



CSU
College of Law Library

Cleveland State Law Review

Volume 71 | Issue 3

Article

5-15-2023

Bans on Bags or Bans on Bans?: A Home Rule Analysis of Recent Attempts in Ohio to Enact Legislation Eliminating Plastic Bags From Stores

Christine Mika

Karin Mika

Cleveland State University College of Law

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstlrev>



Part of the [Environmental Law Commons](#), and the [State and Local Government Law Commons](#)

[How does access to this work benefit you? Let us know!](#)

Recommended Citation

Christine Mika and Karin Mika, *Bans on Bags or Bans on Bans?: A Home Rule Analysis of Recent Attempts in Ohio to Enact Legislation Eliminating Plastic Bags From Stores*, 71 *Clev. St. L. Rev.* 853 (2023) available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol71/iss3/10>

This Article is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

BANS ON BAGS OR BANS ON BANS?: A HOME RULE ANALYSIS OF RECENT ATTEMPTS IN OHIO TO ENACT LEGISLATION ELIMINATING PLASTIC BAGS FROM STORES

CHRISTINE MIKA* AND KARIN MIKA**

ABSTRACT

This Article addresses how Ohio's Home Rule provision in the Ohio Constitution has played out as legislators grapple with efforts to ban plastic bags from stores. It discusses the complexities of the Home Rule doctrine in Ohio, especially as it relates to the competing authority of state, county, and municipal governments. The Article discusses the history of Home Rule in Ohio, and the pre-emptive relationships between the competing governmental entities stemming from the existence of County and Municipal Charters that also grant legislative powers. It explains that the opting out of plastic bag bans by Ohio municipalities is a valid exercise of Home Rule power. The Article further examines how Home Rule has played out in other states where there is a tension between entities that wish to ban plastics and those who want to ban any bans. The Article suggests that even though Home Rule tends to be a partisan issue in which conservative legislators seek to limit the power of municipalities, many municipalities in both conservative and liberal states have been successful in enforcing plastic bag bans. The Article concludes, however, that after the quarantine, conservative legislators have returned to partisan lines in attempting to limit the power of municipalities. In Ohio, this has resulted in the Ohio Legislature enacting legislation prohibiting the development of alternative energy sources in some counties. The Article suggests that the return to partisan politics in Home Rule issues will make it much more difficult for counties and municipalities to act on their own in efforts to improve the environment.

* Attorney-at-law, J.D. 2022, Cleveland State University, College of Law.

** Senior Professor of Legal Writing and Research, Cleveland State University, College of Law.

CONTENTS

I.	INTRODUCTION	854
II.	BACKGROUND.....	858
	A. <i>Ohio Constitution</i>	858
	B. <i>Home Rule Authority for Counties</i>	859
	C. <i>Cuyahoga County Bag Ban Background</i>	860
	D. <i>City Opt-Outs and Reactions</i>	862
	E. <i>House Bill 242</i>	863
III.	ANALYSIS	865
	A. <i>Tiers of Home Rule Powers in Ohio</i>	865
	B. <i>Traditional Home Rule Analysis Under Ohio Law</i>	866
	C. <i>Applying the Home Rule Analysis to the Original Ban on Bag Bans</i>	868
	D. <i>Municipality Opt-Outs and Home Rule</i>	872
	E. <i>Plastic Bag Bans, the Environment, and the Conflict over Power</i>	873
	F. <i>The Juxtaposition: Home Rule and Plastic Bag Bans</i>	876
IV.	CONCLUSION.....	881

I. INTRODUCTION

Ninety-six percent of the pollution found on the beaches of the Great Lakes is plastic.¹ And despite the hopeful fact that the plastic found is not commonly plastic bags, it is not for good reason. It is the result of plastic bags getting stuck in trees or sewers before making it to the lake.² Plastic bags that do manage to reach the lake sink to the bottom.³ Plastics do not biodegrade and remain in the environment for a long period of time.⁴ Often, these plastics will be consumed by animals or make their way

¹ Olivia Fecteau, *Plastic Pollution Becoming Problem in Northeast Ohio Waterways*, NEWS5CLEVELAND (Sept. 18, 2019, 6:43 PM), <https://www.news5cleveland.com/news/local-news/oh-cuyahoga/plastic-pollution-becoming-problem-in-northeast-ohio-waterways>.

² *Id.*

³ *Id.*

⁴ *See id.*

into the food chain or water system, causing health problems for residents.⁵ Microplastics⁶ are now starting to appear in human blood samples.⁷

In response to this longstanding pollution problem, several states enacted plastic bag bans, starting with California in 2015.⁸ Other states enacting early legislation banning plastic bags included Connecticut, Delaware, Hawaii, Maine, New York, Oregon, and Vermont.⁹ The most recent states enacting plastic bag bans are Rhode Island and New Jersey.¹⁰ Numerous counties and cities have also enacted plastic bag bans.¹¹ California's ban led to a seventy-two percent drop in plastic bag use and was reportedly smoothly implemented.¹²

Following in the footsteps of other locales, in 2019, the Cuyahoga County Council also passed a ban on single use plastic bags.¹³ Proponents of the Bill lauded its

⁵ *Id.*

⁶ Microplastics are small plastic pieces less than five millimeters long which can be harmful to our ocean and aquatic life. See *What Are Microplastics?*, NAT'L OCEAN SERV., <https://oceanservice.noaa.gov/facts/microplastics.html> (last visited Jan. 27, 2023).

⁷ Damian Carrington, *Microplastics Found in Human Blood for the First Time*, THE GUARDIAN (March 24, 2022), <https://www.theguardian.com/environment/2022/mar/24/microplastics-found-in-human-blood-for-first-time>.

⁸ See Bill Chappell, *Ban on Single-Use Plastic Bags Enacted in California*, NPR (Sept. 30, 2014), <https://www.npr.org/sections/thetwo-way/2014/09/30/352774915/ban-on-single-use-plastic-bags-is-enacted-in-california>.

⁹ Dillon Baxter, *States with Promising Single-Use Plastic Bans*, PLANTSWITCH (Aug. 12, 2021), <https://www.plantswitch.com/single-use-plastic-ban/>.

¹⁰ See Megan Quinn, *Rhode Island Governor Signs Plastic Bag Ban Law*, WASTEDIVE (July 8, 2022), <https://www.wastedive.com/news/rhode-island-plastic-bag-ban-law-passes/626835/>; see also Nikita Biryukov, *New Jersey's Single-Use Plastic Bag Ban Goes into Effect*, NEW JERSEY MONITOR (May 4, 2022), <https://newjerseymonitor.com/2022/05/04/new-jerseys-single-use-bag-ban-goes-into-effect/>.

¹¹ Trevor Nance, *Here's a List of Every City in the US to Ban Plastic Bags, Will Your City be Next*, FORBES (Sept. 20, 2018), <https://www.forbes.com/sites/trevornance/2018/09/20/heres-a-list-of-every-city-in-the-us-to-ban-plastic-bags-will-your-city-be-next/#4f1b1e943243>.

¹² See Anne Barnard, *Get Ready New York: The Plastic Bag Ban is Coming*, N.Y. TIMES (Feb. 28, 2020), <https://www.nytimes.com/2020/02/28/nyregion/new-york-state-ban-plastic-bags.html>. However, not all citizens and state legislatures are happy about the bans. See Paul Mulshine, *New Jersey's Ban on Shopping Bags Won't Get a Whole Lotta Love*, NJ.COM (Apr. 5, 2022), <https://www.nj.com/opinion/2022/04/new-jerseys-ban-on-shopping-bags-wont-get-a-whole-lotta-love-mulshine.html>; see also *Eight States Ban Plastic Bags, but More Prohibit Local Bans*, INSTITUTE FOR ENERGY RESEARCH (Oct. 8, 2020), <https://www.instituteforenergyresearch.org/uncategorized/eight-states-ban-plastic-bags-but-more-prohibit-local-bans/>.

¹³ Courtney Astolfi, *Cuyahoga County Council Passes Plastic Bag Ban*, CLEVELAND.COM, <https://www.cleveland.com/metro/2019/05/cuyahoga-county-council-passes-plastic-bag-ban.html> (May 29, 2019).

environmental efforts.¹⁴ Opponents worried about the effects on retailers and the costs to consumers.¹⁵ The conflict expanded beyond Cuyahoga County and to the statehouse in Columbus, when the State Legislature passed a Bill banning any ban on using plastic bags.¹⁶

The debate about plastic bags took a detour when, in March of 2020, Governor Mike DeWine issued a “stay at home” order for Ohio.¹⁷ Although the original quarantine for nonessential workers was to last only a month, various COVID orders were extended into July 2020, with other recommended restrictions continuing on beyond that.¹⁸ Although many, (including retailers) lobbied for Governor DeWine to veto the “ban on the ban,” DeWine signed an amended version of the Bill citing COVID-19 concerns.¹⁹ The amended version would ban any bans on plastic bags for twelve months.²⁰

A good argument could be made that the original “ban on bans” by the Ohio Legislature was likely unconstitutional because it violated “Home Rule” under the Ohio Constitution. However, even before there could be any challenges to the law, the ban expired. Thus, the ordinance originally passed by the Cuyahoga County Council went into effect in January of 2022.²¹ Since the ban went into effect, several municipalities have passed ordinances opting out of the plastic bag ban—in a sense, “banning the ban” through municipal ordinances.²²

¹⁴ *See id.*

¹⁵ *See id.*

¹⁶ Andrew J. Tobias, *Ohio House Passes Bill that Would Block Local Bans on Plastic Bags*, CLEVELAND.COM, <https://www.cleveland.com/open/2019/12/ohio-house-passes-bill-that-would-block-local-bans-on-plastic-bags.html> (Dec. 11, 2019).

¹⁷ *Ohio Issues "Stay at Home" Order; New Restrictions Placed on Day Cares for Children*, GOVERNOR OF OHIO (Mar. 22, 2020), <https://governor.ohio.gov/media/news-and-media/ohio-issues-stay-at-home-order-and-new-restrictions-placed-on-day-cares-for-children>.

¹⁸ *New Ohio Orders and Restrictions Extended Until July 1, 2020*, OLGETREE DEAKINS (June 5, 2020), <https://ogletree.com/insights/new-ohio-orders-and-restrictions-extended-until-july-1-2020/>.

¹⁹ Marc Kovac & Randy Ludlow, *Due to Pandemic, DeWine to Sign Statewide Ban on Plastic Bag Bans Despite Veto Request*, COLUMBUS DISPATCH, <https://www.dispatch.com/story/news/politics/state/2020/09/28/ohio-gov-mike-dewine-sign-statewide-ban-plastic-bag-bans-despite-concerns-of-environmentalists/3560654001/> (Sept. 28, 2020).

²⁰ OHIO REV. CODE ANN. § 301.30 (2020) (Substitute House Bill 242).

²¹ Jen Steer, *Cuyahoga County Plastic Ban Went into Effect*, FOX 8 NEWS (Feb. 10, 2022), <https://fox8.com/news/cuyahoga-county-plastic-bag-ban-went-into-effect/>.

²² *Id.* “Cleveland, Brooklyn, Independence, North Olmsted and Strongsville previously opted out of the ban.” *Id.* North Royalton has also opted out of the ban. *See* Bob Sandrick, *North Royalton Opts Out of Cuyahoga County's Plastic Bag Ban*, CLEVELAND.COM, <https://www.cleveland.com/community/2022/07/north-royalton-opts-out-of-cuyahoga-countys-plastic-bag-ban.html> (July 5, 2022).

Environmentalists and concerned citizens might be left wondering how a validly enacted ordinance can result in cities deciding that they will simply not follow the directive. This may seem contrary to our system of governance, especially when that governance is done for the health and safety of the people. The reason why this may occur is because of a provision in the Ohio Constitution that affords municipalities “Home Rule.”²³ That is, municipalities have the constitutional right to enact legislation that encompasses the concerns and welfare of the individual municipality.²⁴ This legislation may pre-empt both a state statute, as well as a county ordinance.

This Article addresses some of the issues related to Ohio’s Home Rule provision in the Ohio Constitution as Home Rule relates to recent environmental regulation. It explains that, regardless of any disappointment regarding the enforcement of bans on plastic bags, the opting out of municipalities is a valid exercise of Home Rule power. In doing so, this Article will discuss the complexities of the Home Rule doctrine in Ohio, especially as it relates to the competing authority of state, county, and municipal governments. It will discuss the history of Home Rule in Ohio and history of the charters in Ohio (as well as the authority that charters grant), as well as examine the pre-emptive relationships between the competing governmental entities. It will then examine how “Home Rule” has played out in other states where there is a tension between entities that wish to ban plastics and those who want to ban any bans.

Although the Article will ultimately conclude that environmentalists have achieved many small victories regarding banning plastic bags under Home Rule, the Article will highlight new issues concerning partisanship, environmentalism, and Home Rule. At the end of 2021, the Ohio Legislature enacted a Bill that allowed counties to ban solar and wind projects in various unincorporated areas in their counties.²⁵ Since that Bill was enacted ten Ohio counties have done so.²⁶ Finally, this Article asserts that this Bill again raises Home Rule issues that will likely come into play in more major ways as partisanship continues to be the dividing force in achieving environmental regulation.²⁷

²³ OHIO CONST. art. XVIII, § 7; see Laura Hancock, *Is the Plastic Bag Bill the Ohio Legislature’s Latest Attempt to Prevent Home Rule in Cuyahoga County?*, CLEVELAND.COM, <https://www.cleveland.com/open/2019/05/is-the-plastic-bag-bill-the-ohio-legislatures-latest-attempt-to-prevent-home-rule-in-cuyahoga-county.html> (May 23, 2019).

²⁴ Matthew Mahoney, *Home Rule in Ohio: General Laws, Conflicts, and the Failure of the Courts to Protect the Ohio Constitution*, 67 CLEV. ST. L. REV. 113, 113 (2019).

²⁵ S.B. 52, 134th Gen. Assemb., Reg. Sess. (Ohio 2021) (“Revise law governing wind farms and solar facilities,” effective, Oct. 11, 2021).

²⁶ See Jake Zuckerman, *Ten Ohio Counties Ban Wind, Solar Projects Under New State Law*, OHIO CAP. J. (Aug 23, 2022), <https://ohiocapitaljournal.com/2022/08/23/nine-ohio-counties-ban-wind-solar-projects-under-new-state-law/>.

²⁷ There is nothing stopping the Ohio Legislature from re-instituting the ban on plastic bag bans. Although it might seem unlikely for the Legislature to do so at this point, should the alternative energy source ban survive any future Home Rule challenge, the Legislature might choose to be bolder in terms of how it will attempt to restrict the Home Rule powers of municipalities and counties.

II. BACKGROUND

A. *Ohio Constitution*

All political power to enact legislation derives from the Constitution.²⁸ This includes a declared power for municipalities to enact their own legislation.²⁹ Section 3, Article XVIII of the Ohio Constitution provides that “[m]unicipalities 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.”³⁰

Thus, under Ohio’s Constitution, municipalities have inherent power independent of the General Assembly.³¹ Municipalities have the right to engage in self-government and pass ordinances specific to their communities. This power is generally referred to as “Home Rule” power.³² When analyzing “Home Rule” challenges (i.e., whether an ordinance in a municipality is a valid exercise of municipal powers), Ohio courts examine whether the municipal legislation “relates solely to the government and administration of the internal affairs of the municipality.”³³ With respect to challenges made that relate to “local police, sanitary and other similar regulations,” courts focus on whether municipal ordinances may be “in conflict with general laws.”³⁴ An ordinance enacted by a municipality may be determined invalid if it conflicts with a law enacted by the Ohio Legislature that is of “statewide concern.”³⁵ It is the concept of “statewide concern” that is often litigated when an entity alleges that a municipality’s right of Home Rule has been violated.³⁶

²⁸ See OHIO CONST. art. II, § 1.

²⁹ OHIO CONST. art. II, § 1f.

³⁰ OHIO CONST. art. XVIII, § 3.

³¹ STEVEN STEINGLASS & GINO J. SCARSELLI, *THE OHIO CONSTITUTION* 271 (2004).

³² For a thorough discussion of Home Rule powers, see Wendy H. Gridley, *Municipal Home Rule*, 128 LSC MEMBERS ONLY 1, 1 (Feb. 12, 2020), <https://www.lsc.ohio.gov/documents/reference/current/membersonlybriefs/133Municipal%20Home%20Rule.pdf>. (“Members Only” is a publication prepared for members of the Ohio General Assembly by the Legislative Service Commission Staff.)

³³ *Beachwood v. Bd. of Elections of Cuyahoga Cnty.*, 148 N.E.2d 921, 923 (Ohio 1958).

³⁴ *State ex rel. Evans v. Moore*, 431 N.E.2d 311, 312 (Ohio 1982).

³⁵ *Bucyrus v. Dept. of Health*, 166 N.E. 370, 371 (Ohio 1929); accord *Cleveland Elec. Illuminating Co. v. Painesville*, 239 N.E.2d 75, 78 (Ohio 1968).

³⁶ See, e.g., *Buckeye Inst. v. Kilgore*, 181 N.E.3d 1272, 1279 (Ohio Ct. App. 2021) (finding that General Assembly has the right to limit municipalities’ right to levy taxes); *Newburg Heights v. State*, No. 2021-0247, N.E.3d (Ohio S. Ct., May 19, 2022) (finding that state law concerning fees for litigating traffic camera tickets did not violate municipality Home Rule); *Buckeye Firearms Found., Inc. v. Cincinnati*, 2020-Ohio-5422 163 N.E.3d 68, at ¶1 (finding that municipal ordinance preventing rapid fire “trigger activators” was pre-empted by statewide concern regarding legislation covering gun ownership).

B. *Home Rule Authority for Counties*

Counties in Ohio are inherently administrative arms of the state, deriving all power from the General Assembly.³⁷ They do not, by their existence, have any governmental powers, nor an ability to pass ordinances; however, in 1933, Ohio voters approved a constitutional amendment that would give counties the ability to have some form of legislative power, in essence, a second tier of “Home Rule.”³⁸ In order for a county to have the power to enact ordinances that will be enforceable in municipalities within that county, the municipality must agree to ceding that power through a county charter.³⁹ Any such transfer must be approved of by the voters of the municipalities and the county.⁴⁰ According to the constitutional provision, “[in] case of conflict between the exercise of powers granted by such charter and the exercise of powers by municipalities or townships . . . the exercise of power by the municipality or township shall prevail.”⁴¹

Only two counties in Ohio have charters: Summit County and Cuyahoga County.⁴² Cuyahoga County’s charter went into effect on January 1, 2010.⁴³ The Cuyahoga County charter gives the county powers to:

Exercise all powers specifically conferred by this Charter or incidental to powers specifically conferred by this Charter and all other powers that the Constitution and laws of Ohio now or hereafter grant to counties to exercise or do not prohibit counties from exercising, including the concurrent exercise

³⁷ STEINGLASS & SCARSELLI, *supra* note 31.

³⁸ Article X, Section 1 of the Ohio Constitution states:

The general assembly shall provide by general law for the organization and government of counties and may provide by general law alternative forms of county government. No alternative form shall become operative in any county until submitted to the electors thereof and approved by a majority of those voting thereon under regulations provided by law. Municipalities and townships shall have authority, with the consent of the county, to transfer to the county any of their powers or to revoke the transfer of any such power, under regulations provided by general law, but the rights of initiative and referendum shall be secured to the people of such municipalities or townships in respect of every measure making or revoking such transfer, and to the people of such county in respect of every measure giving or withdrawing such consent.

OHIO CONST. art. X, § 1.

³⁹ OHIO CONST. art. X, § 3.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See Carter Adams & Andrew Meyer, *Voters in Summit, Cuyahoga County Face Questions on County Charters*, WKSU: IDEASTREAM (Nov. 1, 2019), <https://www.ideastream.org/news/government-politics/2019-11-01/voters-in-summit-cuyahoga-face-questions-on-county-charters>.

⁴³ CUYAHOGA COUNTY CHARTER, art. XII, § 12.01.

by the County of all or any powers vested in municipalities by the Ohio Constitution or by general law.⁴⁴

Cuyahoga County ordinances are codified within the Cuyahoga County Code.⁴⁵ Although not often in the news absent a dispute or challenge to the resolutions introduced or passed, the Council has been enacting ordinances since 2011.⁴⁶ Summit County has had a charter since 1979⁴⁷ and has been actively passing ordinances since that time.⁴⁸ Although Summit County also discussed enacting an ordinance banning plastic bags, it has yet to do so.⁴⁹

C. Cuyahoga County Bag Ban Background

The Cuyahoga County Council passed the plastic bag ban on May 28, 2019.⁵⁰ The ban was approved in an 8-3 vote, with the vote division along party lines with the three negative votes coming from Republican council members.⁵¹ The ban was to go into effect on January 1, 2020, in order to give retailers time to prepare.⁵²

At an earlier council meeting, the Council rejected an amendment which proposed to delay the ban's implementation by eighteen months.⁵³ The purpose of this delay was "to be used for gauging the community's thoughts, conducting an economic impact study, and an analysis proving the ban would significantly reduce plastic waste."⁵⁴ However, council members who rejected this amendment said that "no need existed for further delays or studies because it is 'very clear' the ban would reduce

⁴⁴ CUYAHOGA COUNTY CHARTER, art. I, § 1.01.

⁴⁵ See *Ordinances*, CUYAHOGA COUNTY COUNCIL, <http://council.cuyahogacounty.us/en-US/Ordinances.aspx> (last visited Feb. 6, 2023).

⁴⁶ *Id.*; see also Karen Farkas, *Concealed Carry Advocates Say Cuyahoga County Can't Pass Gun Restrictions*, CLEVELAND.COM (May 23, 2017), https://www.cleveland.com/cuyahoga-county/2017/05/concealed_carry_advocates_say_cuyahoga_county_council_cant_impose_gun_restrictions.html.

⁴⁷ *About Summit County*, SUMMIT COUNTY, <https://www.summit4success.com/about-summit-county> (last visited Feb. 6, 2023).

⁴⁸ See generally *Summit County Codified Ordinances*, AM. LEGAL PUBL'G, <https://codelibrary.amlegal.com/codes/summitcounty/latest/overview> (last visited Feb. 6, 2023).

⁴⁹ See Rick Brough, *Summit County Council Has First Discussion Around Single Use Plastic Bags*, KPCW (Sept. 19, 2019), <https://www.kpcw.org/local-news/2019-09-19/summit-county-council-has-first-discussion-around-single-use-plastic-bags>.

⁵⁰ See Astolfi, *supra* note 13.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

plastic waste, citing 320 million plastic bags that Cuyahoga residents use each year.”⁵⁵ Retailers, such as the Greater Cleveland Partnership and the grocery store, Heinen’s, opposed the bag ban because retailers needed more time to address the costs on their business and gauge the ban’s impact on the business’ bottom line.⁵⁶

The bag ban is Ordinance Number O2019-005 of the County Council of Cuyahoga County, known as the Disposable Bag Ban.⁵⁷ According to the ordinance, “there has been an increase in plastic production and pollution over the past seventy years, with 269,000 tons of globally distributed plastic waste pollution,”⁵⁸ and the council has a “compelling public interest” in “discouraging the wasteful use of disposable bags and mitigating the negative impact disposable bags have on our environment.”⁵⁹ One reason for this interest was related to new policies in China. China ended its policy of accepting disposable plastic bags for recycling.⁶⁰ The result of China’s decision was that more plastic bags would wind up remaining unrecycled in the United States, and this increased amount of bags had even more potential of polluting the environment.⁶¹ The Council stated that it “desire[d] to combat the polluting effects of and accompanying blight caused by disposable bags on the environment of Cuyahoga County.”⁶²

The first section of the ordinance discusses which types of bags are banned and which are permitted. The ordinance defines a disposable plastic bag as “a bag made from either non-composable plastic or compostable plastic provided by a Retail Establishment to a customer at point of sale for the purpose of transporting purchased items.”⁶³ Several exceptions are provided including things such as newspaper bags, bags for prescription drugs, and bags used for curbside pickup.⁶⁴ In addition to banning disposable plastic bags, the ordinance also makes requirements of retailers

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Cuyahoga County, OH Ordinance No. O2019-0005 (May 28, 2019) (codified as CUYAHOGA COUNTY ORDINANCE § 1304 *et seq.*).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See Christopher Joyce, *Where Will Your Plastic Trash Go Now That China Doesn't Want It?*, NPR (Mar. 13, 2019), <https://www.npr.org/sections/goatsandsoda/2019/03/13/702501726/where-will-your-plastic-trash-go-now-that-china-doesnt-want-it>.

⁶¹ See Alana Semuels, *Is This the End of Recycling?*, THE ATLANTIC (Mar. 5, 2019), <https://www.theatlantic.com/technology/archive/2019/03/china-has-stopped-accepting-our-trash/584131/>.

⁶² Cuyahoga County, OH Ordinance No. O2019-0005 (preamble).

⁶³ CUYAHOGA COUNTY, OHIO, ORDINANCE § 1304.01.

⁶⁴ *Id.*

for the types of paper bags to be used.⁶⁵ For a paper bag to be permitted, it must be manufactured from at least 40% recycled content and be 100% recyclable.⁶⁶

The next section stated that the ban would commence on October 1, 2019,⁶⁷ and provided that retail establishments may not refuse to allow customers to bring in reusable bags, nor shall they charge customers to use their own reusable bags.⁶⁸ The statute provided that retailers who violate this ordinance will:

Be subject to a written warning for the first violation, a civil fine of up to \$100 for a second violation, and a civil fine of up to \$500 for each subsequent violation. A separate violation shall be deemed committed each day during or on which a violation or noncompliance occurs or continues.⁶⁹

The Cuyahoga County Department of Consumer Affairs was given the power to enforce the ordinance.⁷⁰ Retail establishments may appeal citations to the Cuyahoga County Debarment Review Board.⁷¹ Any determination from the Review Board may be appealed to the Cuyahoga County Common Pleas Court.⁷²

D. City Opt-Outs and Reactions

Even before the COVID-19 quarantines were issued, cities within Cuyahoga County made the decision to opt out of the plastic bag ban. The City of Cleveland opted out of the ban for six months, choosing to study ways to reduce the use of disposable bags without hurting businesses.⁷³ The city of Strongsville also passed an ordinance exempting its business from complying with the ban until January 1, 2021.⁷⁴ Strongsville City Council members stated that they would come up with their own plan for eliminating plastic bags.⁷⁵ A councilman of Strongsville stated, “I am concerned for our lower-income residents and seniors who may not be able to afford

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at § 1304.03.

⁷⁰ *Id.* at § 1304.04.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Jen Steer, *Cleveland Opts Out of Cuyahoga County’s Plastic Bag Ban... for Now*, FOX 8 NEWS, <https://fox8.com/news/cleveland-opts-out-of-cuyahoga-countys-plastic-bag-ban-for-now/> (Dec. 2, 2019).

⁷⁴ Bob Sandrick, *Strongsville Opts Out of Cuyahoga County’s Plastic Bag Ban; North Royalton Introduces Ordinance to do the Same*, CLEVELAND.COM, <https://www.cleveland.com/business/2020/01/strongsville-opts-out-of-cuyahoga-countys-plastic-bag-ban-north-royalton-introduces-ordinance-to-do-the-same.html> (Jan. 7, 2020).

⁷⁵ *Id.*

the cost to comply or may have issues getting groceries or other products home if businesses no longer provide bags.”⁷⁶ Although the opt-out ordinances undoubtedly generated much social controversy, there were surprisingly no subsequent legal challenges.⁷⁷

E. House Bill 242

After the Cuyahoga County Council passed the plastic bag ban, some members of the Ohio Legislature attempted to ban the ban before any implementation. House Bill 242 (“HB 242”) proposed to amend the Ohio Revised Code Chapter 301.⁷⁸ Chapter 301 deals with the organization of counties in the state.⁷⁹ The proposed section stated:

No county that has adopted a charter under Section 3 of Article X, Ohio Constitution, may impose a fee, tax, assessment, or other charge on auxiliary containers, on the sales, use, or consumption of such containers, except as authorized in Chapters 5739. and 5741. of the Revised Code, or on the basis of receipts received from the sale of such containers. As used in this section, “auxiliary container” has the same meaning as in section 3736.01 of the Revised Code.⁸⁰

Additionally, the House Bill sought to add a subsection to section 504.04, which currently deals with the exercise of powers under limited Home Rule government.⁸¹ Effectively, ending Cuyahoga’s bag ban, the proposed subsection states that no resolution may:

Impose a fee, assessment, or other charge on auxiliary containers, on the sale, use, or consumption of such containers, or on the basis of receipts received from the sale of such containers. As used in this division, “auxiliary container” has the same meaning as in section 3736.01 of the Revised Code.⁸²

The House also sought to add a subsection to Section 715.013, which is titled “Prohibiting Levy of Municipal Taxes.”⁸³ This proposed subsection duplicates the proposed languages to be added to section 504.04, stating:

⁷⁶ *Id.*

⁷⁷ See generally Steer, *supra* note 73; see, e.g., Keshia Clukey, *New York Ban on ‘Scourge’ of Plastic Bags Upheld by Judge*, BLOOMBERG LAW, <https://news.bloomberglaw.com/environment-and-energy/new-york-ban-on-scourge-of-plastic-bags-upheld-by-judge> (Aug. 20, 2020) (showing that bans on plastic bag bans are legal, and thus, no legal challenges are underway).

⁷⁸ H.R. 242, 133rd Gen. Assemb., Reg. Sess. (Ohio 2019).

⁷⁹ See generally OHIO REV. CODE § 301 (2020).

⁸⁰ H.R. 242, 133rd Gen. Assemb., Reg. Sess. (Ohio 2019).

⁸¹ OHIO REV. CODE § 504.04 (2020).

⁸² H.R. 242, 133rd Gen. Assemb., Reg. Sess. (Ohio 2019).

⁸³ OHIO REV. CODE ANN. § 715.013 (2020).

No municipal corporation may impose any tax, fee, assessment, or other charge on auxiliary containers, on the sale, use, or consumption of such containers, or on the basis of receipts received from the sale of such containers. As used in this division, “auxiliary container” has the same meaning as in section 3736.01 of the Revised Code.⁸⁴

These sections go further than prohibiting counties from applying a bag ban and extend the prohibition to cities as well. It is also important to note that the House did not seek to amend any parts of the Ohio Revised Code relating to business dealings, but rather sections which deal directly with municipal and county Home Rule powers.

The Bill was sponsored by Representatives George Lang and Don Jones, as well as eighteen co-sponsors.⁸⁵ Interestingly, neither the sponsors, nor any of the cosponsors represented Cuyahoga County. The Bill was passed by the Ohio House of Representatives on December 11, 2019 by a vote of 57-35.⁸⁶ Ohio Governor Mike DeWine originally opposed the Bill, believing that it interfered with the constitutional Home Rule powers of Ohio cities.⁸⁷ As a result, the Bill was amended, and in 2020, the Ohio Senate approved the “banning the ban” bill, but with amendments.⁸⁸ These amendments related to a sunset provision for the final version of the statute enacted.⁸⁹

The Bill’s supporters believed that the statute would help businesses.⁹⁰ One of the sponsors, Representative Don Jones said, “[w]hen 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.”⁹¹ Along with the representatives, several pro-business groups in Ohio came out in support of the Bill, including the Ohio Chamber of Commerce, NFIB Ohio, the Ohio Manufacturers’ Association, the Ohio Council of Retail Merchants, and the Ohio Beverage Association.⁹²

⁸⁴ H.R. 242, 133rd Gen. Assemb., Reg. Sess. (Ohio 2019).

⁸⁵ *Id.*

⁸⁶ Randy Ludlow, *Ohio House Passes Ban on Plastic Bag Bans*, COLUMBUS DISPATCH, <https://www.dispatch.com/story/special/2019/12/11/ohio-house-passes-ban-on/2092233007/> (Dec. 12, 2019).

⁸⁷ *Id.*

⁸⁸ Ohio House of Representatives, *Jones’s Bill to Ban Fees on Plastic Bags Signed into Law*, DOW JONES NEWS (Oct. 13, 2020), <https://ohiohouse.gov/members/don-jones/news/jones-bill-to-ban-fees-on-plastic-bags-signed-into-law-104254>.

⁸⁹ *Id.*

⁹⁰ Ben Deeter, *Some GOP Lawmakers in Ohio Seek to Stop Local Plastic-Bag Bans, Taxes*, COLUMBUS DISPATCH (July 17, 2019), <https://web.archive.org/web/20190622223125/https://www.dispatch.com/news/20190617/some-gop-lawmakers-in-ohio-seek-to-stop-local-plastic-bag-bans-taxes>.

⁹¹ *Id.*

⁹² *Id.*

III. ANALYSIS

A. *Tiers of Home Rule Powers in Ohio*

Because of the timing of the COVID-19 pandemic and the later amendment to the Ohio legislation banning bans on plastic bags, the courts were never confronted with a challenge to the statute based on Home Rule. Moreover, rather than challenging the Cuyahoga County ban on the basis of a violation of “Home Rule,” municipalities in Cuyahoga County merely passed ordinances opting out of the ban.⁹³ Thus, the banning of plastic bags and the responsive banning of the ban raises interesting issues of Home Rule analysis that have yet to be resolved by precedent in Ohio law.

There are very few cases dealing with the powers of a county charter in contrast to a municipality. This is, in large part, because only two counties in Ohio have a charter: Summit County and Cuyahoga County.⁹⁴

One case involving a County’s powers was decided in 1982 by the Ninth Appellate District in Summit County.⁹⁵ In *Akron-Canton Chapter Am. Subcontractors Ass’n v. Morgan*, the Summit County Council enacted an ordinance to build a new jail and designated a vacant county building as a temporary jail site.⁹⁶ However, the proposed temporary site required extensive construction work to be made suitable for use as a jail.⁹⁷ The Summit County Council enacted another ordinance to repair and alter the building.⁹⁸ After finding out how long it would take to source competitive bids, the Council passed yet another ordinance, this time allowing the solicitation of bids without advertisement and designated the ordinance as emergency legislation.⁹⁹ Plaintiffs (the Akron-Canton American Subcontractors Association) brought this case forward on the basis that the Council did not follow the state laws of competitive bidding and did not have the power to circumvent these laws.¹⁰⁰ The lower court found in favor of the Defendants (the County, as represented by County Executive John Morgan.)¹⁰¹

In affirming the lower court, the appellate court focused most of their analysis on the text within the Summit County Charter. The court found that the words of the charter, “confer upon the county the most expansive grant of powers made available

⁹³ Steer, *supra* note 73.

⁹⁴ See Khabir Bhatia, *What is a County Executive and Why Do Only Two Counties Have One?*, WKSU: IDEASTREAM (Oct. 20, 2016), <https://www.wksu.org/government-politics/2016-10-20/what-is-a-county-executive-and-why-do-only-two-ohio-counties-have-one>.

⁹⁵ See generally *Akron-Canton Chapter Am. Subcontractors Ass’n v. Morgan*, No. 10724, 1982 Ohio App. LEXIS 12232 (Ohio Ct. App. Sept. 1, 1982).

⁹⁶ *Id.* at *1-2.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at *3.

¹⁰⁰ *Id.* at *3.

¹⁰¹ *Id.* at *1.

to a county by the Constitution.”¹⁰² The charter specifically stated that Summit County has, “all powers specifically conferred by this charter . . . including the concurrent exercise by the County of all or any powers vested in municipalities by the Ohio Constitution . . .”¹⁰³ Because of this expansive language, the court stated, “[t]he County Charter grants not only all of the powers of a county, but also all of the powers of a municipality.”¹⁰⁴ The court did not, however, phrase its reasoning in terms of any type of Home Rule protection or pre-emption.¹⁰⁵

In comparing the language of Summit County’s Charter to Cuyahoga County’s charter, there is nearly identical phrasing. Article 1, Section 1.01 of the Cuyahoga County Charter states:

The County may exercise all powers specifically conferred by this Charter or incidental to powers specifically conferred by this Charter and all other powers that the Constitution and laws of Ohio now or hereafter grant to counties to exercise or do not prohibit counties from exercising, including the concurrent exercise by the County of all or any powers vested in municipalities by the Ohio Constitution or by general law.¹⁰⁶

Because of the identical language found in both charters, it is plausible to suggest that, even if the Ninth Appellate District Court did not specifically mention “Home Rule,” courts should be using existing Home Rule case law to resolve conflicts between the various tiers of statutes and ordinances. The county charter grants the Cuyahoga County Council the powers of a municipality.¹⁰⁷ Charters may vest the county with some or all of the powers given by the state to municipalities.¹⁰⁸ A Home Rule charter can vest these powers concurrently so that the autonomy of existing municipalities, such as the City of Cleveland, is not jeopardized.¹⁰⁹ Thus, it is fair to suggest that counties with charters have the same classification as a municipality for purposes of asserting that a state statute might violate the Home Rule of that chartered County.

B. Traditional Home Rule Analysis Under Ohio Law

When analyzing a challenge based on Home Rule rights, a court must first determine whether the ordinance in question involves an issue of purely local self-

¹⁰² *Id.* at *7.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at *11.

¹⁰⁵ *Id.*

¹⁰⁶ CUYAHOGA COUNTY CHARTER, art. I, §1.01.

¹⁰⁷ *Id.*

¹⁰⁸ See Stephen Cianca, *Home Rule in Ohio Counties: Legal and Constitutional Perspectives*, 19 DAYTON L. REV. 533, 548 (1994).

¹⁰⁹ *Id.* at 555.

governance or an exercise of local police power.¹¹⁰ If a “conflicting city ordinance relates solely to self-government, the analysis stops, because the [Ohio] Constitution authorizes a municipality to exercise all powers of local self-government within its jurisdiction.”¹¹¹ If the ordinance relates to the police power, a municipal ordinance in conflict must yield to a general state law.¹¹²

In order to determine if an ordinance is a general law, the Ohio Supreme Court set out a three-part test in *Canton v. State*.¹¹³ The Court stated, “[a] state statute takes precedence over a local ordinance when (1) the ordinance is in conflict with the statute, (2) the ordinance is an exercise of the police power, rather than of local self-government, and (3) the statute is a general law.”¹¹⁴

The phrase “general law” in part three of the Canton test was further defined as being assessed by a four-prong test¹¹⁵ To constitute a general law, the state statute must:

- (1) be part of a statewide and comprehensive legislative 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 of conduct upon citizens generally.¹¹⁶

If, after analysis, the state statute constitutes a general law, the court can move onto a conflict analysis, as established in *Struthers v. Sokol*.¹¹⁷ The court stated, “[n]o real conflict can exist unless the ordinance declares something to be right which the state law declares to be wrong, or vice versa. There can be no conflict unless one authority grants a permit or license to do an act which is forbidden or prohibited by the other.”¹¹⁸ In what has sometimes been called a “head-on collision test,” a municipal law will only be invalidated if there is a “direct confrontation” with an area of law that the state has pre-empted by its own legislation.¹¹⁹

Since *Struthers* was decided in 1923, assessing conflict analysis has evolved. In *American Financial Services v. Cleveland*, the Ohio Supreme Court stated that a

¹¹⁰ Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d 776, 780 (Ohio 2006).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ 766 N.E.2d 963, 966 (Ohio 2002).

¹¹⁴ *Id.*

¹¹⁵ *See id.* at 967–68.

¹¹⁶ *Id.*

¹¹⁷ *See Struthers v. Sokol*, 140 N.E. 519, 520 (Ohio 1923).

¹¹⁸ *Id.* at 521.

¹¹⁹ Mahoney, *supra* note 24, at 125.

conflict-by-implication test also exists.¹²⁰ The court cited various examples of situations where there was partial pre-emption by the state that would not invalidate a municipal ordinance, but also concluded that in some situations, the relationship of a municipal ordinance to a state statute meant that the municipal ordinance *would* be invalidated.¹²¹ The court specifically stated, “we conclude that any local ordinances that seek to prohibit conduct that the state has authorized are in conflict with the state statutes and are therefore unconstitutional.”¹²² The implication test is complex and ambiguous leading to confusion in Ohio’s courts. Since *American Financial Services*, the lower courts have used both the head-on conflict test and the conflict-by-implication test, sometimes using both tests in the same case.¹²³

This confusion was addressed by the concurrence in *American Financial Services*, which discussed the lack of guidance regarding pre-emption in Ohio.¹²⁴ Justice O’Conner suggested a two-pronged test to signal that an issue is a statewide concern: “(1) [a] need for uniform regulation exists and (2) any local regulation of the matter would have extraterritorial effects[.]”¹²⁵ that is, the statute has implications “beyond the scope of any municipality’s local self-government or police powers.”¹²⁶ Despite this suggestion, no bright line test has yet been adopted, although various courts have examined whether a municipal ordinance should be considered invalid because it has extraterritorial effects.¹²⁷

C. Applying the Home Rule Analysis to the Original Ban on Bag Bans

Although the original ban on bans was never challenged, Governor DeWine was correct in concluding that it likely violated the Home Rule provision of the Ohio Constitution. First, the court would have decided whether there was a conflict with

¹²⁰ *Am. Fin. Servs. Ass’n*, 858 N.E.2d at 784.

¹²¹ *Id.* (citing *Schneiderman v. Sesanstein*, 167 N.E. 158 (Ohio 1929) (finding municipal ordinance regarding speed limited was pre-empted by state law); *Neil House Hotel Co. v. Columbus*, 58 N.E.2d 665, 668 (Ohio 1944) (finding municipal ordinance setting time for liquor sales was pre-empted by state law setting time for liquor sales); *Sheffield v. Rowland*, 716 N.E.2d 1121, 1124 (Ohio 1999) (finding that construction and demolition business could not be restricted from operating in a county because it was licensed as a state-authorized facility); *Middleburg Hts. v. Ohio Bd. of Bldg. Stds.*, 605 N.E.2d 66, 68 (Ohio 1992) (finding that municipal regulation that exceeded state minimum standards of state ordinance was valid exercise of municipal power).

¹²² *Am. Fin. Servs. Ass’n*, 858 N.E.2d at 785.

¹²³ See *Mahoney*, *supra* note 24, at 125.

¹²⁴ *Am. Fin. Servs. Ass’n*, 858 N.E.2d at 786.

¹²⁵ *Id.*

¹²⁶ *State ex rel. Evans v. Moore*, 431 N.E.2d 311, 311 (Ohio 1982) (syllabus).

¹²⁷ See generally *id.* at 312–13 (citing *Cleveland Elec. Illuminating Co. v. Painesville*, 239 N.E.2d 75, 78 (Ohio 1968); see also *Beachwood v. Bd. of Elections*, 148 N.E.2d 921, 923 (Ohio 1958).

state law.¹²⁸ A conflict exists if there is a direct conflict, or an implied conflict between the municipal ordinance and a state statute.¹²⁹ In this instance, it does not matter if the court would have used a direct or implied conflict test. The state statute specifically prohibited the actions of the municipality as it stated that “[n]o county that has adopted a charter . . . may impose a fee, tax, assessment, or other charge on auxiliary containers.”¹³⁰ As such, there appears to be a very clear conflict between the state statute and the County ordinance.

Next, a court would have examined whether the statute in question was a matter of purely local self-governance, or an exercise of the police powers.¹³¹ Historically, matters of local self-governance have dealt with municipality employees or contracts.¹³² However, the county would have relied on its assertion that it had power to pass laws related to police, sanitary, or other similar laws.¹³³ Because the bag ban targets plastic bags and creates fines for their use,¹³⁴ the county could state that the ordinance was validly enacted under the police powers of the county.

Finally, to establish that the statute is a general law, the state would likely have argued that bag bans are a matter of statewide concern. While bags were to be banned within county limits, the state would argue that this affects the statewide economy, as many stores have locations in different counties throughout the state (i.e., “extraterritorial affect”). However, in order to be successful, the state would have to argue that the ban on bag bans was a general law affecting the welfare of citizenry of

¹²⁸ *Canton v. State*, 766 N.E.2d 963, 966 (Ohio 2002).

¹²⁹ *Am. Fin. Servs. Ass'n*, 858 N.E.2d at 784–86.

¹³⁰ The original version of H.B.242 did not have a limitation on the ban period. The modified and adopted version read:

For twelve months after the effective date of the enactment of this section by H.B. 242 of the 133rd general assembly, no county that has adopted a charter under Section 3 of Article X, Ohio Constitution, may impose a fee, tax, assessment, or other charge on auxiliary containers, on the sales, use, or consumption of such containers, except as authorized in Chapters 5739. and 5741. of the Revised Code, or on the basis of receipts received from the sale of such containers. As used in this section, “auxiliary container” has the same meaning as in section 3767.32 of the Revised Code.

OHIO REV. CODE ANN. § 301.30.

¹³¹ *Am. Fin. Servs. Ass'n v. City of Cleveland*, 858 N.E.2d 776, 780 (Ohio 2006).

¹³² *See generally* *Northern Ohio Patrolmen's Benevolent Ass'n v. Parma*, 402 N.E.2d 519, 522–24 (Ohio 1980).

¹³³ *See, e.g., Akron-Canton Chapter Am. Subcontractors Ass'n v. Morgan*, No. 10724, 1982 Ohio App. LEXIS 12232 (Ohio Ct. App. Sept. 1, 1982).

¹³⁴ CUYAHOGA, OHIO ORDINANCE § 1304.03 (“[A] written warning for the first violation, a civil fine of up to \$100 for a second violation, and a civil fine of up to \$500 for each subsequent violation.”).

the state and that it would effectively pre-empt any county (or municipal) ordinances that conflicted with it.¹³⁵

In order to determine whether a law is a general law, a court would apply the four-pronged test established in *Canton*.¹³⁶ The first prong is that the law in question “be part of a statewide and comprehensive legislative enactment.”¹³⁷ For example, in *American Financial Services*, the state passed an ordinance requiring certain disclosures on loans.¹³⁸ The city of Cleveland attempted to go further and make more requirements of lenders.¹³⁹ Eventually, the court held that the Cleveland ordinance was in conflict with the state statute regarding lending because the ordinance sought to prohibit what the state statute allowed.¹⁴⁰

In contrast to *American Financial Services*, the original HB 242 was not a part of a comprehensive legislative enactment and is unlikely to meet prong one of the *Canton* test. The Bill was not written into chapters of the Ohio Revised Code that dealt with health and safety.¹⁴¹ Rather, the Bill seemed only intended to amend the Code to specifically limit one aspect of county power.¹⁴² State lawmakers would likely argue that this affected the state economy, and thus, was part of the statewide plan. In fact, HB 242 did amend other individual provisions of the Ohio Revised Code related to authority to use and the taxation of “auxiliary container[s]” for litter and other items related to trash disposal.¹⁴³ The Bill also endeavored to restrict municipalities from imposing fines in conflict with restrictions contained within the general powers of the state.¹⁴⁴ However, there are no indications that this was meant to promote anything other than a control on county and municipal powers. Thus, it is unlikely that the Bill

¹³⁵ This is what the state of South Carolina attempted to do when it proposed a statute that would pre-empt any legislation that a municipality enacted related to banning plastic bags. See Madison Guyton, *Bans on Bans: Plastic Bags, Power, and Home Rule in South Carolina*, 71 S.C. L. REV. 801, 823–25 (2020).

¹³⁶ *Canton*, 766 N.E.2d at 968.

¹³⁷ *Id.*

¹³⁸ See *Am. Fin. Servs. Ass'n*, 858 N.E.2d at 778.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 786.

¹⁴¹ Title 37 of the Ohio Revised Code covers “Health-Safety-Morals.” See generally OHIO REV. CODE ANN. § 3736.01 (covering recycling, waste reduction, and litter prevention).

¹⁴² The Bill was codified into Title 3 of the Ohio Revised Code—Counties. See generally OHIO REV. CODE ANN. § 301.

¹⁴³ The Preamble to H.B. 242 states that it is, “[t]o amend sections 504.04, 715.013, and 3767.32 and to enact section 301.30 of the Revised Code to specify the authority to use an auxiliary container, to temporarily prohibit the imposition of a tax or fee on those containers, and to apply existing anti-littering law to those containers.” H.B. 242, 133rd Gen. Assemb., Reg. Sess. (Ohio 2021).

¹⁴⁴ OHIO REV. CODE ANN. § 504.04 (2021).

would have met the first prong of the *Canton* test as the statute being “part of a statewide and comprehensive legislative enactment.”¹⁴⁵

The second prong asks the court to assess whether the statute in question applies “to all parts of the state alike and operate[s] uniformly throughout the state.”¹⁴⁶ A court would have likely found that the state would meet this prong of the test. HB 242 did not target Cuyahoga County specifically, but rather banned all counties and municipalities from banning plastic bags (“No county”).¹⁴⁷

Within the third prong, the court considers whether the statute “set[s] forth police, sanitary, or similar regulations, rather than purport[s] only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations.”¹⁴⁸ The state would fail were a court to assess this prong. The text of HB 242 does not set forth any policy, sanitary, or similar regulations.¹⁴⁹ Rather, the Bill only limits the power of municipal corporations and counties to ban plastic bags and to impose fines on their use.¹⁵⁰

The fourth and final prong of the *Canton* test assesses whether the statute “prescribe[s] a rule of conduct upon citizens generally.”¹⁵¹ This prong considers whether the statute in question applies to all citizens or a select group. In attempting to define this concept, in *Canton*, the Ohio Supreme Court cited *Youngstown v. Evans*¹⁵² and *Linndale v. State*.¹⁵³ In *Youngstown v. Evans*, the court considered a municipal ordinance that conflicted with state statute that provided penalties for transporting liquor.¹⁵⁴ The *Youngstown* court concluded that the statute in question was “not a general law in the sense of prescribing a rule of conduct upon citizens generally. It is a limitation upon law making by municipal legislative bodies.”¹⁵⁵ Similarly, in *Linndale*, the court considered a state statute prohibiting the issuing of

¹⁴⁵ *Canton v. State*, 95 Ohio St. 3d 149, 2002-Ohio-2005, 766 N.E.2d 963, at ¶ 21.

¹⁴⁶ *Id.*

¹⁴⁷ OHIO REV. CODE ANN. § 301.30 (2021).

¹⁴⁸ *Canton*, 95 Ohio St. 3d 149 at ¶ 21.

¹⁴⁹ Although an argument could possibly be made that allowing the use of plastic bags is, in a sense, a “sanitary regulation,” H.B. 242 was never phrased as an attempt to regulate plastic bag usage (which would likely have been contained in Title 37 of the Ohio Revised Code), but as restriction on the powers of municipalities. *See generally* H.B. 242, 133rd Gen. Assemb., Reg. Sess. (Ohio 2021).

¹⁵⁰ *Id.* at § 3(B).

¹⁵¹ *Canton*, 95 Ohio St. 3d 149 at ¶ 21.

¹⁵² *Id.* at ¶ 34; *See generally* *Youngstown v. Evans*, 168 N.E. 844 (Ohio 1929).

¹⁵³ *Canton*, 95 Ohio St. 3d 149; *See generally* *Vill. of Linndale v. State*, 706 N.E.2d 1227 (Ohio 1999).

¹⁵⁴ *Canton*, 95 Ohio St. 3d 149 at ¶ 37; *Youngstown*, 168 N.E. at 844–45.

¹⁵⁵ *Youngstown*, 168 N.E. at 845.

certain traffic tickets within a municipality.¹⁵⁶ The court ultimately concluded that the statute in question was not “a rule of conduct upon citizens generally” but on what the municipality was allowed to do and therefore found the statute violated Linndale’s rights of Home Rule.¹⁵⁷

Applying this standard, the court in *Canton*, which was considering a situation where the City of Canton updated an ordinance to ban manufactured homes from city limits, found that the statute in question was violative of the municipality’s Home Rule powers.¹⁵⁸ The court reiterated that, unless a state statute relates to the conduct of citizens generally as opposed to what municipal legislatures may be allowed to do, a state statute will not be able to pre-empt the Home Rule powers of a municipality.¹⁵⁹

It is unlikely that HB 242 could have passed the fourth prong of the *Canton* test. Similar to the situations described in *Canton*, the language in HB 242 did not prescribe any conduct upon citizens but only limited the powers of municipal and county governments.¹⁶⁰ Because of the similarities with previous case law analyzing Home Rule, there would have been a great likelihood that HB 242, codified as O.R.C. § 301.30, would have been found violative of the Ohio Constitution.

D. Municipality Opt-Outs and Home Rule

Ultimately, neither HB 242 nor the final codified version of the Bill—O.R.C. 301.30—were challenged in court. Because of the expiration provision within the modified version of the statute,¹⁶¹ there was no need to challenge the validity of the statute. However, a second potential Home Rule challenge arose when the moratorium on bag bans expired and various municipalities began to opt-out of the ban through local ordinance.

Although case law supports that counties with charters have the same Home Rule powers as municipalities,¹⁶² there is no case law analyzing any type of pre-emption power should a county pass an ordinance that conflicts with a municipality’s ordinance. However, both the Ohio Constitution and the Cuyahoga County Charter appear to answer the question of Home Rule pre-emption directly by incorporation of the following language in the respective governance provisions:

In case of conflict between the exercise of powers granted by such charter and the exercise of powers by municipalities or townships, granted by the constitution or general law, whether or not such powers are being exercised

¹⁵⁶ *Vill. of Linndale*, 706 N.E.2d at 1229.

¹⁵⁷ *Id.* at 1230.

¹⁵⁸ *Canton*, 95 Ohio St. 3d 149 at ¶ 1.

¹⁵⁹ *Id.* at ¶ 37.

¹⁶⁰ *See id.*; *see generally* H.B. 242.

¹⁶¹ H.B. 242, 133rd Gen. Assemb., Reg. Sess. (Ohio 2021); *supra* note 149 and accompanying text.

¹⁶² *See generally* Akron-Canton Chapter Am. Subcontractors Ass’n v. Morgan, No. 10724, 1982 Ohio App. LEXIS 12232, at *11–12 (Ohio Ct. App. 1982).

at the time of the adoption of the charter, the exercise of power by the municipality or township shall prevail.¹⁶³

Thus, even if the county may validly pass ordinances and defend them on the basis of Home Rule, the clear language of the governing documents for the state and the county indicate that a municipality's exercise of Home Rule would negate an ordinance enacted by the County Council.

E. Plastic Bag Bans, the Environment, and the Conflict Over Power

Currently, the majority of states that have enacted statewide bag bans are considered “blue states” or those with a more politically liberal legislature.¹⁶⁴ Cities enacting plastic bag bans are usually considered “blue,” even if they are in a politically conservative state.¹⁶⁵ Fifteen states have attempted to pre-empt plastic bag bans by enacting a prohibition on plastic bag bans, or a “ban on bans.”¹⁶⁶ These states are a mix of states that are traditionally considered liberal and some that are traditionally considered conservative.¹⁶⁷

The reasons for attempting to ban plastic bag bans are not as related to divisive politics as one might at first believe. Rather, there are a variety of reasons. These include economic reasons, especially with respect to communities where plastic plants

¹⁶³ OHIO CONST. art. X, § 3; *accord* CUYAHOGA COUNTY CHARTER, art. I § 1.02 (“POWERS LIMITED. This Charter does not empower the County to exercise exclusively any municipal powers nor to provide for the succession by the County to any property or obligation of any municipality or township without the consent of the legislative authority of such municipality or township. In case of conflict between the exercise of powers granted by this Charter and the exercise of powers by municipalities or townships granted by the Constitution or general law, the exercise of powers by the municipality or township shall prevail. The County shall have power to levy only those taxes that counties are by general law authorized to levy.”).

¹⁶⁴ California, Connecticut, Delaware, Hawaii, Maine, New Jersey, New York, Oregon, Rhode Island, and Vermont. *Supra* text accompanying notes 9–10; *see also List of Blue States and Red States in the U.S.*, GKIGS, <https://www.gkgigs.com/list-of-blue-states-and-red-states/> (Jan. 2, 2023).

¹⁶⁵ The politics of urban areas lean toward being liberal, and liberal politics lean towards both environmental protection and governmental regulation to achieve environmental protection. *See* Bryan Caplan, *Why are There Zero Republican Mega-Cities?*, ECONLIB (Sept. 16, 2021), <https://www.econlib.org/why-are-there-zero-republican-mega-cities/>; *see* Nawrotzki, *Politics of Environmental Concern*, 25 *ORGAN ENV'T.* 286, 288 (“[In general,] liberals show higher levels of environmental concern than conservatives.”).

¹⁶⁶ *See generally Eight States Ban Plastic Bags, but More Prohibit Local Bans*, IER (Oct. 8, 2020), <https://www.instituteforenergyresearch.org/uncategorized/eight-states-ban-plastic-bags-but-more-prohibit-local-bans/>.

¹⁶⁷ Colorado, Minnesota, Wisconsin, and Michigan, often considered “blue” states, have legislation pre-empting plastic bag bans. *Supra* note 164; *see also id.* However, legislation has been introduced that would allow communities in Michigan to enact legislation to ban plastic bags. *Supra* note 164; *see also New Bill Would Allow Plastic Bags to be Banned in Michigan Communities*, WXYZ DETROIT, <https://www.wxyz.com/news/new-bill-would-allow-plastic-bags-to-be-banned-in-michigan-communities> (Apr. 22, 2021, 11:04 AM).

exist and community members are employed.¹⁶⁸ They also include a legitimate concern for low-income residents who would be penalized by being forced to purchase reusable bags.¹⁶⁹ Those who proposed the original legislation in Ohio could not be said to be anti-environment or engaging in partisan politics. Many supporting the ban on the ban were concerned about the effects of the local ordinances on various parts of the population, including smaller grocery stores.¹⁷⁰ Some wished that the problem would be studied more and were concerned about the communities they represented.¹⁷¹ Governor DeWine was concerned about COVID-19, as well as Home Rule.¹⁷² Ultimately, the ban on any plastic bag ban was allowed to expire.¹⁷³

Other states are seeing similar tension that often has nothing to do with climate science or is purely related to divisiveness in politics. Two particular situations are worthy of note and exemplify the difficulties of finding any uniformity in the desire to ban single use plastics. The first involves a conflict between Philadelphia and the State of Pennsylvania. The second involves a similar situation in South Carolina regarding the conflict between state and local powers.

In the first situation, the City of Philadelphia enacted a plastic bag ban in 2019.¹⁷⁴ Several other municipalities joined Philadelphia in enacting bans.¹⁷⁵ In response, the

¹⁶⁸ See, e.g., *How Plastic Bans Impact the Economy*, THISISPLASTICS, <https://thisisplastics.com/economics/how-plastic-bag-bans-impact-the-economy/#:~:text=Proponents%20of%20plastic%20bag%20bans,least%20afford%20to%20pay%20them> (last visited Jan. 23, 2023).

¹⁶⁹ See, e.g., Erin Mundahl, *Boston Bans the Bag: Minority Shoppers Hardest Hit*, INSIDE SOURCES (Dec. 17, 2018), <https://insidesources.com/boston-bans-the-bag-minority-shoppers-hardest-hit/>.

¹⁷⁰ See, e.g., Andrew J. Tobias, *Ohio Legislature Moving Closer to Blocking Plastic Bag Bans*, CLEVELAND.COM (Dec. 3, 2019, 5:56 PM), <https://www.cleveland.com/open/2019/12/ohio-legislature-moving-closer-to-blocking-local-plastic-bag-bans.html>.

¹⁷¹ See Steve Toloken, *Ohio Takes Up Debate on Banning Plastic Bags*, PLASTIC NEWS (Nov. 29, 2018, 1:00 AM), <https://www.plasticsnews.com/article/20181129/NEWS/181129907/ohio-takes-up-the-debate-on-banning-plastic-bag-bans>.

¹⁷² Jo Ingles, *DeWine Will Sign Bill Preventing Local Bans on Plastic Bags*, IDEASTREAM (Sept. 30, 2020, 6:24 PM), <https://www.ideastream.org/news/dewine-will-sign-bill-preventing-local-bans-on-plastic-bags>.

¹⁷³ *Id.*

¹⁷⁴ See Maria Pulcinella, *Philly's Plastic Bag Ban Now Fully in Effect – Enforcement Included*, WHYY PBS (April 1, 2022), <https://whyy.org/articles/philly-plastic-bag-ban-enforcement-exemptions2022/#:~:text=After%20a%20pandemic%2Dinduced%20delay,prohibition%20now%20comes%20with%20consequences>.

¹⁷⁵ Cities included West Chester, Narberth, and Lower Merion. See Max Bennett, *Lower Merion, Others Sue PA Over Plastic Ban Limitations*, PATCH (March 4, 2021, 12:00 PM), <https://patch.com/pennsylvania/ardmore/lower-merion-others-sue-pa-over-plastic-bag-ban-limitations>.

State of Pennsylvania, similar to the state of Ohio, proposed legislation banning cities from banning single-use plastic bags.¹⁷⁶ The City of Philadelphia, along with other municipalities, sued the state.¹⁷⁷ These entities alleged, among other things, the introduction of the legislation itself violated a constitutional provision requiring that each proposed bill relate to only one subject in a bill.¹⁷⁸ Before there was litigation on the issue, the ban on bans expired and the Pennsylvania Legislature did not act to extend it.¹⁷⁹ Philadelphia and surrounding cities began enforcing their plastic ban (as well as a fee for single use straws) in July of 2021.¹⁸⁰

In South Carolina, several cities enacted plastic bag bans in 2019.¹⁸¹ In response to these ordinances and the concerns of retail establishments and plastic manufacturers, members of the South Carolina Legislature proposed a ban on any municipal bans.¹⁸² However, South Carolina's statute was bolder than other similar statutes because the statute overtly proposed to purposely pre-empt any alleged Home Rule defense a municipality might raise. In pertinent part, the statute provides:

Any regulation regarding the use, disposition, sale, or imposition of any prohibition, restriction, fee imposition, or taxation of auxiliary containers must be done only by the General Assembly. This article supersedes and preempts any ordinance enacted by a political subdivision that purports to regulate the use, disposition, sale, or imposition of any prohibition,

¹⁷⁶ Susan Phillips, *State Lawmakers Block Plastic Bag Bans, Like Philadelphia's, in Move One Representative Calls 'Huge Abuse of Power'*, STATE IMPACT PENNSYLVANIA (June 1, 2020, 6:54 PM), <https://stateimpact.npr.org/pennsylvania/2020/06/01/state-lawmakers-block-plastic-bag-bans-like-philadelphias-in-move-one-representative-calls-huge-abuse-of-power/>.

¹⁷⁷ See Bennett, *supra* note 175.

¹⁷⁸ Philadelphia and the other cities alleged that the ban on bans was hidden in a fiscal bill. See Susan Phillips, *Philadelphia, Suburban Towns Sue State Over Moratorium on Plastic Bag Bans*, WHYY PBS (Mar. 3, 2021), <https://whyy.org/articles/philadelphia-suburban-towns-sue-state-over-moratorium-on-plastic-bag-bans/>.

¹⁷⁹ Susan Phillips, *Pa. Efforts to Halt Plastic Bag Bans Recede as Philadelphia Begins to Enact its Own Law*, WHYY PBS (July 1, 2021), <https://whyy.org/articles/pa-efforts-to-halt-plastic-bag-bans-recede-as-philadelphia-begins-to-enact-its-own-law/>.

¹⁸⁰ Kenny Cooper, *Media Borough Becomes Latest Philly-Area Community to Ban Plastic Bags and Straws*, WHYY PBS (July 27, 2022), <https://whyy.org/articles/media-borough-to-ban-plastic-bags-and-straws/>.

¹⁸¹ Isle of Palms was the first to pass a single-use plastics ban. See *Isle of Palms Passes Ban on Single-use Plastic Bags, Plastic Straws*, LIVE5NEWS (June 25, 2019), <https://www.live5news.com/2019/06/26/isle-palms-passes-ban-single-use-plastic-bags-plastic-straws/>.

¹⁸² See generally S.B. 394, Gen. Assemb., 123rd Sess. (S.C. 2019) (giving the General Assembly power to enact regulations regarding the prohibition, restriction, fee, imposition, or taxation on auxiliary containers).

restriction, fee imposition, or taxation of auxiliary containers at the retail, manufacturer, or distributor level.¹⁸³

However, even though the Bill moved forward in the Senatorial process,¹⁸⁴ there has been no action by the Senate since 2019 and the municipalities have been enacting bans on various plastics including plastic bags without any challenges.¹⁸⁵

F. *The Juxtaposition: Home Rule and Plastic Bag Bans*

The existence of Home Rule has presented an interesting backdrop to the tension created by two concepts that at first might seem unrelated: (1) the philosophical debate between what is state and what is municipal authority; and (2) the conflict between those who want to take a step forward in environmental protection and those who do not agree with the steps taken. In terms of the plastic bag bans, it appears as though the push for municipal autonomy has been winning the war. Once the municipalities in Pennsylvania and South Carolina decided to stand their ground when implementing plastic bag bans, the respective state legislatures did not move forward in challenging the municipal authority, nor in attempting to push a political agenda of banning any attempts to ban plastic bags within municipalities.¹⁸⁶

The Ohio Legislature acted similarly, although possibly not predicated on any philosophical reasons regarding the concept of Home Rule. As the “ban the ban” legislation was being introduced, Governor DeWine sent signals that he would not sign the legislation as it was written.¹⁸⁷ Although the pandemic interrupted the debate regarding plastic bags, Governor DeWine eventually made good on his promise not to sign the Bill until it included an expiration date on any bans of plastic bag bans.¹⁸⁸ It

¹⁸³ *Id.* at § 39-17-720 (A).

¹⁸⁴ Seanna Adcox, *SC Bill Voiding Plastic Bag Ban Advances, Setting Up a Floor Fight Next Year*, POST & COURIER (Apr. 11, 2019), https://www.postandcourier.com/politics/sc-bill-voiding-local-plastic-bag-bans-advances-setting-up-a-floor-fight-next-year/article_6b9a22f2-5c7f-11e9-a320-13fc7d3f0057.html.

¹⁸⁵ *See generally* S.B. 394, Gen. Assemb. 123rd Sess. (S.C. 2019).

¹⁸⁶ *See* Phillips, *supra* note 179; *see also* Adcox, *supra* note 184.

¹⁸⁷ *See, e.g.*, Andrew J. Tobias, *Gov. DeWine Favors Letting Ohio Cities Ban Plastic Bags*, CLEVELAND.COM (Dec. 4, 2019, 6:41 PM), <https://www.cleveland.com/open/2019/12/gov-mike-dewine-favors-letting-ohio-cities-ban-plastic-bags.html>; *see also* Laura A. Bischoff, *Gov. DeWine Opposes State Barring Local Bans on Plastic Bags*, DAYTON DAILY NEWS (Dec. 5, 2019), <https://www.daytondailynews.com/news/state--regional-govt--politics/state-lawmakers-seek-block-local-bans-fees-plastic-bags/1GsU3c7AxQtYCO9u2F3KwI/>. Governor DeWine’s signing the original plastic bag ban bill was predicated on the statute’s including a sunset provision within it. *See* WLWT Digital Staff, *Gov. DeWine will sign bill banning bans on single-use plastic bags*, WLWT, <https://www.wlwt.com/article/gov-dewine-will-sign-bill-banning-bans-on-single-use-plastic-bags/34211592#> (Sept. 29, 2020, 6:50 PM).

¹⁸⁸ *See, e.g.*, Marc Kovac & Randy Ludlow, *Due to Pandemic, DeWine to Sign Statewide Ban on Plastic Bag Bans Despite Veto Request*, COLUMBUS DISPATCH <https://www.dispatch.com/story/news/politics/state/2020/09/28/ohio-gov-mike-dewine-sign-statewide-ban-plastic-bag-bans-despite-concerns-of-environmentalists/3560654001/> (Sept. 28, 2020, 2:01 PM).

is difficult to know whether Governor DeWine sensed a Home Rule challenge to the original Bill, or whether his actions were just good business.¹⁸⁹ As the pandemic started to dissipate, it became clear that many businesses that might otherwise oppose a plastic bag ban might be in favor of banning plastic bags.¹⁹⁰ As a result, one can hypothesize that Governor DeWine no longer needed to fear the backlash from members of the traditional conservative base regarding environmental restrictions.

Home Rule, in relation to plastic bags specifically, has played out in an interesting way across the United States. The key to whether there can be a successful, wide-reaching ban has had little to do with partisan politics, but whether the critical voting mass of a municipality, county, or state supports a ban. Bans not only exist in traditionally liberal states (e.g., California) but exist or are being called for in states normally associated with conservative agendas (e.g., North and South Carolina).¹⁹¹

That is not to say that states are unconcerned about traditional bases in relation to environmental protection, or, more specifically, plastic bag regulation.¹⁹² For example, South Carolina attempted to stop blanket bans on plastic bags by attempting to set up plastics regulation as an area of law reserved to the State Assembly as opposed to the municipalities.¹⁹³ However, any showdown as far as defining political powers never came to fruition. The original “ban on bans” and attempt at pre-empting municipal legislation on plastic bags never even came up for a Senate vote.¹⁹⁴

Perhaps a lot of the vituperative fire that one might have expected to see in a fight over power was lost because of the COVID-19 pandemic. Prior to the pandemic, it did look like there was going to be a showdown predicated on partisan politics theories of governing.¹⁹⁵ However, the pandemic caused a crisis situation on what would have

¹⁸⁹ See, e.g., Ryan Haidet, *No More Plastic Grocery Bags: Giant Eagle Changes Shopping Policy at Cuyahoga County Stores*, WKYC, <https://www.wkyc.com/article/life/shopping/giant-eagle-bans-single-use-plastic-grocery-bags-cuyahoga-county-stores/95-56774b73-d9af-4533-a3bf-168631fcd088> (Apr. 22, 2022, 6:12 PM).

¹⁹⁰ *Id.*

¹⁹¹ See generally Will Atwater, *Environmentalists Say Policies Limiting Single-use Plastics Are Necessary to Curb NC's Growing Microplastics Problem*, NC HEALTH NEWS (Aug. 9, 2022), <https://www.northcarolinahealthnews.org/2022/08/09/environmentalists-say-policies-limiting-singl-plastics-are-necessary-to-curb-ncs-growing-microplastics-problem/>; *Wegman's Eliminating Plastic Bags at All North Carolina Stores as of July 1*, WRAL, <https://www.wral.com/wegmans-eliminating-plastic-bags-at-all-north-carolina-stores-as-of-july-1/20327984/> (July 8, 2022).

¹⁹² The North Carolina General Assembly removed the plastic bag ban that had existed in the Outer Banks for nine years. See *Legislature Overrides Cooper's Veto of HB 56, Repeals OBX Plastic Bag Ban*, SIERRA CLUB NORTH CAROLINA (Oct. 4, 2017), <https://contentdev.sierraclub.org/www/north-carolina/blog/2017/10/legislature-overrides-cooper-s-veto-h-56-repeals-obx-plastic-ban-ban>.

¹⁹³ See Guyton, *supra* note 135.

¹⁹⁴ See Atwater, *supra* note 191.

¹⁹⁵ See Laura Hancock, *Is the Plastic Bag Bill the Ohio Legislature's Latest Attempt to Prevent Home Rule in Cuyahoga County?*, CLEVELAND.COM,

been various battlefronts. “[S]ingle use” everything became necessary for health and safety,¹⁹⁶ and many argued that restrictions on plastics would put industries out of work at a very critical time period.¹⁹⁷

Also, even though environmentalism is often regarded as a liberal cause, coastal and beach communities in traditionally red states have long recognized the need to preserve their environment in order to preserve their habitat and economic welfare.¹⁹⁸ As a result, beach communities especially have pushed to enact local bans on plastic bags.¹⁹⁹ State legislatures in traditionally red states have recognized the value of tourism as an economic value and thus, have not pushed hard on attempting to curb Home Rule powers of municipalities enacting legislation about plastic bags.²⁰⁰

Ohio, specifically, presents an interesting juxtaposition. Several municipalities have opted out of the Cuyahoga County ordinance and there have been no legal challenges to the municipalities.²⁰¹ Although a few communities regarded as conservative have opted out of the ban (e.g., Strongsville and North Royalton²⁰²),

<https://www.cleveland.com/open/2019/05/is-the-plastic-bag-bill-the-ohio-legislatures-latest-attempt-to-prevent-home-rule-in-cuyahoga-county.html> (May 23, 2019, 11:16 AM).

¹⁹⁶ See, e.g., Yiming Peng et al., *Plastic Waste Release Caused by COVID-19 and its Fate in the Global Ocean*, PNAS (Nov. 8, 2021), <https://www.pnas.org/doi/10.1073/pnas.2111530118#:~:text=The%20recent%20COVID%2D19%20pandemic,tons%20entering%20the%20global%20ocean.>

¹⁹⁷ See, e.g., Elaine S. Povich, *Pandemic-Paused Plastic Bag Bans Ripped Anew by Critics*, PEW (March 30, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/03/30/pandemic-paused-plastic-bag-bans-ripped-anew-by-critics>.

¹⁹⁸ See, e.g., thodges, *Surfrider Charleston on the Front Lines of Battle Against Plastics*, SURFRIDER FOUNDATION (Apr. 27, 2018), <https://www.surfrider.org/coastal-blog/entry/surfrider-charleston-on-the-front-lines-of-the-battle-against-plastic-pollu>.

¹⁹⁹ See, e.g., *Plastic Bag Ban and Reusable Bag Program*, CITY OF MANHATTAN BEACH (CALIFORNIA), <https://www.manhattanbeach.gov/departments/environmental-sustainability/plastic-bag-ban-and-reusable-bag-program> (last visited Jan. 23, 2023); Ashlea Kosikowski, *Group Pushes Plastic Bag Ban*, WECT NEWS, <https://www.wect.com/story/15594704/group-pushes-plastic-bag-ban/> (Oct. 4, 2011, 10:10 PM); Rick Crawford, *South Carolina Beach Communities Pushing For Plastic Bag Ban*, EMERGER STRATEGIES (Nov. 8, 2017), <https://emergerstrategies.com/south-carolina-beach-communities-pushing-for-plastic-bag-bans/>; Jessica Clark, *Plastic Bag Ban Proposed in St. Augustine Beach*, WLTV FIRST COAST NEWS, <https://www.firstcoastnews.com/article/news/local/plastic-bag-ban-proposed-in-st-augustine-beach/77-467130433> (Aug. 25, 2017, 9:54 PM).

²⁰⁰ See Adcox, *supra* note 184; *Will South Carolina Put an End to Plastic Bag Bans?*, FACTORY DIRECT PROMOS, <https://www.factorydirectpromos.com/blog/will-south-carolina-put-an-end-to-plastic-bag-bans/> (last visited Jan. 23, 2023).

²⁰¹ See Hancock, *supra* note 195.

²⁰² See Bob Sandrick, *North Royalton Opts Out of Cuyahoga’s Plastic Bag Ban*, CLEVELAND.COM, <https://www.cleveland.com/community/2022/07/north-royalton-opts-out-of-cuyahoga-countys-plastic-bag-ban.html> (July 5, 2022, 1:26 PM).

various communities regarded as liberal have also opted out.²⁰³ The most unlikely suspect is the City of Cleveland, which used the “Home Rule” argument to opt out of restrictions when they determined that those restrictions were not right for its citizenry.²⁰⁴ However, even the City of Cleveland did not dispute the need to reduce plastic waste from the environment. The City voted to delay the implementation of any plastic bag ban restriction until the problem could be further studied.²⁰⁵

Perhaps the plastic bag ban issue is just not politically contentious enough to generate disputes over political power. There are few legislators who would argue that plastic bags in our environment are not a problem, and it has been hard to argue that bans are not appropriate when various businesses are supporting bans. Although bans on bags began as a political “us v. them” battle, few states persisted in the campaign, at least as it concerns plastic bags.

However, a new issue has emerged that does have a larger capacity for a truer “us v. them” battleground. In late October of 2021, the Ohio Legislature enacted a law conferring authority on county commissioners to ban alternative energy within unincorporated areas in their counties.²⁰⁶ To date, ten counties have decided upon various alternative energy bans.²⁰⁷ Only one of these counties (Crawford) intends to put the measure on the ballot, while another county (Union) acted when petitioned by its constituents.²⁰⁸

Unincorporated townships with populations over 2,500 people are generally regarded as having some Home Rule powers, not necessarily much different than incorporated municipalities.²⁰⁹ These powers, similar to other cities within the states, may not conflict with the general laws of the State of Ohio.²¹⁰ Moreover, “unlike

²⁰³ See Robert Higgs, *Cuyahoga County Fears Cleveland May Opt out of Plastics Bag Ban, Diminishing its Effectiveness*, CLEVELAND.COM, <https://www.cleveland.com/cuyahoga-county/2019/11/cuyahoga-county-fears-cleveland-may-opt-out-of-plastic-bag-ban-diminishing-its-effectiveness.html> (Nov. 22, 2019, 1:51 PM).

²⁰⁴ *Id.*

²⁰⁵ See Nick Castele, *Cleveland City Council Shortens Proposed Delay on County's Plastic Bag Ban*, IDEASTREAM, <https://www.ideastream.org/news/cleveland-city-council-shortens-proposed-delay-on-countys-plastic-bag-ban> (Dec. 3, 2019, 1:24 PM).

²⁰⁶ See Jake Zuckerman, *Ten Ohio Counties Ban Wind, Solar Projects Under New State Law*, OHIO CAPITAL JOURNAL (Aug 23, 2022, 3:55 AM), <https://ohiocapitaljournal.com/2022/08/23/nine-ohio-counties-ban-wind-solar-projects-under-new-state-law/>.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ See generally Alyssa Bethel, *Limited Home Rule Townships*, 134 LSC MEMBERS BRIEF 1 (Dec. 8, 2021), <https://www.lsc.ohio.gov/documents/reference/current/membersonlybriefs/134%20Limited%20Home%20Rule%20Townships.pdf>.

²¹⁰ *Id.*

municipal corporations, townships are limited to local self-government matters that do not conflict with statutory provisions.”²¹¹

The chartered counties in Ohio, Summit and Cuyahoga, have specifically delineated Home Rule powers.²¹² By enacting legislation allowing counties to ban alternative energies in unincorporated townships, the Ohio Legislature has essentially conferred a more specific Home Rule power on counties without charters and potentially removed those same powers from unincorporated townships.

Currently, the counties choosing to ban alternative energy would be categorized as falling into “conservative.”²¹³ As a result, it is not likely that the unincorporated townships will be challenging the legislation as being violative of their Home Rule; however, as the need for alternative energy sources develops in the future, there may be Home Rule challenges to this legislation. This would especially be true if cultivating alternative energy sources would become economically advantageous, which may prove sooner than later because of recent federal government incentives promoting the development of alternative energy sources.²¹⁴

Of the two chartered counties only Summit County has unincorporated townships.²¹⁵ There is no prohibition in the current statute regarding whether the chartered counties may enact legislation banning alternative energy sources; however, Summit County is not one of the counties that has enacted a ban. Because of the newness of the statute, and because neither one of the chartered counties opposes alternative energy sources, the conflict between Home Rule and plastic bag bans will likely play out much differently than the issues related to banning alternative energy sources. The ban on alternative energy sources has demonstrated that politics has again returned to issues concerning preserving the environment as well as Home Rule power.²¹⁶

²¹¹ *Id.* at 3.

²¹² OHIO CONST. art. X, § 3.

²¹³ See, e.g., *Decision 2020, Ohio Election Results 2020*, NBCNEWS, <https://www.nbcnews.com/politics/2020-elections/ohio-results> (last visited Jan. 23, 2023); see also *Politics and Voting in Medina, Ohio*, BEST PLACES, <https://www.bestplaces.net/voting/city/ohio/medina> (last visited Jan. 23, 2023).

²¹⁴ First Solar has Solar Energy plants in Ohio and plans to invest an additional \$185 million dollars in plants in Ohio. See NBC24 Staff, *First Solar to Invest up to \$1B in New Plant, \$185M in Ohio Facilities*, NBC24 NEWS (Aug. 30, 2022), <https://nbc24.com/news/local/first-solar-to-invest-up-to-1b-in-new-plant-185m-in-ohiofacilities#:~:text=Ohio's%20two%20active%20First%20Solar,the%20first%20half%20of%202023>.

²¹⁵ *Sanitary Sewer Services*, COUNTY OF SUMMIT, OHIO, <https://co.summitoh.net/departments/Sanitary-Sewer-Services.html> (last visited Jan. 23, 2023).

²¹⁶ See, e.g., Laura Benschhoff, *Renewable Energy is Maligned by Misinformation. It's A Distraction Experts Say*, NPR MORNING EDITION, <https://www.npr.org/2022/08/24/1110850169/misinformation-renewable-energy-gop-climate> (Aug. 26, 2022, 6:40 AM); see also Kathiann Kowalski, *How Misinformation Propped up Ohio Lawmakers' Latest Attack on Renewables*, ENERGY NEWS NETWORK (July 7, 2021), <https://energynews.us/2021/07/07/how-misinformation-propped-up-ohio-lawmakers-latest-attack-on-renewables/>; Peter Krouse, *Republican-led Effort Singles Out Wind and Solar Power*

IV. CONCLUSION

Although environmentalists in Cuyahoga County might have been disappointed in the lack of complete enforceability of the plastic bag ban, the outcome is legally valid given the existence of the constitutional Home Rule powers. The use of Home Rule powers has been a growing trend across the United States. In many instances, the use has allowed for municipalities to increasingly adopt environmental restrictions without worry that a state would be able to usurp those powers and prevent any environmental action. This is more of a cause for celebration than despair. Statistics indicate that more people than ever are in favor of limiting plastics in our environment, and by mobilizing more grass roots movements, greater strides can be made than would be made in any overarching legislative declarations that do not have the support of the citizenry. In the current age of partisan in-fighting, it seems almost impossible to affect meaningful change at the federal level. It would be beneficial to advocates to pay more attention to the specifics of state law and constitutions and advocate for statutes at the local and state levels.

Nonetheless, the plastic bag issue may be an outlier in the partisan battle over both environmental regulation and powers of governance. Issues related to plastic bag regulation united many constituencies—environmentalists, beach communities in traditionally conservative states, and businesses seeking to enhance their reputation as being pro-environment. Moreover, the COVID-19 pandemic and quarantine derailed the momentum of any true partisan fight that might have otherwise occurred. However, even if a minor victory can be declared regarding banning plastic bags in at least a few cities, the partisan power struggle over Home Rule and environmental regulation has again arisen in Ohio. It is thus likely that interpreting the nature of Home Rule will play a larger role in the near future where control over environmental regulation is concerned.

for Local Control, CLEVELAND.COM (July 12, 2021, 5:30 AM), <https://www.cleveland.com/news/2021/07/republican-led-effort-singles-out-wind-and-solar-power-for-local-control.html>.