FILED
16-0748
6/9/2017 11:27:20 AM
tex-17525607
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

NO. 16-0748

IN THE SUPREME COURT OF TEXAS

CITY OF LAREDO, TEXAS

Petitioner,

V.

LAREDO MERCHANTS ASSOCIATION,

Respondent.

On Appeal from the
Fourth Court of Appeals, San Antonio, Texas

Cause No. 04-15-00610-CV

BRIEF OF TEXAS PUBLIC POLICY FOUNDATION AS *AMICUS CURIAE*

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Texas Public Policy Foundation (the "Foundation") is a non-profit, non-partisan research organization dedicated to promoting liberty, personal responsibility, and free enterprise through academically-sound research and outreach.

Since its inception in 1989, the Foundation has emphasized the importance of limited government, free market competition, private property rights, and freedom from regulation. In accordance with its central mission, the Foundation has hosted policy discussions, authored research, presented legislative testimony, and drafted model ordinances to reduce the burden of government on Texans. Historically, the Foundation has worked on policymaking through its Center for Local Governance related to the constitutional limitation on local government ordinances by requiring such laws to be in conformity with the state statute or rule on the same subject.

It is with this background and experience that the Foundation submits this Brief in support of Respondents the Laredo Merchants Association (the "Association"). The Foundation's Brief supplements the Association's legal arguments to expand upon the larger policy framework. The Foundation requests this Court affirm the opinion of the Texas Fourth Court of Appeals.

The Foundation has paid all of the costs and fees incurred in the preparation of this brief.

SUMMARY OF ARGUMENT

The Texas Supreme Court should affirm the Fourth Court of Appeals' Opinion in order to encourage Texas courts to strike down city ordinances that conflict with Texas law. Local governments are creatures of the state—local control does not give cities authority to regulate in areas where the Legislature has expressly and definitively removed city authority. State law prohibits restrictions on the use of containers or packages. Nevertheless, cities throughout Texas are directly contradicting state law through ordinances that prohibit retailers from providing customers with single-use plastic bags, and Laredo's ordinance is a representative example. When local governments exceed their scope of authority, the rule of law requires courts to enforce objective, black-letter restrictions against them. Accordingly, the Court should affirm the Fourth Court of Appeals' opinion, strike down Laredo's ordinance, and thereby uphold the rule of law.

ARGUMENT

I. THE TEXAS SUPREME COURT SHOULD AFFIRM THE FOURTH COURT OF APPEALS' DECISION IN ORDER TO CLARIFY THAT LOCAL CONTROL IS DEFINED AND LIMITED BY THE STATE.

A. Local Governments are Creatures of the State.

Local governments receive their authority from the state, must be supervised by the state because of their peculiar susceptibility to factionalism, and are held accountable by the state because ultimate responsibility for their actions rests with

the state. Therefore, they are creatures of the state, and their authority is limited and checked by the state.

First, local governments derive their authority from the state: "Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the state to assist in the carrying out of state governmental functions." *Bennett v. Brown Cnty. Water Imp. Dist. No. 1,* 272 S.W.2d 498, 506-07 (Tex. 1954) ("[A] city is a creature of the State and is defined by the State Constitution and the Legislature. . . . [it] is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit."). Thus, cities are arms of the state authorized to carry out particular responsibilities to secure the blessings of liberty for Texans under their jurisdiction.

Further, local governments must also be supervised by the state because of their peculiar vulnerability to charismatic leaders and factions. In the course of making the case for a large, federal republic, our nation's leaders explained that smaller democratic units are more susceptible to factions that may abuse their power and trample on the people's liberty.

As James Madison stated:

> *The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must*

> *secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State.*

THE FEDERALIST NO. 10 (James Madison). Madison's recognition of the need for competing centers of power within a republican form of government was heavily influenced by the philosophical works of the French lawyer Montesquieu, who wrote:

> *Should a popular insurrection happen in one of the confederate states, the others are able to quell it. Should abuses creep into one part, they are reformed by those that remain sound. The state may be destroyed on one side and not on the other; the confederacy may be dissolved, and the confederates preserve their sovereignty.*

Charles Louis de Secondat, Baron de Montesquieu, *Of Laws, in the Relation They Bear to a Defensive Force*, in 1 THE COMPLETE WORKS OF M. DE MONTESQUIEU § 9, ¶ 1 (London, T. Evans, 1777), available at http://oll.libertyfund.org/titles/837#Montesquieu_0171-01_757. Montesquieu's point is that the presence of multiple, competing governments within the same polity allow for those governments that remain sound to admonish and correct those governments that abuse their power. Since local governments are particularly susceptible to abusing their power, it is all the more important that the competing state government play a supervisory role.

Finally, in addition to the state's formational and supervisory role over local governments, the state maintains ultimate responsibility for the local government's

actions. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 179 (1907), *overruled on other grounds by Kramer v. Union Free Sch. Dist. 2*, 395 U.S. 621 (1969) ("The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it."). The state's restrictions on local government power operate not only as checks for the citizens' sake but also as safeguards for the state, which ultimately answers for the local government's actions. For these reasons, local governments are creatures of the state. *Bennett*, 272 S.W.2d at 506–07 ("However great or small its sphere of action, it remains the creature of the state exercising and holding powers and privileges subject to the sovereign will.").

B. The State Sets Limits on Local Control.

As illustrated above, the state operates as a check on local government overreach, due to its position as the enabling power, supervisory power, and bearer of ultimate responsibility for local government action. It then follows that the state also sets limits on the exercise of local control.

In Texas, "it has become a fundamental principle in our theory of government, to entrust probably the largest portion of the powers of the Government, to be exercised within their limits, to local control, under town and city charters." *City of Navasota v. Pearce*, 46 Tex. 525 (1877); *see also* Tex. Const. art. I, § 1; *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49-50 (1973) (noting that one of the benefits of local control "is the opportunity it offers for participation in the decision making process that determines how those local tax dollars will be spent. Each

locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence."); G.K. CHESTERTON, WHAT I SAW IN AMERICA 233 (New York, Dodd, Mead & Co. 1923) ("The only purely popular government is local, and founded on local knowledge. The citizens can rule the city because they know the city; but it will always be an exceptional sort of citizen who has or claims the right to rule over ten cities, and these remote and altogether alien cities.").

However, the gift of local control is still received from, checked by, and ultimately governed under the laws of the state. Texas law clearly prohibits cities from enacting charters or ordinances that are "inconsistent with the Texas Constitution or Texas statutes." Tex. Const. art. XI, §5 ("Neither a home-rule city nor a general-law city may adopt an ordinance that is inconsistent with the Texas Constitution or Texas statutes."); *see Sw. Travis Cty. Water Dist. v. City of Austin*, 64 S.W.3d 25, 29 n.3 (Tex. App. 2000, pet. withdrawn) (citing *Lower Colorado River Auth. v. City of San Marcos*, 523 S.W.2d 641, 643-44 (Tex. 1975)); Tex. Loc. Gov't Code §§ 55.002-.079 ("The City, as a home-rule city, draws governing power from this provision of the constitution, and it is necessary to look to the acts of the legislature not for grants of power to such cities but only for limitations on their powers, whether substantive or procedural."); *S. Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676 (Tex. 2013) (striking down Houston ordinance as preempted by the Texas Clean Air Act).

Consequently, Texas law restrains local authority and defines the limits of municipal power—including the exercise of local control. Any city ordinance or charter inconsistent with the Texas Constitution or Texas statutes is unenforceable and must be struck down. *See Dallas Merch.'s & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993) (stating, "an ordinance of a home-rule city that attempts to regulate a subject matter preempted by a state statute is unenforceable to the extent it conflicts with the state statute," and holding that the City of Dallas' ordinance was preempted by the Texas Alcoholic Beverage Code); *City of Houston v. Bates*, 406 S.W.3d 539, 548 (Tex. 2013) (finding that the Texas statute regarding termination pay preempted the City of Houston's ordinances redefining the term "salary"). Therefore, the courts have a large role to play in checking local governments' abuse of local control by striking down unenforceable city ordinances.

II. THE TEXAS SUPREME COURT SHOULD AFFIRM THE FOURTH COURT OF APPEALS' DECISION IN ORDER TO PROVIDE GUIDANCE TO LOWER COURTS.

A. The Fourth Court of Appeals Correctly Decided That Laredo's Ordinance Exceeds the Scope of Its Authority.

The Fourth Court of Appeals correctly held that Laredo's ordinance exceeds the scope of its authority because it is inconsistent with Texas Health & Safety Code §361.0961(a). *Laredo Merchants Ass'n v. City of Laredo*, No. 04-15-00610-CV, 2016 WL 4376627 (Tex. App. Aug. 17, 2016). First, the Fourth Court of Appeals held that a single-use plastic bag is a "container" or "package" under state law. *Id.*

at *6. ("We conclude a "checkout bag" as defined by the Ordinance is a type of "container" or "package" as those terms are used in section 361.0961 of the Act."). Second, the Fourth Court of Appeals disagreed with Laredo's argument that its ordinance was not for solid waste management purposes. *Id.* at *7. ("The Ordinance does exactly what the Act intends to prevent—regulate the sale or use of plastic bags for solid waste management purposes."). The Texas Supreme Court should affirm the Fourth Court of Appeals' reasoning that a single-use plastic bag is a "container" or "package" under Texas Health & Safety Code § 361.0961(a), and that the actual effect of ordinances restricting plastic bags is solid waste management.

Texas law prohibits local governments from restricting the use of specific types of bags, including single-use plastic bags.

> *A local government or other political subdivision may not adopt an ordinance, rule, or regulation to 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.*

Texas Health and Safety Code § 361.0961(a)(1).

In 2014, the Texas Attorney General opined:

> *[S]ection 361.0961 would likely prohibit a city ordinance adopted for solid waste management purposes that prohibited single-use plastic bags.*

Tex. Atty. Gen. Op. FA-1078, Aug. 29, 2014, at 4.

Nevertheless, Laredo passed an ordinance prohibiting the provision of single-use plastic bags in 2015:

> *"It shall be unlawful for any commercial establishment to provide checkout bags to customers except as outlined by this article."*

Laredo, Tex., Code of Ordinances ch. 33, art. VIII, § 33-505 (2015).

Laredo claimed its ordinance did not violate Texas law because a plastic bag is not a "container" or "package" under Texas Health & Safety Code § 361.0961(a). The Fourth Court of Appeals disagreed, relying on a plain and ordinary meaning of the word, since the terms "container" and "package" are undefined in the state statute. *Laredo Merch. Ass'n v. City of Laredo*, at *6. ("The plain language of section 361.0961 or the Act does not limit the terms "containers" or "packages" to closed vessels or wrappings as the City contends."). When terms are undefined, they must be interpreted according to their ordinary meanings, which can be found in dictionaries. *See City of Rockwall v. Hughes*, 246 S.W.3d 621, 626 (Tex. 2008).

Further, Laredo claimed its ordinance did not violate Texas law because it was intended for "beautification" purposes rather than "solid waste management." However, Laredo's ordinance reveals that the desired "beautification" is achieved through solid waste management. Accordingly, Laredo's ordinance is intended:

> (a) To promote the beautification of the city ***through prevention of litter*** generated from discarded checkout bags.
>
> (b) To reduce costs associated with ***floatable trash controls*** and the maintenance of the municipal separate stormwater sewer system.
>
> (c) To protect life and property from flooding that is a consequence of improper stormwater drainage

> attributed in part to ***obstruction by litter*** from checkout bags.

Laredo, Tex., Code of Ordinances ch. 33, art. VIII, § 33-501 (2015) (emphasis added).

Again, the Fourth Court of Appeals rejected Laredo's argument that litter prevention was not solid waste management. It held that the actual effect of prohibition on the sale of plastic bags was solid waste management, in violation of Texas Health & Safety Code § 361.0961(a). (*Laredo Merch. Ass'n v. City of Laredo*, at 7). ("Here, the actual effect of the Ordinance is to manage solid waste by regulating litter produced from discarded checkout bags.").

This Court has stated that when evaluating preemption claims, Texas courts must consider not only the stated purpose of an ordinance as defined by that ordinance, but also the actual effect of the ordinance, so that cities cannot circumvent preemption by passing ordinances that "purport to regulate something other than" that which has been reserved by the state. *See S. Crushed Concrete, LLC*, 398 S.W.3d at 678-679. Therefore, whatever Laredo's protestations, an examination of the actual effect of a prohibition on the sale and use of plastic bags reveals that it simply is solid waste management.

In sum, Laredo enacted an ordinance that prohibits for solid waste management purposes the sale of single-use plastic bags in violation of Texas Health & Safety Code § 361.0961(a)(1). Accordingly, the Texas Supreme Court should affirm the Fourth Court of Appeals' correct decision that Laredo's ordinance

exceeds the scope of its authority. Doing so is particularly important because cities across Texas have adopted similar ordinances.

B. Laredo's Ordinance is Representative of Other Cities' Ordinances That Exceed Their Scope of Authority.

Other Texas cities have enacted ordinances prohibiting the sale of plastic bags similar to Laredo.[1] For example, Austin's ordinance states:

> *Beginning March 1, 2013, a business establishment within the City limits may not provide single-use carryout bags to its customers or to any person.*

Austin, Tex., Code of Ordinances ch. 15-6, art. VI, § 15-6-122 (2012). Austin enacted its ordinance to reduce the city's overall impact on the environment, particularly in its solid waste stream. Austin, Tex., Ordinance No. 20120301-078 (2012) ("The successful reduction of single use carryout bags entering the City's

[1] *See, e.g.*, Corpus Christi, Tex., Code of Ordinances chp. 22, § 22-10 (2014) ("Beginning twelve (12) months from the date this chapter takes effect, no person may provide plastic checkout bags at any city facility, city-sponsored event, or any event held on city property."); Freer, Tex., Ordinance No. 2012-05 (2012) ("Affected retail establishments are prohibited from providing Plastic Carry-out bags to their customers at the point of sale."); Fort Stockton, Tex., Code of Ordinances chp. 12, art. I, § 12-9 (2010) ("Businesses will be prohibited from providing plastic shopping bags beginning September 1, 2011, with the exception of plastic shopping bags specifically provided to the customer at the point of sale for the purpose of transporting meat, fish and poultry products. Businesses may instead provide only recyclable paper bags, reusable bags or biodegradable bags as checkout bags to their customers with or without charge."); Kermit, Tex., Code of Ordinances chp. 98 (2013) ("No store shall provide to any customer a plastic carryout bag."); Laguna Vista, Tex., Ordinance No. 2012-23 (2012) ("Affected retail establishments are prohibiting [sic] from providing plastic carry-out bags to their customers at the point of sale."); South Padre Island, Tex., Ordinance No. 10-38 (2011) ("Affected retail establishments are prohibited from providing Plastic Carry-out Bags to their customers at the point of sale."); Sunset Valley, Tex., Code of Ordinances chp. 93, § 93-61 (Beginning September 1, 2013 a business establishment within the city limits may not provide single-use carryout bags to its customers.).

solid waste stream, along with the integration of reusable bags and composting, will help the city achieve its goal of "Zero Waste" by the year 2040.").

The Texas Constitution conferred upon cities the power only to enact ordinances that do not conflict with state statute. Tex. Const. art. XI § 5. The Texas Legislature, in turn, made a deliberate decision to deny Texas cities the authority to impose a ban on the sale of containers for waste management. Tex. Health & Safety Code § 361.0961(a)(1). The Fourth Court of Appeals correctly held that Texas Health & Safety Code § 361.0961(a)(1) applies to restrictions on single-use plastic bags, and that despite Laredo's protestations, its ordinance was adopted for a solid waste management purpose. Given that cities throughout Texas have passed similar ordinances to Laredo, and have articulated similar reasons to justify these ordinances, the Texas Supreme Court should affirm the Fourth Court of Appeals' decision and thereby encourage the lower courts to strike down these impermissible ordinances.

III. THE TEXAS SUPREME COURT SHOULD STRIKE DOWN LAREDO'S ORDINANCE BECAUSE LOCAL GOVERNMENTS MUST BE CHECKED TO PRESERVE THE RULE OF LAW.

A. Courts Must Enforce Objective, Black-Letter Restrictions To Preserve the Rule of Law.

The rule of law is a concept fundamental to our nation, and its end is the protection of the people's liberty. It means that no one—in government or otherwise—can act above the law. *Dialogue on the Rule of Law*, AMERICAN BAR ASSOCIATION DIVISION FOR PUBLIC EDUCATION (2008), *available at*

http://www.americanbar.org/content/dam/aba/migrated/publiced/features/FinalDialogueROLPDF.authcheckdam.pdf. In keeping with this reverence for liberty, Texas is governed by objective, black-letter rules, not the capricious desires of men.

This foundational concept is often traced to the Magna Carta and encapsulates the significance of the document. The Magna Carta established a defined set of rules, freeing the English people from the changing preferences and unpredictable whims of tyrants. The document transitioned England toward limitations on government by recognizing laws applicable to everyone—including the monarch. *See, e.g.*, Dan Jones *Magna Carta*, BRITISH LIBRARY, https://www.bl.uk/magna-carta/articles/magna-carta-and-kingship (last visited June 6, 2017).

However, the existence of the black-letter law by itself is insufficient. Since laws are written by men acting in governmental capacities, the concept of the rule of law depends on the enforcement of the black-letter law—particularly when the law constrains government. James Madison best articulated this concept in Federalist Paper No. 51:

> *In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.*

THE FEDERALIST NO. 51 (James Madison). For the "rule of law' to prevail, the government must be affirmatively checked. In America, this is accomplished through the separation of powers into three branches of government. When the legislative branch overreaches by enacting an unconstitutional law, the judicial

branch has the power to strike down that law. *Marbury v. Madison*, 5 U.S. 137, 178 (1803) ([I]f a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty.").

To preserve the rule of law, courts must intervene and enforce the law when it is violated — particularly when the government is the transgressor. The United States Supreme Court has recognized a heightened duty for judicial intervention when the government is involved, explaining:

> *In a democracy, power implies responsibility. The greater the power that defies law the less tolerant can this Court be of defiance. As the Nation's ultimate judicial tribunal, this Court, beyond any other organ of society, is the trustee of law and charged with the duty of securing obedience to it.*

United States v. United Mine Workers of Am., 330 U.S. 258, 312 (1947).

As established above, the State of Texas has a strong interest in checking local governments when they step outside the bounds of city authority. However, black-letter constraints on local governments are not self-enforcing; from time to time, they require courts to step in and enforce the law. Accordingly, this Court should affirm the Fourth Court of Appeals' decision to enforce the black-letter Texas law that prohibits cities like Laredo from restricting the use of plastic bags. In doing so, the Court will preserve the rule of law in Texas.

CONCLUSION

For the foregoing reasons, the Foundation respectfully requests the Court affirm the Opinion of the Fourth Court of Appeals, strike down Laredo's plastic bag ban ordinance, and thereby preserve the rule of law.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this document complies with the typeface requirements of Tex. R. App. 9.4(e), because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), because it contains 3,406 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2017, the Brief of the Texas Public Policy Foundation as *Amicus Curiae* was served via electronic service on the following:

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