IN THE SUPREME COURT OF FLORIDA

CASE NO. SC19-1798

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

Petitioner,

vs.

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

Respondents.
_____/

L.T. Case No. 3D17-0562

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

RESPONDENT'S RESPONSE TO JURISDICTIONAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

JURISDICTIONAL STATEMENT

Respondent agrees that this Court has jurisdiction to hear this case because the Third District Court of Appeal declared the three Florida Statutes at issue constitutional and thus valid in *Florida Retail Federation, Inc., v. City of Coral Gables*, No. 3D17-0562, 2019 WL 3807999 (Fla. 3d DCA Aug. 14, 2019)(the "Opinion"); *See* Art. V § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(i). However, the Court should exercise its discretion against granting review of the lower court opinion. It has been held by this Court that the intent of the constitutional framers is for the Supreme Court to refuse to exercise the discretion to review decisions where, as here, the opinion below establishes no point of law contrary to a decision of this Court or another district court. *The Florida Star v. B.J.F.*, 530 So.2d 286, 288-289 (Fla. 1988) (principle announced in conflicts case, but also applicable in great public importance case).

STATEMENT OF THE CASE AND FACTS

The City of Coral Gables is asking this Court to review a clear and otherwise unremarkable decision of the Third District Court of Appeal, finding three Florida statutes valid and constitutional: sections 500.90, 403.7033, and 403.708(9), Florida Statutes.[1] The City argued below, and the trial court agreed with the stroke of its

[1] (1) § 403.708(9) Fla. Stat. (1974) (prohibiting local governmental control of the packaging of products manufactured or sold in the state except as stated);

pen, that all three statutes are unconstitutional, and that the City's efforts to regulate the use of polystyrene in open violation of the preemption statutes should stand. There was no argument in the pleadings or elsewhere in trial court that the City's regulation of the use of polystyrene packaging materials was not within the activities and products actually regulated by the state statutes, so that any such argument is no longer cognizable. Instead the City argued – and the trial court agreed at the urging of the City – that all three statutes are simply unconstitutional.

The Third District Court of Appeal disagreed and found that all three statutes are valid and constitutional. In fact, the only cogent argument of the City in this regard concerns Section 500.90, Florida Statutes, and the other two statutes seem to have been innocent bystanders, declared unconstitutional due to situational need. Neither of sections 403.7033 and 403.708(9), Florida Statutes, on their face delegates anything, or singles out any city, or is at all vague (nor is section 500.90, Florida Statutes, for that matter).

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(2) § 403.7033, Fla. Stat. (2008) (prohibiting all local governments from enacting rules or ordinances regulating the use, disposition etc. of auxiliary containers used by consumers to carry products from retail establishments); and

(3) § 500.90, Fla. Stat (2016) (preempting local regulation of polystyrene products specifically, while excepting from its reach products used or sold at municipal special events on public property and pursuant to local government contracts, and grandfathering non-conforming local regulations enacted prior to 2016).

All along, the City (and amici) took issue with the general concept of express preemption of local regulation where a City urgently wants to regulate. However, the Third District clearly recognized the continued validity of the principle of express preemption. Ultimately, if even one of the three statutes is valid and constitutional, the result of the Third District was correct, and the City's heavy-handed attempt at regulation of polystyrene at the local level was invalid. [2]

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[2] The following facts are from Plaintiff's Complaint, and either admitted or conceded as "the ordinance speaks for itself." Complaint at ¶¶17, 19-20, 27-29, 30.

On January 27, 2016, an amendment to House Bill 7007 was introduced in the Florida Legislature, proposing to preempt local regulation of "polystyrene products." The legislation was adopted and signed into law on March 16, 2016, became effective July 1, 2016, and has been in full force and effect ever since. It plainly preempts local regulation of polystyrene throughout the entire state, with an exception for regulations *enacted* before January 1, 2016, the month when the Legislature first considered the issue.

On February 9, 2016, the Coral Gables Commission adopted Ordinance 2016-08, prohibiting, inter alia, the use of polystyrene containers by businesses in Coral Gables and declaring the "Sale, Use or Distribution of Polystyrene by Businesses within the City" a nuisance. The Commission also provided for an immediate (i.e., February 9, 2016) effective date for the Coral Gables prohibition on all sale, use or distribution by businesses of polystyrene containers.

At its March 15, 2016, meeting, the Coral Gables Commission in light of the Legislature's ongoing consideration of H.B. 7007 enacted a single-reading "Emergency Ordinance," (the "March Emergency Ordinance"), backdating the effective date of Ordinance 2016-08 to December 8, 2015," *i.e.* the date when February's polystyrene regulation was first read.

Finally, on April 26, 2016, the Coral Gables Commission passed another belt-and-suspenders ordinance providing that "the City hereby exercises its Home Rule powers . . . to conflict with [sic], modify, and nullify the polystyrene preemption and grandfathering provisions of [section 500.90]," (the "April Home Rule Ordinance"). The February Ordinance, the March Emergency Ordinance, and the April Home

Crucially, the Third District did not hold that the three statutes at issue "rescind Florida municipalities' right to control the sale and use of nonrecyclable materials." Jurisdictional Brief at p. 1. It simply held that the Legislature has the right to, and did in fact, expressly preempt local regulation of polystyrene products.

SUMMARY OF THE ARGUMENT

Petitioner fails to demonstrate a need for this Court to grant review of the Third District's decision. The decision simply restated the well established legal principle that the Florida legislature can expressly preempt a subject matter for state regulation if it so chooses. The legislature did so in the three clear and unambiguous statutes at issue.

The Third District's decision was correct because section 500.90 did not violate the Home Rule Amendment to the Florida Constitution, as it applies to all regulation of the issue state-wide. Section 500.90 is not unconstitutionally vague in violation of the nondelegation principle because the statute does not, on its face, delegate rulemaking authority to the Department of Agriculture. Nor does the statute create an impermissible classification scheme pitching some municipalities against the City of Coral Gables. The Third District was also correct in holding that sections

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Rule Ordinance were all *enacted* after the January 1, 2016 effective date of section 500.90.

403.708(9) and 403.7033 are not unconstitutionally vague because neither of those two statutes delegates any sort of authority.

There is nothing extraordinary or unique about the Third District's decision that necessitates further review. Nothing in Florida law suggests that every issue in Florida *must* be regulated at the local or state level, or that the law abhors a "regulatory vacuum." The impact of the opinion is ultimately limited to the City of Coral Gables, the only municipality bold enough to regulate the subject despite express preemption.

ARGUMENT

E. There Is No Need to Review the Opinion of the Third District Court of Appeal.

There is no need for this Court to spend its resources to review a clear and concise decision of the Third District, which found the three statutes at issue to be constitutional and preempting local regulation. The law is clear that although Florida municipalities are given broad authority to enact ordinances, "municipal ordinances must yield to state statutes." *Masone v. City of Aventura*, 147 So.3d 492, 495 (Fla. 2014). Petitioner's general appeal to this Court is to review the Third District's decision because in this case only, established preemption law should not govern. Indeed, the City and several amici below have argued precisely this point: *i.e.,* that in the case of polystyrene, the normal constitutional hierarchy should not apply because regulation of polystyrene is somehow different. The City suggests

that regulation of polystyrene is a uniquely local issue, thus reversing the established constitutional balance of power between regulatory powers of the state versus counties/municipalities. Petitioner cites no authority for this novel argument, and indeed there is no such authority. Respondent respectfully submits that this Court should not even consider the argument.

Second, there is no need to review whether the Third District correctly found the three state statutes to be valid and constitutional. As the Third District explained, resort to the canons of interpretation is not needed in this case as the statutes at issue are clear on their face. The Petition for Review in this case simply amounts to an attempt to reargue the case, in the hope that a higher appellate court comes to a different conclusion. There simply is no indication here that the Third District erred in any way in its reading of the statutes, or in its finding that the statutes are clear on their face.

F. The Matter Was Correctly Decided by the Third District.

The Third District correctly determined that Section 500.90 is valid because it does not single out Coral Gables (i.e., is not an impermissible special law applicable only to a municipality in Miami-Dade), simply because Coral Gables to date was the only municipality flaunting the prohibition against local regulation. *See* Opinion at pp. 7-8. The Third District thus found that section 500.90 did not violate the Miami-Dade County Home Rule Amendment in the Florida Constitution. There

is no basis to review that determination, as it is supported by a plain reading of the statute.[3]

The Third District also correctly determined that section 500.90 is not unconstitutionally vague in violation of the nondelegation principle. As the Third District properly noted, the statute does not, on its face, delegate rulemaking authority to the Department of Agriculture. That authority arises from a separate statute, Section 500.09, Florida Statutes, which was in no way challenged by the City.

Third, the Third District correctly decided that section 500.90 does not create an impermissible classification scheme, between municipalities who regulated polystyrene products before the effective date of the statute and Coral Gables. The court properly noted that the Statute at issue does not address cities or counties, but local regulations enacted after the January 1, 2016 grandfathering date. That demarcation was entirely logical and natural, and any other conclusion would have opened the floodgates of challenges to legislation with a specific effective date, i.e., all legislation. There are, after all, always persons or entities that acted contrary to

[3] The Third District correctly noted that the trial court had erroneously (but at the urging of Petitioner City) applied a presumption of validity to the local ordinances without considering the superior presumption of validity of state statutes. Opinion at p. 5.

new regulations before the effective date, and distinction of actions before and after the effective day of the regulation is the natural result of law making.

Finally, as the Third District noted, the trial court was focused almost entirely on section 500.90 in its analysis. The trial court's determination that sections 403.708(9) and 403.7033 are also unconstitutionally vague solely because they "lack necessary standards and guidelines for implementation" was erroneous because neither of those two statutes delegate any sort of authority to any department. No cogent argument was advanced or can be advanced to challenge that conclusion of the Third District. The trial court's invalidation of those two statutes was at best an afterthought, intended to bring about an outcome the trial court desired rather than analyzing the statutes and applying established law. Petitioner's argument, that a statute that preempts local regulation without thereafter specifically regulating the subject matter is unconstitutional, is not supported by any legal precedent.

C. There Is Nothing Extraordinary About The Impact Of The Lower Court's Decision On The City.

The impact of the Third District's Opinion on the City and on municipalities in general is not extraordinary, i.e., no greater than the impact of any opinion re-stating the constitutional supremacy of state statutes over local regulations in direct conflict. The City's suggestion that the Third District's decision "will paralyze local regulation" and would "create a regulatory vacuum" professes a profound misunderstanding of regulatory authority in Florida. Apparently, the City believes

that every issue must be regulated in Florida at some level, and the absence of regulation is somehow abhorrent to notions of an effective government. In that argument, the City is misguided. In our legal system, not every legal issue is in absolute need of regulation. Indeed, the decision below correctly determined that the Florida legislature may preempt local regulation of an issue and then chose not to regulate that preempted issue, i.e., the legislature can consciously create a "regulatory vacuum." Ours is a system of limited government, a system where certain issues may remain relatively unregulated if the law so provides (*e.g.,* regulation of guns). That may frustrate a local government desiring regulation, but relief lies at the ballot box, not in the courts. Petitioner provides no precedent for the novel proposition that the Legislature cannot validly preempt regulation of a subject to the state, and then not regulate at the state level at all. Besides, this argument is inapposite to section 403.708(9), which does not preempt and then not regulate. Accordingly, there is no argument advanced for finding section 403.708(9) unconstitutional, other than the City's desire to obliterate all laws limiting its home rule powers.

D. This Case is Unique to the City, As No Other Municipality Appears to Have Attempted To Regulate Polystyrene Despite The Express Preemption.

For obvious reasons, the City argues that leaving the decision of the Third District will have "serious repercussions throughout the State," but in reality, Coral

Gables has been the only municipality to regulate polystyrene at a local level into the teeth of statutory preemptions. Granting review in this case would thus be of little value to other municipalities or to the public at large.

CONCLUSION

For the foregoing reasons, this Court should not undertake review of the decision of the Third District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellants Florida Retail Federation and Super Progreso, Inc. was served on the 25th day of November, 2019 by electronic mail to the parties on the attached service list.

By: /s/ Claudio Riedi_____
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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief was computer generated using the Times New Roman, 14-point font, and complies with the font requirement of Rule 9.210(2) of the Florida Rules of Appellate Procedure.

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