

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 Court of Appeals,
San Antonio, Texas Cause No. 04-15-00610-CV

**BRIEF OF ENVIRONMENT TEXAS, NATURAL GROCERS, AND
BICYCLE SPORT SHOP AS *AMICUS CURIAE***

IN SUPPORT OF THE CITY OF LAREDO

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INTEREST OF AMICUS CURIAE

Environment Texas is a statewide, citizen-based environmental advocacy project of Environment America. Its core mission is to protect air, water, and open spaces in Texas through education and research. Environment Texas conducts policy-focused research at its Environment Texas Research and Policy Center. Environment Texas advocates for the interests of all Texas cities, all of which would be detrimentally affected by increased pollution and a heavy burden on their storm-drain infrastructures should this Court accept the Court of Appeals' flawed interpretation of the Solid Waste Disposal Act, Tex. Health & Safety Code § 361.0961, thus allowing the preemption of local bag ordinances.

Environment Texas strongly supports the position of the City of Laredo City that the Checkout Bag Reduction Ordinance, Ordinance 2014-O-064, is not, as a matter of law, preempted by the SWDA, and respectfully urges this court to affirm the decision of the trial court.

Environment Texas submits this amicus on behalf of retailers statewide that support these ordinances. Some of these retailers include:

Natural Grocers

Natural Grocers is a national organic grocery store chain. With 142 stores located around the country, Natural Grocers takes pride in their environmental commitments. In 2009, Natural Grocer's went bag-free at their checkouts in all stores nationwide,¹ and estimates that since implementing this program, approximately 100 million single-use bags per year have been saved from landfills.

Bicycle Sport Shop

Bicycle Sport Shop has five locations in and around Austin. The first shop was opened in 1985 by Hill Abell and Laura Agnew, who have shared their passion for cycling for over thirty years. The store sells items ranging from bikes and frames, bike parts, apparel, accessories, and health and nutrition items, among other things. Before the Austin ordinance went into effect, Bicycle Sport Shop used compostable check out bags. Although not all locations are within the limits of Austin, and so not subject to the city's ordinance, the same bag policies are practiced

¹ Natural Grocers, "Sustainability," <https://www.naturalgrocers.com/about/sustainability/>.

in all stores. This means that a paper bag with handles will only be provided when a customer asks for one. There is no charge for bags.

Each of these organizations has a keen interest in supporting efforts to promote sustainability by limiting the use of single-use, plastic bags. No party was paid a fee in connection with this brief.

SUMMARY OF ARGUMENT

This case is paramount for Laredo and other cities across Texas. In most retail stores, single-use bags are widely used without a visible charge to the consumer, with little to no thought given to their future disposal or impact on the environment. This brief demonstrates that there is a cost even if there is no charge at the checkout counter. While these bags may be briefly used by customers to carry products from these stores, the production and disposition of single-use checkout bags have significant environmental impacts, including, but not limited to obstructing the aesthetics of public spaces, polluting waterways, clogging storm drains, destroying habitats and wildlife, and increasing the cost of municipal waste disposal. Single-use bags also pose a threat to human health. All told, single-use bags offer very little benefit for all of their costs to the public and the environment.

Laredo’s single-use bag ordinance is a valuable tool to protect the environment and public health, and to improve the local economy by benefitting tourism and recreation in the region. Laredo’s ordinance is not preempted by Section 361.0961(a)(1) of the Texas Health and Safety Code. As the City of Laredo argues, along with various *amici* in this case, this provision should be interpreted as creating a narrow prohibition on the local regulation of only those containers and packages that are used for managing waste. Federal law supports this interpretation.

Laredo’s ordinance had a clear purpose and set of benefits related to beautification, reduction of costs associated with floatable trash controls and maintenance of the separate municipal storm water sewer system, and the protection of life and property. Pet. Br. at 6 (citing to the Ordinance). But the ordinance would have additional benefits. Single-use bags not only harm the environment, but can also harm the retail businesses which bear the costs of supplying, storing, and cleaning up the bags from their property. While the Texas Retailers Association submits that they are the “voice of retail in Texas,”² they have failed to

² See Texas Retailers Association *amicus* at 1.

voice the opinion of retailers who support and have benefitted from local ordinances like the one at issue here that prohibit, restrict, or otherwise regulate the use of single-use checkout bags.

Amici concur in much of the reasoning in the City’s brief and in the dissenting opinion. This *amicus brief* provides further reasons why the Court should not interpret Section 361.0961(a)(1) to preempt Laredo’s ordinance. Its focus is illustrating that these ordinances are not a burden, but can be a benefit to local retailers.

ARGUMENT

I. The court of appeals erred in its application of the “unmistakable clarity” standard.

A city operating under the home rule amendment is empowered to adopt and amend its charter in any manner consistent with and in accordance with the State Constitution and general laws of the state. *See* Tex. Const. Article XI, § 5(a). A home rule city, like Laredo, need only look to the Legislature for limitations on its authority. *BCCA Appeal Group, Inc. v. City of Houston*, 496 S.W.3d 1, 7 (Tex. 2016). The court of appeals correctly states the standard in preemption cases, stating that “[i]f the Legislature chooses to preempt a particular subject matter that is part of a home-rule city’s broad discretionary powers, [it] must do so

with ‘unmistakable clarity.’” Op. at 5-6 (citing *BCCA Appeal Group*, 496 S.W.3 at 7). But the court of appeals misapplied this standard.

Under this standard, a “general law and a city ordinance will not be held repugnant to each other if any other reasonable construction” would leave both in effect. *Id.* at 6. As similarly stated in the dissent: “The issue is not whether the SWDA and the Ordinance may be construed as conflicting with each other, but whether they may reasonably be construed as *not* conflicting with each other and both given effect.” *Laredo Merchants Assoc. v. City of Laredo*, No. 04-15-00610-CV, 2016 WL 4376627, at *11 (Tex. App.—San Antonio Aug. 17, 2016) (Chapa, J., dissenting). The answer, in this case, is yes: as the trial court and the dissent found, there are reasonable constructions of the SWDA and the ordinance that are not in conflict.

Other briefing in this case, and the dissenting opinion below, adequately support Laredo’s position that Section 361.0961(a)(1) does not preempt the City’s ordinance with unmistakable clarity. *See, e.g.*, Pet. Br. at 18–22; *see generally* Dissenting Op. Those arguments need not be repeated here.

II. This Court must apply accepted principles of statutory construction to its interpretation of the Solid Waste Disposal Act.

To determine whether the Legislature expressed a preemptive intent through clear and unmistakable clarity, the court must construe the statutory provision at issue. In this case, the court of appeals misconstrued the plain language of the statute, failed to consider the Act's legislative history and circumstances under which the statute was enacted, and failed to consider alternative constructions that would have made clear that the statute and ordinance in conflict.

When construing statutes, a court's primary objective is to give effect to the Legislature's intent. *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010). Courts "rely on the plain meaning of the text as expressing legislative intent" unless a different meaning is apparent from the context. *Id.* Further, to determine a statute's plain meaning, Texas courts follow the fundamental interpretive rule that statutory words are given their ordinary, common meaning. See Tex. Gov't Code § 311.011(a). "The cardinal rule in statutory interpretation and construction is to seek out the legislative intent from a general view of the enactment as a whole[.]" *Citizens Bank*

of *Bryan v. First State Bank, Hearne*, 580 S.W.2d 344, 348 (Tex. 1979); see also Tex. Gov't Code § 311.021(2) (it is presumed that “the entire statute is intended to be effective”).

Here, the two key words in Section 361.0961 are “container” and “package,” neither of which are defined in the statute. However, the Legislature and state agencies know how to define and use the word “bag.” See, e.g., Tex. Agric. Code § 63.001(4); Tex. Agric. Code § 141.001(5); Tex. Health & Safety Code § 485.001(8); 25 Tex. Admin. Code § 241.57(b)(1)(C); 22 Tex. Admin. Code § 291.133(d). The legislature could have written the word “bag” into Section 361.0961, but chose not to do so.

First, Texas courts read statutes as a whole. *Citizens Bank of Bryan*, 580 S.W.2d at 347. In so doing, Texas courts “presume the Legislature included each word in the statute for a purpose and that words not included were purposefully omitted.” *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015). The use of the terms “bag” or “plastic bag” are so common—especially in the context of a retail transaction—that it requires linguistic gymnastics to believe that “container” and “package” are synonymous with “bag.” It is hard to

imagine a single Texan ever being asked by the grocery store clerk: “would you like a container for your groceries?” or “can I put your pecan pie in a package?”

Second, Chapter 361 of the Texas Health and Safety Code uses the word “container” or “containers” fifteen times, and “containerized” twice more, for a total of seventeen. Outside of Section 361.0961 in dispute here, all fifteen other uses of “container” clearly mean things holding or containing either solid waste or hazardous waste. *E.g.* §§ 361.003(14) (defining a hazardous waste management unit to include a “container used to manage hazardous waste”); 361.003(29) (defining remedial action to include “repair or replacement of leaking container”); 361.0905(e)(8)(B) (requiring “use of sufficient containers between collections” of medical waste); 361.091(a) (prohibiting municipal solid waste sites or Type IV landfills from accepting “solid waste that is in a completely enclosed container”); 361.121(l) (prohibiting acceptance of Class B sewage sludge for land application unless it is transported “in a covered container”); also §§ 361.181; 361.651; 367.701. The court of appeals failed to even attempt to define what qualifies as a “container” under Section 361.0961(a)(1) in light of this statutory context.

Third, a court “must look to the intent of the legislature and must construe the statute so as to give effect to that intent.” *Union Bankers Ins. Co. v. Shelton*, 889 S.W.2d 278, 280 (Tex. 1994) (citations omitted); see *Crimmins v. Lowry*, 691 S.W.2d 582, 585 (Tex. 1985) (“A fundamental rule controlling the construction of a statute is to determine, if possible, the intent of the legislature as expressed in the language of that statute”); see also Tex. Gov’t Code § 311.023 (stating the matters that courts may consider whether or not a statute is ambiguous). Here, Texas’s policy and purpose of the Solid Waste Disposal Act is “to safeguard the health, welfare, and physical property of the people and to protect the environment by controlling the management of solid waste.” § 361.002(a). The strained interpretation of Section 361.0961 of the Court of Appeals deviates far from this policy and purpose—indeed it flatly contravenes it—and should be rejected.

Finally, Laredo Merchant’s interpretation of Section 361.0961(a)(1) would expand the scope of solid waste management in a manner inconsistent with federal law interpreting “solid waste” and solid waste management. In construing statutes, courts may consider common law and laws on the “same or similar subjects.” Tex. Gov’t Code § 311.023(4).

The court of appeals failed to consider common law interpreting “solid waste” management that would inform the interpretation of the SWDA.

This Court has previously noted that the definition of “solid waste” in SWDA is similar to that in RCRA. *R.R. Street & Co. Inc. v. Pilgrim Enterprises, Inc*, 166 S.W.3d 232, 238 n.5 (Tex. 2005). As the briefing in this case makes clear, the term “solid waste” has been interpreted by courts to encompass only materials that have been “truly discarded, disposed of, thrown away, or abandoned.” *Am. Mining Congress v. E.P.A.*, 824 F.2d 1177, 1186–87 (D.C. Cir. 1987). Courts have rejected attempts to expand solid waste management authority beyond the authority to regulate already discarded or abandoned materials. *See id.* Courts have repeatedly held that individuals who sell useful products are not liable for arranging for the disposal of waste merely because that product may be disposed of by someone else at a later time. Amicus Br. of Turtle Island at 8 n.15 (citing cases).

We adopt these arguments regarding the regulatory reach of “solid waste” and solid waste management. This Court should reject interpretations of Section 361.0961(a)(1) that would expand regulation of the “generation” of solid waste to persons who merely sell or use products

that may be disposed of at a later time. Regulation of commercial entities that offer single-use bags, including Laredo’s ordinance, does not involve a generator, waste generation, or solid waste management under the well-understood meaning of the terms in federal law or the state counterpart in Chapter 361. This Court should reject Laredo Merchant’s attempts to expand the scope of waste management through their interpretations of Section 361.0961(a)(1) and should reverse the court of appeals.

III. Laredo’s ordinance will not impose significant burdens on Texas businesses; in fact, preemption of the ordinance will burden Texas retailers and consumers.

The City Council for Laredo, in passing its ordinance, decided not to ban checkout bags or charge a fee for their distribution, but chose to implement a plan to incrementally reduce non-reusable plastic and paper checkout bags. Pet. Br. at 6. The ordinance makes it unlawful for a commercial establishment to “provide checkout bags to customers except as outlined by this ordinance,” excepting reusable bags and specified single-use bags. *Id.* (citing Ordinance). The ordinance addressed “single-use paper bag[s]”—defined as a “checkout bag provided by a commercial establishment at the point of sale that is made from paper and contains

old growth fiber and or contains less than forty percent post-consumer recycled material”—as well as “checkout bags” that are “plastic one-time-use carryout bag[s] that [are] provided by a commercial establishment at the point of sale” and are less than four Mils thick. Sec. 33-454. The ordinance contained various exceptions. Sec. 33-459. The ordinance does not assess a fee or deposit for the checkout bags regulated. Sec. 33-457.

Contrary to the assertions by Texas Retailers Association in their *amicus brief*, single-use checkout bags can actually burden both Texas businesses and consumers, and regulations like Laredo’s ordinance can provide net benefits to business owners and individual members of the public.

First, there are direct costs to retailers associated with purchasing single-use checkout bags. According to several of the leading manufacturing brands, the costs associated with purchasing 1,000 medium white plastic grocery bags range from \$17.95 to \$55.54.³ Prices are higher for brown paper bags, ranging from \$29.49 to \$76.73 for a

³ See Store Supply Warehouse, “Medium White Plastic T-Shirt Bags,” <https://www.storesupply.com/pc-13202-774-plastic-t-shirt-bags-white-90107.aspx>; American Retail Supply, “White HD Plastic Bags,” <https://www.americanretailsupply.com/white-hd-plastic-bags-with-t-shirt-handle-12-7-22-5792.html>.

bundle of 500 brown paper grocery bags.⁴ In addition to the measured cost of purchasing quantities of bags from a wholesaler or manufacturer, bags have to be transported, distributed, stocked at checkout lanes, and removed from private parking lots and public areas. Alan Lewis, Director of Government Affairs and Food and Agriculture Policy at Natural Grocers, states the logistical and financial impact of offering single-use bags is a considerable burden to retailers.⁵ As the providers of these bags, the cost of providing a single use bag is reduced to near zero once retailers are no longer allowed to distribute these bags freely.

Reflecting on the impact of the single-use checkout bag ordinance passed in Austin, Mr. Hill Abell from Bicycle Sport Shop stated that the biggest positive for them as a retailer was the financial savings they have experienced since the passage of the ordinance. According to Mr. Abell, even though they now stock three sizes of heavy stock bags with handles, their bag spend over the past year is down eight-five percent from when

⁴ See WebstaurantStore, Duro 1/6 Brown Paper Barrel Sack, <https://www.webstaurantstore.com/duro-1-6-brown-paper-barrel-sack-bundle/4331657.html>; Bags on the Net, SOS Bags (KRAFT), <http://www.bagsonthenet.com/SOS-BAGS-KRAFT-Prodview.html>

⁵ Alan Lewis from Natural Grocers, Email Correspondence.

they handed out bags for almost every purchase.⁶ The Bicycle Sport Shop has saved over \$4,000 in 2016 due to the diminished bag use.⁷ In his conversations with the independent bicycle dealer industry group at semi-annual meetings, other dealers have expressed envy towards the Austin bag ordinance.⁸

Second, these prices for bags are often embedded into prices, resulting in consumers unknowingly spending additional money to cover the costs of the single-use bags. According to a study undertaken in the context of the Los Angeles county bag ordinance, grocery stores currently embed 2 to 5 cents per plastic bag and 5 to 23 cents per paper bag into food prices.⁹ Thus, by eliminating the cost to retailers of providing bags free of charge, Los Angeles County found its ordinance potentially saves approximately \$18 to \$30 per consumer per year.¹⁰ Against these savings to taxpayers, the county estimated that the combined costs of its ordinance to each unincorporated county resident was less than \$4.00 per

⁶ Hill Abell, Email Correspondence (Sept. 19, 2017)

⁷ *Id.*

⁸ *Id.*

⁹ L.A. Cnty. Bd. of Supervisors, *An Overview of Carryout Bags in Los Angeles County*, L.A. Dep't of Pub. Works at 15-16, tbl. 1 (Aug. 2007).

¹⁰ *Id.* at 36 tbl. 9.

year, including the cost of purchasing replacement plastic bags for trash liners and their associated taxes.¹¹

For this reason, Mr. Lewis believes that the economic argument made by some retailers that free bags are an important service or that some consumers depend on free single-use bags because they cannot afford to purchase a reusable bag “does not hold water.”¹² The costs to provide bags to customers is often simply embedded into the prices that customers end up paying. In Mr. Lewis’ view, consumers do not “lose the freedom of choice” when they are no longer given free plastic, one-time use bags at checkout. Rather, removing these free bags encourages consumers to make a more informed choice.¹³ Rather than viewing it as taking a choice away from our fellow citizens, “addressing the problem of single-use plastic bags gives customers a clearer set of facts about the costs, benefits, and consequences of this particular choice.”¹⁴ In his own experience at Natural Grocers, a reusable bag sells for 99 cents and can be reused indefinitely. Buying three reusable bags, which can hold a

¹¹ *Implementation of the County of Los Angeles Plastic and Paper Carryout Bag Ordinance*, L.A. Cnty. Dep’t of Pub. Works 1 (Nov. 23, 2010).

¹² Alan Lewis from Natural Grocers, Email Correspondence.

¹³ *Id.*

¹⁴ *Id.*

typical week's worth of groceries for a small household, costs approximately \$3.¹⁵ Given an estimated embedded cost of \$18 to \$30 per year per household for "free" bags, consumers are given not only a clear choice, but the choice is financially beneficial to them.

Third, retailers report that many customers feel ownership over the reduction of waste when single-bag ordinances go into effect. Mr. Lewis stated that his customers "like being part of a community that is addressing this problem together[.]"¹⁶ Mr. Lewis estimates that each reusable bag has prevented the production of ten single-use bags per week over approximately ten years.¹⁷ According to Lewis, a reusable tote bag with a ten-year lifespan costs approximately fifty cents to a retailer. That fifty cents "may eliminate sixty-two (62) pounds of plastic from entering waterways and landfills. That's a bargain."¹⁸

CONCLUSION AND PRAYER

For the reasons stated above, *Amici* respectfully request that this Court reverse the judgment of the Fourth District Court of Appeals.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4, Tex. R. App. P., I hereby certify that this document contains 3296 words, excluding the portions of the brief exempted by rule 9.2(i)(1). This is a computer-generated document created in Microsoft Word, using 14-point typeface for all text, except for footnotes which are in 12-point typeface. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

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