IN THE SUPREME COURT OF FLORIDA

CASE NO. SC-16-645

FREDDY D'AGASTINO, et. al.,

Petitioners,

vs.

THE CITY OF MIAMI, et al.,

Respondents.

On discretionary conflict review of a decision of the Third District Court of Appeal in a direct civil appeal

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PETITIONERS' INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Lieutenant Freddy D'Agastino is a law enforcement officer employed by the City of Miami Police Department. *D'Agastino v. City of Miami*, 189 So. 3d 236, 237 (Fla. 3d DCA 2016). A civilian lodged a complaint with the Civilian Investigative Panel ("CIP") alleging professional misconduct by D'Agastino during a traffic stop. *Id.* at 238. The City of Miami Police Department's Internal Affairs unit investigated and concluded the allegations were "inconclusive." *Id.* & n. 1. During that internal investigation D'Agastino was compelled to answer questions with limited immunity pursuant to *Garrity v. New Jersey*, 385 U.S. 493 (1967), requiring an officer to answer specific, narrow and direct questions, which could have implications on his employment, but the statement cannot be used against him in a criminal investigation. *See also* § 112.533(1), Fla. Stat. (2016).

After the Internal Affairs investigation, the CIP subpoenaed D'Agastino to appear before it and answer questions regarding the same civilian complaint. *D'Agastino,* 189 So. 2d at 238. D'Agastino filed a petition in the trial court moving to quash the subpoena and concurrently sought a protective order against testifying. *Id.* He alleged that Florida Statute Section 112.533(1), typically referred to as the Law Enforcement Officer's Bill of Rights ("LEOBOR"), prevented the CIP from compelling him from appearing and cooperating with the investigation. *Id.*

The City of Miami intervened and then was served with a separate declaratory

judgment action by the Fraternal Order of Police ("FOP") (the certified bargaining representative for Miami Police Officers) seeking to declare unconstitutional those ordinances empowering the CIP to investigate the City's law enforcement officers. *Id.* The FOP argued Section 112.533(1) precludes the CIP from investigating and issuing subpoenas to its law enforcement officer members. The cases were consolidated and each party moved for summary judgment. *Id.* The Court granted summary judgment to the City and the CIP. The original *D'Agastino* opinion from the Third District was issued on January 23, 2013. 2013 WL 238217 (Fla. 3d DCA 2013) (opinion withdrawn and superseded on denial of rehearing). Three years later, the *D'Agastino* opinion on rehearing was issued.

The Fifth District in *Demings v. Orange County Citizens Review Board*, 15 So. 3d 604, 605-06 (Fla 5th DCA 2009) stated: "…the county charter and ordinance provisions creating the [citizens review board] and authorizing it to investigate citizens complaints against the Sheriff's deputies are unconstitutional…." The Third District in *D'Agastino*, considered *Demings* and concluded the opposite – civilian investigations are permissible under the law. *D'Agastino,* 189 So. 3d at 242. This Supreme Court recognized the conflict between the district courts of appeal and granted review on the merits.

SUMMARY OF ARGUMENT

Law enforcement officers are subject to criminal, civil, and administrative review from many government agencies both inside and outside their police departments. They are subject to civil suit by private parties and discipline from their employer. On the other hand, the Legislature has enacted a bill of rights for those very law enforcement and corrections officers when internal investigations are conducted. There are procedural and substantive rights that are enforceable in the internal investigative setting. Chapter 112 does not contemplate a civilian review of law enforcement officers' conduct and therefore those civilian entities would not be bound to safeguard those procedural and substantive rights.

The City of Miami created and enabled the Civilian Investigative Panel ("CIP"). Miami, Fla. Code, Art. II, §11.5-26 (2002). It grants the CIP tremendous power to obtain subpoenas for witnesses and evidence, hire trained investigators, consult its own attorney and the state attorney, and issue reports and recommendations as to the "disposition of alleged incidents of police misconduct, to which the police chief is required to respond." *Id.* §§11.5-27(4), (5), (9).

D'Agastino moved to quash the subpoena issued for D'Agastino to appear before the CIP, and for a corresponding protective order to prevent him from being compelled to ever appear. The FOP filed suit seeking to have a court declare the CIP ordinance unconstitutional because the ordinance is preempted by State law. The Miami Ordinance

is preempted by Florida Statute Section 112.533. It is expressly preempted by the language of Section 112.533(1). While express preemption does not have to be an outright declaration of preemption, the legislature must make clear that the local regulation is preempted by State law. *Baragan v. City of Miami,* 545 So. 2d 252, 254 (Fla. 1989) (citation omitted). Florida Statute Section 166.021(3)(c) (2016) deems ordinances that are expressly preempted to state government by the constitution or general law. The CIP ordinance is expressly preempted by Chapter 112.

The LEOBOR provides officers with protections during investigations of alleged misconduct. Florida Statute Section 112.533(1)(a) delineates that each agency shall establish a system for investigations of complaints received by the agency "which shall be *the procedure* for the investigating agency against a law enforcement . . . officer and for *determining whether to proceed with disciplinary action or to file disciplinary charges, notwithstanding any other law or ordinance to the contrary."* The CIP creates a supplemental disciplinary procedure in violation of the prohibition on ordinances to the contrary. *See* §112.533(1), Fla. Stat.

The CIP also is impliedly preempted by Chapter 112. If the language of Chapter 112 is not explicit enough to meet the test of express preemption, then it meets the test of implied preemption. There are several types of implied preemption. The CIP violates all the tests for implied preemption.

Conflict preemption is a form of implied preemption. *Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 681 So. 2d at 831. The Court must turn to the language of the statute and compare it to the local ordinance. Chapter 112 sets out "the procedure" for investigating complaints of law enforcement officers. Notwithstanding "any other law or ordinance," this is the procedure for investigating those complaints. §112.533(1)(a), Fla. Stat. Compared with the Miami City Ordinance which establishes an "independent civilian oversight of the sworn police department" so that it can conduct "investigations" in order "to make "factual determinations" and "propose recommendations" to the City regarding "allegations of misconduct" by "any sworn officer of the police department." Miami, Fla. Code, Art. II, §11.5-27(1), (5). The CIP is also empowered to "make recommendations as to the disposition of the alleged incident of police misconduct. *Id.* Art. II, §11.5-27(9). These two laws cannot coexist. Any argument that claims supplementation of statutory scheme is permissible is inapt because the language of Section 112.533 states it exists despite an ordinance to the contrary. *See Tallahassee Memorial Regional Medical Center, Inc.*, 681 So. 2d at 831 (local ordinance may not provide an alternative method to one expressly contemplated by statute).

Separate and apart from conflict preemption, is a conflict analysis. Under the second side of the same coin, involving statutory interpretation, a state statute that explicitly precludes the existence of a local ordinance is not able to survive. *Browning*

v. Sarasota Alliance for Fair Elections, Inc., 968 So. 2d 637, 649 (Fla. 2d DCA 2007), *decision approved in part, quashed in part,* 28 So. 3d 880 (Fla. 2010). The question asked is whether one must violate one provision in order to comply with the other. *Id.* at 888. Under the same language of Section 112.533, there can only be one procedure for law enforcement officer investigations, and it must be done by the employing agency, notwithstanding any ordinance to the contrary.

The CIP and the City will argue that the Third District correctly concluded the CIP provides a different type of purpose to its investigation and therefore it is not conflict preempted or in conflict with the Chapter 112. However, the Third District relies upon its own precedent in *Timoney v. City of Miami Civilian Investigative Panel*, 990 So. 2d 614, 619 (Fla 3d DCA 2008). *Timoney* did not consider the constitutionality of the CIP Ordinance or Chapter 112 at all. Therefore, reliance upon it in the court below is misplaced. *See Demings,* 15 So. 3d at 610.

In addition to a direct conflict with a state statute, a local government cannot legislate in a "field" if the subject area has been preempted by the State. *Phantom of Brevard, Inc. v. Brevard County*, 3 So. 3d 309, 314 (Fla. 2008) (citation omitted). The field is investigations of law enforcement officers. The field is occupied by two state statutes: Florida Statute Section 112.533, (LEOBOR) and Florida Statute Sections 943.12, which enabled the Criminal Justice Standards and Training Commission. The Miami City Ordinance does an end run around the rights provided by LEOBOR and

collective bargaining agreements because the officers' rights do not apply at the CIP. *See D'Agastino,* 189 So. 3d at 241. Those rights for the officer under investigation, among them, is a speedy investigation (180 days) and established conditions for the interview, such as permitting the officer to review all the evidence and statements before providing a statement. The purpose and legislative intent is to provide procedural rights to a law enforcement officer while under investigation for alleged wrongdoing. Since the field is occupied by rights and instructive procedures, Section 112.533 and Section 943.12, and the civilian investigative review cannot coexist.

Lastly, in addition to the arguments that the CIP is expressly and impliedly preempted by Florida Statute, the Court should uphold the Fifth District's opinion in *Demings. Demings* held that Chapter 112, the LEOBOR, created the exclusive method for investigating law enforcement officers, and any local law which created an additional procedure for further investigation was in conflict. 15 So. 3d at 608-09. Even though the cases were analyzed under different constitutional provisions, the Third District stated that the 1968 Constitution, under which *Demings* was analyzed, and the 1885 Constitution under which *D'Agastino* was analyzed, both required an analysis of whether two legislative provisions can co-exist. *D'Agastino*, 189 So. 3d at 243 n. 3 ("The terms are given the same construction in local government law in this state") (citations omitted). *Demings* was not determined based solely upon the fact Demings was a constitutionally elected sheriff versus an appointed police chief.

Demings, 15 So. 3d at 609. It came down to the conclusion that the language in Section 112.533 conflicted with its county ordinance that allowed a civilian independent investigative panel with subpoena and investigative power.

ARGUMENT

I. Introduction

This case is about whether a municipality can, consistent with Florida Stuatutes, create a civilian board that can review, subpoena, investigate, and recommend discipline and policy changes of its police department's law enforcement and corrections officers. In other words, is investigating law enforcement officers exclusively a government function by grand juries, prosecutors, and internal affairs investigators of police departments; or, are officers subject to a civilian investigative panel with authority to compel testimony, produce documents, and recommend discipline of officers.

A. Miami's Civilian Investigative Panel Ordinance

The Charter of the City of Miami, Section 51, establishes a Civilian Investigative Panel ("CIP"), which acts as independent civilian oversight of the sworn police department. Miami, Fla., Code, Art. II, § 11.5-27(5). The CIP is granted, by City ordinance the power to, "[c]onduct investigations, inquiries and public hearings to make factual determinations, facilitate resolution and propose recommendations to the city manager and police chief regarding allegations of misconduct by *any sworn officer*

of the city police department." Art. II, § 11.5-27(5) (emphasis added). Particularly at issue is the CIP's subpoena power, through which it can compel a sworn police officer and other witnesses to testify before it. *Id.* (citing Art. II, § 11.5–32). At the conclusion of an investigation of a complaint of alleged police misconduct, the CIP must issue a report to the mayor, city commission, city attorney, city manager, chief of police, and the public. Art. II, § 11.5-27(8). The Chief then must respond within 30 days, to the recommendations as to "the disposition of alleged incidents of police misconduct," findings, and recommendations. Art. II, § 11.5-27(9).

Interacting with the CIP is the Law Enforcement Officer Bill of Rights ("LEOBOR,") located at Florida Statute Section 112.533(1)(a) and is entitled: "Receipt and processing of complaints." D'Agastino below alleged that Florida Statute Section 112.533(1) granted the police department exclusive authority to investigate police misconduct.[1] *See id.*

That section provides, in relevant part, that

> (1)(a) Every law enforcement agency and correctional agency shall establish and put into operation a system for **the** receipt, **investigation**, and determination of complaints received by such agency from any person, which shall be **the procedure** for investigating a complaint against a law enforcement and correctional officer and for determining whether to proceed with disciplinary action or to file

1 In the motion to quash and protective order, D'Agastino argued that the Fraternal Order Police's collective bargaining agreement with the City of Miami, Article 8 precludes the City or its progeny, like the CIP, from compelling an officer from giving a second statement and must take place at the police department. This is explored further in the PBA's amicus brief.

> disciplinary charges, **notwithstanding any other law or ordinance to the contrary.**

(emphasis added).

D'Agastino and the FOP relied on the Fifth Districts opinion in *Demings,* which held:

> Section 112.533, as amended in 2003 and 2007, is unambiguous. It conveys a clear and definite directive that when a complaint is registered against a law enforcement officer, the employing agency is **the only local governmental entity authorized to investigate** that complaint.

15 So. 3d at 608-09 (emphasis added).

Additionally, *Demings* ruled:

> Because section 112.533 limits the investigation of complaints against law enforcement officers by local government to the employing agency's investigation, the charter provisions and ordinance that establish an additional procedure for investigating these complaints necessarily and directly conflict with the statute.

15 So. 3d at 609.

The Third District's opinion in *D'Agastino* rejected *Demings* stating: Section 112.533 does not "expressly preempt other investigative bodies or means of oversight." 189 So. 3d at 240. Also, the Court concluded that Miami's CIP does not otherwise conflict with Section 112.533. *Id.* This case raises the questions of whether the LEOBOR preempts the authority of the Civilian Investigative Panel and whether it conflicts with the LEOBOR. This appeal requests this Supreme Court to adopt *Demings* and reject the Third District's opinion in *D'Agastino.*

B. Miami's Home Rule Charter

Article VIII, Section 11 of the 1885 Constitution, as amended in 1968, authorized the creation of a metropolitan government for Miami Dade County. County electors were granted the power to adopt a home rule charter under Article VIII, section 11(1)(b) of the Florida Constitution. *Bd. of County Com'rs of Dade County v. Wilson*, 386 So. 2d 556, 559 (Fla. 1980). Home Rule permits political subdivisions of the state to "pass ordinances relating to the affairs, property, and government of Dade County and provide suitable penalties for the violation thereof. . . ." *Dade County v. Dade County League of Municipalities*, 104 So. 2d 512, 516 (Fla. 1958) (quoting Article VIII, Section 11(1)(b), Fla. Const.)). The county's home rule power is extended even further to municipalities like the City of Miami. "In Florida, a municipality is given broad authority to enact ordinances under its municipal home rule powers." Art. VIII, § 2(b), Fla. Const.; §§ 166.021(1), (3)(c), (4), Fla. Stat. (2016); *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006).

There are, however, limits to the authority of municipal home rule powers. "Under its broad home rule powers, a municipality may legislate concurrently with the Legislature on any subject which has not been expressly preempted to the State." *Id.* Indeed, nothing in the grant of Home Rule permits local government to "limit or restrict the power of the Legislature to enact general laws which shall relate to Dade County. . . or to any other one or more municipalities in Dade County. . . ." *Dade*

County League of Municipalities, 104 So. 2d at 517 (citing Article VIII, Section 11(6), Fla. Const.)). *See also City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801, 804 (Fla. 1972) ("Local governments have not been given omnipotence by home rule provisions or by Article VIII, Section 2 of the 1968 Constitution); Art. VIII, § 1(g), Fla. Const. (county charters "shall have all powers of local self-government not inconsistent with general law"); Art. VIII, § 2(b), Fla. Const. (granting municipalities broad powers to conduct municipal government, perform municipal functions, and render municipal services "except as otherwise provided by law").

Florida Statute Section 166.021(1) codifies the Municipal Home rule in Article VIII, Section 2(b) of the Florida Constitution. It also recognizes the limits on Home Rule when a subject matter is preempted by State law. §§ 166.021(3)(d), (4), Fla. Stat. (2016). Municipalities, therefore, can pass ordinances, so long as the state law does not preempt it or the ordinance does not conflict with state law. *Sarasota Alliance For Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010); *Tallahassee Mem'l Reg'l Med. Ctr., Inc. v. Tallahassee Med. Ctr., Inc.*, 681 So. 2d 826, 831 (Fla. 1st DCA 1996).

C. De Novo Standard of Review

The *de novo* standard of review applies when the Court is reviewing the decision to grant or deny final summary judgment. *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1074 (Fla. 2001). *De novo* review is also appropriate for considering the

constitutionality of an ordinance. *W. Florida Reg'l Med. Ctr., Inc. v. See*, 79 So. 3d 1, 8 (Fla. 2012); *Mulligan*, 934 So. 2d at 1238.

II. THE CITY OF MIAMI ORDINANCE AUTHORIZING A CIVILIAN INVESTIGATIVE PANEL IS PREEMPTED BY FLORIDA STATUTE SECTION 112.533.

The theory of preemption is based upon the Supremacy Clause, *i.e.* one form of government's supremacy over the other. *State v. Harden*, 938 So. 2d 480, 486 (Fla. 2006). The United States Supreme Court has recognized three categories of preemption when analyzing a federal statute or statutory scheme. The three categories are:

> (1) **express preemption** where a federal statute contains "explicit pre-emptive language"; (2) **implied field preemption**, where the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it"; and (3) **implied conflict preemption,** in which "compliance with both federal and state regulations is a physical impossibility" or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Harden, 938 So. 2d at 486 (Fla. 2006) (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98, 112 S. Ct. 2374, 120 L.Ed.2d 73 (1992) (plurality opinion) (emphasis added)). The preemption analysis of a local ordinance versus a State law, is similar to the federal preemption analysis.

> Preemption of local ordinances by state law may, of course, be accomplished by **express preemption**—that is, by a statutory provision stating that a particular subject is preempted by state law or that local ordinances on a particular subject are precluded.
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> ****
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> "**Implied preemption** is found where the state legislative scheme of regulation is pervasive and the local legislation would present the danger of **conflict** with that pervasive regulatory scheme."
>
> ****
>
> Even "where concurrent state and municipal regulation is permitted because the state has not preemptively occupied a regulatory **field**, 'a municipality's concurrent legislation must not **conflict** with state law.'" Such "**conflict preemption**" comes into play "where the local enactment irreconcilably **conflicts** with or **stands as an obstacle** to the execution of the full purposes of the statute." *Id.* (quoting 5 McQuillin Mun. Corp. § 15:16 (3d ed. 2012)).

Masone v. City of Aventura, 147 So. 3d 492, 495 (Fla. 2014) (emphasis added) (citations omitted).

A. The Civilian Investigative Panel Expressly Preempts Florida Statute Section 112.533.

"Express preemption requires a specific statement. . ." *Mulligan*, 934 So. 2d at 1243 (Fla. 2006) (quoting *Fla. League of Cities, Inc. v. Dep't of Ins. & Treasurer*, 540 So.2d 850, 856 (Fla. 1st DCA 1989) (citation omitted); *see also Phantom of Clearwater, Inc.*, 894 So.2d at 1018 ("Express preemption ... must be accomplished by clear language stating that intent."); *Edwards v. State*, 422 So.2d 84, 85 (Fla. 2d DCA

1982) ("An 'express' reference is one which is distinctly stated and not left to inference"). However, "[t]he preemption need not be explicit so long as it is clear that the legislature has clearly preempted local regulation of the subject." *Barragan,* 545 So.2d at 254 (citing *Tribune Co. v. Cannella,* 458 So.2d 1075 (Fla.1984)).

The City of Miami's CIP ordinance is expressly preempted by Florida Statute. The LEOBOR, Section 112.533, protects law enforcement officers from interminable and abusive investigations by internal affairs divisions of police departments. It places time limits (a statute of limitations) on administrative investigations and it outlines the conditions for interviews by the agency's management. Florida Statute Section 112.533(1)(a) delineates that each agency shall establish a system for investigations of complaints received by the agency "which shall be *the procedure* for the investigating agency against a law enforcement . . . officer and for *determining whether to proceed with disciplinary action or to file disciplinary charges, notwithstanding any other law or ordinance to the contrary."*

Florida Statute expressly preempts the Miami ordinance based upon the language of Section 112.533(1)(a). There should only be one procedure for investigation, which is "the procedure." *D'Agastino,* 189 So. 3d at 247 (citing Op. Att'y Gen. Fla. 259 (1981); *Work v. U.S. ex rel. McAlester-Edwards Coal Co.*, 262 U.S. 200, 208 (1923) (". . . the language would not have been '*the'* appraisement but *'an'* appraisement")) (Rothenberg, J., dissenting). The CIP ordinance, however,

provides an alternative form or an additional procedure to determine whether to proceed with disciplinary action against the officer because it permits the CIP to investigate and then recommend discipline in which the Chief, the City Commission, and Mayor, review and consider. Miami, Fla., Code, Art II, § 11.5-27(5) ("conduct investigations, inquiries and public hearing to make factual determinations . . . propose recommendations . . ."); §11.5-27(9) ("make recommendations as to the disposition. . ."). Additionally and more explicitly to the express preemption analysis is the language: "notwithstanding any other law or ordinance to the contrary." § 112.533(1)(a). Meaning, despite any other ordinance to the contrary, Section 112.533 is the law. That law requires *such agency*, the police department, to investigate its officers in which a complaint has been filed – and no other.

In 2003, Section 112.533 was amended to express a statutory exception authorizing an investigation by the Criminal Justice Standards and Training Commission ("CJSTC"). Florida Statute Sections 943.12(3), (4), (5), & (16), enables the CJSTC to adopt rules for the certification, maintenance, and discipline of law enforcement and corrections officers. Additionally, Florida Statute Section 943.1395 also enabled the CJSTC to initiate its own investigations of officer misconduct. "[Section 112.533] did **not** however, provide an exception authorizing citizen review panels to conduct such investigations." *D'Agastino,* 189 So. 3d at 247 (emphasis in original) (Rothenberg, J.,).

The Fifth District in *Demings* made it clear when a complaint is lodged against a law enforcement officer, the employing agency is the "only local governmental entity authorized to investigate that complaint." 15 So. 3d at 608. If this Court agrees that the express function of the CIP is the same as the function of an agency's internal affairs division, then the CIP ordinance is expressly preempted and therefore unconstitutional.

The Third District briefly perused Chapter 112 against the CIP ordinance and concluded LEOBOR does not expressly preempt other investigative bodies as a means of oversight. *D'Agastino,* 189 So. 3d at 240. The Third District wrote that D'Agastino conceded this point. But Judge Rothenberg's dissent did not. *Id.* at 247 (dissent). As discussed below, D'Agastino and the FOP argued that Chapter 112 and the City Ordinance conflict. Conflict between a state statute and a local ordinance is a form of preemption. *Masone,* 147 So. 3d at 495. The Third District *D'Agastino* court recognized this by citing to cases which all referred to conflict as preemption. 189 So. 3d at 240 (citing *Jordan Chapel Freewill Baptist Church v. Dade County,* 334 So. 2d 661, 664 (Fla. 3d DCA 1976); *Hines v. Davidowitz,* 312 U.S. 52, 79 (1941); *Bravman v. Baxter Healthcare Corp.*, 842 F. Supp. 747, 752 (S.D.N.Y. 1994); *City of Jacksonville v. Am. Envtl. Services, Inc.*, 699 So. 2d 255, 256 (Fla. 1st DCA 1997); Judge James R. Wolf and Sarah Harley Bolinder, "The Effectiveness of Home Rule: A Preemption and Conflict Analysis," 83 Fla. Bar Jnl, 92, 93 (June 2009)).

Where "conflict" fits into the preemption analysis has shifted or has been conflated over time across the field of preemption cases. *See generally, City of Palm Bay v. Wells Fargo Bank, N.A.*, 114 So. 3d 924, 930 (Fla. 2013) (Perry, J., dissenting); Judge James R. Wolf and Sarah Harley Bolinder, 83 Fla. Bar Jnl, at 92 (employing the term "expressly conflicts" as opposed to a form of implied preemption). In fact, in *Demings,* the Fifth District found the county ordinance creating the civilian review board conflicted with Chapter 112 and therefore was unconstitutional; but, it explicitly did not refer to the conflict as "preemption," since it decided the case based upon the plain language of Section 112.533. *Demings,* 15 So. 3d at 612 n. 6. Logically, however, if a statute expressly preempts an ordinance, then the ordinance would conflict with the provisions of the statute. Since express preemption requires less than an outright explicit expression of preemption, the line between express and implied preemption has blurred. Regardless of the majority's opinion by the Third District in *D'Agastino* that there was a waiver of express preemption, if a statute explicitly preempts an ordinance because the language of the statute states it is *the procedure* for investigating complaints, *notwithstanding* any other law or *ordinance* to the contrary, then the LEOBOR statute expressly preempts the CIP ordinance.

B. The Civilian Investigative Panel Conflicts with Section 112.533 and Impliedly Preempts the Civilian Investigative Panel.

"As an alternative to the preemption issue, . . . the SAFE amendment conflicts with the Election Code." *Browning v. Sarasota Alliance for Fair Elections, Inc.*, 968 So. 2d 637, 649 (Fla. 2d DCA 2007), *decision approved in part, quashed in part*, 28 So. 3d 880 (Fla. 2010). The test of conflict between a local government enactment and state law is "whether one must violate one provision in order to comply with the other." *Id.* at 888. Again, the Fifth District in *Demings* concluded the ordinance authorizing separate and independent investigation of law enforcement officers by the civilian review board conflicted with Florida Chapter 112, LEOBOR. 15 So. 3d at 610. Preemption is implied when "the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature." *Sarasota Alliance For Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010) (citations omitted). Implied preemption is a more difficult concept than express preemption. *Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 681 So. 2d at 831. "The courts should be careful in imputing an intent on behalf of the Legislature to preclude a local elected governing body from exercising its home rule powers." *Id.* (citations omitted).

1. Conflict and Conflict Preemption

"Implied preemption is found where the state legislative scheme of regulation is pervasive and the local legislation would present the danger of conflict with that pervasive regulatory scheme." *Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 681 So. 2d at

831. Separate and apart from conflict preemption is conflict between a statute and an ordinance itself. Since the legal theories of conflict preemption and conflict test whether a statute and an ordinance can coexist, and the statute survives over the ordinance if it does not, the discussion will be combined.

First, the LEOBOR statute explicitly states the agency must establish a procedure for handling complaints against its officers. It must investigate and determine the complaints and this is "the procedure." Notwithstanding "any other law or ordinance," this is the procedure for investigating those complaints. §112.533(1)(a), Fla. Stat. Yet, the Miami City Ordinance establishes a second procedure, "independent civilian oversight of the sworn police department" so that it can conduct "investigations" in order to make "factual determinations" and "propose recommendations" to the City regarding "allegations of misconduct" by "any sworn officer of the police department." Miami, Fla. Code, Art. II, §11.5-27(1), (5). All ambiguity about conflict between the statute and the ordinance is resolved when the Ordinance tasks the CIP to "make recommendations as to the disposition of alleged incidents of police misconduct to which the police chief is required to respond within 30 days." § 11.5-27(9). Section 9 compels the chief to defend or accede to the recommendation of the CIP. This could have a career impact upon the law enforcement officer. The two laws, therefore, cannot coexist. The police department cannot be the only procedure for investigation where the officer maintains the

protection of the LEOBOR and then a supplemental or separate procedure continues with another agency. *See Tallahassee Memorial Regional Medical Center, Inc.*, 681 So. 2d at 831 (local ordinance may not provide an alternative method to one expressly contemplated by statute).

The CIP and the City will argue that the Third District correctly concluded that the CIP provides a "distinct" function that is not prohibited by Chapter 112. *D'Agastino,* 189 So. 3d at 243. Other than the investigators themselves being civilians, *i.e.*, not law enforcement officers, there is no distinct function. In essence, CIP gathers evidence and testimony through its subpoena power, and presents a report with factual findings, conclusions, and recommendations for discipline and policy changes. This is precisely the function of an internal affairs investigation.

Furthermore, the Third District improperly relied on its own precedent in *Timoney*, 990 So. 2d at 614. *D'Agastino*, 189 So. 3d at 243. Timoney, at the time, the police chief in Miami, was subpoenaed before the CIP. *Timoney* did not address the constitutionality of the CIP or whether it conflicts with Chapter 112 because Chapter 112 does not apply, *i.e.*, excludes chiefs of police. *Id.* at 251. (Rothenberg, J., dissenting). *Timoney* plainly did not address the Chapter 112 at all. *Demings,* 15 So. 3d at 610. Thus, the Third District's reliance upon *Timoney* as *stare decisis* is inapt.

2. Field Preemption

"Municipal ordinances are inferior to laws of the state and must not conflict with any controlling provision of a statute." *Thomas v. State*, 614 So.2d 468, 470 (Fla.1993). In addition to a direct conflict with a state statute, a local government cannot legislate in a "field" if the subject area has been preempted by the State. *Phantom of Brevard, Inc. v. Brevard County*, 3 So. 3d 309, 314 (Fla. 2008) (citation omitted). When courts recognize preemption by implication, the preempted field is usually a narrowly defined field, "limited to the specific area where the Legislature has expressed their will to be the sole regulator." *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011, 1019 (Fla. 2d DCA 2005) (citations omitted). "Preemption essentially takes a topic or a field in which local government might otherwise establish appropriate local laws and reserves that topic for regulation exclusively by the legislature." *Mulligan*, 934 So. 2d at 1243 (citing *Phantom of Clearwater*, 894 So. 2d at 1018)).

The field in this context is investigations of law enforcement officers. The field is occupied by two state statutes: Florida Statute Section 112.533, (LEOBOR) and Florida Statute Sections 943.12, which enabled the Criminal Justice Standards and Training Commission. LEBOR establishes the procedure for investigating and disciplining the officer and the CJSTC expressly oversees the agency's procedure and conclusions of the investigations. Furthermore, the various State Attorney's offices and state and federal grand juries can investigate alleged criminal wrong doing by law

enforcement officers. The field is occupied by state law. Furthermore, the City of Miami Ordinance does an end run around the rights provided by LEOBOR and collective bargaining agreements because the officers' rights do not apply at the CIP. *D'Agastino,* 189 So. 3d at 241. The rights provided to an officer under investigation include, a speedy investigation (180 days) and established conditions for the interview, such as permitting the officer to review all the evidence and statements before providing a statement; and, according to the collective bargaining agreement, limits the agency to one interview of the officer. (CBA, § 8). The Third District interprets the inapplicability of Section 112.533 as proof of the absence of a conflict between the Ordinance and Chapter 112 and therefore can coexist. *D'Agastino,* 189 So. 2d at 241. This analysis fails to recognize the purpose of Chapter 112, the bargaining agreement, and the field occupied by the police department (agency), the State's CJSTC, and state and federal investigators and prosecutors. The purpose and legislative intent is to provide procedural rights to a law enforcement officer while under investigation for alleged wrongdoing. The CIP has the subpoena power to compel evidence and testimony and make recommendations to the City regarding incidents of police misconduct. Miami, Fla. Code, Art. II, §11.5-27(9). Since the field is abundantly occupied, Section 112.533 and Section 943.12, versus the civilian investigative review cannot coexist.

III. The Fifth District's Decision in *Demings* was Correctly Decided.

The City and the CIP are likely to argue that there is no express conflict between *D'Agastino* and *Demings* because Demings is a Sheriff who is a constitutional officer and not a municipal police department chief. *See D'Agastino,* 189 So 3d at 242. *Demings,* however, was not based exclusively on the differences between a Sheriff versus a Chief of Police. 15 So. 3d at 608-09. As shown above, *Demings* squarely held that the LEOBOR created the exclusive method for investigating law enforcement officers, and any local law which created an additional procedure was in conflict. *Id.* Even though the cases were analyzed under different constitutional provisions, the Third District stated that the 1968 Constitution, under which *Demings* was analyzed, and the 1885 Constitution under which *D'Agastino* was analyzed, both required an analysis of whether two legislative provisions can co-exist. *D'Agastino*, 189 So. 3d at 243 n. 3 ("The terms are given the same construction in local government law in this state") (citations omitted).

The Third District also incorrectly states that the "decisive holding" in *Demings* was that the "Sheriff could not be required to account for his activities to a locally-created Board," and quotes a portion of *Demings*, but the quotation is incomplete and leaves out an important word, which context is critical to its meaning. First, the quotation of *Demings* appearing in *D'Agastino*:

> Given this constitutional framework, we [ ] find that the County cannot interfere with the Sheriff's independent exercise of his duty to investigate misconduct by his deputies either by forcing him to appoint members to the CRB or by mandating his participation in CRB proceedings, either in person or through his deputies or employees.

The actual statement in *Demings*, without the brackets, is as follows:

> Given this constitutional framework, we **also** find that the County cannot interfere with the Sheriff's independent exercise of his duty to investigate misconduct by his deputies either by forcing him to appoint members to the CRB or by mandating his participation in CRB proceedings, either in person or through his deputies or employees.

(emphasis added).

Indeed, this part of the *Demings* opinion is well after the Court had already ruled that "when a complaint is registered against a law enforcement officer, the employing agency is the only local governmental entity authorized to investigate that complaint," and "[b]ecause section 112.533 limits the investigation of complaints against law enforcement officers by local government to the employing agency's investigation, the charter provisions and ordinance that establish an additional procedure for investigating these complaints necessarily and directly conflict with the statute." *Demings*, 15 So. 3d at 609. Indeed the quotation from *Demings* relied on by the Third District is under a section entitled: "*Other problems with the CRB Charter Provision and Implementing Ordinance,*" which appears after it decided the statutory conflict issue. *Id.* at 611 (italics in the original).

Demings was correctly decided because it properly recognizes the conflict between the county ordinance enabling a civilian review panel and Chapter 112. The Third District recognized that the civilian review board which was found to be illegal in *Demings* was the "equivalent" of the civilian review board here. *D'Agastino* at 241. It also glossed over the conflict between the Ordinance and the LEOBOR by merely asserting that the CIP does not have the authority to make police management decisions addressed in Chapter 112. *Id.* at 241. This assumes the field of investigation of police misconduct has room for another review by a civilian agency and that the Legislature intended to allow for civilian investigation. This also assumes that the CIP is designed to have no influence at all on the City and the Chief who must respond in writing to the report of findings and discipline by the CIP. It ignores the authority given under Section 9 of the Ordinance to the CIP. Lastly, it assumes that a negative finding or recommendation of discipline would have no effect whatsoever on the officer or his career. Further, it did not analyze the different theories of preemption. *D'Agastino* did not analyze conflict preemption. *D'Agastino,* 189 So. 3d at 240.

The Legislature has carefully crafted the Law Enforcement and Correctional Officers Bill of Rights. It requires that there be a method to receive and process complaints by a law enforcement agency; it provides that it be the exclusive method for processing complaints, and grants law enforcement officers certain carefully delineated rights. The decision in *D'Agastino* allows a City or other government agency to skirt

the procedural protections.

CONCLUSION

The CIP conflicts with Chapter 112. Additionally, the explicit language in Chapter 112, expressly and impliedly preempts the CIP. For the foregoing reasons, the decision of the Third District should be overturned and the decision of the Fifth District in *Demings* should be the law in the State. This matter should be remanded to the trial court with instructions to quash the CIP subpoena of D'Agastino, grant his protective order and declare the CIP unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via email to: **Charles C. Mays, Esq.**, Attorney for CIP, 10240 S.W. 144th Street, Miami, Florida 33176 (*ccmays@bellsouth.net*); **John J. Quick, Esq.**, Attorney for CIP, Weiss Serota Helfman Cole & Bierman, P.L., 2525 Ponce de Leon Boulevard, Suite 700, Coral Gables, Florida 33134 (*jquick@wsh-law.com*); and **Victoria Mendez**, City Attorney and **John Greco, Esq.**, Deputy City Attorney, Attorney for City of Miami, Miami Riverside Center, Suite 945, 444 S.W. 2nd Avenue, Miami, Florida 33130-1910 (*jagreco@miamigov.com*).

Dated: August 9, 2016.

__/s/ Robert Buschel_____
Robert C. Buschel

CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this brief is in Times New Roman 14 Point Font and is in compliance with Rule 9.210, Fla. R. App. P.

__/s/ Robert Buschel_____
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