

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

CASE NO. 3D17-0562

L.T. No. 2016-018370-CA-01

FLORIDA RETAIL FEDERATION, INC., SUPER PROGRESO, INC., and THE  
STATE OF FLORIDA,

Appellants,  
v.

THE CITY OF CORAL GABLES, FLORIDA,

Appellee.

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**AMENDED MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF  
OF SURFRIDER FOUNDATION, CAMPAIGN TO DEFEND LOCAL  
SOLUTIONS, LEAGUE OF WOMEN VOTERS OF FLORIDA, LEGAL  
SCHOLARS, 1000 FRIENDS OF FLORIDA, RETHINK ENERGY  
FLORIDA, FLORIDA WILDLIFE FEDERATION, SAVE THE MANATEE  
CLUB, AND CENTER FOR BIOLOGICAL DIVERSITY IN SUPPORT OF  
APPELLEE**

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Surfrider Foundation, Campaign to Defend Local Solutions, League of Women Voters of Florida, Legal Scholars, 1000 Friends of Florida, ReThink Energy Florida, Florida Wildlife Federation, Save the Manatee Club, and Center for Biological Diversity (Proposed Amici), pursuant to Rule 9.370, Florida Rules of Appellate Procedure, respectfully request leave to submit an amicus curiae brief in support of upholding the Trial Court's Final Order. Counsel for Appellee and counsel for the State of Florida have consented to Proposed Amici's participation as amici curiae in this proceeding. Counsel for Appellants Florida Retail Federation, Inc., and Super Progreso, Inc., has not consented to the Proposed Amici's participation in this proceeding.

Pursuant to the Florida Rule of Appellate Procedure 9.370, amicus briefs supporting Appellee are due today, September 28, 2017 (10 days from their initial filing on September 18, 2017). As no order responding to Proposed Amici's original motion for leave to file an amicus brief has been received,<sup>1</sup> Proposed Amici are filing this amended motion contemporaneously with its amicus brief in

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<sup>1</sup> Proposed Amici submitted its original motion seeking leave to file an amicus brief on September 18, 2017. On September 19, 2017, Appellants Florida Retail Federation, Inc., and Super Progreso, Inc., filed a response in opposition to the Proposed Amici's request and Proposed Amici filed a motion requesting leave to file a reply. On September 25, 2017, this Court issued an order granting Proposed Amici's request to file a reply and Proposed Amici filed their reply on September 26, 2017.

an abundance of caution to allow for a timely filing should this Court grant its request.

**STATEMENT OF INTEREST OF PROPOSED AMICI**

Surfrider Foundation is a grassroots nonprofit organization dedicated to the protection and enjoyment of the world's oceans, waves, and beaches through a powerful activist network of more than 500,000 supporters in the U.S., including eleven grassroots Chapters in Florida. Surfrider Foundation has a particular interest in the outcome of this case, because plastic pollution harms coastal recreation and the marine environment in Florida, including coastal parks and preserves in Coral Gables, that are regularly used and enjoyed by its members.

The Campaign to Defend Local Solutions (CDLS) is a nonpartisan effort focused on raising awareness of the spread of state preemption of local laws occurring across the country by working with a network of over 1,100 individuals across 43 states, including 15 national and Florida-based organizations and over 40 elected officials. CDLS has an interest in protecting local governments' ability to respond to issues of environmental concern impacting their communities and provides support to cities whose rights are under attack.

The League of Women Voters of Florida (LWVFL) is a nonpartisan political organization encouraging informed and active participation of citizens in

government. LWVFL has an interest in protecting natural resources and local governments' ability to exercise their constitutional powers.

Laurie Reynolds is the Prentice H. Marshall Professor of Law, Emerita, at the University of Illinois College of Law. Nestor Davidson is Professor of Law at the Fordham University School of Law and runs its Urban Law Center. As professors of state and local government law, these legal scholars understand the background and development of home rule across the country and how home rule has been indispensable to protecting local participatory democracy. Accordingly, they have an interest in honoring the balance of power enshrined in the Florida Constitution and are concerned with the recent trends in Florida that are undermining the value of home rule.

The Center for Biological Diversity (Center) is a national non-profit organization seeking to protect endangered animals and plants and habitat needed for their survival. The Center has an interest in protecting the unique and biologically diverse marine habitats in Florida from the harmful impacts of expanded polystyrene litter.

Florida Wildlife Federation, Inc. (FWF) is a conservation education organization composed of approximately 60,000 members and supporters who have a common interest in preserving, managing, and improving Florida's fish, wildlife, soil, water and plant life. FWF has a particular interest in abating harmful

pollution, including the reduction of expanded polystyrene litter, so as to afford protection to Florida's natural resources, wildlife, and marine environment.

Save the Manatee Club (SMC) is a national nonprofit organization founded in Florida over three decades ago to protect manatees and their aquatic habitat for future generations. Since marine debris remains a significant cause of manatee mortality, SMC has a particular interest in reducing plastic litter, including expanded polystyrene at issue in this case, in order to improve and protect aquatic ecosystems that support manatee populations.

1000 Friends of Florida, Inc. (1000 Friends) is a nonprofit organization which has been advocating for sound growth management to conserve environmental resources and build better communities since 1986. 1000 Friends has an interest in providing citizens and local governments a meaningful role in shaping the futures of their communities and protecting municipalities' constitutional right to plan for growth and development.

ReThink Energy Florida (REF) is a Florida-focused non-profit organization dedicated to engaging, educating, and empowering citizens to take action and achieve energy independence in a healthier, more sustainable environment. REF has an interest in reducing the consumption of petroleum based products, like expanded polystyrene at issue in this case, and creating a sustainable environment, including the preservation of Florida beaches and parks.

## **ISSUE TO BE ADDRESSED AND GROUNDS FOR GRANTING**

In moving for leave to file an amicus curiae brief, the Proposed Amici seek to supplement Appellee's legal arguments against preemption of Coral Gables' ordinance by providing the historical and legal context of how the law ensures the use of home rule authority to protect local economies, public health, and the environment. The statutes at issue in this case contain language purporting to preempt local regulation, but they neither articulate a uniform state policy nor establish statewide minimum standards. Unlike past use of the power of preemption, this case involves a narrow usurpation of home rule authority in order to create a regulatory vacuum. The statutes would in effect unconstitutionally strip local governments of the power to address an important issue of local concern—the way in which expanded polystyrene is harming the economic, environmental and aesthetic fabric of their communities. The amicus brief will aid in the Court's disposition of this case by providing a broader context of the legislative effort to remove constitutionally authorized power from home rule governments, underscoring the legal protection of home rule under the law, and highlighting the special importance local voices play in the environmental arena. Proposed Amici will describe the environmental and economic harms caused by expanded polystyrene (the subject of Coral Gables' ban) and other plastics and how the Florida Constitution authorizes local governments to act on their constituents'

environmental policy preferences, especially in the absence of a statewide program.

The Proposed Amici will argue that the Trial Court's order should be upheld per curiam.

**WHEREFORE**, Proposed Amici respectfully request this Court to issue an order granting Proposed Amici leave to file an amicus curiae brief and deem the amicus curiae brief attached timely filed as of the date of the order.

Respectfully submitted on this 28th day of September, 2017.

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MANATEE CLUB, AND CENTER FOR BIOLOGICAL DIVERSITY, IN  
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## **IDENTITY AND INTEREST OF AMICI CURIAE**

**Surfrider Foundation** is a nonprofit organization dedicated to the protection and enjoyment of the world's oceans and beaches through a network of more than 500,000 supporters in the U.S. Surfrider Foundation has a particular interest in this case, because plastic pollution harms coastal recreation and the marine environment in Florida, including coastal parks in Coral Gables.

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**The League of Women Voters of Florida** (LWVFL) is a nonpartisan, political organization encouraging informed and active participation of citizens in government. LWVFL has an interest in protecting natural resources and local governments' ability to exercise their constitutional powers.

**Laurie Reynolds** is the Prentice H. Marshall Professor of Law, Emerita, at the University of Illinois College of Law. **Nestor Davidson** is Professor of Law at the Fordham University School of Law. As professors of state and local government law, these academics understand the development of home rule across the country and have an interest in protecting local participatory democracy. They

offer their vantage points on the recent trends in Florida, including the statutes at issue in this case, that are undermining home rule.

The above amici are joined by five additional organizations committed to protecting local governments' ability to respond to issues of environmental concern impacting their communities.<sup>1</sup>

## **INTRODUCTION**

The trial court identified fatal legal flaws in the preemption statutes under which appellants challenged a local government's authority to adopt environmental protections. The court properly concluded that the statutes violated the prohibition on special legislation as well as the non-delegation doctrine. Amici submit this brief not to elaborate on the doctrinal strengths of the trial court's opinion, but rather to put the issue of local authority to protect the environment into its legal and policy context, particularly given the absence of state action to address this serious problem. Amici have come together to voice their concern over the legislature's disregard of the constitutional authority guaranteed to home rule municipalities in Florida, seeking to deprive local governments of the tools they need to deal with significant environmental damage in their communities, including those caused by plastics.

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<sup>1</sup> The additional five non-profit organizational Amici are identified and listed in Appendix A to this brief.

In this case, the City of Coral Gables followed in the footsteps of numerous other coastal communities in Florida and across the U.S. to reduce plastic pollution by banning expanded polystyrene (EPS) containers.<sup>2</sup> Coral Gables, known as “the City Beautiful,” sits on the east coast along Biscayne Bay Aquatic Preserve just south of Miami, with picturesque parks and preserves spanning the majority of its coastline. Coral Gables is also known for its tree-lined boulevards, first class shopping, as well as historical landmarks such as the world-famous Biltmore Hotel and the Venetian Pool. Given its renown as a beautiful destination, it is not surprising that litter would take a toll on Coral Gables’ economy and environment. Indeed, Coral Gables cited EPS’s negative impacts and presence in its streets, parks, and waterways when the City passed the ordinance appellants challenged below.<sup>3</sup> The trial court’s order was correct, and affirming it will ensure that all communities can protect their health, economy, and environment.

## **STANDARD OF REVIEW**

The validity of an ordinance is a question of law subject to de novo review. *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1241 (Fla. 2006). In Florida, a municipality is given broad authority to enact ordinances under its municipal home

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<sup>2</sup> Expanded polystyrene (EPS), also commonly referred to as the brand name Styrofoam, is a lightweight, petroleum-based plastic material commonly used in single-use food service containers and other packaging materials.

<sup>3</sup> City of Coral Gables City Comm., File No. 15-4582-Sign Cover Memo-First Reading (Dec. 8, 2015).

rule powers and an appellate court will “indulge every reasonable presumption in favor of an ordinance’s constitutionality.” *See Art. VIII, § 2(b), Fla. Const.; § 166.021 (4), Fla. Stat. (2011); City of Pompano Beach v. Capalbo*, 455 So. 2d 468, 469 (Fla. 4th DCA 1984) (citing *Kass v. Lewin*, 104 So. 2d 572 (Fla. 1958)). The standard of review as to whether a statute is constitutional is also de novo. *Johnson v. State*, 78 So. 3d 1305, 1310 (Fla. 2012).

## **ARGUMENT**

### **I. THE PREEMPTION STATUTES ON WHICH APPELLANTS RELY UPSET THE CAREFULLY CONSTRUCTED BALANCE BETWEEN STATE AND LOCAL POWERS**

The home rule powers enshrined by the people of Florida in their constitution allow communities to efficiently and creatively address their particular needs, challenges, and preferences through adoption of local laws. Prior to Florida’s adoption of home rule, absolute legislative authority was vested in the State. Though the State regularly transferred legislative power to its local governments, “Dillon’s Rule” applied to strictly and narrowly construe the scope of municipal power.<sup>4</sup> Beginning in the late 19th century, however, many states began to recognize the value of municipal government initiative and flexibility to

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<sup>4</sup> As a general rule of strict statutory construction, Dillon’s Rule allowed municipalities powers expressly granted, necessarily or fairly implied, and essential to the accomplishment of local power granted by the State. *See Richard Briffault and Laurie Reynolds, Cases and Materials on State and Local Government Law* 327 (8th Ed. 2016).

respond to local problems. Home rule became an increasingly popular state constitutional provision, rejecting Dillon's Rule and recognizing the need for local democratic institutions to respond to their own local issues without state interference.

In Florida, the push for home rule was triggered by the post-World War II growth in population and the increasingly complex and localized problems for which a statewide solution would not be appropriate. *See Boca Raton v. State*, 595 So. 2d 25, 27 (Fla. 2002). In 1968, the Florida Constitution was amended to release municipalities from the narrow restrictions of Dillon's Rule and to transfer broad swaths of generalized legislative authority to municipal governments.<sup>5</sup> This amendment fundamentally transformed the state-local relationship and gave municipalities "inherent power to meet municipal needs." *Lake Worth Utilities Auth. v. City of Lake Worth*, 468 So. 2d 215, 217 (Fla. 1985).<sup>6</sup>

Home rule's reallocation of power between state and local governments reflects the drafters' judgment that when it comes to local problems, the state legislature has neither the time nor the expertise to find solutions. Moreover, it

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<sup>5</sup> "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." Fla. Const., Art. VIII, § 2(b).

<sup>6</sup> *See also* Talbot D'Alemberte, *The Florida State Constitution* 257 (2d ed. 2017); Robert L. Nabors, *Florida Home Rule GreenBook* 47-51 (2014).

embodies the basic principles of federalism that government power should be exercised at the most local level of government possible, allowing the people most affected to shape the contours of that action. The State of Florida is comprised of many different communities with many different geographic, economic, and demographic issues. Home rule respects that wide-ranging diversity by allowing each locality to respond to its particular concerns in the way most appropriate for its citizens.

Municipal home rule power, of course, is not absolute. In the implementation of statewide policy, the legislature may decide that local power should be subject to overriding general state statutory schemes, uniform statewide policies, or minimum statewide standards that local governments can supplement, but not undercut. Using the doctrinal tool of preemption, legislatures may limit or curtail local home rule authority in such cases. For years, preemption cases in Florida have predominately dealt with the question of whether state statutes should be interpreted as impliedly preempting local legislative action. Instances of express preemption in Florida statutes have been few and required little legal doctrinal analysis.<sup>7</sup> Notably, however, every Florida case involving express

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<sup>7</sup> Florida courts have cautioned that the threshold for express preemption is high, and not to be imputed lightly. *See D'Agastino v. City of Miami*, No. SC16-645, 2017 WL 2687694, at 10-13 (Fla., June 22, 2017). This heightened standard reflects a judicial assumption that the legislature would not restrict constitutionally protected local powers without good reason and a statewide program. The same

preemption has involved a statute that was based on a careful legislative consideration of competing concerns, resulting in the adoption of a comprehensive statewide regulatory scheme which, in the legislature's estimation, would make local regulation unwise or contrary to state policy.<sup>8</sup>

The statutes at issue in this case contain express language purporting to preempt local regulation, but they neither articulate a uniform state program nor establish statewide minimum standards. They have but one effect—to create a regulatory vacuum by stripping local governments of the power to address an important issue of local concern—the way in which EPS is harming the economic, environmental and aesthetic fabric of their communities. Because this is the first litigated challenge to a state effort to create a regulatory void in the guise of express preemption, it should be treated as a case of first impression. Unlike other Florida cases involving express preemption, here the court is asked to evaluate the legitimacy of a preemption statute that is unhinged from general state regulation

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rationale supports a heightened scrutiny to the review of infringements of home rule that lack any statewide program or minimum standards, as is the case here. With the increasing erosion of home rule, heightened judicial scrutiny is an important check on improper state preemption.

<sup>8</sup> See, e.g., *Masone v. City of Aventura*, 147 So. 2d 492 (Fla. 2014) (Florida Uniform Traffic Control Law carves out a few instances in which local regulation is permissible, but generally imposes statewide standards); *Tampa Electric Co. v. Garcia*, 767 So.2d 428 (Fla. 2000) (Florida Electrical Power Plant Siting Act restricts local authority leaving the state as the sole entity to approve siting); *Tribune Co. v. Canella*, 458 So. 2d 1075 (Fla. 1984) (statewide regulatory scheme in Florida Public Records Act expressly preempts most local action).

and would only undermine constitutionally-recognized local power intended to afford communities vital protections.

Standing alone, the statutes in this case may seem isolated as to their impact on local powers. They are, however, part of a new disturbing pattern of state legislative erosion of constitutionally protected home rule powers. In recent years, the Florida legislature has passed laws prohibiting local regulation of smoking; of fire sprinklers; of nutrition and food policy; of hoisting equipment; of beekeeping; of fuel terminals; of wireless alarm systems; of minimum wages, paid sick leave and other employment benefits such as vacation time; of moving companies; of bio-medical waste in city landfills; and even of milk and frozen desserts. *See* Fla. Stat. §§ 386.209 et seq., 553.73(17), 509.032 et seq., 489.113 et seq., 586.10 et seq., 163.3206(3); 553.793 et seq., 218.077, 507.13 et seq., 381.0098(8), and 502.232 et seq. (2016). Although unchallenged in court to date, each of these laws is nothing more than a targeted effort to eviscerate specific home rule powers like the statutes at issue here—there is no statewide program to take their place, no statewide protections to meet communities' needs.

As currently used by the Florida legislature, preemption has become a tool to selectively strip local powers and to create a regulatory vacuum, even where there is strong local political will to regulate an important local problem. This is not a valid exercise of the preemption power, but instead an unlawful expansion of state

power beyond its constitutionally permissible limits. The statutes appellants rely on here to claim preemption of Coral Gables' ordinance far exceed the legislature's authority, distort the careful balance between state and local power, and should be invalidated by this court as they were by the trial court below.

## **II. UNFETTERED LEGISLATIVE PREEMPTION IS AN UNCONSTITUTIONAL EVISCERATION OF HOME RULE AUTHORITY AS PROTECTED IN THE FLORIDA CONSTITUTION**

The legislature that passed the Municipal Home Rule Powers Act understood the balance needed and stressed that home rule initiative powers must be given wide latitude. *See Fla. Stat. §166.021.* The passage of statutes such as those at issue here, however, has turned that basic tenet on its head. Instead of respecting local government flexibility to respond to local problems, it puts municipalities on a short leash and selectively targets specific home rule powers for removal, creating a regulatory vacuum in spite of strong local political will to act. In essence, the State's approach limits local governments' ability to exercise their home rule powers to a narrow range of regulations, only those deemed acceptable by the State.

Indeed, over time the State's "preemption" legislation has morphed well beyond the term's original purpose, as a tool to assure the consistency of local policy with a statewide regulatory framework or minimum standard. As noted in Part I, preemption in Florida today has degenerated into a series of targeted attacks

on the decision-making authority of local communities, which undermines the Florida Constitution's protection of home rule.<sup>9</sup> Florida legislators have forgotten that their Constitution anticipates that localities will frequently enact regulations to deal with problems in their own individual ways, without State approval or State authorization, and often in ways that the State would not choose to adopt at the state level. Policy experimentation and the ability to respond to unique local situations are essential aspects of a strong home rule system. The State's erosion of home rule powers leaves local governments unable to deal with local problems.

Looked at through a historical lens, the current rash of preemption legislation is in reality nothing more than a reincarnation of the pre-home rule state legislative practice of “ripper bills.” As Professor Richard Briffault has noted:

One notorious abuse of the period was the practice by rural dominated state legislatures of adopting “ripper bills”—laws that wrested municipal functions out of urban hands and transferred them to state appointees. Home rule was intended to change the traditional rule of plenary state legislative authority over local matters, to protect cities from opportunistic, partisan state meddling, and thus to vindicate the principle of local self-government.<sup>10</sup>

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<sup>9</sup> For instance, though the State has the authority to preempt local firearms regulation pursuant to its comprehensive statewide scheme (as it has), its “preemption” goes even further. Section 790.33(3)(a), Florida Statutes, imposes up to \$5,000 in personal liability and the threat of removal from office if a local elected official enacts or enforces a local ordinance or administrative rule encroaching on the field of firearm regulation. Penalizing legislators who exercise their right to vote is an unprecedented and extreme use of preemption.

<sup>10</sup> Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as Case Study in the Dilemmas of Local Self-Determination*, 92 Colum. L. Rev. 775, 805-06 (1992) (citations omitted).

Like those 19th century anti-urban measures, state preemption today deprives cities of the initiative powers they need to respond to their own specific local issues.

This practice is just as inconsistent with Florida's constitutional protection of home rule as were the ripper bills that home rule decisively rejected. The legislature's resort to a tactic that prompted the adoption of home rule should not stand.

Considering the breadth and number of legislative enactments regarding preemption in Florida, and the reality that preemption is increasingly being used to strip local governments of power without statewide regimes in place, it is evident that the legislature has fundamentally misapprehended the proper role for state preemption. While the State can adopt a valid statewide program that applies uniform minimum statewide standards, it should not be allowed to eviscerate home rule by disregarding constitutionally protected local power. The Florida Constitution stands squarely in the way of any such effort.

### **III. THE CITY PROPERLY EXERCISED ITS HOME RULE AUTHORITY IN RESPONSE TO MARINE POLLUTION AND OTHER ENVIRONMENTAL IMPACTS FROM EPS**

Perhaps no issue is more compelling for a coastal Florida municipality than protecting its community from the blight of pollution. EPS, more so than other plastic, easily fragments into small non-biodegradable pieces that wreak havoc on the environment by polluting waterways, killing wildlife, and contaminating our food chain. These environmental impacts hurt local economies by reducing coastal

tourism and increasing urban blight and cleanup costs. Home rule powers protected by the Florida Constitution afford localities the authority to address these economic, environmental, and public health concerns. Like several other towns in Florida and across the U.S., Coral Gables chose to ban certain uses of EPS food containers to reduce their harmful impacts, which are particularly devastating to the City's coastal environment and economy.

**A. Plastic Marine Pollution Threatens Coral Gables Aesthetically and Ecologically**

Marine litter is one of the most pervasive problems facing the world's oceans today, and coastal communities such as Coral Gables are at particular risk from the harms it poses. Due to its mass production and persistency, plastics account for 60 to 90 percent of marine litter and are particularly hazardous to marine ecosystems because plastic is durable, indigestible, non-biodegradable, and toxic. U.N. Env't Programme and GRID-Arendal, *Marine Litter Vital Graphics* 7 (2016); U.S. Envtl. Prot. Agency, *Marine Debris in the North Pacific: A Summary of Existing Information and Identification of Data Gaps* 3 (2011). The material Coral Gables banned in certain forms—EPS—is one of the most common types of plastic in the aquatic environment. U.S. Envtl. Prot. Agency, *State of the Science White Paper: A Summary of Literature on the Chemical Toxicity of Plastics Pollution to Aquatic Life and Aquatic-Dependent Wildlife* 23 (2016). EPS was targeted by the City because the expanded (or “foam”) form of polystyrene is

composed of over 95% air, making it more prone to fragmentation, more easily disbursed by wind, and harder to clean up. Although there is not a comprehensive assessment of the amount of litter going into Florida's waterways, cleanup efforts rank plastic and foam packaging in the top 10 types for 2015. Leonardo Mata, Fla. Dep't of Envtl. Prot., *Florida Marine Reduction Guidance Plan 5* (2017).

Plastic marine litter has wide-ranging adverse environmental impacts, particularly in our oceans, because plastic is not biodegradable and therefore remains for hundreds of years. See U.N. Env't Programme and GRID-Arendal, *Marine Litter Vital Graphics 7* (2016). As EPS is slowly fragmented by waves, wind, and sun, marine life frequently ingest the small pieces which can cause choking, internal blockages, and starvation. U.S. Envtl. Prot. Agency, *State of the Science White Paper: A Summary of Literature on the Chemical Toxicity of Plastics Pollution to Aquatic Life and Aquatic-Dependent Wildlife* 31 (2016). EPS consumption can poison marine life and potentially humans because the toxins it contains enter the food chain when ingested by marine life. See Emma Teuten et al., *Transport and Release of Chemicals from Plastics to the Environment and to Wildlife*, Philosophical Transactions of the Royal Society B, June 14, 2009, at 2037, 2042. EPS also sorbs<sup>11</sup> pollutants, like PCBs and DDT, which are already

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<sup>11</sup> "Sorption" encompasses the processes of absorption (permeates within) and adsorption (adheres to surface). The term sorption is widely used since it is often unknown which process or if both occurred. S. Endo and A. Koelmans, *Sorption*

present in seawater. Once ingested, these materials can cause disease, physical abnormalities, and adverse reproductive, developmental, neurological, endocrine, and immunologic impacts. *Id.* at 2032-2042; Peter Orris et al., *Persistent Organic Pollutants and Human Health* 7-9 (World Fed'n of Public Health Ass'n 2000).

In addition to transferring hazardous substances to marine life, lingering EPS also introduces pathogens, parasites, toxic algae, and invasive and non-native species to new coastal ecosystems. David K. Barnes et al., *Accumulation and Fragmentation of Plastic Debris in Global Environments*, Philosophical Transactions of the Royal Society B, June 14, 2009, at 1985. Invasive species can be detrimental to shoreline ecosystems by introducing new predators, causing loss of biodiversity, and modifying habitat structure and functions. U.N. Env't Programme et al., *The Honolulu Strategy: A Global Framework for Prevention and Management of Marine Debris* 8 (2011). As the amount of marine debris increases in our oceans, so does the risk of invasions.

## **B. Impacts on Coastal Tourism and the Economy**

It is widely recognized that litter harms the economy by reducing tourism, damaging fisheries and aquaculture industries, and increasing cleanup and animal rescue costs. U.N. Env't Programme, *Marine Plastic Debris & Microplastics:*

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*of Hydrophobic Organic Compounds to Plastics in the Marine Environment: Equilibrium, in The Handbook of Environmental Chemistry* (Springer ed., 2016).

*Global Lessons and Research to Inspire Action and Guide Policy Change* 99-110 (2016); Leonardo Mata, Fla. Dep’t of Env’tl. Prot., *Florida Marine Reduction Guidance Plan 5* (2017). In the U.S., litter causes millions of dollars in lost fishing and tourism revenue and over \$10 billion in cleanup costs annually, with state and local governments covering 11.5 percent of the cleanup costs. Surfrider Foundation and UCLA Wells Env’tl. Law Clinic, *2013 Briefing Book: Federal Actions to Address Plastic Marine Pollution* 4 (2013). Whether for aesthetic reasons or out of health and safety concerns, plastic litter discourages individuals from swimming, boating, and fishing activities Allsopp et al., *Plastic Debris in the World’s Oceans* 9 (Greenpeace 2006). Several studies have confirmed what most would expect, that people prefer litter-free beaches and, in fact, that cleanliness is the most important characteristic for coastal visitors. U.N. Env’t Programme et al., *The Honolulu Strategy: A Global Framework for Prevention and Management of Marine Debris* 8 (2011). In addition to its deterrent effect, marine debris can lead to beach closures that cause millions of dollars in economic losses. *Id.* at 9 (Beach closures due to litter in New Jersey caused between \$53 to \$224 million in economic losses in 1988.) Plastic litter’s ability to transport red tide and toxic algae could also significantly damage water-based activities. Moreover, plastic litter in waterways creates a perception of polluted waters which can dissuade tourists and lower the demand and price for fish. As discussed above, plastic litter

can also transfer contaminants to water bodies and marine animals, causing potential public health risks when the animals are consumed by people.

Because of Florida's prolific coastlines, rivers, and lakes, tourism and the fishing industry are vital to the state and local economies. For these important revenue streams, litter impacts are of significant concern. In 2015, for example, out-of-state tourism generated approximately \$24.3 billion in tax revenue, with over \$5 billion going to local governments. *Tourism Economics, The Economic Impact of Out-of-State Visitor Spending in Florida* 2, 23-24 (2016). This revenue equaled almost a third of all government spending for the year. Nat'l Ass'n of State Budget Officers, *State Expenditure Report: Examining Fiscal 2014-2016 State Spending* 8 (2016). Without this revenue, every household in Florida would have to be taxed an additional \$1,535 to maintain the state's economy. *Id.* Furthermore, Florida's commercial and recreational fishing industries are one of the largest in the nation, each producing over \$5 billion in income in 2015. Nat'l Marine Fisheries Serv., U.S. Dep't of Commerce, *Fisheries Economics of the United States 2014* 7-10 (2016). Accordingly, reducing actual or perceived harms to these industries is a critical issue facing municipalities like Coral Gables.

### C. Harm to Water Quality

Plastic debris not only impairs beneficial uses of Florida's waterways, but also the quality of those waters. As discussed above, plastics like EPS contain and

sorb contaminants. As EPS decomposes, it leaches toxic chemicals such as styrene, BPA, PCBs, phthalates, polycyclic aromatic hydrocarbons (PAHs), organochlorine pesticides (OCPs), and metals, into the water. Carolyn Barry, *Plastic Breaks Down in Ocean, After All—And Fast*, Nat'l Geographic News, Aug. 20, 2009. A 2009 study found that water samples around the world contained derivatives of EPS that are not naturally occurring in the ocean. *Id.* EPS's ability to transport these harmful pollutants, as well as harmful algae, may increase human exposure to toxins at swimming beaches. U.N. Env't Programme and GRID-Arendal, *Marine Litter Vital Graphics* 19 (2016).

EPS itself constitutes a “pollutant” for purposes of the Clean Water Act (CWA), which allows states to set trash pollution limits for waters they have identified as impaired. Essentially, the CWA’s Total Maximum Daily Loads specifies the maximum amount of a pollutant that can be discharged into a given waterway from all sources. *See* 33 U.S.C. § 1313(d)(1)(A) (2000); 40 C.F.R. § 130.7(b) (2017). Unlike several other states such as Alaska, Maryland, and California, however, Florida has not established a TMDL for trash like EPS. As a result, local governments concerned with the amount of EPS in their waterways—like Coral Gables—are left to grapple with the issue themselves.

#### **IV. EFFICACY OF LITTER REDUCTION ORDINANCES AND THE IMPORTANCE OF LOCAL GOVERNMENT INVOLVEMENT**

Local governments across the United States have taken the initiative to ban plastics for decades. *See Stephen M. Reck, The Expanding Environmental Consciousness of Local Government: Municipalities That Have Banned Styrofoam and the Legal Consequences*, 11 U. Bridgeport L. Rev. 127 (1990).

They have employed various forms of legislation, market-based devices, and waste management programs to tackle plastic's harmful impacts. Local regulation aimed at reducing and banning single-use plastics like bags and foam food containers has proven largely effective,<sup>12</sup> while recycling policies and voluntary reduction programs have not.<sup>13</sup>

Prohibitions on EPS use are particularly more effective because, at present, EPS is not easily (or frequently) recycled.<sup>14</sup> *See Stephen Heverly et al., Center for*

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<sup>12</sup> A 2007 plastic bag ban in San Francisco, for example, led to a monthly reduction of 5 million plastic bags. David Gorn, *San Francisco Plastic Bag Ban Interests Other Cities*, NPR, Mar. 27, 2008, <http://www.npr.org/templates/story/story.php?storyId=89135360>. Washington D.C.'s five cent fee reduced monthly bag use from 22.5 million to 3 million while also generating more than six million for the Anacostia River Fund. Lauren McGaughy, *Plastic bag tax proposed by Louisiana Lawmaker*, Times Picayune, Mar. 29, 2013, [http://www.nola.com/politics/index.ssf/2013/03/plastic\\_bag\\_tax\\_louisiana.html](http://www.nola.com/politics/index.ssf/2013/03/plastic_bag_tax_louisiana.html).

<sup>13</sup> See Surfrider and UCLA Wells Envtl. Law Clinic, *2013 Briefing Book: Federal Actions to Address Plastic Marine Pollution* 7 (2013); U.N. Env't Programme, *Marine Litter Legislation: A Toolkit for Policymakers* 35 (2016); Stephen Heverly et al., Center for Sustainable Energy, *Recommendations for Reducing or Banning Foam Food Service Containers* 5, 7 (Mar. 2017).

<sup>14</sup> In Florida, for example, only three locations collect used foam food containers. *See Homeforfoam.com, Foam Recycling Programs, Drop-offs and Municipal Programs*, <http://www.homeforfoam.com/foam-101/foam-recycling-centers> (last visited Aug. 22, 2017).

Sustainable Energy, *Recommendations for Reducing or Banning Foam Food Service Containers* 3 (Mar. 2017). Moreover, collection of EPS containers for recycling is only part of the recycling process; a buyer for the EPS collected would also be needed, but there is no market for re-used EPS food service containers.<sup>15</sup> Because most recycling businesses make money based on the weight of their resulting product, and because EPS consists of 95% air, there is little incentive for companies to recycle EPS. See John Kelly, *How does polystyrene recycling work?*, Aug. 29, 2012, HowStuffWorks.com.<<http://science.howstuffworks.com/environmental/green-science/polystyrene-recycling.htm>> 21 August 2017. EPS is also more expensive to transport and clean than other plastics. *Id.*, Stephen Heverly et al., Center for Sustainable Energy, *Recommendations for Reducing or Banning Foam Food Service Containers* 10-11 (Mar. 2017). Due to sanitation concerns, foam food containers, which are the target of Coral Gables' ban along with beach coolers, are especially expensive to recycle and once recycled can not be used for new food packaging products. *See id.* In fact, most localities that recycle exclude soiled EPS containers or all EPS. *See id.* The manufacture of foam food containers, therefore, always requires producing new (as opposed to

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<sup>15</sup> “For 30 years, attempts to recycle Food-Service Foam—both subsidized and non-subsidized attempts—have failed at each step of the recycling process.” New York City Dep’t of Sanitation, *Determination on the Recyclability of Food-Service Foam Pursuant to Local Law 142 of 2013*, May 12, 2017, available at [http://www1.nyc.gov/assets/dsny/docs/2017-05-12FoamDetermination\\_FINAL.pdf](http://www1.nyc.gov/assets/dsny/docs/2017-05-12FoamDetermination_FINAL.pdf)

recycled) EPS. Reducing the production and use of EPS is the best way to prevent its damaging accumulation in the environment.

Local governments are uniquely suited to address plastic's environmental and economic impacts, since they can more quickly understand and react to their constituents' and communities' needs. Localities can enact new laws and modify existing ones more quickly making them more efficient and adaptable. Stephen M. Reck, *The Expanding Environmental Consciousness of Local Government: Municipalities That Have Banned Styrofoam and the Legal Consequences*, 11 U. Bridgeport L. Rev. 127, 133-134 (1990). This means innovative or creative approaches are easier to test and more likely to be enacted since there are fewer countervailing interests and compromises at the local level as compared to the state level. *Id.* Municipalities can also more easily educate local businesses about recyclable or biodegradable alternatives, local suppliers, and bulk purchasing and distribution options, which will aid in the passage and success of EPS bans. In addition, many EPS alternatives are biodegradable, so even though food packaging will still be used, it will have less impact on the environment and economy. *Id.*

## **CONCLUSION**

This Court should uphold the Final Order of the trial court finding that the City's ordinance is valid. Home rule in Florida is vitally important to allow local governments like Coral Gables to respond to serious threats from plastic pollution.

Respectfully submitted this 28th day of September, 2017.

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## **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document has been electronically served on all parties of record via EDCA and via electronic mail on this 28th day of September, 2017 on:

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## CERTIFICATE OF COMPLIANCE

This brief was prepared using Times New Roman size 14 font pursuant to Fla. R. of App. P. 9.210(2).

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## **APPENDIX A: LIST AND DESCRIPTION OF ORGANIZATIONAL AMICI CURIAE**

The following organizations respectfully submit this brief as Amici Curiae in support of the City of Coral Gables' ordinance and Appellee.

**1000 Friends of Florida, Inc.** (1000 Friends), is a nonprofit organization which has been advocating for sound growth management to conserve environmental resources and build better communities since 1986. 1000 Friends has an interest in providing citizens and local governments a meaningful role in shaping the futures of their communities and protecting municipalities' constitutional right to plan for growth and development.

**The Center for Biological Diversity** (Center) is a national non-profit organization seeking to protect endangered animals and plants and habitat needed for their survival. The Center has an interest in protecting the unique and biologically diverse marine habitats in Florida from the harmful impacts of expanded polystyrene litter.

**Florida Wildlife Federation, Inc.** (FWF), is a conservation education organization composed of approximately 12,500 members who have a common interest in preserving, managing, and improving Florida's fish, wildlife, soil, water and plant life. FWF has a particular interest in abating harmful pollution, including the reduction of expanded polystyrene litter, so as to afford protection to Florida's natural resources, wildlife, and marine environment.

**ReThink Energy Florida** (REF) is a Florida-focused non-profit organization dedicated to engaging, educating, and empowering citizens to take action and achieve energy independence in a healthier, more sustainable environment. REF has an interest in reducing the consumption of petroleum based products, like expanded polystyrene at issue in this case, and creating a sustainable environment, including the preservation of Florida beaches and parks.

**Save the Manatee Club** (SMC) is a national nonprofit organization founded in Florida over three decades ago to protect manatees and their aquatic habitat for future generations. Since marine debris remains a significant cause of manatee mortality, SMC has a particular interest in reducing plastic litter, including expanded polystyrene at issue in this case, in order to improve and protect aquatic ecosystems that support manatee populations.