

IN THE SUPREME COURT OF FLORIDA

**CASE NO.: SC16-645**  
Lower Case No.: 3D10-2704

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FREDDY D'AGASTINO, et al.,

Petitioners,

vs.

THE CITY OF MIAMI, et al.,

Respondents.

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

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**ANSWER BRIEF OF RESPONDENT, CITY OF MIAMI**

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**ISSUE ON APPEAL**

**WHETHER THE CIVILIAN INVESTIGATIVE PANEL, WHICH CONDUCTS EXTERNAL INVESTIGATIONS, IS NOT PREEMPTED BY, AND DOES NOT CONFLICT WITH, SECTION 112.533, FLORIDA STATUTES, WHICH MANDATES AN INTERNAL PROCEDURE FOR RECEIPT AND PROCESSING OF COMPLAINTS BY THE POLICE DEPARTMENT FOR THE PURPOSE OF INVESTIGATING AND DETERMINING WHETHER TO DISCIPLINE LAW ENFORCEMENT OFFICERS.**

**STATEMENT OF THE CASE AND FACTS**

The Appellant, Lieutenant D'Agastino, is employed by the City of Miami Police Department. (R.5; 40). On March 2009, a civilian initiated a complaint with the Civilian Investigative Panel (hereinafter "CIP") regarding a traffic stop that involved alleged misconduct by D'Agastino. (R. 7; 40). As a result, the Police Department's Internal Affairs Unit initiated an investigation surrounding the events described in the complaint. (R.103; 121-124). The Internal Affairs Unit determined that the complaint's allegations were inconclusive. (R. 103; 121-124).

Upon the completion of the Internal Affairs investigation, the CIP subpoenaed D'Agastino to appear before the CIP to give testimony regarding the complaint. (R.7; 40). In response, D'Agastino filed a petition against the CIP in circuit court to quash the subpoena and for entry of a protective order. (R.5-32). Specifically, D'Agastino claimed that under section 112.533, Florida Statutes, the City's Police Department had exclusive power to investigate the alleged misconduct. (R.5-32). The City intervened in this action as a defendant. (R.42).

The Fraternal Order of Police (hereinafter, "FOP") filed a separate declaratory action against the City. (R.46-50). In particular, the FOP sought to declare invalid the portions of the Charter and Ordinances of the City that empowered the CIP to investigate complaints of alleged misconduct of sworn City police officers. (R.46-50). The CIP intervened in the declaratory action. (R. 60-61).

D'Agastino's petition and the FOP declaratory action were consolidated. (R.62-93). The parties filed cross-motions for summary judgment. (R.94-128). Upon hearing the motions, the trial court granted both the City's and the CIP's motions for summary judgment. (R. 135-136). Final Judgment was entered on October 15, 2010. (R. 135-136).

D'Agastino and the FOP appealed to the Third District. The Third District affirmed the judgment of the trial court and subsequently denied rehearing. In its opinion, the Third District held that the CIP charter provision and ordinance are not preempted by or in conflict with section 112.533.

This Court's discretionary review follows.

## **SUMMARY OF THE ARGUMENT**

The CIP is not preempted by, and does not conflict with, section 112.533, Florida Statutes. The CIP is an independent body that serves as citizens' oversight of the sworn police department. The CIP has no management authority over police officers and does not determine discipline. While the CIP conducts independent external investigations of police misconduct by civilians, section 112.533 governs internal police department investigations to determine whether to proceed with disciplinary charges. Section 112.533 does not expressly or by implication prohibit external investigations that are purely advisory and do not determine discipline. The CIP charter and ordinance provisions specifically ensure that the CIP will not interfere with any pending investigation, and that policies and procedures are established to ensure compliance with chapter 112. Accordingly, the decision of the Third District Court of Appeal was correct and should be affirmed.



## **STANDARD OF REVIEW**

Trial court's orders on Motions for Summary Judgment are reviewed *de novo* on appeal. See *Volusia County v. Aberdeen at Orman Beach, L.P.*, 760 So.2d 126, 130 (Fla. 2000); *Major League Baseball v. Morsani*, 790 So.2d 1071, 1074 (Fla. 2001).

## ARGUMENT

### **THE CIVILIAN INVESTIGATIVE PANEL, WHICH CONDUCTS EXTERNAL INVESTIGATIONS, IS NOT PREEMPTED BY, AND DOES NOT CONFLICT WITH, SECTION 112.533, FLORIDA STATUTES.**

D'Agastino and the FOP claim that the CIP is preempted by, or in conflict with, section 112.533. The Third District determined that the CIP was not preempted by section 112.533, and that there was no conflict between either of them. This is so because section 112.533 provides for the establishment of a process for internal review of conduct to determine whether to proceed with discipline. The CIP was formed as an advisory committee to provide external review. The CIP does not determine discipline. Thus, as explained herein, the decision of the Third District Court of Appeal was correct and should be affirmed.

#### **I. Section 112.533, Florida Statutes.**

Part IV of chapter 112, Florida Statutes, concerns “Law Enforcement and Correctional Officers.” Part IV includes of sections 112.532, 112.533, and 112.534.

Section 112.532 is titled “Law enforcement officers’ and correctional officers’ rights.” It sets forth certain rights and privileges of law enforcement and correctional officers. Section 112.532(1) provides that certain conditions must be met whenever a law enforcement 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.)

Section 112.532(3) provides for a civil action against any persons or organizations who abridge an officer's rights, but does “not establish a separate civil action against the officer's employing law enforcement agency for investigation and processing of a complaint filed under this part.”

Section 112.533 requires that law enforcement agencies establish a process for investigation of officers to determine whether to impose discipline. To this end, section 112.533, Florida Statutes, is titled “Receipt and processing of complaints.”

Section 112.533(1)(a) provides in part:

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

(Emphasis added.)

Under section 112.533(1)(a), when an investigative report is prepared, the assigned investigator is required to verify the truth and accuracy of the report and provide a sworn statement that the investigator has not deprived the subject of any rights in section 112.532 and 112.533, Florida Statutes. Importantly, the statute mandates that these requirements “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). The statute further provides an affirmative right for officers to review their personnel files. § 112.533(3), Fla. Stat.

Section 112.533(2)(a) provides for the confidentiality of all investigative information during the investigation. That section provides that the confidentiality ends when the investigation ceases to be active, or upon written notice from the agency head (or designee) that the agency has either “Concluded the investigation with a finding not to proceed with **disciplinary action or to file charges,**” or “Concluded the investigation with a finding to proceed with **disciplinary action or to file charges.**” § 112.533(2)(a) 1. and 2. (emphasis added). An investigation is considered active as long as it is continuing with a reasonable, good faith anticipation that an “administrative finding” will be made in the foreseeable future; it is presumed inactive if no finding is made within 45 days after the complaint is filed. § 112.533(2)(b).

Section 112.533 refers to said process as an “internal investigation.” To this end, section 112.533(4) provides in part:

Any person who is a participant in an **internal investigation**, including the complainant, the subject of the investigation and the subject's legal counsel or a representative of his or her choice, the investigator conducting the investigation, and any witnesses in the investigation, who willfully discloses any information

obtained pursuant to the agency's investigation, including, but not limited to, the identity of the officer under investigation, the nature of the questions asked, information revealed, or documents furnished in connection with a confidential **internal investigation** of an agency, before such complaint, document, action, or proceeding becomes a public record as provided in this section commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. ...

(Emphasis added.)

Section 112.534 provides a process if “any law enforcement agency ... including investigators in its internal affairs or professional standards division, or an assigned investigating supervisor, intentionally fails to comply with the requirements of this part.” Section 112.534 provides for notice to the investigator, an opportunity to cure, and, if necessary, a compliance review hearing. Under section 112.534, the compliance review panel determines whether there was an intentional violation, and, if so, the investigator is removed from the investigation and may be investigated himself or herself.

## **II. The City of Miami Civilian Investigative Panel.**

The CIP was enabled by City of Miami Charter section 51. The purpose of this Charter provision was for the City to establish by Ordinance a “civilian investigative panel to act as independent citizens’ oversight of the sworn police department.” *City of Miami Charter*, § 51. Section 51 states that the CIP is to be “Authorized 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, further, the CIP may not confer immunity and must 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, further, all actions of the CIP shall not interfere with any pending or potential criminal investigation or prosecution." *City of Miami Charter*, § 51. The Charter provision states that the CIP is to be authorized to "conduct independent investigations of police misconduct," "review policies of the police department," and "make recommendations to the city manager and/or directly to the police chief, to which a timely written response shall be received within 30 days." *City of Miami Charter*, § 51.

Pursuant to Charter section 51, the City of Miami created the CIP by Ordinance. City of Miami Code, sections 11.5-26 et seq. The CIP Ordinance provides the purposes, powers and duties of the CIP, which includes making "recommendations" regarding city police department policies and procedures and allegations of police misconduct. *City of Miami Code*, § 11.5-27(3), (5), and (9).

Significantly, the CIP Ordinance provides that the CIP is to "Exercise 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." *City of Miami Code*,

§ 11.5-27(2). The CIP Ordinance further provides that “Policies and procedures shall be established to ensure compliance with Chapters 112 and 119 of the Florida Statutes and any other applicable laws.” *City of Miami Code*, §11.5-33(e).

Finally, the Ordinance provides that “[a] decision of the CIP to proceed with an investigation may be challenged by any agency engaged in such investigation or prosecution by seeking judicial order in law or equity in a court of competent jurisdiction,” and that “[w]ritten notification of such challenge to the CIP shall stay the investigation for 48 hours permitting the agency to obtain such a judicial order.” *City of Miami Code*, § 11.5–31(2)(a).

### **III. The Decision of The Third District.**

The Third District Court of Appeal in the case below held that the CIP was not preempted by, and was not in conflict with, section 112.533.

In explain the structure of the CIP, the Third District in *D'Agastino* stated:

The CIP is granted limited power to act in response to its investigations, and may only propose recommendations to the City Manager or Police Chief. City of Miami Charter § 51(E)(1)-(3); Miami, Fla., Code, art. II, § 11.5–27. The CIP has no management authority over City police officers. It cannot discipline, suspend, demote, discharge, or transfer city police officers. Management decisions as a result of police misconduct are reserved to city police administrators, in keeping with the structure of the PBR. Indeed, the CIP ordinance provides that “[p]olicies and procedures shall be established to ensure compliance with Chapters 112 and 119 of the Florida Statutes and any other applicable laws.” Miami, Fla., Code, art. II, § 11.5–33(e) (2002).

Additionally, the City Charter provides the CIP “shall not interfere with any pending or potential criminal investigation or prosecution.” City of Miami Charter § 51(D). The CIP ordinance further dictates the CIP shall “[e]xercise its powers so as to not interfere with any ongoing investigations and conduct its activities consistent with applicable law ... and labor contracts.” Miami, Fla., Code, art. II, § 11.5–27(2). To that end, the CIP is restricted from investigating a complaint until “after determination by its independent counsel, who shall be required to consult with the appropriate prosecutorial agencies, [so] that an investigation will not interfere with any pending criminal investigation.” Miami, Fla., Code, art. II, § 11.5–31(2)(a). Finally, the Ordinance provides that “[a] decision of the CIP to proceed with an investigation may be challenged by any agency engaged in such investigation or prosecution by seeking judicial order in law or equity in a court of competent jurisdiction,” and that “[w]ritten notification of such challenge to the CIP shall stay the investigation for 48 hours permitting the agency to obtain such a judicial order.” *Id.*

*Id.* at 240-241.

The Third District concluded that the “CIP provides a distinct function that is not prohibited by the rights and restrictions set forth under Chapter 112.” *Id.* at 242. “The absence of any authority granted to the CIP to make the sort of police management decisions addressed in Chapter 112, or to affect the obligations that chapter imposes on the Miami Police Department and its investigators, makes manifest the absence of a conflict between the CIP ordinance and Chapter 112.”

*Id.* at 243.

#### **IV. The Municipal Home Rule Powers Act.**



Under the Florida Constitution and Florida Statutes, “a municipality is granted broad authority to enact ordinances under its municipal home rule powers.” *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006).

Article VIII, section 2(b), of the Florida Constitution provides in part: “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.” Section 166.021, Florida Statutes, establishes the home rule powers vested to municipalities by Florida’s Constitution. Section 166.021(1) provides:

[M]unicipalities 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 when expressly prohibited by law.

Municipal purpose is further defined in the statute to mean “any activity or power which may be exercised by the state or its political subdivisions.” § 166.021(2), Fla. Stat. This power granted to municipalities is expressly intended to be construed broadly. § 166.021(4), Fla. Stat. To this effect, the Florida Legislature has stated:

[I]t 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.

*Id.*

Given the broad home rule authority of municipalities, this Court has held that municipal laws are upheld unless preempted by, or in conflict with, Florida law. *City of Palm Bay v. Wells Fargo Bank, N.A.*, 114 So. 3d 924 (Fla. 2013). As explained herein, the CIP is neither preempted by, nor in conflict with, section 112.533.

**V. The Civilian Investigative Panel is not Preempted by Section 112.533.**

**A. Section 112.533 does not Expressly Preempt the CIP.**

“Florida law recognizes two types of preemption: express and implied. Express preemption requires a specific legislative statement; it cannot be implied or inferred.” *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010); *see also City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006).

There is no express preemption in this case because there is no express legislative statement or language of preemption contained in section 112.533 or in the remaining provisions of Part IV of chapter 112. As set forth below, the Legislature did not address or preclude external investigations. *See Sarasota*

*Alliance for Fair Elections, Inc.*, 28 So. 3d 880, 886 (finding no express preemption where the Florida Elections Code, although extensive, contained no express language of preemption).

**B. Section 112.533 does not Preempt the CIP by Implication.**

Preemption need not be explicit so long as it is clear that the legislature has clearly preempted local regulation of the subject. *See Barragan v. City of Miami*, 545 So.2d 252, 254 (Fla. 1989). 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. *See Tallahassee Mem'l Reg. Med. Cntr. v. Tallahassee Med. Cntr., Inc.*, 681 So.2d 826, 831 (Fla. 1st DCA 1996). "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.* at 831.

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. *See Tribune Co. v. Cannella*, 458 So.2d 1075, 1077 (Fla. 1984) (finding that the legislative scheme of the Public Records Act preempted the law relating to production of records for inspection). In determining if implied preemption applies, the court must look to the provisions of the whole law, and to its object and policy. *See Sarasota Alliance for Fair Elections, Inc.*, 28

So. 3d 880, 886 (Fla. 2010) (quoting *State v. Harden*, 938 So.2d 480, 486 (Fla. 2006)). The nature of the power exerted by the Legislature, the object sought to be attained by the statute at issue, and the character of the obligations imposed by the statute are all vital to this determination. *Id.*

As this Court stated in *Sarasota Alliance for Fair Elections, Inc.*, Florida Courts have not found an implied preemption of local ordinances which address local issues. Quoting the Second District Court of Appeal in that appeal, this Court stated “it generally serves no useful public policy to prohibit local government from deciding local issues.” *Id.* at 887 (quoting *Browning*, 968 So. 2d at 646). *See also Exile v. Miami-Dade County*, 35 So.3d 118, 119 (Fla. 3d DCA 2010) (implied preemption is a “severely restricted and strongly disfavored doctrine”).

The CIP is not impliedly preempted by section 112.533. Section 112.532 provides for rights of law enforcement officers when they are “subject to interrogation by members of his or her agency for any reason that could lead to disciplinary action, suspension, demotion, or dismissal.” Under this provision, the police officers’ rights are limited to the context of investigation and interrogation by members of his or her employing law enforcement agency. Section 122.533 requires that the police department establish a system for “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.” The above statutory provisions relate to internal investigations by the police department to determine discipline.

Section 112.533 is not a legislative scheme so pervasive as to demonstrate an intent to preempt and preclude external investigations. Requiring that an agency establish a procedure to investigate and determine discipline is not the same as completely preempting a field. Section 112.533 does not preclude external investigations, nor does the statutory scheme preempt the entire field.

The formation of a citizen review panel like the CIP is a distinctly local issue and falls within the City’s home rule authority. The creation of the CIP does not run counter to the purpose behind section 112.533. D’Agastino and the FOP admit as much in their brief. They proffer that the stated purpose of section 112.533 is to “protect[] 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.” INITIAL BRIEF, p. 15.

The City does not dispute that section 112.533(1) provides the exclusive procedure for the receipt and processing of complaints *by the police department for the imposition of employee discipline*. The City does not dispute that the CIP has no authority to discipline or file disciplinary charges against any sworn officer.

However, section 112.533 does not expressly preclude the formation of an independent and external citizens review panel, such as the CIP, to investigate alleged police misconduct and make proposed recommendations. If the legislature meant to expressly prohibit external investigations, it would have included clear language to that effect.

The language of section 112.533(1)(b) that requires “political subdivisions” to forward complaints to the police department for investigation within five days does not preclude external investigations. This subsection does not expressly preclude the formation of a citizens review board. Although this provision requires agencies to forward copies of any complaints about an officer to that officer’s employing agency, it does not preclude the forwarding agency from conducting its own investigation.

Likewise, the amendment exempting the Criminal Justice Standards and Training Commission (hereinafter “CJSTC”) from section 112.533 does not evince an intent to preclude CIP advisory review. Under section 943.12(3), the CJSTC has the power to “certify, and revoke the certification of, officers.” The revocation of certification is discipline. In addition, the revocation of certification by CJSTC would cause the discipline of an officer by the employing agency. The amendment to section 112.533 recognizing the authority of CJSTC merely makes clear that CJSTC also has authority to have its own procedure for discipline. Unlike internal

affairs and CJSTC, the CIP does not investigate to determine discipline; it does not have that power. It simply provides for citizen review and recommendations.

**VI. There is no Conflict Between the Civilian Investigative Panel and Section 112.533.**

There is conflict between a local ordinance and a state statute when the local ordinance cannot coexist with the state statute. *See Sarasota alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 888 (Fla. 2010); *Phantom of Brevard, Inc. v. Brevard County*, 3 So. 3d 309, 314 (Fla. 2008); *City of Hollywood*, 934 So.2d 1238, 1246 (Fla. 2006). Stated otherwise, the test for conflict is whether in order to comply with one provision, a violation of the other is required. *See Sarasota alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 888 (Fla. 2010).

There is no conflict where a local government chooses to legislate in an area where the State Legislature chose to remain silent. *See Phantom of Brevard, Inc. v. Brevard County*, 3 So. 3d 309, 315 (Fla. 2008) (concluding that there was no conflict between county fireworks ordinance provision and state law because “the county simply chose to legislate in an area where the Legislature chose to remain silent.”).

When a municipal “ordinance flies in the face of state law”—that is, cannot be reconciled with state law—the ordinance “cannot be sustained.” *City of Palm Bay v. Wells Fargo Bank, N.A.*, 114 So. 3d 924, 928 (Fla. 2013) (quoting

*Barragan*, 545 So.2d at 255). 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)).

There is no conflict between the CIP and the Police Officers Bill of Rights. Examining the entire law, it is clear that Part IV of chapter 112 provides a process for *internal* investigations by the police department *to determine whether to proceed with disciplinary charges*. See § 112.532(1) (referencing interrogation by members of agency that could lead to discipline); § 112.533(1)(a) (referencing investigation for purpose of determine whether to discipline; reference to disciplinary action and disciplinary charges); § 112.533(2)(a) (referencing disciplinary action or filing of charges); § 112.533(4) (referencing internal investigations); § 112.534 (referencing internal affairs).

Unlike section 112.533, the CIP is duly established to act as an independent citizens’ oversight of the sworn police department. *City of Miami Charter*, §51. The City Charter makes it clear that the CIP’s investigations of police misconduct are “independent.” *City of Miami Charter*, §51(E)(1). In connection with this “independent” investigation, the CIP is only empowered to propose recommendations to the City Manager or Police Chief. *City of Miami Charter*, §51(E)(1)-(3); *see also City of Miami Code*, §11.5-27(5).



Built into the CIP's charter provision and ordinance are provisions ensuring that there is no conflict. In this regard, the CIP's authority to subpoena may only be used upon the approval of independent counsel and in consultation of the State Attorney of the Miami-Dade County. *See City of Miami Charter*, §51(D); *see also City of Miami Code*, § 11.5-27(6). The ordinance establishing the CIP provides that "Policies and procedures shall be established to ensure compliance with Chapters 112 and 119 of the Florida Statutes and any other applicable laws." *City of Miami Code* § 11.5-33(e). The City charter establishes that the CIP "shall not interfere with any pending or potential criminal investigation or prosecution." *City of Miami Charter*, §51(D). The ordinance further states that 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." *City of Miami Code*, § 11.5-27(2). Hence, the CIP and chapter 112 are entirely reconcilable.

The Third District Court of Appeal in a prior case interpreted the CIP as an entity distinct from the internal investigations conducted by the police department pursuant to section 112.533. *See Timoney v. City of Miami Civilian Investigative Panel*, 990 So.2d 614 (Fla. 3d DCA 2008). There, the Third District considered

the authority of the CIP to investigate the Chief of Police. In doing so, the Third District interpreted and reconciled the CIP and chapter 112:

The [CIP] Enabling Ordinance also specifically requires that "policies and procedures shall be established to ensure compliance with Chapters 112 and 119 of the Florida Statutes." City of Miami Code, art. II, § 11.5-33(e) (2002). Chapter 112 concerns internal investigations conducted by a police department of its own officers. The pertinent portions of Chapter 112 are sections 112.531 and 112.532, Florida Statutes (2007). Section 112.532, known as the "Police Officers' Bill of Rights," describes the rights and privileges of all law enforcement officers and correctional officers, and imposes conditions for investigation, "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 which could lead to disciplinary action, demotion or dismissal . . ." (emphasis added). That section sets forth the procedures to be followed *by the police department* for interrogation of a law enforcement officer under investigation *by the police department*. See § 112.532 (1)-(6), Fla. Stat. (2007). Section 112.531(1) defines "law enforcement officers" for the purposes of Chapter 112 internal investigations to include any person, other than the chief of police, who is employed full time by any municipality and whose primary responsibility is the prevention of crime. The chief of police is, therefore, exempt from an internal police department investigation. The CIP's authority, however, extends to independent, external investigations, from which the chief of police is not exempt.

The CIP has independent investigative authority over the City of Miami's police chief. The plain language of the Enabling Ordinance gives CIP independent civilian oversight of the sworn police department, and that includes the chief of police. See City of Miami Codes, § 11.5-27(1)-(11) (2002). Chief Timoney argues that, as the CIP must comply with the provisions of Chapter 112, Florida Statutes (2007), he is therefore exempt from investigation by the CIP. See City of Miami Code, §11.5-33(e) (2002). Chapter 112 governs the

rights of law enforcement officers while under investigation, and it specifically exempts the police chief from internal agency investigation. §§ 112.531-112.532, Fla. Stat. (2007). We agree with Chief Timoney that the procedures for internal police investigations established by Chapter 112 do not apply to chiefs of police. The CIP, however, is only restricted by Chapter 112's definition of "law enforcement officer" when the investigation is internal, that is, by "members of his or her agency for any reason which could lead to disciplinary action, demotion, or dismissal . . . ." Ch. 112.531(1), Fla. Stat. (2007). Chapter 112 does not apply, as in this case, to an *independent, external* investigation, where the CIP's Enabling Ordinance provides that any sworn police officer is subject to an independent investigation by the CIP. City of Miami Code, art. II, § 11.5-27(1) (2002). Accordingly, Chief Timoney is not exempt from the CIP's authority because the CIP is not following up on an internal affairs investigation pursuant to Chapter 112, from which Timoney is exempt; rather, the CIP is conducting its own, independent external investigation, and Chief Timoney is not exempt. See City of Miami Code, Art. II, Sec. 11.5-26 (2002).

*Id.* at 618-619 (underlining added; footnote omitted). Hence, as explained in the *Timoney* decision, the CIP provides a distinct function that is not precluded by section 112.533.

The Appellants substantially rely upon the holding of *Demings v. Orange County Citizens Review Board*, 15 So. 3d 604 (Fla. 5th DCA 2009), to argue that section 122.533 is the exclusive method of investigating police misconduct. Although *Demings* held that the Orange County Citizens Review Board conflicted with section 112.533, notably, *Demings*, unlike this case, involved the Constitutional Office of Sheriff. The Fifth District there found that the citizens

review board unconstitutionally interfered with the Office of the Sheriff and his deputies. The Fifth District opinion also does not reference whether the citizens review board had the power to effectuate discipline, and whether that board was required to comply with section 112.533. Nonetheless, based on the reasoning herein, the City submits that this holding in *Demings* is incorrect.

There is no conflict between the CIP and section 112.533. The interpretation of the Third District in this case, as reflected by the reasoning in *Timoney*, should prevail. Accordingly, as there is no conflict between the CIP and section 112.533, the summary judgment in favor of the City and the decision of the Third District Court of Appeal below should be affirmed.

**CONCLUSION**

Based upon the foregoing, the City of Miami respectfully requests that the Court affirm the decision of the Third District Court of Appeal in favor of the City of Miami.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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**CERTIFICATE OF COMPLIANCE**

**I CERTIFY** that this Answer Brief complies with the font requirements of Florida Rules of Appellate Procedure 9.100(l) and 9.210(a)(2).

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