bags would be used.¹⁹⁶

V. RECOMMENDATION: REVERSE *LAREDO MERCHANTS ASS’N V. CITY OF LAREDO* AND ENACT A COMPREHENSIVE STATUTEA. *Reverse Laredo Merchants Ass’n v. City of Laredo*

Affirming the court of appeals’s decision “would represent a swift departure from Texas’[s] history of supporting local governments.”¹⁹⁷ The Texas Constitution gives Texas municipalities the authority to self-govern by adopting their own rules, laws, and regulations.¹⁹⁸ State statutes are presumed not to interfere with local law unless the state statute, with

188. See SCI. AM., *supra* note 35.

189. See *id.*

190. See *id.*

191. See Taylor & Villa-Boas, *supra* note 2, at 371 (“[T]he percentage of customers using paper bags climbs from less than 5% before the policy to over 40% afterwards.”).

192. See generally Rebecca Taylor, *Bag ‘Leakage’: The Effect of Disposable Carryout Bag Regulations on Unregulated Bags* (May 5, 2017), available at <https://ssrn.com/abstract=2964036>.

193. See *id.*; Warner, *supra* note 23.

194. See Taylor & Villas-Boas, *supra* note 2, at 355.

195. See *id.*

196. See *id.* at 371 (finding that “the two disposable bag policies produce remarkably similar increases in reusable bag usage”).

197. See Paul Cobler, *State Supreme Court Case Could Bring an End to Plastic Bag Bans in Texas*, TEX. TRIB. (Jan. 11, 2018, 12:00 AM), <https://www.texastribune.org/2018/01/11/texas-plastic-bag-bans-threatened-supreme-court-challenge-laredo-ordin/>.

198. See TEX. CONST. art. XI, §§ 4–5.

“unmistakable clarity,” preempts it.¹⁹⁹ The SWDA does not unmistakably preempt local governments from adopting plastic bag regulations.²⁰⁰ The Fourth Court of Appeals broadened the scope of § 361.0961 of the SWDA beyond the legislature’s intent.²⁰¹ Nowhere in § 361.0961 does it specify that municipalities cannot adopt an ordinance that prohibits businesses from providing plastic bags to customers.²⁰² Nowhere in the SWDA does it define plastic bags as a container or package.²⁰³ And nowhere in the SWDA does it prohibit *any* sale or use for solid waste management purposes.²⁰⁴ The statute is ambiguous, and an ambiguous statute fails to clearly preempt local government authority.²⁰⁵ Therefore, the Texas Supreme Court should reverse the court of appeals’s decision in *Laredo Merchants Ass’n*.²⁰⁶

Additionally, an affirmance of *Laredo Merchants Ass’n* will have immediate impact across the State of Texas and set “a dangerous precedent of strict, uniform regulations on cities.”²⁰⁷ Extreme uniform regulations will not work in Texas; Texas is too big and too geographically diverse.²⁰⁸ Several city ordinances will be at risk of being struck down, and diverse local concerns will no longer be addressed.²⁰⁹

I. Coastal Cities

Coastal cities such as South Padre Island, Corpus Christi, Port Aransas, and Laguna Vista want to control plastic bags to prevent them from littering their beaches and harming marine life.²¹⁰ Plastic bags easily get caught in the wind and end up in oceans and bays where they will essentially stay forever because they photodegrade instead of biodegrade.²¹¹ Plastic bags in the water cause harm to marine life.²¹² Marine life entangle themselves in or ingest the

199. See *Laredo Merchs. Ass’n v. City of Laredo*, No. 04-15-00610-CV, 2016 WL 4376627, at *1 (Tex. App.—San Antonio Aug. 17, 2016, pet. granted); Petitioner City of Laredo’s Corrected Brief on the Merits, *supra* note 117, at 27.

200. See *id.*

201. See *id.*

202. See *id.*

203. See *id.*

204. See *id.*

205. See *id.*

206. See *id.*

207. See *Cobler*, *supra* note 197.

208. See *id.*

209. See *id.*; Petitioner City of Laredo’s Corrected Brief on the Merits, *supra* note 117, at 27.

210. See, e.g., LAGUNA VISTA, TEX., ORDINANCE No. 2012-23 (Sept. 11, 2012) (stating “Laguna Vista has a strong interest in protecting the marine environment . . .” and that “there are many instances of marine animals being injured or dying from ingesting or choking on plastic debris in the ocean” as reasons to adopt its ordinance); see also S. PADRE ISLAND, TEX., CODE OF ORDINANCES ch. 12, art. III §§ 12-30–30.3 (2011) (“[P]lastic . . . bags create significant litter problems in the City of South Padre Island and also litter community beaches.”).

211. See LAGUNA VISTA, TEX., Ordinance No. 2012-23 (2012).

212. See S. PADRE ISLAND, TEX., CODE OF ORDINANCES ch. 12, art. III §§ 12-30–30.3 (2011).

plastic bags.²¹³ As they are entangled in the plastic bags, their mobility is constricted, often causing death from starvation, exhaustion, or infection.²¹⁴ When marine life ingest the plastic bags, they often die because their digestive system becomes blocked.²¹⁵ Because of their proximity to the coast and the strong likelihood that plastic bags provided in their cities will end up in the ocean, coastal cities have a unique interest to regulate plastic bags.²¹⁶

Additionally, coastal cities depend on tourism to generate public revenues.²¹⁷ When plastic bags are caught in trees and litter the beaches, tourists do not want to visit those cities. To keep the city clean and attractive for tourists, coastal cities need to be able to regulate plastic bags.²¹⁸ Therefore, if *Laredo Merchants Ass'n* is affirmed, coastal cities will no longer have the authority to adopt plastic bag ordinances that address their unique interests.

2. Rural Areas: Plastic Bags' Effect on Texas's Agricultural Businesses

Farming and ranching cities have the specific local interest of preventing plastic bags from contaminating their cotton crops and killing their livestock.²¹⁹ Texas has the most farms and ranches in the United States, and cattle and cotton are Texas's top two commodities.²²⁰ Therefore, harvesting valuable cotton and raising healthy cattle are very important to millions of Texans.²²¹ The use of plastic bags affects Texas's cotton industry because the bags blow in the wind and get caught in the cotton crops.²²² Farmers must remove plastic bags from their harvest before the ginning process because if plastic is present, shredded pieces of plastic bags will

213. *See id.*

214. *See id.*

215. *See id.*

216. *See id.*; LAGUNA VISTA, TEX., ORDINANCE No. 2012-23 (Sept. 11, 2012). Both the Laguna Vista Ordinance and the South Padre Island Ordinance state the "strong possibility that plastic bags discarded in [the city] can end up in the ocean where they will last indefinitely" as reasoning for adopting their ordinance. *Id.*

217. *See generally* CITY OF S. PADRE ISLAND ECON. INDEX, S. PADRE ISLAND ECON. DEV. CORP. 4 (Sept. 2016), http://southpadreislanddc.com/sites/default/files/files/SPIIndexReport2015_3j.pdf (reporting that South Padre Island's most important revenue streams are hospitality, tourism, and real estate).

218. *See id.*

219. *See* Brief of Amici Curiae Tex. Cotton Ginners' Ass'n Billy Joe Easter in Support of the City of Laredo, *supra* note 13, at 6–12; *Senate Committee Video Part I*, *supra* note 67 (testifying that a rancher from Freer, Texas witnessed his sheep eating plastic bags, and that he knows of other ranchers who have lost livestock from ingesting plastic bags).

220. *See* TEX. DEP'T OF AGRIC., TEXAS AG STATS, <http://texasagriculture.gov/About/TexasAgStats> (last visited Apr. 17, 2018). There are "248,800 farms and ranches covering 130.2 million acres" in Texas. *Id.* In 2012, cattle were Texas's number one commodity with \$10.5 billion cash receipts, and cotton was its number two commodity with \$2.2 billion in cash receipts. *Id.*

221. *See id.*

222. *See* Brief of Amici Curiae Tex. Cotton Ginners' Ass'n Billy Joe Easter in Support of the City of Laredo, *supra* note 13, at 6–12.

inevitably remain after the process is complete.²²³ But plastic bags are difficult to detect in cotton crops because they are usually the same color as the cotton when it is ready for harvest: white.²²⁴

Once the ginning process is complete and the cotton is baled, the United States Department of Agriculture (USDA) grades the bales and they are sold to a textile mill.²²⁵ The value of the cotton depends on a number of factors, including lack of trash and other extraneous matter.²²⁶ Plastic bag particles in bales of cotton have a direct effect on the quality and value of the cotton sold.²²⁷ Thus, the increase in plastic bag litter in rural areas negatively affects the value of Texas's second largest commodity: cotton.²²⁸

Cattle and other livestock are also affected by plastic bags.²²⁹ Plastic bags that litter large roaming pastures are frequently consumed by cattle.²³⁰ Because cattle have four stomachs, they are particularly vulnerable to the serious consequences of ingesting plastic bags.²³¹ The bags can block all liquids and gases from passing through the compartment to the next stomach.²³² If this happens, then the cow can develop blood poisoning or suffer from a bloated stomach that compresses the lungs and suffocates it.²³³ A cow that dies from blood poisoning loses its value and is worthless.²³⁴

Local municipalities currently have the authority to protect their own local concerns such as crops and livestock.²³⁵ However, if the Court affirms *Laredo Merchants Ass'n*, rural areas with a large farming and ranching presence will no longer have the local authority to prevent plastic bag litter from damaging their cotton and killing their cattle.²³⁶

3. Urban Cities

More urban and inland cities in Texas do not have the same needs as coastal or rural cities.²³⁷ Also, cities with larger populations have different needs than smaller populations.²³⁸ Although larger cities may have the

223. *See id.* at 6–8.

224. *See id.*

225. *See id.* at 7.

226. *See id.* at 7–8.

227. *See id.* at 8.

228. *See id.*

229. *See id.* at 8–12.

230. *See id.* at 8.

231. *See id.* at 9–10.

232. *See id.* at 10.

233. *See id.*

234. *See generally id.* at 11–12.

235. *See id.* at 12.

236. *See id.* at 1–2.

237. *See, e.g.,* LAREDO, TEX., CODE OF ORDINANCES ch. 33, art. VIII, § 33-501 (2015) (stating one of Laredo's purposes for adopting its ordinance was to prevent flooding and protect life and property).

238. *See* NACS, *supra* note 11. Austin is the largest city to currently have plastic bag regulations. *Id.* A study revealed that Austin “residents used 263 million plastic bags per year, costing the city more than

resources to pay for the clean-up and maintenance plastic bags impose, smaller cities with smaller budgets may not be able to afford the expenses that are incurred from cleaning up plastic bags in the city.²³⁹

Some cities may not want to adopt plastic bag regulations because they do not have a problem with bags littering the city, and their citizens do not want them. Thus, a statewide law in either direction—banning carryout bags or preempting municipalities from regulating—is not beneficial or necessary. However, a state law that provides municipalities with the authority to adopt regulating ordinances, if they choose to adopt such ordinance, is necessary.²⁴⁰

B. New Texas Statute that Gives Municipalities the Authority They Deserve

Plastic bags are harmful to the environment, and the majority of plastic bags are littered or end up in city landfills.²⁴¹ Nevertheless, people still use plastic bags.²⁴² Therefore, it is up to the government to deter people from using plastic bags.²⁴³ An excise tax in the form of a bag tax is designed to change citizens' behavior.²⁴⁴ And evidence shows that excise taxes are an effective way to change citizens' behavior.²⁴⁵ As analyzed above, a tax on plastic bags would be similar to other sin taxes the state already imposes on tobacco, alcohol, and gambling.²⁴⁶ The only difference is which governing body is imposing the tax and collecting the revenue—the State of Texas or a local Texas municipality.

Therefore, regardless of how the Court rules in *Laredo Merchants Ass'n*, the Texas Legislature should enact legislation that explicitly authorizes municipalities to adopt ordinances regulating carryout bags. This legislation should also authorize municipalities to impose and collect a tax on plastic bags. Similar to statutes that authorize municipalities to impose taxes and Texas's sin tax statutes, the statute could read:

- (a) The governing body of a municipality may impose and collect a single-use carryout-bag tax that becomes due and payable when a person receives a single-use carryout bag at the point of sale.

\$850,000 in annual trash costs." *Id.* Smaller cities have fewer bags used by their residents; thus, they may not have a bag litter problem. *See generally id.*

239. *See id.*

240. *See infra* Section V.B (recommending that the legislature grant Texas municipalities the authority to regulate the use of plastic bags).

241. *See* U.S. ENVTL. PROT. AGENCY, *supra* note 3.

242. *See* Taylor & Villas-Boas, *supra* note 2, at 351.

243. *See id.* at 351–52.

244. *See id.*

245. *See* Minton, *supra* note 29.

246. *See, e.g.,* TEX. TAX CODE ANN. § 154.021 (West 2017) (imposing a tax on cigarettes); *see also* Minton, *supra* note 29 (discussing sin taxes imposed in Texas).

(b) The maximum amount a municipality may tax is \$0.15 per bag.²⁴⁷

Allowing municipalities to collect taxes on plastic bags will also provide another source of revenue to the cities.²⁴⁸ Texas receives billions of dollars from the various sin taxes it imposes.²⁴⁹ The revenue that municipalities receive from plastic bag taxes could be used to pay for city clean-up costs.²⁵⁰ Additionally, cities will still be limited to the total amount of taxes they may collect.²⁵¹ Thus, imposing a plastic bag tax may lead to a reduction of other taxes.²⁵² If cities want to impose a plastic bag tax but they are already collecting the maximum amount of taxes they can collect, they will have to lower other taxes to make room for the plastic bag tax.²⁵³

VI. CONCLUSION

Plastic bags have a serious impact on the environment.²⁵⁴ Other states are doing their part to reduce the amount of plastic that is polluting our country and oceans.²⁵⁵ Texas municipalities are trying to use their power to put an end to plastic bags and solve the local problems that plastic bags cause.²⁵⁶ However, the State of Texas is trying to prevent local governments from exercising this control.²⁵⁷ Texas should join the fight against plastic bags, but instead it is fighting in favor of plastic bags.

The Texas Supreme Court decision in *Laredo Merchants Ass'n* will determine the immediate future for carryout-bag regulations in Texas.²⁵⁸ However, regardless of how the Court decides, the Texas Legislature should enact legislation that makes it clear that municipalities have the authority to control plastic bags in their own city.

247. See generally TEX. TAX CODE §§ 154.0212; 302.101 (providing a state sin tax on cigarettes and authorizing municipalities the authority to impose occupation taxes).

248. See Malewitz, *supra* note 78; Minton, *supra* note 29.

249. See Minton, *supra* note 29.

250. See Romer & Tamminen, *supra* note 22 (stating that Washington D.C.'s tax is used to clean up the river).

251. See TEX. CONST., art. XI §§ 4–5.

252. See *id.*

253. See *id.*

254. See *supra* Part I (discussing the impact of plastic bags).

255. See *supra* Section II.A (discussing the rise of the plastic bag regulations in the United States).

256. See *supra* Section II.C.2 (explaining the various municipal bag ordinances currently and previously adopted in Texas).

257. See *supra* Sections II.C.1, III.C (analyzing Texas's position on plastic bag regulations).

258. See *supra* Section III.C (analyzing the impact of the pending *Laredo Merchs. Ass'n* decision).