IN THE SUPREME COURT OF FLORIDA

CASE NO. SC19-1798

THE CITY OF CORAL GABLES, FLORIDA, a Florida municipality,

L.T. Case No. 3D17-0562

Petitioner,

v.

FLORIDA RETAIL FEDERATION, INC., a Florida not-for-profit corporation and SUPER PROGRESO INC., a Florida for-profit corporation,

Respondents.
_____/

PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

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JURISDICTIONAL STATEMENT

This Court has jurisdiction because the Third District expressly declared three Florida statutory provisions valid in *Florida Retail Federation, Inc. v. City of Coral Gables*, No. 3D17-0562, 2019 WL 3807999 (Fla. 3d DCA Aug. 14, 2019). *See* Art. V § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(i).

STATEMENT OF CASE AND FACTS

The Third District expressly declared sections 500.90, 403.7033, and 403.708(9), Florida Statutes valid (A. 3 ("This appeal concerns the validity and preemptory effect of … three state statutes"), A. 6, 13 ("sections 403.708(9), 403.7033, and 500.90 are constitutional")). It held that all three statutes preempt local regulation of polystyrene (or "Styrofoam"), and thus rescind Florida municipalities' right to control the sale and use of this nonrecyclable material within their borders. The City of Coral Gables (the "City"), seeks review of the Third District's decision because none of the three statutes successfully preempts local polystyrene regulation, and the court's decision wrongly interferes with the City's right to home rule. The Third District's opinion should be reversed.

The specific question presented in the Third District was whether sections 500.90, 403.7033, and 403.708(9) preempt City Ordinance 2016-08 (the "City Ordinance") (A. 2-4). The City Ordinance, enacted on February 9, 2016, prohibits the sale or use of polystyrene "food service articles" by food service providers and

stores within the City (A. 3-4).[1] The larger question posed is whether state statutes which purport to preempt all regulation of a subject matter indefinitely—and without any instructions—to a state agency should prevent local governments from regulating issues of great local concern.

Section 500.90 preempts all regulation of polystyrene use to the Department of Agriculture and Consumer Services (the "Department"), and provides:

> **500.90 Regulation of polystyrene products preempted to department.** — The regulation of the use or sale of polystyrene products by entities regulated under this chapter is preempted to the [D]epartment. This preemption does not apply to local ordinances or provisions thereof enacted before January 1, 2016, and does not limit the authority of a local government to restrict the use of polystyrene by individuals on public property, temporary vendors on public property, or entities engaged in a contractual relationship with the local government for the provision of goods or services, unless such use is otherwise preempted by law.

The Florida Legislature gave section 500.90 an effective date of July 1, 2016 (A. 7). The City was the *only* one of eight Florida municipalities with existing polystyrene bans left unprotected by the statute's retroactivity provision, which saved from preemption all ordinances enacted before January 1, 2016 (A. 7-8).

Section 403.7033, Florida Statutes provides, in pertinent part:

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[1] The City Ordinance also prohibits the sale and use of (1) polystyrene containers by City vendors or contractors within the City or in performing their duties under a City contract; and (2) polystyrene articles by special event permittees in City facilities. Plaintiffs-Appellants did not challenge these two provisions below as they are expressly permitted by section 500.90.

> **403.7033 Departmental analysis of particular recyclable materials.**—The Legislature finds that prudent regulation of recyclable materials is crucial to the ongoing welfare of Florida's ecology and economy. As such, the Department of Environmental Protection shall undertake an analysis of the need for new or different regulation of auxiliary containers, wrappings, or disposable plastic bags used by consumers to carry products from retail establishments. … To ensure consistent and effective implementation, the department shall submit a report with conclusions and recommendations to the Legislature no later than February 1, 2010. Until such time that the Legislature adopts the recommendations of the department, no local government, local governmental agency, or state government agency may enact any rule, regulation, or ordinance regarding use, disposition, sale, prohibition, restriction, or tax of such auxiliary containers, wrappings, or disposable plastic bags.[2]

The Legislature enacted section 403.7033 in 2008 (A. 3). The Department of Environmental Protection timely submitted its report in 2010, but the Legislature has taken no further action in furtherance of its conclusions and recommendations.

Finally, section 403.708, Florida Statutes provides:

> **403.708 Prohibition; penalty.**—
>
> …
>
> (9) The packaging of products manufactured or sold in the state may not be controlled by governmental rule, regulation, or ordinance adopted after March 1, 1974, other than as expressly provided in this act.

Notably, section 403.708(9) purports to preempt local regulations addressing product packaging, while the City Ordinance applies more broadly to the sale and

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[2] It is unclear whether polystyrene qualifies as "recyclable material" under section 403.7033, as it is not generally recyclable in the State of Florida.

use of polystyrene "food service articles." *See* p. 1, *supra*.

A. The Trial Court Proceedings and Ruling on Summary Judgment

Appellant Super Progreso, Inc. filed suit in July 2016, claiming that sections 500.90, 403.7033, and 403.708(9), Florida Statutes preempt the City Ordinance (A. 4). Both parties moved for summary judgment (A. 4).

The trial court granted the City's motion for summary judgment (A. 4). The court ruled on several grounds, three of which the Third District addressed in its opinion. First, the trial court held that section 500.90 violates the Miami-Dade Home Rule Amendment, Art. VIII, § 11, Fla. Const. of 1885 (1956), *retained in* Art. VIII, § 6 n.3, Fla. Const. of 1968, which prohibits the Legislature from enacting "laws which relate only to Dade County [or its municipalities]." *State v. Cannon*, 181 So. 2d 346, 347 (Fla. 1965). The trial court reasoned that section 500.90 violates the Home Rule Amendment because its retroactivity provision singled out the City Ordinance as the only existing municipal ordinance subject to preemption (A. 7).

Second, the trial court held that all three statutory provisions are unconstitutionally vague because they delegate legislative discretion to state agencies without guidelines or standards for implementation (A. 8-10).

Third, the court held that section 500.90 is arbitrary and capricious because it creates classification schemes not reasonably related to the legislation's purpose (A. 10). The court based this conclusion on the retroactivity provision, which segregated

the City Ordinance from ordinances enacted before January 1, 2016, and a "beach town" vs. "non-beach town" classification raised by the Plaintiffs (A. 10-11).

B. The Third District Court of Appeal Reverses

The Third District reversed on three grounds (A. 6-11). The court held first that section 500.90, Florida Statutes does not violate the Home Rule Amendment because section 500.90 preempts all Florida municipalities from regulating polystyrene after January 1, 2016 (A. 7). The court reasoned that section 500.90, despite its retroactivity clause excluding only the City from exemption, "does not impermissibly single out the City or Miami-Dade County." (A. 7-8.)

Next, the Third District held that none of the three provisions at issue violates the nondelegation doctrine (A. 8-10). The court opined that the plain language of section 500.90—"[t]he regulation of the use or sale of polystyrene products by entities regulated under this chapter is preempted to the [D]epartment"—does not delegate any authority to the Department (A. 9). It attributed the statute's silence on delegation to the enactment of section 500.09, Florida Statutes, which permits the Department to "adopt rules necessary for the efficient enforcement of this chapter[,]" and "adopt rules relating to food safety an consumer protection requirements for the … packing … of food." (A. 9-10). The court found sections 403.708(9) and 403.7033 to be constitutional because "neither statute delegates any legislative authority" (A. 10).

Finally, the Third District held that section 500.90 does not set forth a classification scheme not reasonably related to its statutory purpose, and thus is not arbitrary and capricious (A. 10-11). The court rejected the notion that the retroactivity provision in section 500.90, which isolated the City as the only municipality with an existing ordinance left unprotected from preemption, created a classification of "political subdivisions or other entities" (A. 11).

SUMMARY OF ARGUMENT

This Court has discretion to review the opinion below based on the Third District's express declarations that all three statutes are valid and constitutional. Specifically, the Third District held that section 500.90 does not violate the Home Rule Amendment; none of the three provisions impermissibly delegates legislative authority to a state agency; and the Legislature did not create an arbitrary classification scheme by including a retroactivity provision in section 500.90 which segregates the City Ordinance from seven other municipal ordinances protected from preemption based on its date of enactment alone.

The Court should accept review because the Third District's opinion nullifies home rule in favor of three unconstitutional statutes. Its reasoning disregards both the plain language of all three statutory provisions, as well as the effect of section 500.90's retroactivity provision. Left unaddressed, the Third District's opinion will have serious repercussions throughout the State, leaving local governments

powerless to regulate not only the sale and use of polystyrene and other environmentally damaging materials, but also other fields where the Legislature might similarly claim total preemption without meeting constitutional standards.

ARGUMENT

A. The Court Expressly Declared Section 500.90 Valid.

The Third District expressly declared section 500.90 valid on three grounds. It held first that section 500.90 does not violate the Home Rule Amendment to the Florida Constitution, which prohibits the Legislature from enacting "laws which relate only to Dade County [or its municipalities]." *State v. Cannon*, 181 So. 2d 346, 347 (Fla. 1965). The Third District held that the section 500.90 does not target the City because it "plainly preempts *all* municipalities statewide from enacting local polystyrene regulations after January 1, 2016" (A. 7 (emphasis in original)). The Third District did not address the effect of the statute's retroactivity provision, which isolated the City as the *only* Florida municipality with an existing ordinance not protected from preemption (A. 7-8). In fact, the retroactivity provision shielded seven other existing ordinances from preemption.[3]

The Third District next declared section 500.90 valid on the ground that it

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[3] The seven protected municipalities were Bal Harbour, Bay Harbor Islands, Hollywood, Key Biscayne, Miami Beach, North Bay Village, and Surfside. These seven ordinances remain in force and unchallenged.

does not violate the nondelegation doctrine, which prohibits delegations of legislative authority to state agencies absent standards and guidelines for implementation (A. 8-10). Despite clear language preempting the regulation of polystyrene "to the [D]epartment," the court held that section 500.90 "does not, on its face, delegate legislative authority to the Department of Agriculture" (A. 9).

The court reasoned that the Department's rulemaking authority stems from section 500.09, Florida Statutes, which provides that "[t]he department may adopt rules necessary for the efficient enforcement of … chapter [500]" (A. 9-10).[4] Section 500.09(4)—the only subsection of the provision that addresses food packaging—provides that "[t]he department may adopt rules relating to *food safety and consumer protection* requirements for the manufacturing, processing, packing, holding, or preparing of food…."; it does not authorize rulemaking (or set forth standards and guidelines for such rulemaking) on food packaging for all purposes. *See* § 500.09(4), Fla. Stat. (2019) (emphasis added). The Legislature thus delegated its authority over whether *and* how to regulate polystyrene entirely to the Department without any guidelines or standards for implementation. *Cf. Lewis v. Bank of Pasco Cnty.*, 346

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[4] The Third District attributed this language to section 500.09(4) (A. 10). It comes, however, from section 500.09(3). Section 500.09(4), the subsection addressed in the trial court order, empowers the Department to adopt rules relating to food safety and consumer protection requirements for food packing. *See infra*.

So. 2d 53, 55-56 (Fla. 1976) ("This Court has held in a long and unvaried line of cases that statutes granting power to administrative agencies must clearly announce adequate standards to guide the agencies in execution of the powers delegated.").

Finally, the Third District declared section 500.90 valid on the ground that it does not create classification schemes unrelated to its statutory purpose (A. 10-11). In so doing, the Third District rejected the notion that the statute is unconstitutional because its retroactivity provision arbitrarily segregated the City from other municipalities (A. 11). The Third District did not explain how a January 1, 2016 cutoff date for municipalities to regulate polystyrene reasonably relates to a legitimate state purpose (A. 10-11).

B. The Court Expressly Declared Sections 403.708(9) and 403.7033 Valid.

The Third District expressly declared sections 403.708(9) and 403.7033 valid on the ground that neither violates the nondelegation doctrine (A. 10). The court reasoned that these provisions "simply prohibit local governments from regulating" specific activities without delegating legislative authority (A. 10). Both statutes are unconstitutionally vague; section 403.7033, enacted in 2008, allows the State to take no action indefinitely on the regulation of certain recyclable materials, paralyzing local governments with respect to their own legislation. *See* p. 3, *supra*.

C. The Third District's Opinion Will Paralyze Local Regulation.

The Third District's opinion will have serious repercussions throughout the

State for issues beyond environmental regulation. By declaring sections 500.90, 403.7033, and 403.708(9) valid, the Third District has authorized the Legislature to preempt entire fields to state agencies which have neither the intent to take action nor any guidelines for rulemaking. Such broad delegations of legislative power create a regulatory vacuum; municipalities are indefinitely rendered powerless to control potential crises within their borders while the State does nothing for years on end. The City, for example, has more than one hundred miles of waterway; its need to regulate the sale and use of environmentally harmful materials like polystyrene is immediate, and likely more so than that of other Florida municipalities. Despite home rule, its hands are now tied, and there is nothing to indicate that the Department will take action on polystyrene. Were the Legislature to similarly preempt all regulation of a more imminently dangerous product—for example, toxic chemicals or weapons—the consequences for local governments would be all the more severe.

Though the State may preempt local laws, it must do so within the bounds of the Florida Constitution. Florida courts should not approve broad statutes that violate home rule and delegate all discretion as to how and whether to regulate issues of great local concern.

CONCLUSION

For the reasons stated above, this Court should accept jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Rule 9.210(a)(2) and is written in 14-point font.

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CERTIFICATE OF SERVICE

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