IN THE THIRD DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

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

Appellants,

Case No.: 3D17-562

v.

Lower Tribunal Case No.: 2016-018370-CA-01

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

Appellee.
_____/

APPELLEE'S ANSWER BRIEF

Submitted on behalf of Appellee
The City of Coral Gables, Florida

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STATEMENT OF THE CASE AND FACTS

This lawsuit involves competing local and state legislation addressing the regulation of polystyrene use: Ordinance 2016-08 (the "City Ordinance"), enacted by the City of Coral Gables (the "City") on February 9, 2016; and section 500.90, Florida Statutes, enacted by the Florida Legislature on March 16, 2016. The City Ordinance, as considered, prohibited the sale or use of (1) polystyrene containers by City vendors or contractors within the City or in performing their duties under a City contract (Subdivision III); (2) polystyrene articles by special event permittees in City facilities (Article VII); and (3) polystyrene "food service articles" by food service providers and stores within the City (Article VIII). R. 52-58.[1] The City Ordinance sets forth exemptions for food service articles prepackaged in polystyrene, polystyrene used to package raw meat, fish, or poultry, and certain not-for-profit and governmental entities, as well as code enforcement procedures for issuing tickets and fines for violations of the ordinance and for appealing violations found by the City. *See id.* The City Commission considered Ordinance 2016-08 at first reading on December 8, 2015. R. 24.

The City Commission approved Ordinance 2016-08 on first reading, and was prepared and had the authority to enact it (City Charter, Article I, Section 5), but

[1] "R. #" refers to the volume and page number of the record.

postponed the legislation's enactment at the request of the City Chamber of Commerce and Business Improvement District (the "BID"), to allow businesses within the City limits an opportunity to comment on the proposed legislation. R. 59. The BID reviewed the legislation over the course of the coming months, and made two minor additions to the ordinance's text: a $1,000 fine for any violation after a third offense in a twelve-month period, and a requirement that the City continue to "make the ordinance known" to those subject to it after the conclusion of its educational campaign on the ordinance. *See id.* With these changes, the City adopted and enacted the ordinance on February 9, 2016. *See id.*

One month later, on March 9, 2016, the Florida Legislature passed House Bill 7007, creating section 500.90, Florida Statutes, which 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 [Florida Department of Agriculture and Consumer Services]. 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 first considered House Bill 7007 on January 27, 2016, seven weeks after the City's first reading of the City Ordinance. R. 14. The City was the only municipality affected by the provision granting protection to local

ordinances enacted before January 1, 2016 (the "Retroactivity Provision"). Numerous other municipalities enacted ordinances regulating the use of polystyrene, but all were excluded from section 500.90's preemptive reach. Cities with existing polystyrene regulations include: Bal Harbour (Ord. No. 577, § 2, 2014), Bay Harbor Islands (Ord. No. 973, 2015), Hollywood (Am. Ord. 0-96-56, 1996), Key Biscayne (Ord. No. 2014-10, 2014), Miami Beach (Ord. No. 2015-3962, 2015), North Bay Village (Ord. No. 215-14, 2015), and Surfside (Ord. No. 1630, 2015).[2] The effect of the Retroactivity Provision is that the City Ordinance was the only enacted ordinance that was invalidated statewide.

On March 15, 2016, in order to provide immediate notice to businesses in the City of the City's intent to enforce the City Ordinance despite the Legislature's attempt to preempt it, the City enacted an emergency ordinance giving the City Ordinance a retroactive effective date of December 8, 2015—the date of first reading on which the ordinance had been approved in substance and could have been enacted, but for the Chamber of Commerce and BID's insistence on postponing the City Ordinance's enactment. R. 59.

[2]The Court can take judicial notice of these city ordinances pursuant to Florida Statutes § 90.202(10).

On April 26, 2016, the City passed an additional ordinance ("Ordinance No. 2016-28") in the exercise of its authority granted by the Dade County Home Rule Amendment to the Florida Constitution, nullifying section 500.90 to the extent that the statute's preemption of polystyrene regulations was a special law applicable only to the City, and clarifying that the City's polystyrene regulations are not preempted and remain enforceable. R. 82, 94.

Appellants filed suit on July 18, 2016, challenging only Article VIII of the City Ordinance—that provision of the City Ordinance that prohibits the sale or use of polystyrene "food service articles" by food service providers and stores within the City. R. 18, 24. They alleged that the City Ordinance is preempted not only by section 500.90, but also by sections 403.7033 and 403.708(9), Florida Statutes, which provide:

> **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. The analysis shall include input from state and local government agencies, stakeholders, private businesses, and citizens, and shall evaluate the efficacy and necessity of both statewide and local regulation of these materials. 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.
>
> **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, Appellants did not allege that the City had enforced the City Ordinance as against Plaintiff Super Progreso, the Florida Retail Federation (the "FRF"), or any member of the FRF.

The State of Florida (the "State", and together with the Plaintiffs, the "Opponents"), was granted permission to intervene, and filed a Response in Opposition to the City's Motion for Summary Judgment.

Upon competing motions for summary judgment, the trial court held sections 500.90, 403.708(9) and 403.7033 to be unconstitutional, and the City Ordinance valid and enforceable.[3] This appeal followed.

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[3]The Opponents' concern regarding the trial court's adoption of a proposed order is unfounded given the fact that they were given the opportunity to file a competing order and written objections to the City's proposed order. *See John Moriarty & Assoc. of Fla. v. Murton Roofing Corp.*, 128 So. 3d 58, 59 n.1 (2013) (finding that trial court's adoption of proposed order did not compel reversal given the fact that opposing party was given an adequate opportunity to present its own proposed order and voice objections to the competing version). The Opponents filed a joint objection to the City's proposed order, and the joint objection was considered by the trial court and overruled. R. 490, 627.

SUMMARY OF THE ARGUMENT

The question underlying this appeal—whether section 500.90, Florida Statutes prohibits the City from regulating polystyrene within its borders—implicates both the Doctrine of Home Rule, which empowers Florida municipalities to enact local ordinances toward valid municipal ends without State interference; and the doctrines of separation of powers (based on nondelegation) and primary agency jurisdiction or sovereign immunity. A decision reversing the trial court's order, thus, would violate both vertical and horizontal distributions of power contemplated by the Florida Constitution—the distribution of power between municipalities and the state vertically, as well as the horizontal distribution of power among the Florida Department of Agriculture (the "Department"), a division of the state executive branch, the Florida courts, and the State Legislature.

On the vertical axis, Appellants Super Progreso and the FRF challenge an order rendering unenforceable section 500.90, which the Legislature enacted without a proper delegation of legislative authority, and with the effect of preempting the City, and only the City, among all of Florida's municipalities, from regulating the use of polystyrene within its borders. Section 500.90, however, violates the Home Rule Amendment to the Florida Constitution, which prohibits the Florida Legislature from enacting laws directed solely at Miami-Dade County or any one of its

municipalities. Because the City Ordinance is the only local ordinance affected by the statute's "grandfather provision" protecting similar city ordinances adopted prior to January 1, 2016, section 500.90 violates the Home Rule Amendment and is unconstitutional. Section 500.90 also violates the municipal Home Rule Amendment enacted in 1968, which extended home rule to other Florida municipalities.

Section 500.90 is also unconstitutional because it violates the doctrine of nondelegation of legislative power on the horizontal axis. The Florida Legislature enacted section 500.90 without providing guidelines or standards for its implementation by the Department. Without guidelines or standards from the Legislature, the Department has no means by which to ascertain or fulfill the Legislature's intent in exercising the broad discretion afforded to it by section 500.90. This lack of guidelines or standards renders the statute invalid, and it cannot be enforced. This argument applies with equal force to sections 403.7033 and 403.708(9), which do not prohibit local regulation of polystyrene. Had these statutes truly had the effect of preempting the regulation of polystyrene to the State, the Legislature's enactment of section 500.90 would have been redundant and unnecessary.

Appellants' facial challenge to the City Ordinance would fail even if the Court were to find section 500.90 constitutional. A statute or ordinance is facially

unconstitutional only if it can never be applied in a constitutional manner. Appellants, however, admit that they are not challenging the entire ordinance, and the City Ordinance can be applied without violating the preemptive language of section 500.90. There is simply no basis for finding the City Ordinance facially unconstitutional.

This Court should affirm the trial court's findings that the City Ordinance is valid and enforceable, and that sections 500.90, 403.7033 and 403.708(9) of the Florida Statutes are unconstitutional.

ARGUMENT

A. Appellants' Burden

"A regularly enacted ordinance will be presumed to be valid until the contrary is shown, and a party who seeks to overthrow such an ordinance has the burden of establishing its invalidity." *Lowe v. Broward County*, 766 So. 2d 1199, 1203 (Fla. 4th DCA 2000) (citing *State ex rel. Office Realty Co. v. Ehinger*, 46 So. 2d 601, 602 (Fla.1950) (citation omitted)). An appellate court will "indulge every reasonable presumption in favor of an ordinance's constitutionality." *Id.* at 1203 (citing *City of Pompano Beach v. Capalbo*, 455 So.2d 468, 469 (Fla. 4th DCA 1984)). The Appellants have the burden of showing the duly enacted City Ordinance is invalid. *Lowe*, 766 So. 2d at 1203.

B. The Trial Court Correctly Determined That Section 500.90, Florida Statutes is Unconstitutional.

1. The Florida Constitution Prohibits Special Acts Directed Solely at Miami-Dade County or its Municipalities.

Under the Florida Constitution of 1885, municipal powers of self-governance were entirely dependent upon specific delegations of authority from the Florida Legislature. Article VIII, section 8 gave the Legislature "power to establish, and to abolish, municipalities to provide for their government, to prescribe their jurisdiction and power, and to alter or amend the same at any time." Municipalities could not act without express grants of authority by the State, and powers not granted to municipalities were deemed reserved for the Legislature. *City of Boca Raton v. State*, 595 So. 2d 25, 27 (Fla. 1992). This reservation of authority reflected the nineteenth-century judicial doctrine known as "Dillon's Rule," which was set forth in John F. Dillon, THE LAW OF MUNICIPAL CORPORATIONS § 55 (1st ed. 1872). *Id.* Dillon himself articulated the Rule as follows:

> It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third; those essential to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable.

J. Dillon, THE LAW OF MUNICIPAL CORPORATIONS § 237 (5th ed. 1911).

Dillon's Rule reflected a nineteenth-century skepticism of local government, and suggested limitations on local power in favor of state rule. Note, *Dillon's Rule: The Case for Reform*, 68 Va. L. Rev. 693, 694 (1981). The powers granted local governments, Dillon believed, "ought to be more carefully defined and limited, and should embrace such objects only as are necessary for the health, welfare, safety, and convenience of the inhabitants." *Id.* This resulted in a presumption against municipal power, with Dillon counseling courts to resolve doubts regarding local power against its validity. *See id.*

Florida courts consistently followed Dillon's Rule until after World War II when, with Florida's population growing exponentially, municipalities flooded the Legislature with local bills and special acts seeking grants of authority to address local problems themselves. *See City of Boca Raton*, 595 So. 2d at 27. As a result, the Florida Legislature found its time consumed by local matters, at the expense of statewide matters. *See id.* Municipalities, in turn, were unable to act efficiently on local issues, as their authority to do so depended on the Legislature. *See id.* In response to these problems, voters amended the Florida Constitution in 1956, authorizing the citizens of Miami-Dade County to adopt a home rule charter. Art. VIII, § 11, Florida Const. of 1885 (1956), *retained in*, Art. VIII, § 6, n.3, Florida Const. of 1968 (the "Home Rule Amendment").

The Home Rule Charter would, among other things:

> [G]rant full power and authority to the Board of County Commissioners of Dade County to pass ordinances relating to the affairs, property and government of Dade County and provide suitable penalties for the violation thereof; to levy and collect such taxes as may be authorized by general law and no other taxes, and do everything necessary to carry on a central metropolitan government in Dade County.

Home Rule Amendment § (1)(b).

The Home Rule Amendment further provided for the adoption of municipal charters within Dade County, provided that the county and municipal charters and any ordinances enacted pursuant thereto did not conflict with applicable general laws enacted by the state or the Florida Constitution. *See id.* §§ (5), (6).

The Home Rule Amendment rendered the metropolitan government of Miami-Dade County truly unique in this state. *Metropolitan Dade County v. City of Miami*, 396 So. 2d 144, 146 (Fla. 1980). Following the constitutional amendment, the Florida Legislature could no longer enact laws directed solely at Miami-Dade County or any one of its municipalities. The Legislature retained the power only "to enact general laws which shall relate to Dade County and any other one or more counties of the State of Florida or to any municipality in Dade County and any other one or more municipalities of the State of Florida." Home Rule Amendment, §§ (5), (6) (9). These sections provide:

> (5) Nothing in this section shall limit or restrict the power of the Legislature to enact **general laws** which shall relate to Dade County and any other one or more counties in the State of Florida **or to any municipality in Dade County and any other one or more municipalities of the State of Florida**, and the home rule charter provided for herein shall not conflict with any provision of this Constitution nor of any applicable

general laws now applying to Dade County and any other one or more counties of the State of Florida except as expressly authorized in this section nor shall any ordinance enacted in pursuance to said home rule charter conflict with this Constitution or any such applicable general law except as expressly authorized herein, nor shall the charter of any municipality in Dade County conflict with this Constitution or any such applicable general law except as expressly authorized herein, provided however that said charter and said ordinances enacted in pursuance thereof may conflict with, modify or nullify any existing local, special or general law applicable only to Dade County.

(6) Nothing in this section shall be construed to limit or restrict the power of the Legislature to enact general laws which shall relate to Dade County and any other one or more counties of the State of Florida **or to any municipality in Dade County and any other one or more municipalities of the State of Florida relating to county or municipal affairs** and all such general laws shall apply to Dade County and to all municipalities therein to the same extent as if this section had not been adopted and such general laws shall supersede any part or portion of the home rule charter provided for herein in conflict therewith and shall supersede any provision of any ordinance enacted pursuant to said charter and in conflict therewith, and shall supersede any provision of any charter of any municipality in Dade County in conflict therewith.

(9) It is declared to be the intent of the Legislature and of the electors of the State of Florida to provide by this section home rule for the people of Dade County in local affairs and this section shall be liberally construed to carry out such purpose, and it is further declared to be the intent of the Legislature and of the electors of the State of Florida that the provisions of this Constitution and general laws which shall relate to Dade County and any other one or more counties of the State of Florida or to any municipality in Dade County and any other one or more municipalities of the State of Florida enacted pursuant thereto by the Legislature shall be the supreme law in Dade County, Florida, except as expressly provided herein and this section shall be strictly construed to maintain such supremacy of this Constitution and of the Legislature in the enactment of general laws pursuant to this Constitution.

Id. (emphasis supplied).

Construing the Home Rule Amendment, the Florida Supreme Court has repeatedly made clear that the Florida Legislature cannot enact "laws which relate

only to Dade County [or its municipalities]." *State v. Cannon*, 181 So. 2d 346, 347 (Fla. 1965), *cert. denied*, 384 U.S. 981, 86 S. Ct. 1881, 16 L. Ed. 2d 691 (1966). *See also, e.g., Barry v. Garcia*, 573 So. 2d 932, 935 (Fla. 1991) ("The stated objective of the home rule legislation was to transfer the power the legislature had in passing local bills and special laws applicable only to Dade County, from the state to the Dade County Board of County Commissioners, and hence on to the municipalities."); *Dade County v. Dade County League of Municipalities*, 104 So. 2d 512, 517 (Fla. 1958) ("The plain objective to be accomplished by this provision was to endow the people of Dade County with the power to exercise home rule.").[4]

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[4] Home rule powers were extended to other municipalities in Florida by amendment to the Florida Constitution in 1968, which, under Article VIII, Section 2(b), granted municipalities the power to act for any valid municipal purpose except as prohibited by law. That section provides:

> SECTION 2. Municipalities.—
>
> ***
>
> (b) POWERS. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. Each municipal legislative body shall be elective.

The Florida Supreme Court most recently reaffirmed its commitment to broad home rule powers in *D'Agastino v. City of Miami*, No. SC16-645, 2017 WL 2687694 (Fla. June 22, 2017).

2. Section 500.90 Violates the Home Rule Amendment.

Section 500.90 did not become effective until **July** 1, 2016 (the "Effective Date"), yet it reaches back and invalidates any ordinance regulating polystyrene adopted after **January** 1, 2016 (the "Retroactivity Provision"). Although the statute does not invalidate the City Ordinance by name, it has the effect of protecting every pre-existing local ordinance regulating polystyrene *except* for the City Ordinance. Appellants have conceded as much. R. 312. Nevertheless, they urge this Court – as they did before the trial court - to focus solely on the future impact of section 500.90 when conducting its constitutional analysis, without any regard to the impact of the Retroactivity Provision.

The Opponents' efforts to cast section 500.90 as a "purely prospective law," however, cannot overcome the true effect of the statute, which is to retroactively invalidate the City Ordinance. Because the City is the only municipality to have its polystyrene regulation invalidated by the Retroactivity Provision, the trial court correctly determined that section 500.90 is an improper special law. *See Cannon*, 181 So. 2d at 347 (Fla. 1965) (holding that a statute providing for a twenty-three person Grand Jury "in counties having a population of 750,000 or more" was unconstitutional because at the time it was enacted it applied "solely to Dade County, in violation of Article VIII, § 11, Florida Constitution"); *S&J Transp., Inc. v. Gordon*, 176 So. 2d 69, 71 (Fla. 1965) (finding statute unconstitutional where its population

criteria rendered it applicable only to Miami-Dade County); *Homestead Hosp., Inc. v. Miami-Dade County*, 829 So. 2d 259, 262 (Fla. 3d DCA 2002) (finding that the act was "as written ... applicable only to Miami-Dade County, and therefore, [was] an unconstitutional special law.").

The trial court also properly found that the Opponents' reliance on *City of Miami Beach v. Frankel*, 363 So. 2d 555 (Fla. 1978) was misplaced. The trial court found the factual distinctions between *Frankel* and this case to be significant, and appropriately determined that the *Frankel* opinion is not controlling. In *Frankel*, the City of Miami Beach had not enacted a proposed rent control ordinance prior to the time a conflicting state statute became effective, and the impact on the city was no different than that felt by every other municipality in the state. By contrast, the City Ordinance was considered and enacted prior to the Legislature's enactment of section 500.90, and months before section 500.90 became effective. In addition, the City is the only municipality with an *existing* local ordinance regulating polystyrene as of July 1, 2016 to have its ordinance invalidated by the Retroactivity Provision. The City is singled out and treated differently than every other municipality with an existing local ordinance as of the Effective Date. *Frankel* does not present similar facts, nor does it provide any basis for disturbing the trial court's determination that the Retroactivity Provision contained in section 500.90 is a special law applicable only to the City. Section 5 of Florida's Home Rule Amendment for Dade County

authorizes the City to nullify section 500.90's effect, and the City did just that when it passed the April Home Rule Ordinance.[5]

3. Section 500.90 Delegates Legislative Power to the Department Without Defined Standards.

The trial court also properly determined that section 500.90 delegates legislative power to the Department without defined standards. The doctrine of nondelegation of powers, firmly embedded in our law, requires the Legislature to provide specific legislative guidelines when delegating legislative discretion to any executive agency. *See Department of Prof'l Regulation, Fla. State Bd. of Med. v. Marrero*, 536 So. 2d 1094, 1098 n.1 (Fla. 1st DCA 1988); *Solimena v. State Dep't of Bus. Regulation, Div. of Pari-Mutuel Wagering*, 402 So. 2d 1240, 1245 (Fla. 3d DCA 1981). "[T]he crucial test in determining whether a statute amounts to an unlawful delegation of legislative power is whether the statute contains sufficient standards or guidelines to enable the agency and the courts to determine whether the agency is

[5]The Plaintiffs argue that the trial Court misread the Florida Constitution when it ruled that "Section 5 of Florida's Home Rule Amendment for Dade County authorizes the City to nullify [the] effect" of the "Retroactivity Provision contained in section 500.90. . . ." R. 637-38; Appellants' Brief at 19, n. 5. The Appellants cite no authority for this assertion and, in fact, Section 5 specifically states that the home rule charter and ordinances enacted in pursuance thereof "may conflict with, modify or **nullify** any existing local, special or general law applicable only to Dade County." (emphasis added). The City enacted the April Home Rule Ordinance to nullify section 500.90 because the Retroactivity Provision renders the statute a special law. Such action is plainly authorized by Section 5 and, therefore, the trial court correctly found that the ordinance was enforceable.

carrying out the legislature's intent." *Department of Ins. v. Se. Volusia Hosp. Dist.*, 438 So. 2d 815, 819 (Fla. 1983) (citation omitted); *see, e.g., Solimena*, 402 So. 2d at 1245 ("In determining whether the legislature has improperly delegated discretion to the agency, [the court] must consider whether the statute establishes standards and guidelines which direct the agency in implementing the law.") (citing *Coca-Cola Co. v. State Dep't of Citrus*, 398 So. 2d 427 (Fla. 1981)). A simple general grant of authority is insufficient guidance for the adoption of specific rules. *Florida Dept. of Highway Safety & Motor Vehicles v. JM Auto, Inc.*, 977 So. 2d 733, 734 (Fla. 1st DCA 2008).

As explained by the Florida Supreme Court, the nondelegation doctrine requires policy decisions to be made by members of the legislature because they are elected to perform such tasks. *Bush v. Schiavo*, 885 So. 2d 321, 332 (Fla. 2004). Thereafter, administration of the legislative programs must be conducted pursuant to standards and guidelines "ascertainable by reference to the enactment establishing the program.'" *Id*. at 332 (internal citation omitted). "In other words, statutes granting power to the executive branch 'must clearly announce adequate standards to guide ... in the execution of the powers delegated. The statute must so clearly define the power delegated that the [executive] is precluded from acting through whim, showing favoritism, or exercising unbridled discretion.'" *Id.* at 332 (internal citation omitted).

The trial court properly found that section 500.90 is unconstitutionally vague because it affords the Department unfettered discretion to regulate the use of polystyrene products without *any* guidelines or standards for implementing the statute. Without necessary guidance from the Legislature, the Department has no means by which to ascertain legislative intent. This is a clear violation of the doctrine of nondelegation of powers. *See, e.g.*, *High Ridge Mgmt. Corp. v. State*, 354 So. 2d 377, 379-80 (Fla. 1977) (finding unconstitutional section 400.23, Florida Statutes authorizing the Department of Health to promulgate rules establishing uniform criteria for the evaluation of nursing home facilities); *Lewis v. Bank of Pasco County*, 346 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."); *Department of State, Div. of Elections v. Martin*, 885 So. 2d 453, 458-59 (Fla. 4th DCA 2004) (declaring unconstitutional statute vesting "unbridled discretion" in Department of Elections to determine whether nominee could withdraw from election after forty-second day before election).

In an effort to excuse the lack of enabling legislation in section 500.90, the Opponents contend that standards and guidelines are unnecessary because section 500.09(4), Florida Statutes authorizes the Department to, among other things, "adopt rules relating to food safety and consumer protection requirements for the

manufacturing, processing, packing, holding, or preparing of food; the selling of food at wholesale or retail; or the transporting of food by places of business not regulated under chapter 381 or chapter 509." This argument fails, however, because section 500.09 does not authorize the Department to regulate the use of polystyrene for any and all purposes and, as admitted by the Opponents, section 500.90 gave the Department no greater rights than it already had prior to its enactment. R. 318, 321, 350. According to the State, "section 500.09 provides rulemaking authority with respect to polystyrene *only for specified purposes*. . . ." R. 352-53 (emphasis added).[6] Thus, section 500.09 does not empower the Department to enact rules outside of its limited parameters of food safety and consumer protection, which would be considered an invalid exercise of delegated legislative authority. *See State of Fla., Dept. of Fin. Serv. v. Peter R. Brown Constr., Inc.*, 108 So. 3d 723, 727 (Fla. 1st DCA 2013) (finding that administrative code rule was an invalid exercise of delegated legislative authority).

The Opponents also suggest that standards and guidelines are unnecessary because section 500.90 is a statute of preemption as opposed to a delegation of rulemaking authority. The Opponents cite no authority for this distinction and, in

[6]The State further argued: "Far from giving [the Department] carte blanche to regulate polystyrene as it chooses, section 500.09(4) sets out various activities . . . that may be regulated for one of two purposes: food safety or consumer protection."). R. 354.

fact, section 500.90 does expressly delegate authority to regulate polystyrene to the Department, to the exclusion of all other state agencies and departments, by its express terms: "[t]he **regulation** of the use or sale of polystyrene products by entities regulated under this chapter is preempted to the [Department]." (emphasis added). The purported delegation/preemption distinction does not save the statute from a finding of unconstitutionality.

4. The Trial Court Correctly Recognized That Legislation Affecting Municipalities Cannot Be Arbitrary and Capricious.

The trial court also correctly recognized that municipalities enjoy constitutional protection against arbitrary and capricious laws based on Article III, section 11(b) of the Florida Constitution: "In the enactment of general laws on other subjects, political subdivisions or other governmental entities may be classified only on a basis reasonably related to the subject of the law."

Courts interpreting this constitutional provision have recognized that classification schemes affecting municipalities cannot be arbitrary. As recognized by the trial court, the opinion in *Department of Business Regulation v. Classic Mile*, 541 So. 2d 1155 (Fla. 1989), is instructive. The issue before the Florida Supreme Court was the constitutionality of a statute regulating simulcasts of horse races. The statute provided criteria establishing a class of counties in which a facility could be licensed. All parties in the action agreed that Marion County was the sole county that would ever fall within the statutorily designated class of counties eligible for

licensure due to specific requirements in the statute. In conducting its analysis, the Florida Supreme Court noted that "[a] statutory classification scheme must bear a reasonable relationship to the purpose of the statute in order for the statute to constitute a valid general law. . . . *Statutes that employ arbitrary classification schemes are not valid as general laws.*" *Id.* at 1157 (emphasis added) (internal citation omitted).

The court determined that the statute was not a valid general law because the classification scheme was "wholly arbitrary, having no reasonable relationship to the subject of the statute. . . ." *Id.* at 1159. Other courts have similarly recognized that classification schemes affecting municipalities cannot be arbitrary. *See, e.g., City of Miami v. McGrath*, 824 So. 2d 143 (Fla. 2002) (following *Classic Mile* in finding statute an invalid special law because municipalities were subject to an arbitrary classification scheme); *Waybright v. Duval County*, 142 Fla. 875 (Fla. 1940) (recognizing that there must be a reasonable basis for classifying counties differently); *Miami v. Dade County*, 190 So. 2d 436, 440 (Fla. 3d DCA 1966) (upholding a statute because the varying treatment was "neither capricious nor arbitrary."); *Florida League of Cities, Inc. v. Dep't of Environ. Reg.*, 503 So. 2d 1363 (Fla. 1st DCA 1992) (in a case between an association of cities and a state agency,

the court recognized that agency rules, like statutes, cannot be arbitrary and capricious).[7]

The Opponents attempt to distinguish the above cases by arguing that section 500.90 does not arbitrarily distinguish between political subdivisions; instead, section 500.90 merely distinguishes between permissible and impermissible regulations. This is a distinction without a difference. Section 500.90 renders most local polysytrene regulations permissible, while arbitrarily rendering the City's Ordinance preempted, and thus impermissible.

State v. Leavins, 599 So. 2d 1326 (Fla. 1st DCA 1992), cited by the State, has no application here. The challenged statutes in *Leavins* regulated oyster harvesting in Franklin County. The First District Court of Appeal determined that the statutes were general laws even though they applied to a specific region in the state because the Apalachicola Bay was an area of critical state concern, and the classification was "merely geographical, and not political." The challenged aspects of the law apply uniformly to anyone desirous of access to the marine resources in Apalachicola Bay. The protection of valuable marine resources is a valid, and indeed inescapable, exercise of the state's police power." *Id.* at 1336. The court compared the statutes

[7]*See also Goodman v. Martin County Health Dep't*, 786 So. 2d 661, 664 (Fla. 4th DCA 2001) ("A statue that is vague, arbitrary, or capricious and bears no reasonable relationship to a legitimate legislature intent is unconstitutional.").

to Florida's regulations concerning the citrus industry, which, because of climate, affect only those counties in the state that can support a commercial citrus crop. *Id.* at 1336-37. Unlike the statutes in *Leavins*, however, section 500.90's geographical impact is created by the legislation itself, not the geographical characteristics of the state or its climate. Accordingly, *Leavins* provides no basis to disturb the trial court's ruling.

5. Section 500.90 Creates Arbitrary Classification Schemes.

The trial court also correctly determined that the Retroactivity Provision creates a classification scheme that has no reasonable relationship to the subject of the statute. Local ordinances adopted prior to January 1, 2016 are not materially different than the City Ordinance, and there is no reasonable justification for giving them special preference. The State suggests that it was appropriate to use January 1, 2016 as the cutoff date to preserve the status quo, however, this argument actually supports the City's position that it was appropriate to amend the effective date of the City Ordinance to December 8, 2015, the date the City Ordinance was first introduced to the City Commission.

Second, Appellants (not the State) asserted that an additional classification scheme – beach towns vs. non-beach towns – justified the disparate treatment of the City Ordinance. The trial court rejected this argument, finding (i) no intent by the Legislature to protect beach towns; and (ii) even if there was evidence of intent, such

a classification is not reasonably related to the purpose of the statute. On appeal, the Appellants appear to be receding from their original position, arguing now that "there was no evidentiary basis for the Court to rule that the law impermissibly distinguishes between beach towns and non-beach towns." Appellants' Initial Brief at 36. The Appellants now take issue with the Court's finding of a "beach town" classification scheme, yet it was they who argued that such a classification was intended. R. 309, 312-313.

Regardless, the statute fails because the classification created by the exemption date of January 1, 2016 does not withstand constitutional scrutiny. The Opponents have advanced no legitimate justification for treating the City differently than the numerous municipalities granted protection by the Retroactivity Provision. January 1, 2016 predates the Effective Date of section 500.90 by six months and is of no legal or practical significance. The Florida Supreme Court precedent followed by the trial court compels a finding that section 500.90 is unconstitutional. *See Rollins v. State*, 354 So. 2d 61 (Fla. 1978) (finding statute unconstitutional where its separate classifications of billiard halls and bowling establishments had no reasonable basis to the statute); *Moore v. Thompson*, 126 So. 2d 543, 551 (Fla. 1960) (finding Sunday closing law applicable only to used car dealers unconstitutional); *Mikell v. Henderson*, 63 So. 2d 508, 509 (Fla. 1953) (declaring statute that forbade gamecock fighting on land, but not water craft, unreasonable and arbitrary).

C. Sections 403.708(9) and 403.7033 Do Not Preempt the City Ordinance.

The Opponents argue that the City Ordinance would still be preempted by sections 403.708(9) and 403.7033 even if section 500.90 were unconstitutional. Appellants further contend that the Court improperly considered subsequent legislative history to determine the meaning of sections 403.708(9) and 403.7033. Neither argument has merit.

It is a fundamental principle of legislative interpretation that "the Legislature is presumed to know existing law when a statute is enacted." *See Wright v. City of Miami Gardens*, 200 So. 3d 765, 773 (Fla. 2016) (quoting *Dickinson v. Davis*, 224 So. 2d 262, 264 (Fla. 1969)); *Collins Inv. Co. v. Metropolitan Dade County*, 164 So. 2d 806 (Fla. 1964). In addition, "it should never be presumed that the legislature intended to enact purposeless and therefore useless, legislation." *Sharer v. Hotel Corp. of Am.*, 144 So. 2d 813, 817 (Fla. 1962). With regard to section 500.90, the Appellants contend that the Legislature affirmed existing preemptions, but "specifically stressed" the preemption of local regulation of polystyrene. Appellants' Initial Brief at 21. Such an interpretation of section 500.90 defies logic. The Legislature's adoption of a statute that does nothing more than affirm and "stress" existing law is the epitome of useless legislation.

Instead, the Legislature's specific enactment of section 500.90 to preempt the regulation of polystyrene to the Department is evidence of its understanding that

sections 403.708(9) and 403.7033 had not already done so. This understanding is exemplified by plain and unambiguous language in section 500.90 allowing local governments 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***." (emphasis added).

If sections 403.708(9) and 403.7033 preempted ***all*** regulation of polystyrene to the State, the language in section 500.90 purporting to grant limited regulatory authority to local governments would be rendered meaningless as there would be no instance in which a use was not "otherwise preempted by law." It is a fundamental rule of statutory interpretation that courts should avoid readings that render part of a statute meaningless. *Unruh v. State*, 669 So. 2d 242, 245 (Fla. 1996) (quoting *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 456 (Fla. 1992)). "Furthermore, whenever possible courts must give full effect to *all* statutory provisions and *construe related statutory provisions in harmony with one another*." *Id.* at 245 (citation omitted) (emphasis added in part).

The court below was required to construe section 500.90 in a manner that gives meaning to all of its provisions, and harmonizes its language with sections

403.708(9) and 403.7033 to the extent they may overlap[8] or are otherwise applicable. Doing so, the trial court was correct to conclude that sections 403.708(9) and 403.7033 did not preempt all local regulation of polystyrene.[9] To find otherwise would be to render a significant portion of section 500.90 meaningless. R. 648.

D. Sections 403.708(9) and 403.7033 Lack Necessary Enabling Legislation.

Sections 403.708(9) and 403.7033 also lack the necessary standards and guidelines for implementation, rendering them unconstitutionally vague. This failure to provide legislative guidance is especially egregious with respect to section 403.7033 because it allows the State to do nothing, and indefinitely. The statute required the Department of Environmental Protection to conduct a study and provide a report (the "Report") to the Legislature no later than February 1, 2010, which it did. The statute further provides that "until such time that the Legislature adopts the

[8]The City recognizes that statutes may overlap in certain instances, but the cases cited by the State are distinguishable. *See, e.g., Mora v. Tower Hill Prime Inc. Co.*, 155 So. 3d 1224 (Fla. 2d DCA 2015) (the court recognized that two provisions of the same statute regulating insurance providers overlapped such that factors satisfying one section of the statute could also satisfy another section); *Rivera v. Torfino Enters.*, 914 So. 2d 1087 (Fla. 4th DCA 2005) (finding the victim of retaliatory firing could pursue remedies under Whistleblowers Act and Florida Civil Rights Act); *Fayerweather v. State*, 332 So. 2d 21 (Fla. 1976) (recognizing that the same conduct could be considered a crime under more than one statute).

[9]The State takes the argument a step further, suggesting that even the Department cannot enact any new regulations of auxiliary containers, wrappings and plastic bags. State Initial Brief at 32. If that is truly the effect of section 403.7033, it is hard to understand the purpose served by section 500.90.

recommendations" of the Department of Environmental Protection, no local government, local governmental agency, or state government agency may adopt *any* rules or regulations related to the use of "auxiliary containers, wrappings, or disposable plastic bags." The Legislature was given the Report in 2010 and, to date, none of the recommendations contained therein have been adopted. The statute provides no guidelines or deadlines with respect to the Department's adoption or rejection of the environmental recommendations, nor does it contemplate regulation or rulemaking—only approval. Section 403.7033 thus leaves the Department without any direction for implementing the Legislature's intent, and depriving municipalities of critical home rule powers potentially without end. This lack of guidance has resulted in protracted legislative limbo for local governments and state agencies alike.

The trial court properly distinguished the cases relied upon by Appellants. In *Classy Cycles, Inc. v. Bay County*, 201 So. 3d 779 (Fla. 1st DCA 2016), the owner of a vehicle rental business (the "Appellant") challenged local ordinances enacted by the City of Panama City Beach and Bay County imposing specific safety vests and insurance requirements. The Appellant sought a declaratory judgment from the trial court declaring that the ordinances exceeded the scope of the authority of the local governments. Summary judgment was entered in favor of the local governments and appeal was taken.

On further review, the appellate court found that vehicle safety equipment was already well-covered by existing statutes and, therefore, the safety vest requirements were expressly preempted. The court further found that the local government insurance requirements were expressly preempted by section 316.007, Florida Statutes, and impliedly preempted by the "pervasive scheme of regulation set forth in Florida law." *Id.* at 788. Significant to the court's decision in *Classy Cycles* was the existence of a "pervasive scheme of regulation" surrounding the subject matter of the local regulations.

Similarly, *Masone v. City of Aventura*, 147 So. 3d 492 (Fla. 2014), cited by Appellants in support of their argument that sections 403.708(9) and 403.7033 expressly preempt all local regulation of polystyrene, involves a comprehensive statutory scheme regulating a particular subject. In that case the issue was whether certain municipal ordinances prohibiting and providing punishments for red light violations were expressly preempted by the Florida Uniform Traffic Control Law ("FUTCL"). The court found that FUTCL contained a "detailed code regulating traffic throughout the state," as well as "two broad preemption provisions." *Id.* at 495. The court determined that each of the contested ordinances created a "municipal code enforcement system for the disposition of red light violations that is entirely separate from the enforcement system under chapters 316 and 318 [of the Florida statutes]." *Id.* at 496.

In this case, there is no comprehensive scheme regulating the use of polystyrene, and the Department lacks authority to create one outside its limited boundary of food safety and consumer protection. *See* p. 24, *supra*. Thus, *Classy Cycles* and *Masone* actually highlight the lack of any statutory conflict in this case.

E. The Trial Court Properly Considered Appellants' Facial Challenge to the City Ordinance.

At the beginning of this proceeding, Appellants stated that they were asserting a facial challenge to the City Ordinance. R. 651. They then changed their position, arguing instead that the issue was one of "conflict preemption" such that the distinction between "facial unconstitutionality" and "as applied unconstitutionality" is "inapplicable and irrelevant." R. 216. Nevertheless, the trial court appropriately determined that the Appellants' original facial challenge failed because it is undisputed that the City Ordinance can be applied in a constitutional manner. *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1109 (Fla. 2008) (quoting *Florida Dep't of Revenue v. Howard*, 916 So. 2d 640, 642 (Fla. 2005)).

As noted by the trial court, a law will be found facially unconstitutional only if there is no set of circumstances under which the statute can be applied in a valid manner. *Stop the Beach Renourishment*, 998 So. 2d at 1109 (quoting *Florida Dept. of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005)). Appellants have not challenged the City Ordinance in its entirety, thereby recognizing that it can be

applied constitutionally in certain circumstances.[10] There is no basis to disturb the trial court's ruling.[11]

F. The Trial Court Correctly Honored Sovereign Immunity and the Separation of Powers.

Finally, the trial court correctly found that Appellants should have challenged the City Ordinance through appropriate administrative channels rather than the courts. The City Ordinance sets forth comprehensive procedures and penalties for enforcement, and the City has prosecutorial discretion as to how and to what extent it will enforce the City Ordinance, which it is entitled to exercise without interference from the courts. *See Detournay v. City of Coral Gables*, 127 So. 3d 869, 872 (Fla. 3d DCA 2013).

In *Detournay*, this Court held that it could not grant a Coral Gables homeowners' association's ("HOA") request to compel the City to prosecute an

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[10]Plaintiffs do not challenge Sections 3 and 4 of the City Ordinance that prohibit the sale or use of expanded polystyrene by City contractors and vendors under City contract, and the use of polystyrene containers at special events held by the City.

[11]In a footnote on the last page of their brief, the Plaintiffs request to assert an "as applied" challenge now when their first argument on the facial challenge was rejected. The Plaintiffs chose to assert a facial challenge in the proceeding below and reaffirmed that intent, and their ability to now assert an "as applied" challenge is not a proper issue to be considered by the Court in this appeal. R. 123, 126.

enforcement action against a company within its borders that the HOA contended was violating the City building and zoning code. *See* 127 So. 3d at 870. The Court declined to intervene, in favor of the City's prosecutorial discretion: "Under the doctrine of separation of powers, the City's discretion to file, prosecute, abate, settle, or voluntarily dismiss a building and zoning enforcement action is a purely executive function that cannot be supervised by the courts, absent the violation of a specific constitutional provision or law." *Id.* at 870-71. The Court recognized that the principle relied on had arisen most commonly in tort, mandamus, and criminal cases, but held that "the governing principles apply equally well to injunctions and declaratory actions[,]" and concluded: "[s]eparation of powers is a constitutional doctrine that extends across all procedural vehicles that might be used to challenge executive action. It would be a hollow idea if it applied only to some procedures and not others." *Id.* at 874.

Here, Appellants have asked the trial court to violate the doctrine of separation of powers by declaring facially invalid a City Ordinance that had not yet been applied, even though there are clear and admitted facially valid applications of the City Ordinance.[12] Appellants did not, that is, wait for the City to assess a violation

[12] Carving the City Ordinance up such that certain applications remain valid would render its application and enforcement impractical, and create confusion with regard to notice of the Ordinance's prohibitions. Appellants' proposal, for example, would preempt the City Ordinance as applied to restaurants and other retailers, thus allowing them to sell food and beverages in polystyrene containers, but leave food

of the City Ordinance, challenge that assessment through proper administrative channels, or seek first-tier certiorari review before asking this Court to intervene. Recognizing that courts should not second-guess the political and police power of other branches of government, the trial court's ruling properly allows the City to exercise its prosecutorial discretion to apply the City Ordinance as it deems appropriate. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 2779, 81 L. Ed. 2d 694 (1984); *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523 (Fla. 1995). The issues presented should only reach this court for second-tier certiorari review once administrative relief and first-tier certiorari review in the circuit court of appeal have been exhausted.

Appellants disagree, arguing that local regulation in conflict with general state law is unenforceable, and that the trial court had an obligation to declare the City Ordinance invalid and unconstitutional. The flaw with their argument, as detailed above, is that the statute is a special law to the extent it invalidates the City Ordinance, and there is no impermissible conflict with the Department's limited rulemaking authority.

CONCLUSION

The trial court's decision should be affirmed.

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trucks and other outdoor dining facilities on City rights-of-way subject to the City Ordinance.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in Times New Roman 14-point font in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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