

**IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
ATHENS COUNTY**

<b>State of Ohio,</b>	:	Case No. 24CA0031
Plaintiff-Appellee,	:	
v.	:	On Appeal from the Athens County Court of Common Pleas
<b>City of Athens,</b>	:	
Defendant-Appellant.	:	Case No. 23CI0287

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**MOTION FOR LEAVE TO FILE A BRIEF OF AMICI CURIAE OHIO  
ENVIRONMENTAL COUNCIL, THE SURFRIDER FOUNDATION, and SIERRA  
CLUB IN SUPPORT OF DEFENDANT-APPELLANT**

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The Ohio Environmental Council (“OEC”) hereby moves for leave to file an amici curiae brief in support of the Defendant-Appellant, the City of Athens. The OEC is a non-profit organization incorporated in Ohio under Section 501(c)(3) of the U.S. Internal Revenue Code, protecting the environment and health of all Ohio communities through legal and policy advocacy, decision-maker accountability, and civic engagement.

The Surfrider Foundation (“Surfrider”) is a 501(c)(3) non-profit environmental organization headquartered in California at 942 Calle Negocio, Suite 350, San Clemente, California, 92673. Surfrider’s mission is the protection and enjoyment of the world’s ocean, waves and beaches for all people. Surfrider has approximately 350,000 supporters and 80 volunteer-driven, grassroots chapters, including the Northern Ohio Chapter, dedicated to carrying out its mission.

The Sierra Club (“Sierra Club”) is a nonprofit organization headquartered at 2101 Webster Street, Suite 1300 in Oakland, California 94612. Sierra Club has more than 20,000 members in Ohio—members who have identified “plastic pollution” as one of Sierra Club’s top conservation priorities in the State.

Our three organizations, collectively the “Environmental Advocates,” represent the interests of thousands of Ohioans, their communities, and their families who desire a healthy environment. Our legal expertise provides an additional lens through which the Court can understand the regulatory questions it is considering. Fundamentally, we present our arguments to emphasize how this case impacts not just the residents of the City of Athens—it impacts how other communities understand their regulatory responsibilities surrounding plastic pollution, too. Most importantly, the legal questions under the Court’s consideration directly impact the Home Rule authority of communities like Athens to reasonably regulate pollution sources and protect the

health of their residents and their surrounding environment.

Together, the Environmental Advocates present a legal perspective, including additional information regarding the legislative history of R.C. 3736.021, and additional arguments regarding statutory interpretation, that will assist the Court in its just resolution of the questions before it. The Environmental Advocates maintain that the authority of Ohio municipalities, such as Athens, includes the power to regulate the distribution of single-use plastic bags from businesses within their geographic territory. That authority is not superseded by state law.

For the above reasons, the OEC respectfully requests that the Court grant this motion for leave to file the attached amici curiae brief.

Respectfully submitted,

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*Counsel for the Plaintiff-Appellee and Defendant Appellant will receive copies of the Motion for Leave to File and the attached Amicus Brief via electronic mail, as outlined in the Certificate of Service attached to the amicus brief.*



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**BRIEF OF AMICI CURIAE OHIO ENVIRONMENTAL COUNCIL, THE SURFRIDER  
FOUNDATION, and SIERRA CLUB IN SUPPORT OF DEFENDANT-APPELLANT**

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## INTRODUCTION

The Ohio Environmental Council (OEC), The Surfrider Foundation (Surfrider), and Sierra Club (collectively, the Environmental Advocates) submit this amicus curiae brief in support of City of Athens and its appeal of the trial court’s order granting summary judgment in favor of the State of Ohio. The City of Athens (“Athens” or “the City”) defends City of Athens Ordinance 0-25-23, incorporated as Athens City Code 11.13.02(A) (the “Athens Plastic Bag Regulation”) against the Plaintiff-Appellee State of Ohio’s (“Plaintiff” or “State”) legal challenge. As outlined in the City’s briefing and the Environmental Advocates’ amicus brief, and for Ohio’s environment and Ohioans’ health, we urge the Court to overturn the decision of the trial court and grant summary judgment for Athens.

The central question presented in this case is whether R.C. 3736.021 (the “Container Use Law”) is a “general law” under Article XVIII, Section 3 of the Ohio Constitution that conflicts with the Athens Plastic Bag Regulation. The Environmental Advocates contend that it is not a general law—nor does it conflict with the Athens Plastic Bag Regulation. In its simplest terms, the Athens Plastic Bag Regulation regulates a single point of distribution of single-use plastic bags—their provision to customers at stores at the cash register to carry goods out of a store, and it does not prohibit the *use* of plastic bags in any way whatsoever. If a customer of a store brings their own plastic bags, single-use or otherwise, to use in the store, no ordinance prohibits them from doing so. If a store uses plastic bags in its operations, no ordinance prohibits them from doing so. Simply put, there is no prohibition on using plastic bags or other “auxiliary containers,” just on distributing single-use plastic bags to customers to transport goods out of the store.

The Athens Plastic Bag Regulation reflects the City of Athens’s understanding of the science of plastic pollution, noting how “numerous studies continue to show the negative environmental and health effects of plastics and chemicals used to produce them” in addition to

emphasizing “the prevalence of plastic carry-out bags littering the environment, blocking storm drains, being entangled in trees and vegetation, and fouling beaches.” City of Athens Ordinance 0-25-23. The Ordinance represents an appropriate response to such problems—its active sections are narrowly tailored to regulate only the distribution of single-use plastic bags for the purpose of transporting goods from stores, stating: “no store or vendor shall provide or sell a single-use plastic carryout bag to a customer at the checkout stand, cash register, point of sale or other location for the purposes of transporting food or merchandise from the store after January 1, 2024.” Athens City Code 11.13.02(A). At the same time, “nothing in the ordinance prohibits a customer from using bags of any type that they bring to the store or vendor themselves or from carrying away goods that are not placed in a bag.” Athens City Code 11.13.03(A).

The Ohio Attorney General’s complaint against the City of Athens at the trial court attempted to describe the Athens Plastic Bag Regulation as violating the “right” of Ohioans to use single-use plastic bags. *Complaint*, ¶ 18. Leaving aside whether R.C. 3736.021, the Container Use Law, actually establishes a “right” as the term is commonly used, it states that “[a] person may use an auxiliary container for purposes of commerce or otherwise.” *Emphasis added*. R.C. 3767.32 provides the definition of an “auxiliary container” as including “single-use” plastic bags, and thus the State claims the Athens Plastic Bag Regulation violates the Container Use Law. The trial court agreed with the State in its August 28, 2024 *Decision and Entry* (hereinafter referred to as *Decision and Entry*). However, for the reasons outlined below, the trial court incorrectly held that the Container Use Law was a general law that conflicted with the Athens Plastic Bag Regulation; it did not correctly interpret the plain language nor account for the legislative history of the state law. Furthermore, the trial court relied on Facebook posts and internet websites outside the evidentiary

record in reaching its decision on summary judgment, violating Rule 56 of the Ohio Rules of Civil Procedure.

The plain language of both the statute and the local ordinance require an interpretation permitting the City to appropriately regulate single-use plastic bags in particular circumstances within city limits. For the reasons more fully explored below, the Environmental Advocates urge the Court to overturn the trial court's decision and rule in favor of the City.

### **INTERESTS OF AMICI ENVIRONMENTAL ADVOCATES**

The Environmental Advocates represent, collectively, the interests of thousands of Ohioans, their communities, and their families who desire a healthy environment. Our legal expertise provides an additional lens through which the Court can understand the regulatory questions it is considering. Fundamentally, we present our arguments to emphasize how this case impacts not just the residents of the City of Athens—it impacts how other communities understand their regulatory responsibilities surrounding plastic pollution, too. Most importantly, the legal questions under the Court's consideration directly impact the Home Rule authority of communities like Athens to reasonably regulate pollution sources and protect the health of their residents and their surrounding environment.

At the OEC, we envision a clean, healthy Ohio where our democracy empowers all communities to thrive in harmony with the environment. The OEC protects the environment and health of all Ohio communities through legal and policy advocacy, decision-maker accountability, and civic engagement. The OEC's interest in this case, and support of the Defendant's position, is fundamental to its mission to protect Ohio's environment and ensure communities thrive in harmony with that environment. Our interest will fundamentally assist the Court in its decision regarding the City's appeal.

The OEC is a not-for-profit organization incorporated in Ohio under Section 501(c)(3) of the U.S. Internal Revenue Code, with approximately 3000 members and thousands more supporters, including over 300 in Athens. The Home Rule powers of local governments to regulate issues that impact human health and the environment are relevant to every Ohioan connected with the OEC and beyond. While state regulation plays a core role in setting the floor for environmental protection, in the absence of explicit statewide regulatory schemes, local governments should be applauded for taking action to pass sensible environmental legislation—not penalized and sued in state court by the Ohio Attorney General.

The Surfrider Foundation (“Surfrider”) is a 501(c)(3) non-profit environmental organization founded in 1984, and headquartered in California at 942 Calle Negocio, Suite 350, San Clemente, California, 92673. Surfrider’s mission is the protection and enjoyment of the world’s ocean, waves, and beaches for all people through a powerful activist network. Surfrider has approximately 350,000 members and supporters. Surfrider has approximately 80 volunteer-driven, grassroots chapters, including the Northern Ohio Chapter, and more than 100 school clubs, located throughout the U.S., carrying out its mission. Surfrider chapters and clubs engage environmental experts to create solutions, unite local and national resources to protect the coast, and leverage their local chapter network’s knowledge with a national perspective.

Surfrider carries out its initiatives through Campaigns and Programs. Surfrider’s five primary initiatives include clean water protection, ocean protection, plastic pollution prevention, beach access, and coastal preservation. Since 2006, Surfrider’s coastal protection work has included a focus on combating plastic pollution. Surfrider’s Plastic Pollution Prevention Initiative focuses on keeping plastic pollution out of our ocean and waterways, including the Great Lakes. Since 2007, Surfrider has achieved over 350 plastic pollution victories, including passing single-

use plastic bag bans, banning microbeads from consumer products, plastic bottle bills, and other plastics policies. In 2007, Surfrider developed the Rise Above Plastics program to educate the public about the harms of plastic pollution to our ocean and to advocate for a reduction of single-use plastics.

Surfrider's Plastic Pollution Initiative focuses on hosting over 1,000 beach cleanups per year, supporting over 500 Ocean Friendly Restaurants with reduced plastic usage, and advocating for laws and policies that stop plastic pollution at the source. Surfrider currently has 38 active plastic pollution campaigns. In addition to the protection of our ocean, waves, and beaches, Surfrider's mission prioritizes the enjoyment of these public resources. Surfrider's members recreate at the beach and in the water. Surfrider members are not just surfers, but beachgoers and water recreationalists of all types, spanning from coast to coast – including the rocky ledges of Maine, the warm waters of Florida, the Gulf coast of Texas, the lakeshores of the Great Lakes, the west coast, and Hawai'i.

Surfrider joins this amicus brief on its own institutional behalf and on behalf of all of its members, board, staff, and supporters, some of whom live in and regularly recreate in Ohio. The interests of Surfrider and its members, board, staff, and supporters have been and will continue to be harmed by the prevalence of physical trash, including single-use plastic bags, impacting the health of the waters, wildlife, and members of the public who live in and recreate in Ohio. The Surfrider Foundation Northern Ohio Chapter has over 100 active members and over 1,000 supporters. Surfrider members in Ohio have taken action since 2017 to oppose any legislation proposed by the General Assembly that furthers plastic pollution. At the same time, Surfrider members have supported the efforts of local communities to enact legislation to restrict, prohibit, and/or reduce the free distribution of single-use plastic bags.

The Sierra Club (“Sierra Club”) is a nonprofit organization with chapters in each of the 50 states, Puerto Rico, and Washington, D.C. Sierra Club was founded in 1892 and is headquartered at 2101 Webster Street, Suite 1300 in Oakland, California 94612. Sierra Club’s mission is: “To explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth’s ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives.” Sierra Club has more than 20,000 members in Ohio—members who have identified “plastic pollution” as one of Sierra Club’s top conservation priorities in the State. Sierra Club has been working since at least 2012 to reduce the impacts of plastic pollution in Ohio, in part by encouraging personal choices, such as bringing a reusable grocery bag to the store, and by advocating that both local governments and the State of Ohio adopt necessary and appropriate laws and regulations to address the issue. Specifically, Sierra Club members were part of a coalition that advocated for Athens to adopt an ordinance that addressed plastic pollution at a local level.

Last year, the City passed its Plastic Bag Regulation. Together, the Environmental Advocates present a legal perspective that will assist the Court in its just resolution of the questions before it. The Environmental Advocates maintain that the authority of Ohio municipalities, such as Athens, includes the power to regulate the distribution of single-use plastic bags from businesses within their geographic territory. That authority is not superseded by the Container Use Law. The statute is neither a general law, nor does it directly conflict with the Athens Plastic Bag Regulation, and as such this Court should rule in favor of Athens and overturn the trial court’s decision.

## ASSIGNMENTS OF ERROR

**ERROR I: *The trial court improperly granted summary judgment because R.C. 3736.021 is not a general law and Athens City Code 11.13.02 does not conflict with R.C. 3736.021.***

### Issue Presented for Review:

*Did the trial court err in finding that R.C. 3736.021 is a statewide comprehensive enactment, part of Ohio's solid waste management plan?*

### Issue Presented for Review

*Did the trial court err in finding that R.C. 3736.021 conflicted with ACC 11.13 when both laws permit the use of single-use plastic bags?*

**ERROR II: *The trial court improperly relied on facts outside the record, thus it should not have granted summary judgment under Ohio Civ.R. 56 by relying on those facts.***

### Issue Presented for Review

*Did the trial court err in granting the State's motion for summary judgment when it relied on facts outside the record and cited Facebook posts to find that single-use plastic bags are recyclable?*

### Issue Presented for Review

*Did the trial court err in granting the State's motion for summary judgment when the trial court identified a genuine issue of material fact in the State's argument, demonstrated by the court's independent research?*

## STATEMENT OF THE CASE

Amici Curiae accept, and hereby incorporate, Appellant-Defendant's statement of relevant facts as set forth in their brief on pages 4 through 5.

## STATEMENT OF THE FACTS

Amici Curiae accept, and hereby incorporate, Appellant-Defendant's statement of relevant facts as set forth in their brief on pages 5 through 6.

## STANDARD OF REVIEW

Rule 56 of the Ohio Rules of Civil Procedure governs summary judgment. For any Court to grant summary judgment for either party in this case, a “movant must show that (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion when viewing evidence in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party.” *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241, 245 1996-Ohio-336. In Ohio, and in the Fourth District Court of Appeals, rulings on summary judgment are reviewed *de novo*: “an appellate court must independently review the record to determine if summary judgment is appropriate and need not defer to the trial court's decision.” *Tarlton v. City of Logan*, 4th Dist. Hocking No. 19CA1, 2019-Ohio-4832, ¶ 13, *citing Grafton*, 1996-Ohio-336 at 105.

## ARGUMENT

When considering the relationship between state law and local ordinances, the Ohio Constitution provides the foundation: “municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.” Section 3, Article XVIII, Ohio Constitution (hereinafter referred to as “Home Rule” or the “Home Rule Amendment”). Ohio voters approved including Home Rule in the Ohio Constitution in 1912, adopted by 58.3% of the vote alongside a variety of other amendments designed to balance the power of the legislature with that of local communities and the people of Ohio. The history of Home Rule is relevant to understand the context at play in this case—the relationship between the Ohio General Assembly and Ohio’s myriad local governments.

Prior to the passage of the Home Rule amendment, “Ohio's municipalities were mere instruments of the state legislature . . . with only specifically conferred powers, or those by

implication, and in the several following years was born the movement for emancipation from legislative bondage.” See *DiBella v. Village of Ontario* (Ohio Com.Pl. 1965) 4 Ohio Misc. 120, 212 N.E.2d 679, 33 O.O.2d 170. The Home Rule amendment ensured local governments could act independently of the state—so the state should be explicit when it passes general laws overriding Home Rule. For example, in *State ex rel. Morrison*, the state invalidated a local ordinance in part due to the explicit nature of the state statute:

R.C. 1509.02 not only gives ODNR “sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations” within Ohio; it explicitly reserves for the state, to the exclusion of local governments, the right to regulate “all aspects” of the location, drilling, and operation of oil and gas wells, including “permitting relating to those activities.”

*State ex rel. Morrison v. Beck Energy Corp.*, 143 Ohio St.3d 271, 2015-Ohio-485, 37 N.E.3d 128,

¶ 30. In the present case, the state has not passed such an explicit legislative act to manage plastic pollution in Ohio. Instead, it has simply permitted the “use” of single-use plastic bags.

Ohio has failed to enact a general regulatory scheme regarding plastic pollution, despite the fact that it is now an omnipresent issue for human health and the environment. Whether as an emerging risk factor for cardiovascular disease<sup>1</sup> due to the appearance of microplastics in the body or as a complex issue in our waste streams, plastic pollution continues to grow as a wicked problem society must solve. It is not going away—if business continues as usual, “roughly 12 billion tons of plastic waste will be in landfills or in the natural environment by 2050.”<sup>2</sup> As a comparison for the scale of such waste, Ohio’s municipal solid waste landfills received only 10.7 million tons of waste in 2020.<sup>3</sup> Communities must reckon with the impacts of plastic pollution, and in the absence

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<sup>1</sup> Raffaele Marfella et al, *Microplastics and Nanoplastics in Atheromas and Cardiovascular Events*, *The New England Journal of Medicine*, (March 6, 2024), available at: <https://www.nejm.org/doi/full/10.1056/NEJMoa2309822>

<sup>2</sup> Roland Geyer, Jenna R. Jambeck, and Kara Lavender Law, “Production, use, and fate of all plastics ever made,” *Science*, (July 19, 2017), available at: <https://www.science.org/doi/10.1126/sciadv.1700782>

<sup>3</sup> Ohio Solid Waste Disposal - 2020, Ohio Environmental Protection Agency, (December 2021), available at: [https://dam.assets.ohio.gov/image/upload/epa.ohio.gov/Portals/34/document/guidance/gd\\_1008.pdf](https://dam.assets.ohio.gov/image/upload/epa.ohio.gov/Portals/34/document/guidance/gd_1008.pdf)

of comprehensive state government regulation, local governments must act to protect their residents through the use of their constitutionally-derived Home Rule authority.

The Environmental Advocates provide this historical and scientific background to establish the important balance between state law and local law. The Home Rule amendment makes clear that the state can pass general laws overriding local authority, but such power is not unlimited and not without safeguards. Reading the Container Use Law and the Athens Plastic Bag Regulation as conflicting with one another requires a tortured reading of the law, one that distorts the relationship between state and municipal power. And, at the very least, the trial court made factual findings in its opinion outside the scope of its authority in ruling under Rule 56 of the Ohio Rules of Civil Procedure. For these reasons, further explained below, the Fourth District Court of Appeals should overturn the trial court's decision and grant summary judgment in favor of the City.

**I. ASSIGNMENT OF ERROR I: The trial court improperly granted summary judgment because R.C. 3736.021 is not a general law and Athens City Code 11.13.02 does not conflict with R.C. 3736.021.**

**A. The Container Use Law is not a general law.**

The Ohio Supreme Court has established the methodology for approaching a Home Rule analysis. A state statute takes precedence over a municipal ordinance when: “(1) the ordinance is an exercise of the police power, rather than of local self-government, (2) the statute is a general law, and (3) the ordinance is in conflict with the statute.” *Mendenhall v. Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255, ¶ 9, citing *City of Canton v. State*, 95 Ohio St. 3d 149, 2002-Ohio-2005, 766 N.E.2d 963, ¶ 10. The Environmental Advocates focus our analysis on whether The Container Use Law is (a) a general law and (b) whether, even if it is a general law, it conflicts with the Athens Plastic Bag Regulation.

To constitute a “general law”, the Container Use Law must “(1) be part of a statewide and comprehensive enactment, (2) apply to all parts of the state alike and operate uniformly throughout

the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribe a rule upon citizens generally.” *City of Canton v. State*, 95 Ohio St. 3d 149, 2002-Ohio-2005, 766 N.E.2d 963, ¶ 21. The Container Use Law is not a general law primarily because it is not part of a statewide and comprehensive enactment. While we do not discuss the other prongs in our brief, we support the City’s arguments discussed on pages 14 through 17 of its brief.

**1. The Container Use Law is not part of a statewide and comprehensive legislative enactment.**

When determining whether a statute is part of a statewide and comprehensive legislative enactment, courts must “look to the range of activity subject to regulation under the enactment and whether it serves a statewide concern.” *City of Cleveland v. Ohio*, 8th Dis. No 97679, 2012-Ohio-3572, 974 N.E.2d 123, ¶ 23 citing *Clermont Environmental Reclamation Co. v. Wiederhold*, 2 Ohio St.3d 44, 48, 2 Ohio B. 587, 442 N.E.2d 1278 (1982); *Ohioans for Concealed Carry, Inc v. Clyde*, 120 Ohio St.3d 96, 2008 Ohio 4605, 896 N.E.2d 967. In *Clyde*, the Ohio Supreme Court considered this issue when analyzing R.C. 9.68, which regulated firearms. *Ohioans for Concealed Carry, Inc v. City of Clyde*, 120 Ohio St.3d 96, 2008 Ohio 4605, 896 N.E.2d 967, at ¶ 40. The Court held that the General Assembly was clear in its intent for statewide comprehensive handgun possession laws in R.C. 9.68(A), which states that the regulation represents an attempt to nullify all municipal laws impeding uniform application of the state statute. *Id.* at ¶ 40. Statutes that are not so explicit in their intent can nonetheless still be a part of a statewide and comprehensive legislative enactment. However, when analyzing the statute at issue, it “should not be read and interpreted in isolation from the other sections of the Revised Code dealing with the subject matter.” *Cleveland v. Ohio*, 128 Ohio St.3d 135, 2010-Ohio-6318, 942 N.E.2d 370, ¶ 21.

Here, the trial court found that “the State has an overriding statewide interest in curbing solid waste and promoting recycling of materials for various reasons including reducing litter, waste control, landfill reduction, and promoting recycling of materials,” *Decision and Entry* at 11, while also connecting the statute as “linked to Ohio’s plan regarding solid waste reduction, recycling, reuse, and minimization.” *Id.* at 9. In Section II of our brief, we will further explore the legal issues in how the trial court made that connection by making finding of facts using information outside the record (the Court found that “single-use plastic bag[s are] an item that can be recycled,” *Id.*). What the trial court didn’t do, however, is establish how the Container Use Law actually fits within the state’s solid waste management plan beyond both topics being “generally related” to “health, safety, and general welfare of Ohio and its citizens.” *Id.* at 10.

The City’s merit brief provides arguments at length discussing how the Container Use Law is not actually part of the State’s statewide waste management plan. Amici provide, for the Court’s consideration, relevant information regarding the legislative history of R.C. 3736.021 to assist with determining whether it is part of a statewide enactment.

**2. The legislative history of R.C. 3736.021 demonstrates that it is not part of a statewide legislative enactment pertaining to statewide waste management or other similar topics.**

Under Ohio law, when courts determine legislative intent, they may look to all of the following: “(A) The object sought to be attained; (B) The circumstances under which the statute was enacted; (C) *The legislative history*; (D) The common law or former statutory provisions, including laws upon the same or similar subjects; (E) The consequences of a particular construction; (F) The administrative construction of the statute.” R.C. 1.49, *emphasis added*. The Container Use Law first appeared in law through H.B. 242, which did two relevant things:

- Prohibits local governments, for 12 months after the act’s effective date, from imposing a tax, fee, assessment, or other charge on auxiliary containers (for example, a plastic or paper bag), the sale, use, or consumption of those containers,

or on the basis of receipts received from the sale of the containers.

- For 12 months after the act's effective date, specifically authorizes a person to use an auxiliary container for purposes of commerce or otherwise.<sup>4</sup>

In its first iteration, the Ohio General Assembly paired the “Container Use Law” with an explicit prohibition on local governments imposing taxes, fees, or assessments on containers. Proponent testimony for H.B. 242 included language emphasizing that “when everyday products like paper cups, grocery bags, to-go containers and soft-drink bottles are taxed and regulated inconsistently within a state, it creates costly problems for manufacturers, businesses and working families. Adopting statewide uniformity for auxiliary containers is a way to protect against overregulation, support manufacturing jobs and uphold consumer freedom.” *Sponsor Testimony on House Bill 242, State Representatives George Lang and Don Jones, House State and Local Government Committee, May 29, 2019, available at: [https://search-prod.lis.state.oh.us/api/v2/general\\_assembly\\_133/committees/cmte\\_h\\_state\\_local\\_govt\\_1/meetings/cmte\\_h\\_state\\_local\\_govt\\_1\\_2019-05-29-0300\\_632/testimony/3721/uploaded-doc/](https://search-prod.lis.state.oh.us/api/v2/general_assembly_133/committees/cmte_h_state_local_govt_1/meetings/cmte_h_state_local_govt_1_2019-05-29-0300_632/testimony/3721/uploaded-doc/). The Sponsor testimony, notably, did not include any reference to Ohio’s statewide waste management plan.*

Because H.B. 242 only went into effect for twelve months, amendments to R.C. 3736.021 were enacted as part of the enrollment of House Bill 110, which created appropriations for the years 2022-2023. Am.Sub.H.B. No. 110 As Passed by the House, 134th G.A. (2021). When the bill was initially proposed, it did not include any amendment to R.C. 3736.021 or mention the use of auxiliary containers. As the appropriations bill shifted as it moved through committee, legislators discussed many different subjects. However, the statute in question here, or even the mere mention of the supposed right to use auxiliary containers that the State claims was part of a

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<sup>4</sup> *Final Analysis of H.B. 242*, Ohio Legislative Service Commission, 133rd General Assembly, October 26, 2020, available at: <https://www.legislature.ohio.gov/download?key=14605&format=pdf>

comprehensive legislative enactment, was not integrated into the bill until after it was approved by the House Committee and eventually made its way through the Senate.

In the version of H.B. 110 passed by the House, the word “auxiliary container” does not appear in the Bill’s 2,759 pages. Not until the legislative service commission published the final analysis of the enacted version of H.B. 110 is the amendment of R.C. 3736 finally mentioned and integrated into the Bill. Am.Sub.H.B. No. 110 As Passed by the Senate, 134th G.A. (2021). Importantly, the LSC analysis for H.B. 110 directly references H.B. 242 from the previous General Assembly, stating that “the amendments permanently do all of the following, which are provisions enacted in H.B. 242 of the 133rd General Assembly that otherwise would have expired on January 15, 2022.”<sup>5</sup> It then lists the effect of the provisions, including authorizing a person to use an auxiliary container for any purpose, and does not reference the provisions as being part of the statewide waste management plan. It does reference inclusion of the “auxiliary container” definition as part of “anti-littering” statutes, but does not reference the language in the Container Use Law permitting use of the containers “in commerce or otherwise” as part of an anti-littering scheme.

As the legislative history shows, R.C. 3736.021 was added late into the legislative process of H.B. 110. Litter prevention and recycling may be matters of statewide concern, but it is unclear how permitting use of auxiliary containers connects with litter prevention. Due to a lack of a “statewide and comprehensive framework” of regulations in the Ohio Revised Code for plastic bags, plastic recycling, and auxiliary containers, R.C. 3736.021 fails to meet this prong of the *Canton* test.

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<sup>5</sup> *Final Analysis of H.B. 110*, Ohio Legislative Service Commission, 134th General Assembly, September 8, 2021, available at: <https://www.legislature.ohio.gov/download?key=17322>

Compare the statutes here to what was in question in *State ex rel. Morrison v. Beck Energy Corp.*, where the Ohio Department of Natural Resources was given explicit jurisdiction over oil and gas development and specifically named an override of local government authority to regulate oil and gas. See *Morrison v. Beck Energy Corp.*, 2015-Ohio-485 at ¶ 30 (Statute “reserves for the state, to the exclusion of local governments, the right to regulate “all aspects” of the location, drilling, and operation of oil and gas wells, including “permitting relating to those activities.”) Similarly, compare the Container Use Law to the framework in *Ohioans for Concealed Carry, Inc v. City of Clyde*, where the State purported to create a comprehensive firearms regulation scheme.

The legislative history indicates there was no express intent by the legislature in enacting the statute at issue here to create a statewide uniform set of laws around plastics, single-use plastics in stores, and recycling. Nor does it indicate how permitting the “use” of auxiliary containers (single-use plastic bags or other containers) contributes to a statewide anti-littering scheme. If anything, permitting additional types of containers would increase litter, rather than reduce it. At the very least, the general intent behind the law is simply unclear; yet we can return to the testimony of H.B. 242’s original sponsor: “when everyday products like paper cups, grocery bags, to-go containers and soft-drink bottles are taxed and regulated inconsistently within a state, it creates costly problems for manufacturers, businesses and working families.”<sup>6</sup> If that’s the reason for creating a “right” to “use” single-use plastic bags, then the law has nothing to do with a statewide comprehensive enactment of anti-littering laws or a statewide waste management plan.

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<sup>6</sup> *Sponsor Testimony on House Bill 242, State Representatives George Lang and Don Jones, House State and Local Government Committee*, May 29, 2019, available at: [https://search-prod.lis.state.oh.us/api/v2/general\\_assembly\\_133/committees/cmte\\_h\\_state\\_local\\_govt\\_1/meetings/cmte\\_h\\_state\\_local\\_govt\\_1\\_2019-05-29-0300\\_632/testimony/3721/uploaded-doc/](https://search-prod.lis.state.oh.us/api/v2/general_assembly_133/committees/cmte_h_state_local_govt_1/meetings/cmte_h_state_local_govt_1_2019-05-29-0300_632/testimony/3721/uploaded-doc/)

**3. If the State wanted the Container Use Law to occupy the field with a comprehensive legal framework, it should have used more comprehensive language, as demonstrated by similar statutes in other states.**

The lack of express intent to create a comprehensive statewide framework is further reflected by the language the Ohio General Assembly could have included when implementing its Container Use Law. Three nearby states—Indiana, Wisconsin, and Michigan—all have similar language regarding the “use” of auxiliary containers. See W.S.A. 66.0419; *See also* IC 36-1-3-8.6, M.C.L.A. 445.592. But in those three states, the legislatures included explicit language regarding how local governments may regulate activities in addition to the use of auxiliary containers. In Michigan, Section 445.592 explicitly bans a local unit of government from enforcing an ordinance that “regulates the use, disposition, or sale of auxiliary containers.” M.C.L.A. 445.592(a). Indiana similarly states that a local unit of government “may not regulate, or adopt or enforce an ordinance or resolution to regulate the manufacture, distribution, sale, provision, use, disposition or disposal of auxiliary containers.” IC 36-1-3-8.6. Wisconsin law also restricts political subdivisions from enacting or enforcing “an ordinance . . . regulating the use, disposition, or sale of auxiliary containers.” W.S.A. 66.0419.

While Home Rule varies from state to state as to whether a state legislature can restrict local government without passing a general law, these laws in other states illustrate the limited scope of Ohio’s Container Use Law. The Ohio General Assembly could have created both a comprehensive legislative enactment covering the use of auxiliary containers (plastic, paper, or otherwise), their distribution, their disposal, their recycling, etc. In doing so, it could have made clear it was inhabiting the entire field (as it did in the statutory framework discussed in *State ex rel. Morrison v. Beck Energy Corp*) and then passed explicit language prohibiting local governments from regulating the sale and distribution—because the state had created its own scheme. And all three states also distinguish the distribution, sale, and provision of auxiliary

containers as separate from the use. Even H.B. 242, when naming a prohibition on taxes and fees, specified that they may not apply to “the sale, use, or consumption of those containers,” rather than limiting the provision to “use.” Thus, the sale or provision of auxiliary containers should not be construed as included in the definition of the word “use.” The Ohio General Assembly could have created a comprehensive legislative enactment to cover single-use plastics, other auxiliary containers, and comprehensive recycling and waste management of such single-use materials. It simply did not do so.

**B. The Athens Plastic Bag Regulation does not conflict with the Container Use Law.**

The question of conflict presents the most straightforward explanation for why Athens should have been granted summary judgment. Because the Athens Plastic Bag Regulation does not regulate the use of single-use plastic bags, and instead only regulates their distribution, it does not conflict with the Container Use Law, failing the final element of the *Mendenhall* test. If the Ohio General Assembly meant to occupy the field with a statewide legislative enactment and bar local governments from restricting the use of single-use plastic bags or other auxiliary containers, it could have used those specific words. It did not. And, as further explored below, Ohio law distinguishes the words “use,” “provide,” and “sell” as distinct from one another.

In its opinion, the trial court said the “State permits businesses to provide single-use plastic bags but does not mandate their use or another auxiliary container but instead leaves it up to the individual business to choose.” *Decision and Entry* at 4. From the very start of its analysis, the trial court misstates the statute, which only states that individuals “may use” auxiliary containers in commerce. The trial court does not conduct any analysis regarding how “use,” the word contained within the Container Use Law, and “provide” or “sell,” the words used in the Athens Plastic Bag Regulation, directly conflict with one another, and instead focused its analysis on

whether the City’s definition of “single-use plastic bag” matches the State’s definition of “auxiliary container.” *See Id.* at 4 - 5. To determine whether the statutes conflict, however, the Court must consider both questions.

To evaluate the conflict element, a court must determine whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa. *Marich v. Bob Bennett Constr. Co.*, 116 Ohio St. 3d 553, 2008-Ohio-92, 880 N.E.2d 906, ¶ 17, citing *Struthers v. Sokol*, 108 Ohio St. 263, 1 Ohio Law Abs. 485, 2 Ohio Law Abs. 9, 140 N.E. 519. A controlling consideration of the analysis is that “no real conflict can exist unless the ordinance declares something to be right which the state law declares to be wrong, or vice versa.” *Struthers*, at 268. When the statute and the ordinance provide contradictory guidance, then there is direct conflict. *Mendenhall v. Akron* at ¶ 29 (“This test then, which may be labeled ‘contrary directives,’ is met if the ordinance and statute in question provide contradictory guidance”).

**1. The words “use,” “provide,” and “sell” have distinct meanings.**

The Container Use Law permits a person to “use” an auxiliary container for purposes of commerce or otherwise, whereas the Athens ordinance prohibits stores and vendors from “providing” or “selling” single-use plastic bags to customers. The Athens ordinance prohibits businesses from distributing single-use plastic bags that all too often end up as pollution in the Athens community, however it does not ban their use outright. The ordinance does not ban the use of any auxiliary containers, and is merely an attempt by Athens to encourage more environmentally friendly business practices. A customer could still bring their own plastic bag, single-use or otherwise, into a store, to use it for commerce or otherwise. Likewise, a business can use single-use plastic bags in commerce even if they cannot distribute them to people at the cash register. Therefore, the statute and ordinance do not provide “contradictory guidance” or “contrary directives” as envisioned in *Mendenhall*.

Based on the plain language of the ordinance and the statute, the municipal ordinance does not seek to prohibit conduct which the statute allows. Therefore, even if the Container Use Law is deemed to be a general law (which, the Environmental Advocates assert, it is not), the statute and the ordinance are not in direct conflict with each other. Because there is a lack of conflict, the Container Use Law does not take precedence over the municipal ordinance. We remind the court of the other similar statutes in Indiana, Wisconsin, and Michigan, where the word “use” was distinguished from “sale, distribution, provision,” and other similar words. *See* W.S.A. 66.0419 (where the law prohibits a political subdivision from “regulating the use, disposition, or sale of auxiliary containers”); *See also* IC 36-1-3-8.6 (where a political subdivision may not regulate the manufacture, distribution, sale, provision, use, or disposition or disposal of auxiliary containers); M.C.L.A. 445.592 (where a political subdivision may not regulate “the use, disposition, or sale of auxiliary containers”). And as noted above, even H.B. 242 specifies that taxes and fees may not be levied on the “sale, use, or consumption” of auxiliary containers, highlighting the important distinctions between those three words. If the Ohio General Assembly had wanted to be explicit regarding sale and distribution, it could have included such words in the Container Use Law while creating a more comprehensive scheme for the regulation of single-use plastics and other auxiliary containers.

In *Dudley v. Yost*, Slip Opinion No. 2024-Ohio-5166, the Ohio Supreme Court recently considered questions of statutory interpretation and provided guidance helpful in the present case. In a unanimous per curiam opinion, the Ohio Supreme Court overturned a decision of Ohio Attorney General Dave Yost when he failed to certify summary language for a ballot initiative because its title was purportedly “not a fair and truthful statement of the proposed amendment.” *Dudley v. Yost*, Slip Opinion No. 2024-Ohio-5166, ¶ 1. The Court held that the statutory authority

granted to the Attorney General was to review the summary, not the title, because the title is not part of the summary. *Id.* at ¶ 2. In its analysis, the Court noted that the word “title” has a different definition from the word “summary,” and in using their ordinary meanings, they are different things that serve different purposes. *Id.* at ¶ 25 - 26. Thus, the Court concluded they “need go no further than the plain text of R.C. 3519.01(A) to determine the scope of the attorney general’s role; the attorney general ‘shall conduct an examination of’ only the *summary* of the proposed amendment.” *Id.* at ¶ 27. And as it explained its decision, the Court emphasized the attorney general’s mistake in “add[ing] words to the statutory language.” *Id.* at ¶ 29. That is, in adding the word “title” when the statute only used “summary.”

Employing the analysis of the Ohio Supreme Court in *Dudley v. Yost* as a guide for interpreting the word “use,” we must give each word in the Ohio Revised Code its own distinct meaning. Importantly, “use” does not receive its own statutory definition in R.C. 3736.01 (the definitions statute for the chapter), so its ordinary meaning must apply in understanding the Container Use Law. And the Ohio Revised Code has other laws where “use” is distinguished from other verbs such as “distribute” or “sell.” For example, R.C. 3780.02, the authorization and purpose of statutes regulating adult use cannabis, distinguishes “use” from “sale . . . possession, or any other activity.” R.C. 3780.02(C). Other laws throughout the revised code similarly distinguish “use” from other similar verbs. *See* R.C. 4301.65 (“no person shall sell or offer for sale an alcohol vaporizing device . . . or *use* an alcohol vaporizing device”), emphasis added; *See also* R.C. 2925.03 (“no person shall knowingly . . . sell or offer to sell a controlled substance . . . prepare for shipment, transport, deliver, prepare for distribution, or distribute a controlled substance”); R.C. 2923.25 (“each federally licensed firearms dealer who sells any firearm . . . shall offer for sale to the purchaser of the firearm a trigger lock”). For each of these statutes, the General

Assembly knew to use the words “sell” or “distribute” instead of “use.” The General Assembly could have mandated that every store shall make available for sale or provision single-use plastic bags (or auxiliary containers) at the cash register, or other similar language, but it did not use those words.

**2. “Glass-free” zones represent another type of law narrowly tailored to regulate auxiliary containers.**

In its opinion, the trial court rejected the argument that “glass-free” zones represent a similarly situated regulation of auxiliary containers designed to regulate a specific time and place. *See Decision and Entry* at 12. Athens City Code 9.06.04 allows the Service Safety Director to establish “glass-free zones” throughout Athens where “no person shall possess any glass container on city-owned property within a glass-free zone duly established by date, time and geographic boundary.” Glass containers fit within the definition of auxiliary container as provided in R.C. 3767.32. Under the State’s reading of the Container Use Law, any city with an ordinance permitting “glass-free zones” has restricted the “right” of Ohioans to “use” glass auxiliary containers.

The trial court claimed that because the zones are “temporary in nature for special events,” its reading of the Container Use Law would not apply here. But the Athens Plastic Bag Regulation similarly regulates provision and sale of single-use plastic bags in specific geographic boundaries (point-of-sale for businesses). Both regulations are the type of restriction on a specific type of auxiliary container we should expect for a city to develop for specific, narrowly tailored purposes. Glass-free zones are reasonable regulations, and so is the Athens Plastic Bag Regulation, avoiding conflict with the Container Use Law because they still permit “use” while regulating other activities.

**II. ASSIGNMENT OF ERROR II: The trial court improperly relied on facts outside the record, thus it should not have granted summary judgment under Ohio Civ.R. 56 by relying on those facts.**

To decide a case on a Motion for Summary Judgment, a court must conclude that there are no genuine issues of material fact. *See* Ohio Civ.R. 56. While the trial court indeed concluded that “there are no facts in dispute,” *Decision and Entry* at 3, the trial court went beyond the undisputed facts in the record in reaching its legal conclusion. *See, e.g., Decision and Entry* at 9. Specifically, in analyzing whether the Container Use Law is a general law, the trial court both ignored evidence in the record and developed its own evidence—about the recyclability of plastic—upon which it relied in reaching its legal conclusion that the Ohio statute at issue here is a general law. The trial court conducted its own fact finding, a task it found necessary to rule in favor of the State’s Motion for Summary Judgment. While the City’s argument succeeds without such factual findings—mainly, because the Container Use Law and the Athens Plastic Bag Regulation do not conflict—the trial court concluded that “a single use plastic bag is an item that can be recycled” and used this finding in its determination that the Container Use Law was part of a comprehensive statewide enactment. If there are no facts in dispute, as it posited on page 3 of the *Decision and Entry*, it should not have made this factual finding regarding the recyclability of single-use plastics.

The arguments in favor of summary judgment for the city do not require additional factual determinations; they only require pure legal conclusions. Because the trial went outside the record to make its factual conclusions to support deciding in favor of the State, the amici present additional information to illustrate other conclusions it could have made based on separate fact finding. We do not present this information as evidence; rather, as information to illustrate how the trial court’s conclusion may have required additional fact finding beyond the scope of a summary judgment. The legal questions under consideration, through the City’s Motion for Summary Judgment, would not have required additional factual determinations.

**A. City resolutions, provided on the record before the trial court, posited that single-use plastic bags are not recyclable in Athens, as does other information available when the trial court conducted external research.**

In providing context for the Athens Plastic Bag Regulation, the City attached an affidavit to its motion for summary judgment demonstrating that single-use plastic bags are not recyclable in Athens. *See* Affidavit of David Riggs, *City of Athens Mtn for Summ. J.*, Ex. 10 (“City of Athens is currently not able to recycle single-use plastic bags.”). Mr. Riggs also attested that “[s]ingle-use plastics bags contribute to the litter in the community, including getting stuck in trees and storm drains.” *Id.*

Ordinance 0-25-23, the ordinance that implemented the Athens Plastic Bag Regulation, said “single-use plastic bags cause operation problems at recycling processing facilities, landfills, and transfer stations, and contribute to litter throughout the City of Athens.” The Ordinance cites several other resolutions, which the City also attached as exhibits to its Motion for Summary Judgment. Resolution R-06-19, dated June 24, 2019, states that the Athens City Council “has a compelling public interest in discouraging the wasteful use of disposable single-use plastic and mitigating the negative impact disposable single-use plastic has on our environment.” *City of Athens Mtn for Sum. J.*, Ex. 5. Resolution R-06-19 states “plastic waste is not biodegradable and recycled plastic suffers from polymer degradation, limiting its useful life as a recyclable material, inevitably resulting in non-biodegradable micro-plastic particle pollution.” *Id.*

Resolution R-06-19 and Resolution R-15-21, dated Dec. 13, 2021, state that “discarded disposable single-use plastics are a major source of litter, pollute our open spaces, harm and kill wildlife, clog storm drains resulting in localized flooding, end up as debris in our neighborhoods and waterways, and contribute to blight.” *City of Athens Mtn for Sum. J.*, Ex. 7, Resolution R-15-21, Dec. 13, 2021. Both resolutions also state that “the pollution from disposable single-use plastics imposes external cleanup, removal, and processing costs on our communities.” *Id.*

Athens’s Motion also argues that most single-use plastic is used for less than 12 minutes but lasts on the planet for hundreds of years. *City of Athens Mtn for Summ. J.* at 10.<sup>7</sup>

A 2022 study demonstrates that recycling of plastic film—like that used in single-use plastic bags—is not economically feasible at Materials Recovery Facilities and poses significant safety concerns. *Eureka Recycling 2022 Film Capture Study*, available at <https://eurekarecycling.org/wp-content/uploads/2024/02/Eureka-Recycling-Film-Capture-Study-Report.pdf>. Specifically, the study found that the cost of manually sorting plastic film, “an average cost of \$1.10 per lb. (\$2200 per ton),” requires “film markets to pay at least \$1.06 to justify the investment of staff capacity in equipment.” *Id.* at 8. According to the study, “the market has never seen . . . film be above \$.05 per lbs.” *Id.* This means that modifying Materials Recovery Facilities to accept plastic film would not provide “an adequate return on investment” for those facilities. *Id.* The study also acknowledged “the safety concerns of film wrapping around screen and other non-monetary concerns to this material being allowed” in Materials Recovery Facilities “are significant” *Id.* This study demonstrates that recycling single-use plastic bags does not make financial sense.<sup>8</sup> When considering facts outside the record, the trial court could have considered this study and others like it.

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<sup>7</sup> *Citing* Professor Phaedra Pezzullo, CU Boulder Today, “We’re drowning in single-use plastics. Here’s why and what we can do about it,” Apr. 18, 2024, available at <https://www.colorado.edu/today/2024/04/18/were-drowning-single-use-plastics-heres-why-and-what-we-can-do-about-it>.

<sup>8</sup> “It is cheaper to just make a new plastic product than to collect it and recycle it or reuse it,” says Kristian Syberg, who studies plastic pollution at Roskilde University in Denmark. “That’s a systemic problem.” *See* Sarah Deewerdt Scientific American, “Why it’s so hard to recycle plastic,” Dec. 13, 2022 *available at* <https://www.scientificamerican.com/article/why-its-so-hard-to-recycle-plastic/#:~:text=%E2%80%9CIt%20is%20cheaper%20to%20just,at%20Roskilde%20University%20in%20Denmark.>)

**B. The trial court developed its own evidence and then relied on that evidence in reaching its conclusion that single-use plastic bags are recyclable.**

The trial court went beyond the evidence submitted by the Parties in reaching its factual and legal conclusions. First, the court concluded that “plastic bags eventually become ‘solid waste,’” which Ohio law defines as “unwanted residual solid or semisolid material.” *Decision and Entry* at 7. The court then found “the law permitting Ohioans to use plastic bags . . . is rationally linked to solid waste reduction, recycling, reuse and minimization.” *Id.* at 7 - 8.

Critically, the court’s conclusion that “the law permitting Ohioans to use plastic bags . . . is rationally linked to solid waste, recycling, reuse and minimization” hinges on the court’s finding that the law “can reduce littering as the plastic bags can be turned into several stores for recycling.” *Id.* at 8. Nowhere in the record is there evidence that “plastic bags can be turned into several stores for recycling.” Indeed, to support this statement, the court cited the following internet link: <http://www.trex.com/deck-ideas/trex-rei-bryce-canyon-sustainability-partnership>. *Id.* at FN 1.

The court also concluded, without citing to evidence in the record, that the Container Use Law “may also prevent littering, waste, and increase of landfill use of an alternative material that may be used in its place or is more labor intensive to produce or use.” *Decision and Entry* at 8. Undisputed evidence in the record, however, demonstrates that “[s]ingle-use plastics bags contribute to the litter in the community,” Affidavit of David Riggs, *City of Athens Mtn for Summ. J.*, Ex. 10., and “discarded disposable single-use plastics are a major source of litter.” Resolution R-06-19 and Resolution R-15-21.

Instead of giving the City’s evidence due weight, the court dismissed the evidence, suggesting that “the bags do not necessarily go to the landfill even though they are not accepted by Athens’ single stream recycling service.” *Decision and Entry* at 8. If the trial court wanted to properly make factual rulings regarding the recyclability of single-use plastics, it should have held

an evidentiary hearing. Instead, dissatisfied with the evidence Athens presented and the lack of evidence Ohio presented, the court consulted the internet to resolve what it had identified as an issue of material fact. The court made the following factual conclusion without evidence in the record: “the single-use plastic bags can be reused by consumers or returned to several stores that accept such bags.” *Id.* Citing another website, the court said “one wood alternative product manufacturer had partnered with local community organizations to turn plastic film (like that used for single-use plastic bags) into useful products such as park benches.” *Id.* The court also cited Facebook posts about community collection projects and donated benches. *Id.* at 8 - 9.

Relying on these webpages, the Court found “the single-use plastic bag is an item that can be recycled.” *Id.* at 9. Based on this factual finding, the Court concluded, “the statute which allows Ohioans to use plastic bags is linked to Ohio’s plan regarding solid waste reduction, recycling, reuses and minimization.” *Id.* But the trial court could have just as easily considered reports such as the *Eureka Recycling 2022 Film Capture Study*, or the information provided in FNs 7 or 8.

**C. The court effectively took judicial notice of facts in violation of Rule 201 of the Ohio Rules of Evidence.**

The Ohio Rules of Evidence allow a court to take judicial notice of facts in limited circumstances. Ohio R. Evid. 201. A court may only take judicial notice of a fact where the fact is “one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” *Id.*

Here, the trial court decided that the recyclability of single-use plastic bags was an important fact in determining whether the Ohio statute at issue was a general law. Yet the court ignored evidence Athens submitted showing single-use plastic bags are not recyclable in Athens and instead conducted its own internet research to answer the question, only considering internet

posts that support its ultimate legal conclusion. The Ohio Rules of Evidence prohibits the court from doing so regarding disputed factual issues like the recyclability of single-use plastic bags. In relying on its own research on this matter to enter summary judgment in favor of the State, the court committed reversible error.

## **CONCLUSION**

The City of Athens has a demonstrable history of passing a variety of ordinances designed to protect human health and the environment and to reflect the interests of its residents. The most comprehensive environmental protections in Athens live in the “Athens Community Bill of Rights and Water Supply Protection Ordinance,” found in Chapter 97.01 of the Athens City Code. Among other goals, it rested on the people of Athens concluding “that the extraction of shale gas and oil, the procurement of fresh water from the watershed for such purposes, and the disposal of associated wastes in Athens City and its jurisdiction, violates the rights of residents and neighborhoods by posing a significant threat to their health, safety, and welfare.” Athens City Code 97.01.02. Passed on the ballot by Athens voters, it made it “unlawful for any corporation to engage in the extraction of shale gas or oil within the City of Athens or its jurisdiction.” Athens City Code 97.01.05.

While Chapter 97.01 broadly attempts to ban an entire industry, the City of Athens also pursues environmental protection through more narrowly tailored regulations, more similar to the Athens Plastic Bag Regulation in question here. The City of Athens has banned businesses from using, for decorative purposes, “any flammable decorative material, including flammable curtains, draperies, [and] streamers.” Athens City Code 9.03.01. In the context of housing, Athens restricts persons from leasing homes unless the structure is “free from unclean and unsanitary conditions.” Athens City Code 9.07.02. Residents and businesses in Athens are also required to ensure privy

vaults, cesspools, and septic tanks do not become “foul, noisome, filthy, or offensive to neighboring property.” Athens City Code 9.08.02. And the City bans the use of tobacco or other tobacco derivatives in any of its outdoor recreational facilities, including parks, restrooms, playgrounds, and beyond. Athens City Code 9.15.03.

The Athens Plastic Bag Regulation is straightforward in its operation and application. It does not ban the use of plastic bags by any business or individual within the City; nor does it outright ban the use of “all” auxiliary containers as used in the Container Use Law. Instead, the City created its regulation understanding the context of the Home Rule amendment. *See* Athens Ordinance 0-25-23. The City recognized the science showing “the negative environmental and health effects of plastics and the chemicals used to produce them.” *Id.* It noted “numerous studies have documented the prevalence of plastic carry-out bags littering the environment, blocking storm drains, being entangled in trees and vegetation, and fouling beaches.” *Id.* And the City importantly emphasized “single-use plastic bags cause operation problems at recycling processing facilities, landfills, and transfer stations, and contribute to litter throughout the City of Athens.” *Id.* The Athens Plastic Bag Regulation thus prohibits a store or vendor from providing or selling “a single-use, plastic carryout bag to a customer at the checkout stand, cash register, point of sale or other location for the purposes of transporting food or merchandise.” *Id.* at 11.13.02. It does not ban a person from bringing their own plastic bag for use. It does not ban a business from using plastic bags in other contexts within their store. It does not even ban businesses *from selling plastic bags to customers*, only from providing or selling single-use plastic bags for transportation of food or merchandise, and specifically names acceptable instances where stores can still provide them to customers, including for meat products. *Id.* The City of Athens created this narrowly-tailored ordinance to achieve a reduction in single-use plastics into the waste stream of Athens.

The Court faces a simple question: is R.C. 3736.021, the Container Use Law, a general law that conflicts with the Athens Plastic Bag Regulation? We urge the Court to hold that the statute is neither a general law regulating the conduct of Ohioans—nor does it conflict with the Regulation. The plain language of the statute, when read alongside the Athens ordinance, allows for both statute and local rule to exist simultaneously. Ohioans may use a variety of auxiliary containers; Athens regulates specific moments when a specific auxiliary container (single-use plastic bags) may enter the commercial stream. Single-use plastic bags may still be used; they simply may not be distributed in certain situations. Athens developed a narrowly tailored rule to reduce its contribution to plastic pollution and climate change. It also endeavors to improve the health of its community and environment. The State should be applauding the City’s efforts, rather than litigating them.

The trial court’s decision granting summary judgment for the State should be overruled; the City of Athens’s Motion for Summary Judgment should be granted.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on December 20, 2024, the foregoing Motion for Leave to File and Amicus Brief was filed with the 4th District Court of Appeals in Athens County. The OEC served copies to the parties listed below via electronic mail. Thus, under Ohio Rules of Appellate Procedure Rule 13, and in accordance with the 4th District's rules, a true and accurate copy of the foregoing Motion and Brief have been delivered to:

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