

Discovery Control Plan

1. Discovery is intended to be conducted under Level 2 of Texas Rule of Civil Procedure 190.3. This suit is not governed by the expedited-actions process in Texas Rule of Civil Procedure 169 because Texas seeks declaratory and injunctive relief.

Jurisdiction, Venue, & Claims for Relief

2. Texas seeks declaratory and prospective equitable relief for the *ultra vires* acts of Defendants. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 368–69 (Tex. 2009) (concluding governmental immunity “does not preclude prospective injunctive remedies” against government actors); TEX. CIV. PRAC. & REM. CODE §§ 37.001–37.011 (declaratory relief); 65.001, 65.011, 65.021. (injunctive relief). The Texas Constitution expressly prohibits home-rule cities from enacting “any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.” TEX. CONST. art. XI, § 5. Thus, “[a]n 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.” *Dallas Merch.’s & Concessionaire’s Ass’n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993). “That the state has a justiciable ‘interest’ in its sovereign capacity in the maintenance and operation of its municipal corporations in accordance with law does not admit of serious doubt.” *Yett v. Cook*, 115 Tex. 205, 221, 281 S.W. 837, 842 (1926). As such, this Court has jurisdiction to issue declaratory and injunctive relief to require Defendants’ compliance with Texas law.

3. Texas does not seek damages. TEX. R. CIV. P. 47(b).

4. Venue is proper in Cameron County. TEX. CIV. PRAC. & REM. CODE

§§ 15.002(a), 15.005, 15.006, 65.023.

5. Texas may recover “costs and reasonable and necessary attorney’s fees as are equitable and just.” TEX. CIV. PRAC. & REM. CODE § 37.009.

Parties

6. Plaintiff Texas is a sovereign within the United States.

7. Defendant the City of Brownsville is a home-rule city organized under the laws of Texas and may be served with process by serving Charlie Cabler, the City Manager of Brownsville, at 1001 E. Elizabeth St., Brownsville, Texas 78520.

8. Defendant Tony Martinez is Mayor of Brownsville and may be served with process at 1001 E. Elizabeth St., Brownsville, Texas 78520.

9. Defendant Charlie Cabler is City Manager of Brownsville and may be served with process at 1001 E. Elizabeth St., Brownsville, Texas 78520.

10. Defendant Arturo Rodriguez is Public Health Director of Brownsville and may be served with process at 1001 E. Elizabeth St., Brownsville, Texas 78520.

11. Defendant Lupe Granado, III is Finance Director of Brownsville and may be served with process at 1001 E. Elizabeth St., Brownsville, Texas 78520.

Facts

1993 Legislative Enactment

12. In 1993, the Texas Legislature sought to address growing concerns about solid waste at the municipal level. Public sentiment regarding “land disposal facilities,” or landfills, was souring and more effective means of reducing the streams of solid waste that emerge from municipalities, and end

at landfills, was needed. To that end, the Legislature sought, *inter alia*, to devise “an important strategy in state-local waste management policy.” 1993 Tex. Sess. Law Serv. Ch. 1045 (S.B. 963).

13. Animating the Legislature’s concern was what it called “the improper management of solid waste” by both the municipalities themselves and private waste management companies. *Id.* Those that manage the solid waste within a municipality treat different forms of solid waste differently. Generally, some items can be recycled, others composted, etc. *See, e.g.*, TEX. HEALTH & SAFETY CODE § 361.421. What remains is known as a “municipal solid waste stream.” 1993 Tex. Sess. Law Serv. Ch. 1045 (S.B. 963). The “solid waste stream” is the waste that is ultimately transported by municipalities to landfills for disposal. *Id.*; TEX. HEALTH & SAFETY CODE § 361.422. Thus, the Legislature wanted to encourage “the reduction of waste [streams] through environmentally and economically sound waste management incentives and the use of source reduction, reuse, recycling, composting, and resource recovery processes” 1993 Tex. Sess. Law Serv. Ch. 1045 (S.B. 963).

14. An important part of the new strategy addressed the costs associated with managing municipal solid waste. The Legislature, maintaining its focus on the managers of solid waste, and not the citizens, declared that “the actual cost of municipal solid waste disposal should be imposed by municipalities on *those that place municipal solid waste in the solid waste stream* in order to pay for infrastructure development and to encourage waste reduction from landfills.” *Id.* (emphasis added). Thus, the costs of reducing the size of municipal solid waste streams were not to be dumped on citizens, but rather borne by those responsible for managing the solid waste and ultimately

determining what did, and did not, ultimately get sent to landfills.

15. From top to bottom, the Legislature wanted solid waste managers to do more than simply send solid waste to landfills. The Legislature wanted to challenge solid waste managers to compost, recycle, and take other innovative and proactive steps to reduce the stress on landfills and better address municipal solid waste. *Id.* And as with any number of legislative prerogatives, waste managers were incentivized to do their best by bearing the costs of the solid waste that they put into the municipal solid waste streams that ended at landfills. *Id.*

16. And to be abundantly clear regarding who is to bear the costs, the Legislature's ultimate enactment expressly protected consumers, to wit: "A local government or other political subdivision may not adopt an ordinance, rule, or regulation to: . . . (3) assess a fee or deposit on the sale or use of a container or package." TEX. HEALTH & SAFETY CODE § 361.0961.

Brownsville's Ultra Vires Ordinance

17. Though the Legislature was abundantly clear, "leaving no room for discretion," *Heinrich*, 284 S.W.3d at 371, Brownsville nonetheless chose to act *ultra vires* and "assess a fee . . . on the sale or use of a container or package." Government actions are *ultra vires* and, thus, subject to judicial review when conducted "without legal or statutory authority." *Combs v. City of Webster*, 311 S.W.3d 85, 94 (Tex. App.—Austin 2009, pet. denied).

18. On September 20, 2010, Brownsville adopted Ordinance No. 2010-911-F (Exhibit 1) ("Plastic Bag Ordinance"), enacting sections 46-47 through 46-52 of the Brownsville Code of Ordinances. The Plastic Bag Ordinance establishes a "mandatory ban on plastic shopping bags to begin on January 5,

2011.” BROWNSVILLE, TEX., CODE § 46-48 (2016).

19. The Plastic Bag Ordinance regulates “plastic checkout bags,” defined as “a checkout bag made of plastic, which is provided by a business establishment to a customer typically at the point of sale for the purpose of transporting goods after shopping, and which is intended and constructed for single use.” BROWNSVILLE, TEX., CODE § 46-47 (2016). “[P]lastic checkout bags” are “container[s] or package[s]” within the meaning of section 361.0961 of the Texas Health & Safety Code. *See* Tex. Att’y Gen. Op. No. GA-1078 (2014).

20. Section 46-49(a) of the Brownsville Code of Ordinances provides, “Business establishments are prohibited from providing plastic checkout bags as of January 5, 2011 but instead shall only provide reusable bags as checkout bags to their customers with or without charge,” with eight exceptions. Seven of the exceptions cover paper bags or bags provided by certain types of businesses. BROWNSVILLE, TEX., CODE § 46-49(b)(i–vii) (2016).

21. The eighth exception allows business establishments to provide “plastic or other non-reusable bags” if requested by a customer. In that case, the customer must pay “an environmental fee of \$1.00 per transaction” that “must be paid to the business establishment at the time the bag is provided to the customer.” Furthermore, “[t]his fee shall be shown as a separate item on the consumer transaction receipt.” BROWNSVILLE, TEX., CODE § 46-50(b) (2016).

22. The business establishment must then remit the environmental fees collected by the retailer from consumers to Brownsville, minus a reasonable administrative fee. BROWNSVILLE, TEX., CODE § 46-50(c) (2016). “The environmental fee remitted to or collected by the City shall be used towards environmental programs, recycling, and clean-up initiatives.”

BROWNSVILLE, TEX., CODE § 46-50(b) (2016). According to the *Brownsville Herald*, Brownsville collects approximately \$71,000 per month in environmental fees and had collected nearly \$3.8 million as of January 30, 2016. Alisha Baskette, *City's bag ban carries onward*, BROWNSVILLEHERALD.COM, Feb. 1, 2016, http://www.brownsvilleherald.com/news/local/article_ea998838-c7cf-11e5-b532-eff60b9449fa.html.

23. Business establishments found in violation of the Plastic Bag Ordinance may be punished by a fine of not less than one dollar and not more than \$2,000. BROWNSVILLE, TEX., CODE §§ 1-13(a)(1), 46-51 (2016).

Count One—Request for Declaratory Relief

24. Plaintiff repeats and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

25. Brownsville's one-dollar "environmental fee" charged to customers violates section 361.0961(a)(3) of the Texas Health & Safety Code, which prohibits such fees. "A local government or other political subdivision may not adopt an ordinance, rule, or regulation to assess a fee or deposit on the sale or use of a container or package." TEX. HEALTH & SAFETY CODE § 361.0961(a)(3).

26. Brownsville's one-dollar "environmental fee" is also an illegal sales tax adopted in violation of sections 321.101 and 321.103 of the Texas Tax Code. Texas Tax Code section 321.101 provides that "[a] municipality may adopt or repeal a sales and use tax authorized by this chapter, other than the additional municipal sales and use tax, and may reduce or increase the rate of the tax, at an election in which a majority of the qualified voters of the municipality approve the adoption, reduction, increase, or repeal of the tax." TEX. TAX CODE § 321.101. Upon information and belief, the Defendants did not hold an election

to approve the Plastic Bag Ordinance.

27. Texas Tax Code section 321.103 provides that “[i]n a municipality that has adopted the additional municipal sales and use tax, the tax is imposed at any rate that is an increment of one-eighth of one percent, that the municipality determines is appropriate, that would not result in a combined rate that exceeds the maximum combined rate prescribed by section 321.101(f), and that is approved by the voters.” Under Texas Tax Code section 321.101(f), the maximum combined rate is two percent (2%). According to the Texas Comptroller of Public Accounts, the Brownsville tax rate is two percent (2%). Sales Tax Rate Locator, Tex. Comptroller of Pub. Accounts, <https://mycpa.cpa.state.tx.us/atj/> (search for zip code 78520). The Plastic Bag Ordinance’s imposition of a one dollar (\$1.00) tax on all plastic and non-reusable bags, in addition to Brownsville’s two percent tax rate, means that Brownsville’s tax rate exceeds the statutory maximum of two percent.

28. Texas Tax Code section 321.103 also provides that the tax “rate may be reduced in one or more increments of one-eighth of one percent or increased in one or more increments of one-eighth of one percent.” TEX. TAX CODE § 321.103. Brownsville’s one dollar (\$1.00) tax on all plastic and non-reusable bags is not an increase of the tax rate in one-eighth of one percent increments. Thus, the Plastic Bag Ordinance violates the Texas Tax Code.

29. Because the Plastic Bag Ordinance is inconsistent with Texas statutes, it violates Article 11, Section 5 of the Texas Constitution. “The adoption or amendment of charters is subject to such limitations as may be prescribed by the Legislature, and no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of

the State, or of the general laws enacted by the Legislature of this State.” TEX. CONST. art. XI, § 5.

30. For these reasons, Texas requests that the Court declare the Plastic Bag Ordinance null and void under Chapter 37 of the Civil Practices and Remedies Code.

Count Two—Request for Injunctive Relief

31. Plaintiff repeats and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

32. Defendants Tony Martinez, in his official capacity as Mayor of Brownsville, and Charlie Cabler, in his official capacity as City Manager of Brownsville, are charged with enforcement of the Brownsville Code of Ordinances, including the Plastic Bag Ordinance.

33. Defendant Arturo Rodriguez, in his official capacity as Public Health Director of Brownsville, is specifically charged with enforcement of the Plastic Bag Ordinance.

34. Defendant Lupe Granado III, in his official capacity as Finance Director of Brownsville, is charged with the collection of “environmental fees” under the Plastic Bag Ordinance.

35. Unless an injunction is issued, Defendants will continue to enforce the Plastic Bag Ordinance in violation of Texas law.

36. Texas requests that the Court enjoin Defendants in their official capacity from enforcing the Plastic Bag Ordinance.

Prayer

WHEREFORE, PREMISES CONSIDERED, Texas respectfully requests that the Court award the following relief:

37. Texas requests a declaration under Chapter 37 of the Civil Practice and Remedies Code that the Plastic Bag Ordinance is null and void.

38. Texas also seeks attorney's fees under Chapter 37 of the Civil Practices and Remedies Code.

39. Texas also requests a full trial on the merits and, after the trial, a permanent injunction against further enforcement of the Plastic Bag Ordinance.

40. Texas also seeks such other relief to which the Court determines Texas is entitled.

Request for Disclosure

41. Texas requests that Defendants disclose, within 50 days of the service of this request, the information or material described in Texas Rule of Civil Procedure 194.2.

Respectfully submitted this the 12th day of October, 2016,

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