IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC16-645

FREDDY D'AGASTINO, et al.,

Petitioners,

v.

THE CITY OF MIAMI and THE CITY OF MIAMI CIVILIAN INVESTIGATIVE PANEL,

Respondents.

ANSWER BRIEF ON THE MERITS OF THE CITY OF MIAMI CIVILIAN INVESTIGATIVE PANEL

ON DISCRETIONARY REVIEW FROM A DECISION OF THE THIRD DISTRICT COURT OF APPEAL

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(Continued)

Page

TABLE OF CITATIONS

Page

Cases

TABLE OF CITATIONS
(Continued)

Page

Statutes

TABLE OF CITATIONS
(Continued)

Page

TABLE OF CITATIONS
(Continued)

Page

Other Authorities

INTRODUCTION

Respondent, the Civilian Investigative Panel of the City of Miami (the "CIP"), hereby submits its answer brief on the merits.

STATEMENT OF THE CASE AND FACTS

The statement of the case and facts submitted by Freddy D'Agastino ("D'Agastino") and the Fraternal Order of Police (the "FOP") (collectively, the "Petitioners"), while largely unobjectionable, all but ignores the relevant history of the state statutes at issue and the CIP's enabling legislation, as well as the specifics of the CIP Ordinance, all of which were presented to and considered by the trial court and Third District Court of Appeal. Accordingly, the CIP hereby supplements Petitioners' statement of the case and facts.

A. The origins of the complaint against D'Agastino.

A citizen's complaint against D'Agastino originated before the CIP when Nicole Alvarez filed a complaint on March 5, 2009, alleging misconduct by D'Agastino in connection with a traffic stop (hereafter, the "Incident"). R. 13-17, 95.[1] As required by section 112.533(b)1., Florida Statutes, the CIP forwarded the complaint to D'Agastino's employing agency, the City of Miami Police Department (the "MPD"), which internally investigated the Incident and reached a determination that the evidence was "inconclusive" to "prove or disprove the allegations" against D'Agastino. R. 18.

[1] References to the trial court record appear as "R."

The CIP took no further action with respect to its investigation until after MPD had concluded its investigation of the Incident, at which point the CIP issued on April 17, 2009 a subpoena directing D'Agastino to appear before the CIP and give testimony relating to the Incident. R. 103, 125. The issuance of the subpoena prompted the petition to quash filed by D'Agastino (R. 5-32) and the declaratory judgment action filed by the FOP (R. 46-50), which were later consolidated and subsequently resolved on cross-motions for summary judgment. R. 133-34 (granting the CIP's and City's motions and denying Petitioners' motions).

B. The legislative intent of the LEOBOR.

This appeal involves the proper interpretation of the Law Enforcement Officers' Bill of Rights, codified in sections 112.532 and 112.533, Florida Statutes (hereafter, the "LEOBOR"), and in particular, the meaning of the following phrase (found in the latter section): "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 disciplinary charges, notwithstanding any other law or ordinance to the contrary." In fact, the meaning of that phrase lies at the *heart* of Petitioners' initial brief ("IB") and that of their amicus, the Police Benevolent Association ("PBA"). *See, e.g.*, IB at 4, 5, 6, 7, 9, 10, 15-16, 18, 20-21, 22, 24-25; PBA Brief ("PBAB") at 4, 11.[2]

[2] Petitioners characterize the Fifth District Court of Appeal's decision in *Demings v. Orange County Citizens Review Bd.*, 15 So. 3d 604 (Fla. 5th DCA 2009) as turning primarily upon the interpretation of this one phrase. IB at 24.

Petitioners contend that the reference to "the procedure" in section 112.533(1) signifies that the investigatory mechanism mandated by that statutory provision constitutes the only investigatory procedure available to *any* entity, not just the officer's employing agency. When the Legislature amended the LEOBOR in 2003, it explicitly articulated the intent of that critical phrase in section 112.533. In the titular description of Senate Bill No. 1856, which was signed into law on June 12, 2003, the Legislature stated, in pertinent part:

> An act relating to law enforcement officers and correctional officers; … *amending s. 112.533,* F.S.; providing that an established system for the receipt, investigation, and determination of complaints *shall be the exclusive procedure* ***used by law enforcement and correctional agencies***; providing for legal counsel or a representative of the officer's choice to review a complaint filed against the officer and all statements made by the complainant and witnesses; providing an effective date.

R. 20 (setting forth Ch. 2003-149, Laws of Florida) (emphasis added).

C. The City Charter amendment and CIP Ordinance.

The City Charter was amended by public referendum to include what is now section 51 of the Charter. This provision required the City Commission to establish "a civilian investigative panel to act as independent citizens' oversight of the sworn police department[.]" City Charter, § 51. The CIP would be composed of a non-police appointee of the City's chief of police, with the remainder being civilian members nominated by the public and appointed by the City Commission.

Id. at § 51(A). The CIP would be advised by independent counsel and have professional personnel. *Id.* at §§ 51(B), (C).

Relevant here, the CIP would be "[a]uthorized with 'subpoena powers' that may only be used upon the approval of the 'Independent Counsel' and in 'consultation' with the state attorney of Miami-Dade County" and required "to advise all city employees appearing before it that no adverse consequences will result from the valid exercise of their right to be free from self incrimination[.]" *Id.* at § 51(D). Lastly, the City Charter compelled the CIP to engage in its activities in such a manner as to "not interfere with any pending or potential criminal investigation or prosecution[.]" *Id.*

The scope of the CIP's authority extended not merely to "independent investigations of police misconduct," but also "review [of MPD] policies[.]" *Id.* at §§ 51(E)(1), (2). The CIP would be authorized to "[m]ake recommendations to the city manager and/or directly to the police chief, to which a timely written response shall be received within 30 days." *Id.* Nothing within the enabling Charter provision indicates that any recommendations made by the CIP have to be accepted or implemented by the police chief or City manager.

Consistent with the Charter's requirements, the City Commission enacted the CIP Ordinance, codified at Chapter 11.5 of the City Code, sections 11.5-26 through 11.5-37. The CIP Ordinance recognizes that the purpose of the CIP is not merely to investigate instances of alleged officer misconduct, but also to (i) "[m]ake written recommendations related to the city police department policies

and procedures concerning but not limited to training, recruitment and notification system for corrective disciplinary procedures and provide input to the chief of police before changes in police department policy or procedure are implemented," *id.* at § 11.5-27(3); (ii) "[e]nhance understanding of the process of submitting, processing and responding to citizen complaints regarding misconduct by police officers," *id.* at § 11.5-27(7); (iii) "[i]ssue reports to the mayor, city commission, city attorney, city manager, chief of police and the public," *id.* at § 11.5-27(8); and (iv) "[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…," *id.* at § 11.5-27(5) (emphasis added).

Prominent among the provisions of the CIP Ordinance are the following, which are intended to ensure compliance with the LEOBOR and safeguard an officer's rights thereunder:

A. The CIP is to "[e]xercise its powers so as to not interfere with any ongoing investigations and conduct its activities consistent with applicable law, including the Florida Government in the Sunshine Law and with applicable law and labor contracts (*id.* at § 11.5-27(2));

B. MPD is notified by CIP of any complaints of police misconduct within two working days of receipt (*id.* at § 11.5-31(1)b.);

C. The CIP may proceed with an investigation only after determination by its independent counsel, who shall be required to consult with the appropriate prosecutorial agencies, that an investigation will not interfere with any pending criminal investigation (*id.* at § 11.5-31(2)a.);

D. A decision of the CIP to proceed with an investigation may be challenged by any agency engaged in such investigation or prosecution by seeking a judicial order in law or equity in a court of competent jurisdiction. Written notification of such challenge to the CIP shall stay the investigation for 48 hours permitting the agency to obtain judicial relief (*id.*);

E. When any city employee (including an officer) appears before the CIP in response to a subpoena, such employee shall be formally advised prior to the commencement of testimony that if the employee has a good-faith belief that the testimony would tend to be self-incriminating, and if, in reliance upon that good-faith belief, the employee declines to answer any question, that the employee's decision not to provide testimony will not subject him or her to any adverse employment consequences. Any employee who, after receiving such advice, decides to testify or provide evidence, must sign a statement acknowledging that the employee understands the advice and is testifying or providing evidence voluntarily and knowingly (*id.* at 11.5-33(a));

F. A police officer who is the subject of an investigation shall be informed of the nature of the investigation and provided with a copy of the complaint prior to being questioned (*id.*at § 11.5-33(b));

G. A person who appears before the CIP in response to a CIP request for testimony may be represented by counsel or any other representative of his or her choice, which representative may be present at all times during the subject's appearance before the CIP (*id.* at § 11.5-33(c)); and

H. The CIP shall adopt policies and procedures "*to ensure compliance with Chapters 112* and 119 of the Florida Statutes and any other applicable laws." *Id.* at 11.5-33(e) (emphasis added).

SUMMARY OF ARGUMENT

Petitioners (and their amicus, the PBA) proceed from the faulty premise that the purpose of the CIP's investigations is, ultimately, to discipline the officer or officers involved in any incident under investigation. This is incorrect. The

primary purposes of CIP investigations are (i) to afford citizens a degree of oversight of police operations; (ii) to provide a forum in which citizens' concerns may be heard and investigated; and (iii) to provide recommendations as to how police operations may be improved, so as to enhance police relations with those who are being policed. The importance of these objectives cannot be summarily dismissed or ignored in today's climate of tension between citizens and police departments.

Notwithstanding language in the CIP Ordinance ostensibly allowing the CIP to *recommend* possible dispositions of particular incidents of officer misconduct, the CIP acknowledges that no officer may be subjected to discipline based on the findings or investigation of the CIP. The City's police chief may impose discipline *only* in a manner consistent with the requirements of sections 112.532 and 112.533, Florida Statutes. Whether the City's police chief imposes discipline properly is a matter to be disputed and resolved between the investigated officer (and his or her union) and the police chief. The remedy for any improper discipline would be to set it aside. However, under no circumstances should the *police chief's* hypothetical improper imposition of discipline on an officer – because it is somehow influenced by the CIP's findings or recommendations – constitute a basis for (i) declaring the CIP Ordinance unconstitutional on grounds of preemption by or conflict with the LEOBOR, or (ii) stripping away the CIP's subpoena power. To do so would needlessly impinge upon the municipal home rule authority of the

City to implement a civilian oversight panel that the City's residents *voted* into existence because of a perceived need.

Contrary to D'Agastino and the FOP's arguments, section 112.533 does not govern all conceivable investigations of police misconduct, but rather identifies "the" procedure for investigating complaints of officer misconduct ***and*** imposing discipline resulting from that investigation. The statute is written in the conjunctive, a point all but ignored in the initial brief on the merits. Where an investigation conducted by an outside entity like the CIP cannot result in the imposition of discipline – and as the Third District correctly recognized, the parties do not contest that the CIP has no power whatsoever to impose discipline – then the investigation is not governed or prohibited by section 112.533. This conclusion is bolstered not merely by the plain language of section 112.533, but also by (i) the titular description of the 2003 legislation amending section 112.533, and (ii) the explicit recognition in section 112.532(1) that the rights and protections afforded therein (and echoed in section 112.533) are applicable "[w]henever a law enforcement officer or correctional officer is *under investigation and subject to interrogation* ***by members of his or her agency*** for any reason *that could lead to disciplinary action*, suspension, demotion, or dismissal[.]" (emphasis added). The statutory protections in the LEOBOR – almost all of which, incidentally, are observed by the CIP – apply only if the officer involved can be subjected to adverse consequences as a result of participating in an internal investigation.

Ultimately, this appeal is not nearly as complex as Petitioners suggest. It is a matter of ordinary statutory construction to be undertaken with the overarching principle in mind that the Court should not readily conclude that an exercise of home rule authority should be invalidated absent clear indications of preemption or conflict. Here, as the Legislature recognized in 2003, the LEOBOR addresses only those investigations by a law enforcement agency that may result in an officer's discipline; the CIP Ordinance and the LEOBOR may properly co-exist, and compliance with the former neither violates nor undermines the latter. Accordingly, the Court should affirm the Third District's decision upholding the validity of the CIP Ordinance in all its aspects.

ARGUMENT

I. THE CITY PROPERLY EXERCISED ITS HOME RULE AUTHORITY IN ESTABLISHING THE CIP TO CONDUCT INVESTIGATIONS AS TO POLICE PRACTICES AND ALLEGATIONS OF MISCONDUCT.

The proper place to start any preemption or conflict analysis is with an examination of the broad municipal home rule powers afforded by the Florida Constitution and state statute. As the CIP will ultimately conclude – and as the Third District correctly determined – the City enjoyed home rule authority to enact the CIP Ordinance.

A. Municipal legislative authority prior to and after the 1968 Florida Constitution.

Prior to the adoption of the 1968 Florida Constitution, "all municipal powers were dependent upon a specific delegation of authority by the legislature in a general or special act." *City of Boca Raton v. State*, 595 So. 2d 25, 27 (Fla. 1992) ("*City of Boca Raton*"). This constitutional arrangement, however, proved unworkable as Florida's population grew and local governments' needs expanded, resulting in countless bills being submitted to the Florida Legislature to permit "municipalities to provide *solutions to local problems*." *Id.* (emphasis added).

Changing demographic and political realities resulted in the amendment of the Florida Constitution in 1968 and the adoption of Article VIII, section 2(b), which reads:

> (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.

Fla. Const. Art. VIII, § 2(b). The Legislature clarified the meaning and scope of this constitutional provision by enacting the Municipal Home Rule Powers Act, now codified at Chapter 166, Florida Statutes (the "Act").

B. Municipal authority under the Act.

The Legislature in 1973 made clear in the Act the exceedingly broad scope of municipal home rule authority. Section 166.021, Florida Statutes, states, in relevant part:

> (1) As provided in s. 2(b), Art. VIII of the State Constitution, municipalities shall have the 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 when expressly prohibited by law*.
>
> (2) "Municipal purpose" means *any activity or power which may be exercised by the state or its political subdivisions*.
>
> (3) The Legislature recognizes that pursuant to the grant of power set forth in s. 2(b), Art. VIII of the State Constitution, *the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act*, except:
>
> * * *
>
> (b) Any subject *expressly* prohibited by the constitution;
>
> (c) Any subject *expressly* preempted to state or county government by the constitution or by general law;
>
> * * *
>
> (4) *The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution*. It is the further intent of the Legislature to extend to municipalities *the exercise of powers* for municipal governmental, corporate, or proprietary purposes *not expressly prohibited* by the constitution, general or special law, or county charter and *to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited*.

§ 166.021, Fla. Stat. (emphasis added).

In adopting the Act, the Legislature not only conferred on municipalities the *same* inherent legislative authority it enjoyed, itself, but also explicitly carved out limited areas where municipalities could *not* legislate. These include areas "expressly preempted to the state … by the constitution or by general law" and

areas "expressly prohibited by the constitution, general or special law[.]" §§ 166.021(3) and (4), Fla. Stat. In doing so, the Legislature effectively placed municipalities on a par with state government when acting to provide for the health, safety and welfare of their residents, and obligated the Legislature to communicate its intent expressly and unambiguously when electing to restrict municipal home rule authority through legislative preemption.

In the years immediately following the adoption of the Act, this Court began to recognize the broad scope of constitutional and statutory municipal home rule authority. Thus, in *State v. City of Sunrise*, 354 So. 2d 1206 (Fla. 1978), the Court considered a challenge to the issuance of municipal bonds and concluded:

> Article VIII, Section 2, Florida Constitution, expressly grants to every municipality in this state authority to conduct municipal government, perform municipal functions, and render municipal services. *The only limitation on that power is that it must be exercised for a valid "municipal purpose." It would follow that municipalities are not dependent upon the Legislature for further authorization. Legislative statutes are relevant only to determine limitations of authority.*

Id. at 1209 (emphasis added).

C. The Court's continued expansive interpretation of municipal home rule authority.

From the adoption of the Act in 1973 to the present, this Court has consistently interpreted municipal home rule authority broadly in the face of claims of preemption by and conflict with state statute. Thus, in *City of Boca Raton v. Gidman*, 440 So. 2d 1277 (Fla. 1983) ("*Gidman*"), this Court recognized that the

1968 amendment of the Florida Constitution, coupled with the adoption of the Act, had altered the manner in which courts should construe restrictions on municipal authority. The *Gidman* Court rejected the plaintiffs' contention that "grants of power that are out of the usual range, and that may result in public burdens, or which in their exercise touch the right to liberty or property or any common law right of the citizens must be strictly construed" and concluded instead that "[l]ocal governments now have all the powers necessary to function vis-à-vis the Florida Constitution and The Municipal Home Rule Powers Act." *Id.* at 1281.

In 1992, the Court issued two decisions broadly interpreting the home rule authority conferred on municipalities. First, in *City of Boca Raton*, the Court considered whether Boca Raton had the inherent authority to impose special assessments to repay municipal bonds. After detailing the historic development of the "vast breadth of municipal home rule power," the Court explained that a municipality "may now exercise any governmental, corporate, or proprietary power for a municipal purpose except when expressly prohibited by law, and *a municipality may legislate on any subject matter on which the legislature may act, except those subjects described in paragraphs (a), (b), (c), and (d) of section 166.021(3).*" *Id.* at 28 (emphasis added). The Court *rejected* the State's contention that Chapter 170, Florida Statutes, which separately addresses special assessments, preempted Boca Raton's exercise of home rule power, noting that the chapter recognized that its procedures were "deemed to provide a supplemental, additional,

and alternative method of procedure for the benefit of all cities, towns, and municipal corporations of the state."[3] *Id.* at 29.

In *City of Ocala v. Nye*, 608 So. 2d 15 (Fla. 1992), the Court considered a challenge to Ocala's authority to exercise eminent domain to acquire more property than was needed to satisfy the municipal purpose. The Court concluded that Ocala had such authority because "the Department of Transportation (DOT) and counties, as political subdivisions of the state, are expressly permitted by statute to condemn more property than is necessary where they would save money by doing so, the City may likewise do so pursuant to its home rule powers." *Id.* at 16-17. The Court continued its reasoning:

> Thus, municipalities are not dependent upon the legislature for further authorization, and legislative statutes are relevant only to determine limitations of authority. Although section 166.401, Florida Statutes (1989), purports to authorize municipalities to exercise eminent domain powers, municipalities could exercise those powers for a valid municipal purpose without any such "grant" of authority. *If the state has the power to take particular land for public purposes, then a municipality may also exercise that power unless it is "expressly prohibited."* ***Although section 166.401(2) does not expressly grant the taking of an entire parcel by a municipality to save money, it also does not expressly prohibit a municipality from doing so***.

[3] Similarly, section 112.533(1)(b)1. recognizes that entities other than an officer's employing agency may "initiate[] or receive[] a complaint against a law enforcement officer" provided that complaint is also forwarded to the officer's agency for "review or investigation." § 112.533(1)(b)1., Fla. Stat.

Id. at 17 (emphasis added; internal citations omitted). *City of Boca Raton*, and especially *Nye*, stand for the broad propositions that (i) a municipality may exercise any power the state legislature may exercise, and (ii) even when a statute conferring authority does not expressly indicate how that authority may be exercised, *as long as the statute does not expressly prohibit any particular mechanism*, municipalities enjoy the inherent authority to be creative in their exercise of home rule authority.

More recently, this Court has decided a series of cases that have consistently reaffirmed the broad exercise of home rule authority. In *Roper v. City of Clearwater*, 796 So. 2d 1159 (Fla. 2001), a taxpayer challenged Clearwater's issuance of municipal bonds to finance a sports stadium, arguing that Clearwater had approved the bonds without complying with the requirements of Chapter 159, Florida Statutes. *Id.* at 1159-60, 1162. The Court recognized that Clearwater had "acted pursuant to its home rule charter powers in authorizing issuance of the bonds in question[,]" not Chapter 159, and held that this was a valid exercise of the powers granted to municipalities by Article VIII, section 2, Florida Constitution, which "*has consistently been construed as giving municipalities broad home rule powers*." *Id.* at 1162 (emphasis added). Because the ordinance authorizing issuance of the bonds made no reference to chapter 159, but only looked to chapter 159 to interpret a single phrase as used in the Clearwater charter, the Court concluded that Clearwater "*did not thereby invoke chapter 159 as a source of authority in exercising its charter powers to issue the bonds, and did not need to meet the*

requirements of chapter 159." *Id.* at 1162 (emphasis added). Noting that "chapter 159 provides that the authority contained therein is supplementary, and not in derogation of any powers of a local agency otherwise conferred," the Court concluded that the issuance of bonds clearly fell within Clearwater's municipal home rule authority and strict compliance with Chapter 159 was not required.[4] *Id.* at 1163-64.

In the seminal case of *City of Hollywood v. Mulligan*, 934 So. 2d 1238 (Fla. 2006), the Court continued its analytical "train of thought" when it considered a challenge to Hollywood's vehicle impoundment ordinance, based on purported preemption by and conflict with the Florida Contraband Forfeiture Act ("FCFA"). *Id.* at 1240. Hollywood had enacted an ordinance that functioned through the municipality's existing code enforcement mechanisms authorized by Chapter 162, Florida Statutes, rather than through the courts. *Id.* at 1242. In reasoning substantially analogous to that being advanced by Petitioners here, the Fourth

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[4] Petitioners have argued that the phrase "notwithstanding any other law or ordinance to the contrary" in section 112.533(1)(a) is indicative of the Legislature's intent to pretermit the exercise of *any* other investigatory authority relating to police misconduct. However, the more plausible reading – and the one consistent with reconciling the statute with an exercise of municipal home rule authority – is that a local government may not, by ordinance, establish different procedures for an officer's ***agency*** to investigate and discipline an officer. In other words, if the City enacted an ordinance that purported to confer greater authority on its police chief to limit the rights and protections of an officer when being investigated (and potentially disciplined) by the MPD, such an ordinance would be preempted by and conflict with the LEOBOR.

District found that Hollywood's ordinance was expressly preempted by the FCFA because the statute stated that law enforcement agencies "shall utilize" the provisions of the FCFA when forfeiting contraband articles used for criminal purposes.[5] *Id.* at 1244. The Fourth District further found "that under section 932.701(2)(a)(5) of the FCFA, the Legislature had expressly limited the forfeiture of vehicles to felony offenses." *Id.*

This Court rejected the Fourth District's reasoning. The Court first articulated the guiding principles on preemption:

> In Florida, a municipality is given broad authority to enact ordinances under its 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. 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. Express preemption requires a specific statement; the preemption cannot be made by implication [or] by inference. However, the preemption need not be explicit so long as it is clear that the legislature has clearly preempted local regulation of the subject.

934 So. 2d at 1243 (emphasis added; citations, footnotes and internal quotation marks omitted).[6] The Court went on to explain the error in the Fourth District's analysis:

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[5] The Court preliminarily held that "the words 'shall utilize' alone do not express preemption." *Id.* at 1244. Similarly, here, the words "shall be the procedure" should not be construed as "express preemption."

[6] Given the explicit statement in section 166.021(3) that a legislative subject must be "expressly preempted to state or county government" in order to overcome (continued . . .)

> [A] change in this law occurred in 1973 when the Municipal Home Rule Powers Act was enacted. *This act removed all general limitations on a municipality's power to legislate in a particular field. See* § 166.021, Fla. Stat. (2002). Passed the year before the original version of the FCFA, the Municipal Home Rule Powers Act does not reserve to the Legislature the power to legislate in the field of forfeiture. One cannot lightly disregard this omission because the Legislature did retain field preemption in other areas. For example, in chapter 166 itself, the Legislature preempted the field in regard to ammunition sales. *See* § 166.044, Fla. Stat. (2002) ("No municipality may adopt any ordinance relating to the possession or sale of ammunition."). *And since 1973, the Legislature has continued to use similar preemptive language in other contexts*. For instance, regarding the lottery, the Legislature stated that "[a]ll matters relating to the operation of the state lottery *are preempted to the state*, and no county, municipality, or other political subdivision of the state shall enact any ordinance relating to the operation of the lottery authorized by this act." § 24.122(3), Fla. Stat. (2005); *see also* § 320.8249(11), Fla. Stat. (2005) ("The regulation of manufactured homes installers or mobile home installers *is preempted to the state*....").

(. . . continued)
municipal home rule authority, it is unclear why the Court's jurisprudence shifted to allow for "implied" preemption. The first case on the subject was *Tribune Co. v. Cannella*, 458 So. 2d 1075 (Fla. 1984), where the Court endorsed the idea that preemption could be found "if the senior legislative body's scheme of regulation of the subject is pervasive and if further regulation of the subject by the junior legislative body would present *a danger of conflict* with that pervasive regulatory scheme." *Id.* at 1077 (emphasis added). This approach seems to conflate unnecessarily the doctrines of preemption and conflict, and the Court did not attempt to explain its divergence from the Legislature's requirement that preemption be "expressly" stated. *See* http://www.merriam-webster.com/dictionary/expressly, last accessed Sept. 13, 2016 (defining "expressly" to mean "explicitly"). The implied approach, however, "stuck" and was reiterated without further elaboration in *Barragan v. City of Miami*, 545 So. 2d 252 (Fla. 1989). For better or worse, it is now part of this Court's preemption jurisprudence, unless the Court is inclined to recede from it.

Id. at 1246 (emphasis added).

Having concluded that Hollywood's ordinance was not preempted, the Court turned to the Fourth District's alternative conclusion that the ordinance conflicted with the FCFA:

> As an alternative basis for its decision, the Fourth District held that even if the ordinance is not preempted by the FCFA, the ordinance is in conflict with the FCFA *because it does not meet the procedural due process requirements of the FCFA*. We disagree. In addition to the absence of preemption, there is no conflict between the FCFA and the ordinance. *The statute and the ordinance can coexist*.

Id. (emphasis added) (internal citations omitted). The Court offered three (and only three) examples of situations where a municipal ordinance conflicts and cannot co-exist with a state statute: (i) when a municipality forbids what the state "has expressly licensed, authorized or required"; (ii) when a municipality authorizes "what the legislature has expressly forbidden"; or (iii) where the penalty imposed by ordinance exceeds that imposed by the state for the same misconduct. *Id.* at 1247. *See also Thomas v. State*, 614 So. 2d 468, 470 (Fla. 1993) (holding "an ordinance penalty may not exceed the penalty imposed by the state" and "[a] city may not enact an ordinance imposing criminal penalties for conduct essentially identical to that which has been decriminalized by the state").

After reiterating that "[m]unicipal ordinances are inferior to laws of the state and must not conflict with any controlling provision of a statute," the *Mulligan* Court nonetheless went on to conclude:

> Additionally, *the ordinance expressly does not apply when the vehicle is subject to seizure under the FCFA*.[7] The fact that the FCFA and the ordinance ***employ differing procedures to achieve their purposes does not amount to an improper "conflict" necessitating the invalidation of the ordinance***. Therefore, the FCFA and the ordinance can coexist.

934 So. 2d at 1247 (emphasis added).[8]

The Court continued to apply the broad principles reaffirmed in *Mulligan* in *Phantom of Brevard, Inc. v. Brevard County*, 3 So. 3d 309 (Fla. 2008) and *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880 (Fla. 2010).[9] In the former case, the Court considered a challenge to county ordinances that regulated the use, supply and sale of fireworks in a manner inconsistent with Chapter 791, Florida Statutes. *Phantom of Brevard*, 3 So. 3d at 310. The Fifth District's decision conflicted with the Second District's decision in *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011 (Fla. 2d DCA 2005) regarding whether the ordinances conflicted with the state statute.[10] 3 So. 3d at

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7 Just as the CIP Ordinance does not confer any authority on the CIP to discipline officers involved in a CIP investigation.

8 By analogy here, the investigation conducted pursuant to the CIP Ordinance is conducted under different procedures and for different purposes, and the CIP lacks the authority the MPD has to discipline the investigated officer upon conclusion of its investigation.

9 While neither case involved a city, the preemption and conflict analysis was the same, as is evidenced by the Court's reliance on municipal home rule cases like *Mulligan*. *Phantom of Brevard*, 3 So. 3d at 314; *Browning*, 28 So. 3d at 886.

10 The Fifth District had concluded that Chapter 791 did not preempt the ordinance in question, and this Court did not consider that ruling. *Phantom of Brevard*, 3 So. 3d at 310.

310. The Fifth District concluded that the Brevard County ordinance, which required sellers of fireworks and sparklers to maintain a particular amount of liability insurance, conflicted with section 791.001, Florida Statutes, which provides that chapter 791 "*shall be applied uniformly throughout the state*" and which does not contain such an insurance requirement. *Id.* at 311 (emphasis added). Conversely, the Second District held that a county ordinance which established "a permitting process for all businesses involving fireworks" that "imposes additional requirements on businesses wanting to avail themselves of the benefits of doing business in Pinellas County" did "not directly conflict with the provisions of chapter 791. *A person can comply with the requirements of the ordinance without violating chapter 791, and can comply with the requirements of chapter 791 without violating the ordinance*." *Id.* at 311-12 (emphasis supplied).

Notwithstanding the legislative mandate that Chapter 791 "be applied uniformly throughout the state," *id.* at 312, this Court endorsed the Second District's analysis and quashed the Fifth District's decision:

> There is conflict between a local ordinance and a state statute *when the local ordinance cannot coexist with the state statute*. Stated otherwise, the test for conflict is whether in order to comply with one provision, a violation of the other is required.
>
> * * *
>
> The Fifth District concluded that the "Evidence of financial responsibility" provision conflicts with section 791.001, which provides that chapter 791 is to be "applied uniformly throughout the state." More specifically, the Fifth District found that Brevard County's "Evidence of financial responsibility" provision will subject fireworks businesses to varying insurance coverage requirements

> throughout the State. However, *focusing on potential differences caused by varying local requirements confuses the issue. Because chapter 791 does not include an insurance coverage standard or requirement, chapter 791 is not being applied disparately*. In other words, a state statute is not being applied in a non-uniform manner when a locality enacts a regulation on a particular matter that is not addressed in the statute. The statute is being applied uniformly. It is the local ordinance that is creating any variance between counties.

Id. at 315 (emphasis added) (internal citations omitted).

In *Browning*, Sarasota County sought a declaratory judgment regarding the constitutionality of a proposed charter amendment relating to the conduct of elections in the county. 28 So. 3d at 885. The case presented questions of both possible preemption and statutory conflict. *Id.* The Court began its preemption analysis by explaining that the Election Code, "encompassing chapter 97 through 106 and 125 pages and 125 pages of the Florida Statutes," does not contain any express language of preemption and, therefore, "express preemption does not apply in this case." *Id.* at 866. The Court warned that court 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.* Next, the Court explained that

> [p]reemption 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. 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.

Id. at 886 (citations and internal quotation marks omitted).

Although the Second District concluded that Florida's Election Code established "a detailed and comprehensive statutory scheme for the regulation of elections in Florida, thereby evidencing the legislature's intent to [impliedly] preempt the field of elections law," this Court disagreed, concluding "*that the Legislature's grant of power to local authorities in regard to many aspects of the election process does not evince an intent to preempt the field of election laws.*" *Id.* at 886-87 (emphasis added). In reaching this conclusion, the Court cited to cases in which "Florida courts have not found an implied preemption of local ordinances which address local issues." *Id.* at 887-88 (citing *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011 (Fla. 2d DCA 2005) and *GLA & Assocs. v. City of Boca Raton*, 855 So. 2d 278 (Fla. 4th DCA 2003)).

With regard to the question of whether the ordinance conflicted with the Election Code, the three issues considered represent a primer on conflict analysis:

> (i) whether a voting system the Legislature had specifically authorized for use in elections (touch screen machines) could be prohibited by local governments (*id.* at 888);
>
> (ii) whether the county could require "mandatory, independent, and random audits" consisting of "publicly observable hand counts of the voter verified paper ballots in comparison to the machine counts," when the Election Code conferred authority on the Legislature to determine whether to conduct an audit (*id.* at 889); and
>
> (iii) whether certification of election results could be delayed to complete locally required manual recounts when the State had its own deadline for certification of results and its own system for conducting manual recounts (*id.* at 889-90).

Reiterating that "[t]he 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,'" the Court concluded that the first two issues did not present a conflict, but the third one did. *Id*. at 888-90.

With respect to the first issue, the Court reasoned no conflict existed because the Legislature's enumeration of acceptable voting systems constituted the imposition of minimum requirements for systems, and those requirements were merely "*expanded* by the additional standards that the [local] amendment would impose." *Id.* at 888 (emphasis added). The county could comply with the requirements of the local legislation without violating the requirements of the state law. *Id.* As for the second issue, the Court concluded there was no conflict because, while the Election Code authorized the Legislature to require an audit of voting systems, it did not specify procedures for such an audit or (more importantly) did not actually prohibit counties from conducting their own audits. *Id.* at 889.

With regard to the third issue, however, the Court found multiple conflicts based on certification deadlines imposed by the Election Code, specific regulatory requirements in the Florida Administrative Code as to how recounts were to take place, and ultimately, a provision in the Election Code that states that "no vote shall be received or counted in any election, except as prescribed by this code." *Id.* at 890 (quoting § 101.041, Fla. Stat. (2006)). Because of these conflicts, the Court noted, the local legislation did not "parallel or complement the Election Code, but

rather conflict[ed] with it."[11] *Id.* The Court then held that the provision relating to manual recounts could be severed from the amendment because the charter provided for severability and the other provisions were not "necessarily dependent for their operation upon" the conflicting provision. *Id.* at 891.

D. The Ordinance's presumption of validity.

Petitioners' challenge to the CIP Ordinance faces a high burden: the axiomatic presumption of the validity of ordinances, which applies with equal force to preemption challenges to municipal home rule authority. *See, e.g., City of Kissimmee v. Fla. Retail Federation, Inc.*, 915 So. 2d 205, 209 (Fla. 5th DCA 2005) (applying presumption of validity of legislation to preemption challenge to municipal ordinance); *Lowe v. Broward County*, 766 So. 2d 1199, 1203 (Fla. 4th DCA 2000) ("indulg[ing] every reasonable presumption in favor of ordinance's constitutionality," in light of preemption challenge to county ordinance).

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[11] Recently, this Court found a pre-Wandall Act municipal red light camera program to be in conflict with state statutes precisely because the two legislative schemes could not co-exist. *See Masone v. City of Aventura*, 147 So. 3d 492, 495, 496-98 (Fla. 2014) (holding that "'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,'" and concluding that "Chapter 316 could not be clearer in providing that local ordinances on 'a matter covered by' the chapter are preempted unless an ordinance is 'expressly authorized' by the statute" (quoting, in part, *City of Palm Bay v. Wells Fargo Bank, N.A.*, 114 So. 3d 924, 928 (Fla. 2013)). As more fully elaborated below, the LEOBOR does not contain preemption language even remotely comparable to the "unless expressly authorized" limitation at issue in *Masone*.

II. THE LEOBOR DOES NOT EXPRESSLY OR IMPLIEDLY PREEMPT THE CIP ORDINANCE.

A. There is no express preemption of the CIP Ordinance.

The express preemption required to defeat municipal home rule authority "requires a specific statement; the preemption cannot be made by implication [or] by inference." *Mulligan*, 934 So. 2d 1243; see also *Phantom of Clearwater*, 894 So. 2d at 1018. There is no provision in the LEOBOR that expressly preempts the CIP Ordinance. Even *Demings*, upon which Petitioners rely extensively, does not conclude that the ordinance in that case was preempted, but rather that it conflicted with state statute. *Demings*, 15 So. 3d at 609 ("[T]he charter provisions and ordinance that establish an additional procedure for investigating these complaints necessarily and directly conflict with the statute.").[12]

Notwithstanding their reliance on *Demings*, D'Agastino and the FOP argue in favor of *express* preemption based on a strained interpretation of section 112.533. They argue that because section 112.533 "protects law enforcement officers from interminable and abusive investigations *by internal affairs divisions of police departments*," IB at 15, it must necessarily follow that all other investigations by other entities, whether interminable and abusive or not, are "expressly preempted." There is little logic to this argument.

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[12] The Fifth District also observed: "Based on our finding that the charter and ordinance directly conflict with the plain language of section 112.533, we need not conduct a separate preemption analysis." *Id.* at 609. *Demings* is addressed further *infra* at 37-42.

There are innumerable ways in which the Legislature could have communicated a clear intent to preempt all other investigations into police misconduct. For example, the Legislature could have, without using "magic" words of preemption, expressly stated that no other investigations into police misconduct will be permitted except as provided for in sections 112.532 and 112.533. In fact, that is *precisely* the kind of language this Court relied on in *Masone* to conclude that pre-Wandall Act municipal red light camera programs were preempted by Chapters 316 and 318. 147 So. 3d at 496-97 ("Chapter 316 could not be clearer in providing that local ordinances on 'a matter covered by' the chapter are preempted unless an ordinance is 'expressly authorized' by the statute."). Comparable language is absent in sections 112.532 and 112.533. *See also Mulligan*, 934 So. 2d at 1246 (listing examples of the Legislature expressing a clear intent to preempt further legislation or regulation in specific fields).

Moreover, Petitioners *concede* that section 112.533 protects officers in connection with "investigations by internal affairs divisions of police departments." IB at 15. They never articulate how this protection "*expressly* preempts" other investigations. As previously noted, and again as conceded by Petitioners, section 112.533 addresses "the procedure" that must be followed by "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*." IB at 15 (emphasis original). If, however, as the Third District correctly concluded, the investigation

is not conducted by a law enforcement agency and cannot result in the imposition of discipline by the investigating entity, then it is not governed or preempted by section 112.533.

This interpretation is consistent with the Legislature's express description of the 2003 amendment to section 112.533. In enacting Chapter 2003-149, the Legislature explained that the inclusion of a requirement for a sole procedure of investigation was *directed at the officer's employing agency*, and not at any other potential entity that might have an interest in investigating an incident of police misconduct: "An act relating to law enforcement officers and correctional officers; … *amending s. 112.533*, F.S.; providing that an established system for the receipt, investigation, and determination of complaints *shall be the exclusive procedure* ***used by law enforcement and correctional agencies***[.]" Ch. 2003-149, Laws of Fla. (emphasis added). This Court has on more than one occasion explicitly stated, "The title [of legislation] is more than an index to what the section is about or has reference to; it is a direct statement by the legislature of its intent." *Aramark Uniform and Career Apparel, Inc. v. Easton*, 894 So. 2d 20, 25 (Fla. 2004) (quoting *State v. Webb*, 398 So. 2d 820, 824-25 (Fla. 1981)).

The Legislature's concern was not to preempt all other possible investigations but rather to ensure that law enforcement agencies that *might impose* discipline use only the required "system for the receipt, investigation, and determination of complaints." Ch. 2003-149, Laws of Fla. This interpretation dovetails precisely with the requirement within section 112.533 that other laws and

local ordinances may not vary this statutory requirement by allowing *law enforcement agencies* to use other procedures to investigate and impose discipline. *See Browning*, 28 So. 3d at 866 ("[C]ourts are careful in imputing an intent on behalf of the Legislature to preclude a local elected governing body from exercising its home rule powers[.]"); *Lowe*, 766 So. 2d at 1203 ("indulg[ing] every reasonable presumption in favor of ordinance's constitutionality," in light of preemption challenge to county ordinance).

This interpretation also explains the *need* for the Legislature to have "carved out" investigations by the Criminal Justice Standards and Training Commission ("CJSTC"). Because, as the Petitioners point out, the CJSTC is a "law enforcement agency" authorized "to adopt rules for the certification, maintenance, and ***discipline*** of law enforcement … officers" and "initiate its own investigations of officer misconduct," IB at 16 (emphasis added), its authority had to be reconciled with the limiting language in section 112.533 *and* in the Legislature's description of that section. Where, however, an investigation is to be conducted by an entity that is neither a "law enforcement agency" nor authorized to impose discipline, then the Legislature's need for a "carve out" is simply not at issue.[13]

[13] For this reason, Petitioners' repeated reliance on the dissent below is misplaced. Judge Rothenberg's dissent failed to acknowledge that the Legislature's focus was on ensuring that *law enforcement agencies* abide by the "sole procedure" mandated by section 112.533.

Additionally, section 112.533 should be read *in pari materia* with section 112.532. *See State v. Fuchs*, 769 So. 2d 1006, 1009 (Fla. 2000) (holding "statutes which relate to the same or closely related subjects should be read in pari materia") (citing *State v. Ferrari*, 398 So. 2d 804, 807 (Fla. 1981)). Many of the rights set forth in section 112.532 are echoed in section 112.533. Section 112.532 very conspicuously states:

> Whenever a law enforcement officer or correctional officer is under investigation and subject to interrogation *by members of his or her agency* for any reason *that could lead to disciplinary action, suspension, demotion, or dismissal*, the interrogation must be conducted under the following conditions….

§ 112.532(1), Fla. Stat. (emphasis added). It is *not* a coincidence that the two components needed for invocation of the rights afforded by the LEOBOR are the same components the CIP argues must be present for the application of section 112.533: (i) an investigation by the officer's *law enforcement agency*, and (ii) the possibility of *the imposition of discipline*.

The plain language of section 112.533 links the two statutory provisions and makes clear that they apply *only* when an investigation is conducted by a law enforcement agency resulting in possible discipline:

> When *law enforcement … agency personnel assigned the responsibility of investigating the complaint* prepare an investigative report or summary, regardless of form, the person preparing the report shall, at the time the report is completed:
>
> 1. Verify pursuant to s. 92.525 that the contents of the report are true and accurate based upon the person's personal knowledge, information, and belief.

> 2. Include the following statement, sworn and subscribed to pursuant to s. 92.525:
>
> "I, the undersigned, do hereby swear, under penalty of perjury, that, to the best of my personal knowledge, information, and belief, I have not knowingly or willfully *deprived, or allowed another to deprive, the subject of the investigation of any of the rights contained in ss. 112.532 and 112.533*, Florida Statutes."
>
> The requirements of subparagraphs 1. and 2. shall be completed prior to the determination *as to whether to proceed with disciplinary action or to file disciplinary charges*.

§ 112.533(1)(a), Fla. Stat. (emphasis added).

Nothing in sections 112.532 or 112.533 conveys the Legislature's clear intent to expressly preempt any and all investigations into police misconduct by non-law enforcement entities. Indeed, section 112.533(1)(b)1, as amended in 2007, conveys a contrary intent. That section expressly recognizes that entities other than an officer's employing agency may "*initiate*[] or *receive*[] a complaint against a law enforcement officer," requiring only that such a complaint also be forwarded to the officer's agency for its "review or investigation." §112.533(1)(b)1, Fla. Stat. (emphasis added). This recognition stands as an express *rebuttal* to the notion that express preemption is operative here – a point conceded below. *See D'Agastino v. City of Miami*, 189 So. 3d 236, 240 (Fla. 3d DCA 2016) ("A brief perusal of these provisions [section 112.533] makes clear the [LEOBOR] does not purport to expressly preempt other investigative bodies or means of oversight. Lieutenant D'Agastino concedes as much.")

B. There is no implied preemption.

While it is unclear that Petitioners are making an implied preemption argument independent of conflict preemption (*see* IB at 5, 18-20), it *is* clear that there is no basis for concluding that the Legislature intended, by virtue of sections 112.532 and 112.533, to impliedly preempt all other possible investigations into police misconduct by entities other than an officer's employing agency. As Petitioners correctly concede, "Implied preemption is a more difficult concept than express preemption. … '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.'" IB at 19 (citing *Tallahassee Mem'l Reg'l Med. Ctr., Inc. v. Tallahassee Med. Ctr., Inc.*, 681 So. 2d 826, 831 (Fla. 1st DCA 1996)).

Petitioners' field preemption argument (IB at 21-23) misses the mark. This Court in *Mulligan* explicitly held that subsequent to the Legislature's enactment of the Municipal Home Rule Powers Act, "all general limitations on a municipality's power to legislate in a particular field" had been eliminated. 934 So. 2d at 1246. Consequently, Petitioners must do more than merely point out that there are state statutes that touch upon the subject of investigations of police conduct. *Browning*, 28 So. 3d at 886, 887-88 ("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. … Florida courts have not found an implied preemption of local ordinances which address local issues.") (citing *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011 (Fla. 2d

DCA 2005) and *GLA & Assocs. v. City of Boca Raton*, 855 So. 2d 278 (Fla. 4th DCA 2003)).[14]

As previously argued, the plain language of sections 112.532 and 112.533 – as well as the Legislature's own description of the 2003 amendment to 112.533 – establishes that the rights afforded by the those statutes and the procedures set forth therein relate to investigations by an officer's own employing agency, which has the power to impose discipline on the officer as a result of an investigation. In fact, the CIP can readily concede that the "field" of *law enforcement agency* investigations of officers *has* been preempted by sections 112.532 and 112.533. This much is evident by the Legislature's statement that the procedures control "notwithstanding any other law or ordinance to the contrary." Neither the City nor any other local government may establish procedures or alter the protections afforded officers *when they are investigated by their employing agencies.*[15] The defect in Petitioners' field preemption argument is that they have enlarged the scope of the "field" by writing into the statutes language that does not appear there.

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[14] The Court in *Browning* also noted that the subject of election law is addressed in nine chapters and 125 pages of the Florida Statutes, and yet, that did not, by itself, justify concluding that the Legislature had intended to impliedly preempt the field. 28 So. 3d at 886.

[15] It bears noting, though it is certainly not dispositive of the issues presented, that the CIP Ordinance, in attempting to ensure compliance with Chapter 112, Florida Statutes, has afforded any subpoenaed City employee (including an officer) the right to refuse to answer questions if the individual in good faith believes answering may incriminate him or her. City Charter, § 51(D); City Code, § 11.5-33(a).

"Courts should be reluctant to 'preclude a local elected governing body from exercising its local powers' by finding preemption by implication 'in the absence of an explicit legislative directive.'" *Shands Teaching Hosp. and Clinics, Inc. v. Mercury Ins. Co. of Fla.*, 97 So. 3d 204, 211 (Fla. 2012) (quoting *Phantom of Clearwater*, 894 So. 2d at 1019); *Browning*, 28 So. 3d at 886 (same holding). As the Second District has observed, "[I]f the legislature can easily create express preemption by including clear language in a statute, there is little justification for the courts to insert such words into a statute." *Phantom of Clearwater*, 894 So. 2d at 1019.

III. THE CIP ORDINANCE DOES NOT CONFLICT WITH THE LEOBOR.

The thrust of Petitioners' conflict argument is the language in section 112.533(1)(a) mandating that law enforcement agencies establish an exclusive procedure governing their investigation and discipline of officers, which they contend is the only conceivable mechanism by which an alleged incident of police misconduct may be investigated by any other entity. The CIP will not belabor the arguments it has already advanced in this brief in opposition to this theory.

Petitioners also point out the ways that investigations by the CIP would differ from an investigation conducted by an officer's employing agency. They neglect, however, to focus on the fact that an investigation by the CIP *cannot* result in the imposition of discipline on the officer because the CIP has no disciplinary authority over officers. In contrast, discipline imposed by MPD must necessarily

comply with the requirements of the LEOBOR.[16] The fact that the two investigative processes are not identical is immaterial; mere differences do not a conflict make. *Mulligan*, 934 So. 2d at 1247 ("[E]mploy[ing] differing procedures to achieve their purposes does not amount to an improper 'conflict' necessitating the invalidation of the ordinance."). This Court's test to determine whether a conflict precludes the exercise of municipal home rule authority requires that the two pieces of legislation cannot co-exist, such that compliance with one requires violation of the other.[17] *Phantom of Brevard*, 3 So. 3d at 315; *Mulligan*, 934 So. 2d at 1246.

Conflict sufficient to supersede municipal home rule authority has a "very strict and limited meaning." *F.Y.I. Adventures, Inc. v. City of Ocala*, 698 So. 2d

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[16] As previously indicated, whether the City's police management abide by those requirements is an issue separate and apart from the CIP's ability to conduct its own investigation. For this reason, the response to Petitioners' and the PBA's concerns about the CIP's findings being used against the investigated officer is, "Either the LEOBOR permits it or it does not. If it does not, then the discipline should be overturned."

[17] To the extent a particular provision of the CIP Ordinance were found to conflict with state statute, the Court should sever that provision whenever possible out of deference to the separation of powers. *Florida Dept. of State v. Mangat*, 43 So. 3d 642, 649 (Fla. 2010) ("Severability is a judicially created doctrine which recognizes a court's obligation to uphold the constitutionality of legislative enactments where it is possible to remove the unconstitutional portions."). *See* City of Miami Ordinance No. 12188 (2/14/02), Sec. 4 (providing for severability in CIP Ordinance). Moreover, any interpretation of legislation should be in a manner that upholds its constitutionality, whenever reasonably possible. *Capital City Country Club, Inc. v. Tucker*, 613 So. 2d 448, 452 (Fla. 1993).

583, 584 (Fla. 5th DCA 1997). The CIP Ordinance does not fall into any of the categories traditionally recognized by this Court as giving rise to an irreconcilable conflict: (i) when a municipality forbids what the state "has expressly licensed, authorized or required"; (ii) when a municipality authorizes "what the legislature has expressly forbidden"; or (iii) where the penalty imposed by ordinance exceeds that imposed by the state for the same misconduct. *Mulligan*, 934 So. 2d at 1247; *Thomas*, 614 So. 2d at 470.

This Court has, therefore, on more than one occasion, recognized the inherent flexibility municipalities enjoy to structure solutions to local problems, even in the face of an existing state statutory scheme. In *Nye*, for example, the Court upheld a municipality's broader exercise of eminent domain than what was articulated by statute, observing that "municipalities are not dependent upon the legislature for further authorization" to act. 608 So. 2d at 17. It then concluded:

> If the state has the power to take particular land for public purposes, then a municipality may also exercise that power unless it is "expressly prohibited." *Although section 166.401(2) does not expressly grant the taking of an entire parcel by a municipality to save money, it also does not expressly prohibit a municipality from doing so.*

Id. (emphasis added).

In *City of Sunrise*, the city had devised a "novel" mechanism for raising revenue – double advanced refunding bonds. 354 So. 2d at 1207. Despite the fact that section 166.101 enumerated specific types of bonds that could be issued by municipalities, this Court determined that absent a specific prohibition, Sunrise

enjoyed the flexibility under its municipal home rule authority to structure the financing as it did. *Id.* at 1208-09 (emphasis added).

Ultimately, Petitioners' conflict argument devolves into a request that this Court adopt the Fifth District's reasoning in *Demings*. IB at 24-26. Respectfully, though, the Fifth District's conflict analysis in *Demings*, read in isolation, is simply mistaken and ignores both the plain language of the LEOBOR and the Legislature's own expression of intent. Perhaps it was the court's extensive concerns about the constitutional stature of the position of Sheriff of Orange County, 15 So. 3d at 606-08, 610-12, that led the court's analysis astray – the issue, after all, was framed as one of abolishment of a constitutional office. *Id.* at 609 ("[T]he question presented is whether the County charter and ordinance creating and authorizing an independent board to review citizen complaints against the Sheriff's deputies, *without first abolishing the constitutional office of sheriff*, is 'inconsistent' with general law.") (emphasis added). To the extent the Fifth District's reasoning is limited to this concern about the abolishment of the Sheriff's constitutional office, it may arguably be reconciled not only with the Third District's reasoning, but also the LEOBOR, itself. Otherwise, it is difficult to reconcile the Fifth District's reasoning with the plain language of the statutes.

The Fifth District's explained its reasoning as follows:

> 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*. [footnote omitted]. This is clear from: (1) the title language

> of chapter 2003–149, designating the investigation required by chapter 112 as the "exclusive procedure" for investigation; (2) the language added to section 112.533 in 2003, mandating that the investigation authorized by chapter 112 "shall be the procedure" for investigating complaints against local law enforcement "notwithstanding any other law or ordinance to the contrary;" and (3) the language added to section 112.533 in 2007, directing any local governmental entity that receives or initiates a complaint against a local law enforcement officer to forward it to the employing agency for investigation in accordance with chapter 112.

Id. at 608-09. Unfortunately, as to each of the three articulated reasons, the *Demings* court focused only on selective language that supported its conclusion.

First, the title description for Chapter 2003-149 very clearly does ***not*** indicate that it is the "exclusive procedure" for any and all investigations. As previously pointed out, what it *actually* says is the "established system for the receipt, investigation, and determination of complaints *shall be the exclusive procedure* ***used by law enforcement … agencies.***" The Fifth District ignored this additional language tying the "exclusive procedure" to "law enforcement agencies." The Fifth District never explains this omission from its analysis or even indicates that it has excerpted the language. Instead, it extends the "plain language" beyond law enforcement agencies to all possible agencies that might have an interest in investigating police misconduct.

The second reason proffered by the *Demings* court is no more analytically sound. Once again, the court ignored a portion of what the statute actually says. Asserting that the language added to section 112.533 in 2003 mandated that "the investigation authorized by chapter 112 'shall be the procedure' for investigating

complaints against local law enforcement 'notwithstanding any other law or ordinance to the contrary,'" 15 So. 3d at 609, the Fifth District overlooked that the statutory provision was written in the conjunctive: the procedure shall be "the" procedure for investigating officer misconduct ***and*** "for determining whether to proceed with disciplinary action or to file disciplinary charges" as a result of that investigation. § 112.533(1)(a), Fla. Stat. Since the *Demings* court never explained whether the civilian board in question had the authority to impose discipline on the officer, it cannot be determined whether the court's failure to address this conjunctive requirement in the statute was an oversight or deliberate.[18]

Finally, the third reason offered to sustain the interpretation of the LEOBOR also falls short of the mark. The fact that section 112.533 was amended in 2007 to require that complaints initiated or received by other entities be forwarded to the officer's agency for potential investigation in no way warrants the conclusion that all other investigations are precluded.[19] At *most*, this statutory provision can be read to require (i) that an officer's employing agency be notified promptly of complaints so as to allow for internal review or investigation, and (ii) any

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[18] The court's discussion of the authority of the civilian board was very limited. *Demings*, 15 So. 3d at 606-07.

[19] Even here, the court's discussion of the statutory language was imprecise. Section 112.533(1)(b)1. actually states that a complaint shall be forwarded to the officer's agency "for review ***or*** investigation." (emphasis added). In other words, a complaint may be forwarded that does not result in an investigation but merely "review" by the officer's agency.

discipline imposed arise from that investigation. This is precisely what occurred in D'Agastino's case – the CIP forwarded the complaint it received from Ms. Alvarez to the MPD, as required by section 112.533(1)(b)1. and by its own Ordinance. MPD reached its own conclusions about imposing discipline on D'Agastino.

It is also possible that the Fifth District was unduly swayed by two Attorney General opinions cited in the decision.[20] The first of these is an "informal" opinion that the court does not identify by citation, thus preventing critical review and analysis.[21]

The second opinion cited by the Fifth District – AGO 2006-35 – actually clarifies that the procedures in section 112.533 are the sole procedures to be used by an officer's *employing agency* and *the agency* may not employ another mechanism for investigating and possibly disciplining an officer: "The plain language of the statute makes the procedures established thereunder *the exclusive means by an employing agency to investigate complaints against law enforcement officers … for determining whether to proceed with disciplinary action*, regardless

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[20] Ironically, Petitioners never cite to those opinions in support of their arguments. Given that one of those opinions actually supports the CIP's interpretation, it is not surprising neither is mentioned.

[21] A review of the Attorney General's website fails to reveal an opinion, informal or otherwise, dated March 22, 2004. *See* http://www.myfloridalegal.com/ago.nsf/Opinions?Open&Start=601&Count=30, last visited August 31, 2016.

of other laws or ordinances to the contrary." *Id.* As previously indicated, the CIP does not disagree with this conclusion.

It appears that the *Demings* court misconstrued this AGO 2006-35 and read it more broadly than necessary based on a footnote that references the missing informal March 22, 2004 opinion. However, the Attorney General, himself, characterized that 2004 informal opinion as concluding that there is "no statutory authority for [a] citizen review board to *receive* complaints against law enforcement officers under Part VI, Ch. 112, Fla. Stat.") (emphasis added). To the extent that is the correct conclusion derived from the 2004 informal decision, it has been superseded by the 2007 amendment to section 112.533, which now explicitly allows for complaints "initiated or received" by municipal boards to be forwarded to an officer's employing agency for "review or investigation" – without also prohibiting an investigation by the referring entity.[22] § 112.533(1)(b)1., Fla. Stat. ("Any political subdivision that initiates or receives a complaint against a law enforcement officer or correctional officer must within 5 business days forward the complaint to the employing agency of the officer who is the subject of the complaint for review or investigation.").

The CIP respectfully suggests that the Fifth District's analysis in *Demings* of sections 112.532 and 112.533, standing alone, is mistaken, for the reasons

[22] As previously noted, the Legislature could have expressly indicated – but did not – that upon transmission of the complaint, no further action could be taken by the referring entity.

articulated above, and this Court should not adopt it as its own. Whether the *Demings* analysis can be salvaged (or harmonized) by placing it in the context of the Fifth District's concern about the abolishment of the Sheriff's constitutional office is for this Court to determine. However, that reasoning should not be the basis for rejecting the Third District's conclusions below.

IV. THE PBA'S ARGUMENT AS TO THE CONFIDENTIALITY PROVISIONS OF THE LEOBOR, EVEN IF PERMISSIBLE, NONETHELESS MISCONSTRUES THE RIGHT CONFERRED BY STATUTE.

While Petitioners have not raised in their initial brief any argument based on the confidentiality provision of the LEOBOR, and therefore, have waived the issue,[23] the PBA, as amicus, nonetheless injects a concern warranting discussion, if *only* for the Court's edification. *See Bretherick v. State*, 170 So. 3d 766, 779 n. 12 (Fla. 2015) ("An amicus curiae is not permitted to raise new issues that were not initially raised by the parties.") (citing *Riechmann v. State*, 966 So. 2d 298, 304 n. 8 (Fla. 2007)).

The PBA reads too much into the LEOBOR confidentiality provisions by assuming they extend outside the context of the investigation conducted by the officer's *employing agency*. Section 112.532 makes clear in various provisions, including the one addressing confidentiality, that its protections are intended to

[23] *See Hoskins v. State*, 75 So. 3d 250, 257 (Fla. 2011) ("An issue not raised in an initial brief is deemed abandoned and may not be raised for the first time in a reply brief.") (quoting *Hall v. State*, 823 So. 2d 757, 763 (Fla. 2002)).

address an officer's rights only when being investigated by his or her agency. *See, e.g.*, §§ 112. 532(1) ("Whenever a law enforcement officer or correctional officer is under investigation and subject to interrogation *by members of his or her agency* … the interrogation must be conducted under the following conditions…."); 112.532(4)(b) ("[W]henever a law enforcement officer or correctional officer is subject to disciplinary action …, the officer or the officer's representative shall, upon request, be provided with a complete copy of the investigative file … with the opportunity to address the findings … with the employing law enforcement agency before imposing disciplinary action[.] The contents of the complaint and investigation shall remain confidential until such time as the employing law enforcement agency makes a final determination whether or not to issue a notice of disciplinary action[.]").

Similarly, the provision in section 112.533 also makes clear that the confidentiality extends solely to the investigation of the officer's agency, and not to outside individuals or entities. Section 112.533(2)(a) states:

> A complaint filed against a law enforcement officer or correctional officer with a law enforcement agency or correctional agency and all information obtained *pursuant to the investigation by the agency of the complaint* is confidential and exempt from the provisions of s. 119.07(1) until the investigation *ceases to be active*, or until the agency head or the agency head's designee provides written notice to the officer who is the subject of the complaint, either personally or by mail, that the agency has either:
>
> 1. Concluded the investigation with a finding not to proceed with disciplinary action or to file charges; or

> 2. Concluded the investigation with a finding to proceed with disciplinary action or to file charges.

§ 112.532(2)(a), Fla. Stat. (emphasis added). This confidentiality continues only so long as the investigation remains active, and there is a statutory presumption that an investigation is *inactive* if no finding is made within 45 days after the complaint is filed. § 112.532(2)(b), Fla. Stat. Nowhere in the LEOBOR is there a provision that broadens the confidentiality strictures to any investigation by another individual or entity.[24] A couple of straightforward examples demonstrate that the scope of the confidentiality set forth in the LEOBOR does not universally extend to all conceivable information related to the incident.

If a complainant elects to file suit, asserting claims arising from an incident of officer misconduct, nothing in the LEOBOR would preclude the complainant's lawyer from subpoenaing and deposing witnesses to the incident and filing their depositions in court. Similarly, if a local newspaper conducted its own investigation into the incident and interviewed the complainant or other witnesses

[24] Section 112.533(4) precludes any participant in an agency internal investigation from *willfully* disclosing any "information obtained pursuant to the agency's investigation" under penalty of being prosecuted for a misdemeanor. § 112.533(4), Fla. Stat. Presumably, such a participant if called to appear before the CIP would be precluded from disclosing anything he or she learned pursuant to MPD's investigation. *See also* City Code § 11.5-33(e) (requiring CIP policies and procedures "*to ensure compliance with Chapters 112* and 119 of the Florida Statutes and any other applicable laws."). The participant's personal knowledge of the incident, however, obtained outside the context of the agency's investigation, would be fair game.

about their personal knowledge of the incident, nothing in the LEOBOR would preclude the newspaper from reporting what it learned as a result of its independent investigation. In short, the confidentiality provisions in the LEOBOR do not drape a shroud of universal secrecy over any and all information pertaining to the incident being investigated.

Furthermore, the CIP Ordinance creates a mechanism by which an investigating agency, concerned about protecting the integrity of its investigation, may challenge in court the CIP's decision to proceed with its own investigation of an incident. City Code § 11.5-31(2)(a). Notification to the CIP of such a challenge results in an automatic 48-hour stay of the CIP investigation to allow for judicial relief.[25]

The PBA's confidentiality concerns, therefore, even if they were properly before the Court, are unfounded and cannot serve as a basis for invalidating the CIP Ordinance or stripping away the CIP's subpoena power.

[25] This process also serves the salutary purpose of ensuring that the investigating agency move forward with its investigation and conclusions expeditiously and not allow them to linger indefinitely to the detriment of any other investigation that might be conducted. Faced with potential interference with an ongoing agency investigation, a supervising court could impose time limits within which the agency's investigation must be concluded, during which time the CIP's investigation could be temporarily abated.

CONCLUSION

The CIP Ordinance neither is preempted by nor conflicts with sections 112.532 and 112.533, Florida Statutes. The CIP's investigation accomplishes other objectives and cannot result in the imposition of discipline by the CIP. Whether discipline imposed by the MPD comports with the requirements of the LEOBOR is a legitimate but wholly *separate* concern that cannot become a basis for invalidating the City's independent exercise of municipal home rule authority to create the CIP. Accordingly, the CIP respectfully requests that the Third District Court of Appeal's decision below be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this answer brief on the merits was served via E-Portal on September 19, 2016, on the following:

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

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