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BARBARA LANDAU

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2016–2017 SURVEY OF FLORIDA CASES AFFECTING BUSINESS OWNERS

BARBARA LANDAU*

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I. INTRODUCTION

The 2016–2017 Survey of Florida Cases Affecting Business Owners reviews Florida appellate court decisions involving state tax and other business law matters.1 While the cases that have been included are mostly from 2016 through June of 2017, several important 2015 cases have been included.2

Part II provides analysis of appellate cases where the courts were presented with disputes by and among the business, its owners and their transferees, and its key employees, whether sounding in tort, contract, statutory law, or a combination thereof.3

Part III considers litigation with third parties starting with several important state tax cases involving constitutional and procedural issues of note.4 Cases arising in and out of the ordinary course of business, again,

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1 See infra Parts I–II.
2 See infra Parts II–III.
3 See infra Part II.
4 See infra Part III.
whether sounding in tort, contract, or statutory law—other than tax—or a combination follow.\textsuperscript{5}

II. CORPORATIONS, LIMITED LIABILITY COMPANIES, AND PARTNERSHIPS: DIVORCES OF ONE TYPE OR ANOTHER

A. Officers and Directors Liability

1. Director and Officer Liability Policy: Insured Versus Insured Exclusion

Mr. Durant, a shareholder of Bonifay Holding Company, Inc. ("Corporation"), was formerly a director of Corporation.\textsuperscript{6} Mr. James, at all times relevant to this case, was Chief Executive Officer ("CEO") and President of Corporation.\textsuperscript{7} Mr. Durant previously sold his stock back to Corporation\textsuperscript{8} but later repurchased the stock.\textsuperscript{9} After the repurchase, Mr. Durant brought and prevailed in an action against Mr. James, which alleged overvaluation of the repurchased stock.\textsuperscript{10} Mr. Durant attempted to collect the money judgment awarded in that action—of more than $1 million—by seeking a writ of garnishment against the directors and officers under a policy issued by Progressive Casualty Insurance Company ("Insurance Company"), which insured the Corporation’s directors and officers.\textsuperscript{11} Insurance Company counterclaimed and sought a declaration that the claim was not covered by the policy.\textsuperscript{12} The policy contained an \textit{insured versus insured} coverage exclusion ("Exclusion"), whereby Insurance Company was not required to pay claims by one \textit{insured person} against another \textit{insured person} for a \textit{wrongful act},\textsuperscript{13} subject to two exceptions set forth in the policy.\textsuperscript{14} The Exclusion did not apply to claims based upon an insured’s employment or for contribution or indemnification of otherwise covered claims.\textsuperscript{15} Mr. Durant argued that his suit against Mr. James was not undertaken “as a director or [as a] former . . . director, . . . but [rather] in his

\begin{itemize}
\item[\textsuperscript{5}] See id.
\item[\textsuperscript{6}] Durant v. James, 189 So. 3d 993, 995 (Fla. 1st Dist. Ct. App. 2016).
\item[\textsuperscript{7}] Id.
\item[\textsuperscript{8}] Id. Mr. Durant was required by the judgment of dissolution entered in his divorce to sell his stock in Corporation. \textit{Id}.
\item[\textsuperscript{9}] Id.
\item[\textsuperscript{10}] Durant, 189 So. 3d at 995.
\item[\textsuperscript{11}] Id.
\item[\textsuperscript{12}] Id.
\item[\textsuperscript{13}] Id.
\item[\textsuperscript{14}] Id. at 995 & n.1.
\item[\textsuperscript{15}] Durant, 189 So. 3d at 995 n.1.
\end{itemize}
[individual] capacity,” and the writ sought was based on damages awarded to him under a “judgment unrelated to his former director position.” Both Insurance Company and Mr. Durant filed motions seeking summary declaratory judgment; the trial court granted summary judgment to Insurance Company and Mr. Durant appealed. The Exclusion provided that “[t]he insurer shall not be liable to make any payment for [l]oss in connection with any [c]laim by or at the behest of the Company, or any affiliate of the Company or any [i]nsured [p]erson”—the balance of the provision being the two exceptions mentioned above. Insured persons were defined in the policy as “any past, present or future director, trustee, officer . . . of the Company,” and the definition of claim contained in the policy was “any demand ‘against an [i]nsured [p]erson for a [w]rongful [a]ct;’” there was no disagreement as to these definitions. The district court, noting that the fact that Mr. Durant and Mr. James were both insured persons was not contested, concluded that Mr. Durant failed to bring himself within the policy’s express exceptions to the Exclusion, nor was he acting in furtherance of some statutory duty. The First District Court of Appeal in Durant v. James considered the decision of the Third District Court of Appeal in Rigby v. Underwriters at Lloyd’s and concluded that Rigby was distinguishable from the case before the First District Court of Appeal. Rigby involved a trustee in bankruptcy added to a previously issued director and officer liability policy as an insured person, and specifically named in the amended definition of the term director in the policy. As discussed in Durant, there was an amendment to the definition of director in the policy involved in Rigby to include, by name, the bankruptcy trustee. Durant, 189 So. 3d at 995; Rigby, 907 So. 2d at 1189.

16. Id. at 995.
17. Id. at 994–95.
18. Id. at 995 n.1.
19. Id. at 995.
20. Durant, 189 So. 3d at 995–96. The First District Court of Appeal distinguished the facts before it from the decision of the Third District Court of Appeal in Rigby v. Underwriters at Lloyd’s—involving a trustee in bankruptcy acting in furtherance of the duties of the trustee under federal bankruptcy statutes. Id.; see also Rigby v. Underwriters at Lloyd’s, 907 So. 2d 1187, 1189 (Fla. 3d Dist. Ct. App. 2005).
22. 907 So. 2d 1187 (Fla. 3d Dist. Ct. App. 2005).
23. Durant, 189 So. 3d at 995.
24. Id.; Rigby, 907 So. 2d at 1188–89. As discussed in Durant, there was an amendment to the definition of director in the policy involved in Rigby to include, by name, the bankruptcy trustee. Durant, 189 So. 3d at 995; Rigby, 907 So. 2d at 1189.
25. Durant, 189 So. 3d at 995–96; Rigby, 907 So. 2d at 1189.
director. As a result, the insured versus insured [provision] did not apply.”

After distinguishing Rigby, the First District Court of Appeal in Durant noted that it was “further persuaded by the opinions of other jurisdictions, holding that the capacity in which the claimant sued the other officer or director in the first instance had no bearing on the bar on coverage under a [directors and officers] policy’s insured versus insured exclusion.” The First District Court of Appeal concluded that the policy did not contain any ambiguity and there was no “lack of clarity in the terms” requiring interpretation.

2. Who Is on the Board and Where Did the Corporation Go?

The dispute in Wilson v. Wilson stemmed from the death of Reverend John Wilson (“Reverend”). The Reverend had incorporated a number of entities. The initial issue in the trial court was regarding the identities of the members of the boards of directors of those corporations (“Corporations”). Before trial, the judge allowed the former personal representative of the Reverend’s estate (“Intervenor”) to intervene. The Intervenor’s position was that the various Corporations formed by the Reverend had not operated as not-for-profit corporations, and therefore, the Corporations’ assets were part of the Reverend’s probate estate subject to administration. As to the initial issue—the identity of the board members—the trial judge’s order stated that neither the plaintiffs nor the defendants had proven that they were board members. The trial judge also ruled, in essence, that the Corporations were to be disregarded and that the assets were part of the Reverend’s probate estate subject to administration, which supported the Intervenor’s position. On appeal, the Third District Court of Appeal affirmed the trial court’s ruling that the defendants were not directors, but reversed the trial court’s decision that the plaintiffs were not directors. The appellate court noted that the Corporations’ regularly filed required annual reports identified the plaintiffs as members of the Board of

26. Rigby, 907 So. 2d at 1189.
27. Durant, 189 So. 3d at 996.
28. Id.
29. 211 So. 3d 313 (Fla. 3d Dist. Ct. App. 2017).
30. Id. at 314.
31. Id. at 317.
32. Id.
33. Id. at 315.
34. Wilson, 211 So. 3d at 315.
35. Id. at 316.
36. Id.
37. Id. at 319–20.
Directors. The district court also reversed the trial court’s ruling that effectively dissolved the Corporations—and went even further by deciding to whom the dissolved Corporations’ assets belonged. Also, under the test set out by the Supreme Court of Florida in Morgareidge v. Howey, the Intervenor should not have been allowed to intervene as he had no interest of the direct and immediate character required. Nor should the Intervenor have been permitted to introduce new issues of validity of the Corporations and of the ownership of the assets of the Corporations, as intervenors are not allowed to introduce new issues.

3. Fiduciary Duties

The next case, Fonseca v. Taverna Imports, Inc., is a consolidated appeal of two Miami-Dade County Circuit Court cases. In Taverna Imports, Inc. v. Maricela Fonseca (“Case One”), the allegations included the following: Taverna Imports, Inc. (“Corporation”) issued 4500 of its 5000 authorized shares equally to three shareholders—Mario Taverna (“Mario”), Maricela Fonseca (“Maricela”), and Jule Laudisio (“Jule”)—when Corporation was formed in 2002. Corporation, in 2005, redeemed 1000 shares from Jule, and at the end of January 2007, Jule agreed, in writing, to have her remaining 500 shares redeemed for cash—with checks for the correct amounts transmitted to her at the end of January of 2007. This left Mario and Maricela as the remaining shareholders. Within three days after receipt of the checks, Jule attempted to disavow the sale of her remaining shares and she returned the checks to Corporation. In late February 2007, at a formal shareholders’ meeting, Mario, the elected president of Corporation, was purportedly ousted from that role by a vote of the shareholders, including Jule, which ouster occurred even though the
corporate by-laws required that officers be removed by the Board of Directors.\(^{50}\)

Mario and Corporation sued: (1) Maricela; (2) Richard Fonseca (“Richard”), Maricela’s husband; (3) Jule; and (4) Hans Eichmann (“Hans”), a former member of the Board of Directors of Corporation, and an employee and a former employee of Corporation.\(^{51}\) In the lawsuit, Corporation requested a declaratory judgment declaring that the redemption of Jule’s stock was valid and that the corporate actions taken after Jule’s stock had been repurchased were invalid.\(^{52}\) Mario also sought damages for Maricela’s alleged breach of fiduciary duty and for Richard’s alleged aiding and abetting of Maricela’s alleged breach.\(^{53}\) On Corporation’s motion for partial summary judgment, the trial court found that the redemption of Jule’s shares was valid, that the election of a new president at the formal shareholders’ meeting was not valid, and that Mario was still president of Corporation.\(^{54}\) After trial, on the remaining issues, the jury awarded damages of $1,063,234 in favor of Corporation against all of the defendants for “wrongfully [taking] corporate authority of [the Corporation], which caused [it] damages.”\(^{55}\) The jury also awarded damages of $833,000 to Mario, individually, for Maricela’s breach of fiduciary duty and Richard’s role in aiding and abetting.\(^{56}\) The Third District Court of Appeal affirmed the lower court proceedings except as to the calculation of damages.\(^{57}\) The redemption of Jule’s shares to Corporation was valid even though only Jule signed the agreement, and not Corporation, since the parties had performed under the contract.\(^{58}\) The fact that Jule did not cash the checks was of no legal consequence.\(^{59}\) Mario’s removal as president was ineffective as it was not done “by a majority vote of the Board of Directors.”\(^{60}\) The district court also held that there was competent substantial evidence to support the jury’s verdict that Maricela breached her fiduciary duty to Mario under section

\(^{50}\) Id. at 435–36. About a month later, after a special meeting, Mario found himself locked out of the Corporation’s warehouse, although he was subsequently let in, at which time he discovered that Hans, the former employee and former board member, was back and managing the business. Id. Mario was eventually terminated. Fonseca, 212 So. 3d at 436.

\(^{51}\) Id. at 434 & n.3, 437.

\(^{52}\) Id. at 437.

\(^{53}\) Id.

\(^{54}\) Id. at 435, 437.

\(^{55}\) Fonseca, 212 So. 3d at 438.

\(^{56}\) Id.

\(^{57}\) Id. at 443.

\(^{58}\) Id. at 440–41.

\(^{59}\) See id. at 441.

\(^{60}\) Fonseca, 212 So. 3d at 441–42.
607.0831 of the Florida Statutes. In addition, the court found competent substantial evidence in support of the jury’s verdict that Maricela’s husband, Richard, aided and abetted Maricela in breaching her fiduciary duty owed to Mario, with the Third District Court of Appeal holding that “Florida law recognizes a cause of action for aiding and abetting the breach of a fiduciary duty.”

Richard Fonseca v. Taverna Imports, Inc. (“Case Two”) involved Richard’s purchase of Bank of America’s judgments, one against Corporation and one against Mario, but only the judgment for $110,309.36 against Corporation was before the appellate court. The trial judge, in Case Two, granted Richard’s motion and allowed him to proceed as to the purchased judgment against the Corporation—by levying and executing against the 1000 shares redeemed by the Corporation from Jule in 2005. By allowing seizure of Jule’s formerly owned shares, Maricela, by way of Richard, would own a majority interest in Corporation giving Maricela the power to cancel Corporation’s judgments, the only remaining significant assets of Corporation, against Maricela and Richard. The Third District Court of Appeal reversed, holding that under the unique circumstances of this case “[t]he trial court . . . should have applied Richard’s monetary judgment” against Corporation as an offset to Corporation’s judgments against Maricela and Richard in Case One. Otherwise, control of Corporation would be obtained for an improper purpose.

4. Breach of Fiduciary Duty and Tortious Interference: Default/The Ultimate Sanction

In 2010, Mr. Coghlan and Ms. Del Grosso (“Individual Plaintiffs”)—while employees, officers, directors, and shareholders of The Bare Board Group, Inc. (“Defendant Counterclaimant Corporation”)—allegedly lent money to Mr. Doyle, a person who, like Individual Plaintiffs and Defendant Counterclaimant Corporation, was “in the printed computer

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61. Id. at 442; see also Fla. Stat. § 607.0831 (2016).
62. Fonseca, 212 So. 3d at 442.
63. 212 So. 3d 431 (Fla. 3d Dist. Ct. App. 2017).
64. Id. at 434, 439 n.8, 445.
65. Id. at 439 n.6. The district court noted that levy and execution was sought only on the shares redeemed from Jule “given [Richard’s] position throughout the litigation (and here on appeal) that Jule” still owned shares. Id.
66. Id. at 445–46.
67. Fonseca, 212 So. 3d at 434, 445–46.
68. Id. at 447 (citing Rowland v. Times Publ’g Co., 35 So. 2d 399, 402 (Fla. 1948)).
circuit board industry.” 69 Individual Plaintiffs allegedly knew Mr. Doyle planned to establish a printed circuit board company, which he did in 2010, incorporating as ICMfg & Associates, Inc. (“Plaintiff Corporation”). 70 Individual Plaintiffs resigned from their officer and director positions with Defendant Counterclaimant Corporation on January 13, 2012. 71 Individual Plaintiffs had also been highly compensated employees of Defendant Counterclaimant Corporation, but they resigned from their employment on the same day that they resigned as officers and directors. 72 They remained shareholders of Defendant Counterclaimant Corporation, but Individual Plaintiffs and Plaintiff Corporation 73 brought a declaratory judgment action against Defendant Counterclaimant Corporation to determine the proper value of Individual Plaintiffs’ shares held in Defendant Counterclaimant Corporation. 74 They also sought a determination by the court because “they were in doubt about their rights under the shareholder agreement.” 75

Defendant Counterclaimant Corporation answered the complaint, alleged various affirmative defenses and, in an amended counterclaim, alleged the following as to Individual Plaintiffs: (1) [B]reach of fiduciary duty, (2) civil conspiracy to defraud, (3) fraud, (4) “violation of the Florida Deceptive and Unfair Trade Practices Act” (“FDUTPA”), 76 and (5) “tortious interference with business relationships;” and as to Plaintiff Corporation and Mr. Doyle, alleged the following: (1) “[A]iding and abetting breach of fiduciary duty,” (2) civil conspiracy to defraud, (3) violation of FDUTPA, and (4) “tortious interference with [Defendant Counterclaimant Corporation’s] business relationships.” 77 The counterclaim was answered and contained affirmative defenses. 78 The trial court found that in the course of the litigation, Individual Plaintiffs and Plaintiff Corporation (collectively “the Plaintiffs”) had committed what amounted to fraud upon the court, and on Defendant Counterclaimant Corporation’s motion to impose sanctions, the trial court

70. Id.
71. Id. at 3.
72. Id. at 2–3.
73. See id. at 3. Why Plaintiff Corporation was a plaintiff in the original declaratory judgment action is not apparent from the appellate court decision.* However, Plaintiff Corporation and Mr. Doyle were counter-defendants as to Defendant Counterclaimant Corporation’s counterclaims. ICMfg & Assocs., slip op. at 3.
74. Id.
75. Id. The appellate court noted that the shareholder agreement gave Defendant Counterclaimant Corporation “the first right of redemption” of Individual Plaintiffs’ shares in the event their employment ended. Id.
76. Id. at 3–5; see also FLA. STAT. § 501.204(1) (2011).
77. ICMfg & Assocs., slip op. at 5.
78. Id.
struck the Plaintiffs’ pleadings.\textsuperscript{79} This left the Plaintiffs in the position of having defaulted on Defendant Counterclaimant Corporation’s counterclaim so that Defendant Counterclaimant did not need to establish liability on the part of the Plaintiffs.\textsuperscript{80} The Plaintiffs argued that, notwithstanding the default, Defendant Counterclaimant Corporation was still required to prove a causal connection between the Plaintiffs’ conduct and Defendant Counterclaimant Corporation’s lost profits.\textsuperscript{81} The trial judge disagreed, ruling that the default had established the \textit{element of causation} as to all of the Plaintiffs.\textsuperscript{82} The jury awarded substantial damages—totaling almost $10 million—to Defendant Counterclaimant Corporation based on expert testimony, although the expert did not consider the issue of causation.\textsuperscript{83} The Second District Court of Appeal affirmed the trial court’s imposition of the sanction striking Plaintiffs’ pleadings.\textsuperscript{84} The conduct of the Plaintiffs justified the trial court’s exercise of discretion in this fashion and the imposition of the sanction.\textsuperscript{85} However, when it came to the issue of damages, the district court did not approve of the pre-trial ruling that the default on the question of liability was enough to establish the \textit{nexus and causation} between the Plaintiffs’ tortious acts and Defendant Counterclaimant Corporation’s lost profits.\textsuperscript{86} The damages were unliquidated and the Plaintiffs had the right to contest “the causal relationship between the damages claimed and the liability established by the default.”\textsuperscript{87} The district court reversed on the award of damages for lost profits and prejudgment interest and remanded for trial on only the issue of Defendant Counterclaimant Corporation’s lost profits.\textsuperscript{88}

\textbf{B. Claims of Shareholders, Members, and Partners}

1. Statutory Appraisal Right: Valuation of Corporate Stock

The issue on appeal in this case was the proper fair market valuation of shares of a corporation (“Corporation”) that was to be merged with
another corporation.\textsuperscript{89} Corporation estimated the value of the dissenting shareholder’s (“Dissenting Shareholder”) 25\% interest at $420 per share, while Dissenting Shareholder’s proposed estimate was $5,066.67 per share, which would translate into a value for her interest in the corporation of $1.9 million.\textsuperscript{90} At trial, two expert witnesses testified as to the value of Dissenting Shareholder’s stock, one on behalf of Corporation and one on behalf of Dissenting Shareholder, but the judge adopted the opinion of neither.\textsuperscript{91} Instead, the trial judge found that the fair market value of the shares was $1.9 million, the same amount claimed by the Dissenting Shareholder—which was more than her trial expert witness’s valuation.\textsuperscript{92} Dissenting Shareholder based her fair market value estimate “on an independent accountant’s valuation,” but no documentation of this valuation was produced at trial.\textsuperscript{93} The judge entered an order using the $1.9 million amount and Corporation appealed.\textsuperscript{94} On appeal, the Fifth District Court of Appeal stated that the trial court has discretion to: (1) appoint independent appraisers to make a recommendation as to the fair market value,\textsuperscript{95} which the trial judge did not do; (2) has discretion to accept one party’s expert’s opinions, or even portions of more than one expert opinion,\textsuperscript{96} which the judge did not do; or (3) the trial judge may “formulate an independent valuation based on the evidence presented,” but the judge’s valuation must be supported by substantial competent evidence.\textsuperscript{97} The appellate court said the judge did not adopt the opinion of either appraiser, did not appoint an independent appraiser, and did not provide an explanation as to how the judge arrived at the $1.9 million fair market value.\textsuperscript{98} The Fifth District Court reversed and remanded with instructions.\textsuperscript{99}

\begin{thebibliography}{99}
\bibitem{89} Lally Orange Buick Pontiac GMC, Inc. v. Sandhu, 207 So. 3d 981, 983 (Fla. 5th Dist. Ct. App. 2016) (per curiam).
\bibitem{90} \textit{Id}. Dissenting Shareholder was the former spouse of one of the individual defendants sued by Dissenting Shareholder. \textit{Id}. The judgment dissolving their marriage granted each spouse a one-half interest in the individual defendant’s one-half interest, with the merger plan and appraisal proceeding being the outgrowth of the equitable distribution. \textit{Id}.
\bibitem{91} \textit{Id}. at 983–84.
\bibitem{92} \textit{Lally Orange Buick Pontiac GMC, Inc.}, 207 So. 3d at 984.
\bibitem{93} \textit{Id}. at 985.
\bibitem{94} \textit{Id}. at 984.
\bibitem{95} \textit{Id}. at 985 (quoting \textit{Fla. Stat.} § 607.1330(4) (2013)).
\bibitem{96} \textit{Id}. at 986 n.7.
\bibitem{97} \textit{Lally Orange Buick Pontiac GMC, Inc.}, 207 So. 3d at 986.
\bibitem{98} \textit{Id}.
\bibitem{99} \textit{Id}.
\end{thebibliography}
2. No Personal Liability for Repayment of Contribution to Limited Liability Corporation

Georg Schollmeier ("Schollmeier") agreed to a capital contribution of $400,000 in Avrupa, LLC ("LLC") in exchange for a 20% interest in LLC. The members of LLC—Tulga Demir ("Demir"), Tugend Demir ("Tugend"), and Schollmeier—entered into an agreement entitled *Avrupa, LLC Contribution Agreement* ("Agreement") that provided that, if Schollmeier decided to withdraw from LLC, he would be repaid his contribution. When Schollmeier requested repayment of his contribution, and it was not forthcoming, he sued Demir and Tugend and alleged that they breached their Agreement. On December 12, 2014, after hearing a motion for summary judgment, the trial court held Demir personally liable on Schollmeier’s breach of contract claim, and Demir appealed. The Third District Court said that “[t]he final judgment against Demir individually as it relates to Schollmeier’s financial contribution to Avrupa is based on the trial court’s determination that the Agreement . . . was not a limited liability company operating agreement, . . . but instead a personal contract solely governing the terms of Schollmeier’s contribution.” The Third District Court of Appeal disagreed and found that the agreement was tantamount to a limited liability company operating agreement. The Third District reversed and remanded, and cited to its decision in *Dinuro Investments, LLC v. Camacho*, stated that a principal reason for forming a limited liability company agreement under and as provided in the Act. The definition of Act in the Agreement was “the Limited Liability Company Act of the State of Florida.”

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101. Id. at 443–44.
102. Id. at 444. Schollmeier’s complaint contained counts that sought damages for alleged “breach of fiduciary duty, . . . breach of statutory duty of loyalty and care” and a count seeking an accounting, but there were proposals for settlement of these counts, and the proposals were later accepted by Schollmeier. *Demir*, 199 So. 3d at 444.
103. Id. Schollmeier stated that he asked for only $375,000 of the amount on his motion for summary judgment because there was a dispute as to whether the other $25,000 was actually contributed. *Id.* at 444 n.2.
104. Id. at 444.
105. Id. at 445.
106. *Demir*, 199 So. 3d at 445. Section 1 of the Agreement recited that it was a limited liability company agreement under and as provided in the Act. *Id.* The definition of Act in the Agreement was “the Limited Liability Company Act of the State of Florida.” *Id.* at 444 n.1.
107. *Id.* at 447.
108. 141 So. 3d 731 (Fla. 3d Dist. Ct. App. 2014).
liability company is to obtain protection from personal liability. The court, quoting from *Dinuro Investments, LLC* stated that:

Conspicuously missing from the operating agreement is any provision stating that the members shall be directly liable to each other for breaches of the terms of the operating agreement . . . . Section 608.4227 of the Florida Statutes specifically provides that members are typically shielded from individual liability for their involvement with an LLC unless the terms of the articles of organization or the operating agreement provide otherwise.

The court then quoted section 608.4227(1) of the 2011 Florida Statutes as additional support. That subsection provided that:

Except as provided in this chapter, the members, managers, and managing members of a limited liability company are not liable, solely by reason of being a member or serving as a manager or managing member, under a judgment, decree, or order of a court, or in any other manner, for a debt, obligation, or liability of the limited liability company.

The Avrupa agreement “[did] not contain any provision or language indicating that any Member of Avrupa would be personally liable to any

109. *Demir*, 199 So. 3d at 445 (citing *Dinuro Invs., LLC*, 141 So. 3d at 742).
110. *Id.* at 446 (citing *Dinuro Invs., LLC*, 141 So. 3d at 742).
111. *Id.* Section 608.4227 of the Florida Statutes was repealed effective June 11, 2015. Act Effective July 1, 2015, Ch. 2015-148, § 11, 2015 Fla. Laws 1, 9 (amending § 608.4227, F.L.A. STAT. 2011). Section 605.0304(1) of the Florida Revised Limited Liability Company Act provides as follows:

A debt, obligation, or other liability of a limited liability company is solely the debt, obligation, or other liability of the company. A member or manager is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of the company solely by reason of being or acting as a member or manager. This subsection applies regardless of the dissolution of the company.


112. *Demir*, 199 So. 3d at 446.
other Member for the company’s obligations.” The court concluded that if it was the parties’ intent that there would be personal liability for the parties’ capital contributions, “the terms needed to be explicit.” Mr. Schollmeier could only look to the company for reimbursement.

3. Limited Partnerships and Corporations: Derivative Actions Required

In this dispute among siblings, one brother (“Plaintiff”) sued three brothers (“the Brothers”), over the siblings’ ownership interests in each of the siblings’ several business entities including two closely held corporations and two limited partnerships (“the Entities”). However, there was one entity, Biloxi 3, LLC, involved in the litigation that was owned by the Brothers, not Plaintiff. Plaintiff sought relief against the Brothers alleging breach of fiduciary duty owed to him with respect to actions taken by the Entities. The improper actions alleged were “unearned excessive bonuses and management fees paid by” one of the Entities to the Brothers, and the alleged improper diversion by the Brothers of the proceeds of a settlement agreement away from one of the limited partnerships and to Biloxi 3, LLC. The Third District Court of Appeal affirmed, citing its decision in Dinuro Investments, LLC. Plaintiff “failed to show a direct harm and a special injury separate and distinct from that sustained by the other partners [and shareholders]” so a derivative action would have been the proper proceeding. The Third District Court of Appeal also affirmed the trial court’s denial of the Plaintiff’s demand for arbitration under the partnership and shareholder agreements.

4. Tortious Interference Claims: Statute of Limitation

On March 6, 2012, Mr. Eff (“Plaintiff”) brought an action against Sony Pictures (“Defendant”) and alleged that Defendant tortuously interfered in a business relationship that Plaintiff had with Mr. Silvera and another

113. Id.
114. Id.
115. See id.
117. Id. at 236.
118. Id.
119. Id.
120. Id. at 236–39; see also Dinuro Invs., LLC v. Camacho, 141 So. 3d 731, 740 (Fla. 3d Dist. Ct. App. 2014).
121. Fritz, 219 So. 3d at 238.
122. Id.
person. Plaintiff alleged that he had a 25% interest in the movie *Shottas* (“the Movie”) “pursuant to an oral agreement” made with Mr. Silvera and another individual—who was not a party to the action—and that Plaintiff and Mr. Silvera formed Access Pictures, LLC, to produce the Movie. He further alleged that Defendant later made a licensing agreement with others whereby Defendant acquired “exclusive distribution rights to *Shottas*” after Mr. Silvera met with Defendant without Plaintiff. The trial court granted Defendant’s motion for summary judgment based on the applicable four-year statute of limitations under section 95.11(3)(o) of the Florida Statutes. The Third District Court of Appeal affirmed. Under the licensing agreement with other parties, the Defendant was to make the initial payment on October 30, 2005 and other payments were alleged to have been made later. In May of 2007, Plaintiff’s lawyer emailed Defendant to advise him of Plaintiff’s interest in the Movie. The trial court ruled that October 30, 2005 was the date on which the Plaintiff’s claim for tortious interference accrued, and under the *delayed discovery doctrine*, May 2007 was therefore the latest that Plaintiff found out about any alleged tortious interference. Thus, the lawsuit filed on March 6, 2012 was time barred under the four-year statute of limitation unless the *continuing tort doctrine* applied to Plaintiff’s claim. The Third District Court of Appeal described the continuing tort doctrine as being “established by continual tortious acts, not by continual harmful effects from an original, completed act.” The district court found “no Florida cases addressing the *continuing tort* doctrine as it pertains to a cause of action for tortious interference with a business relationship.” The district court refused to apply the doctrine to Plaintiff’s claim because “the tort was not continual in nature merely because [Defendant] made subsequent distribution payments. These additional distribution payments were merely ‘harmful effects from an original, completed act.’”

124. Id.
125. Id.
126. Id.; FLA. STAT. § 95.11(3)(o) (2016).
127. Effs, 197 So. 3d at 1245.
128. Id. at 1244.
129. Id.
130. Id.
131. *See id.* at 1243–44.
132. *Effs*, 197 So. 3d at 1245 (quoting *Suarez v. City of Tampa*, 987 So. 2d 681, 686 (Fla. 2d Dist. Ct. App. 2008)).
133. Id.
134. Id. (quoting *Suarez*, 987 So. 2d at 686).
C. Sale of Business

1. Discovery: Financial Information Provided to Accountant Not Protected by Accountant-Client Privilege

In *PDR Grayson Dental Lab, LLC v. Progressive Dental Reconstruction, Inc.*, PDR Grayson Dental Lab, LLC ("Purchaser") sought discovery of Progressive Dental Reconstruction’s ("Seller") business and financial records given by Seller to Seller’s accountant for income tax purposes. Purchaser alleged that Seller acted fraudulently to accomplish the sale and that the records were necessary to establish its claim. The trial court denied the discovery request, and Purchaser sought immediate review of the trial court’s ruling. The First District Court of Appeal granted the petition for certiorari holding that the records were not shielded from the discovery request by the accountant-client privilege. Seller did not present any evidence that the records possessed by the accountant consisted of privileged communications or work product. The First District Court of Appeal held that otherwise discoverable records did not become privileged just because they were sent to Seller’s accountant. The trial court order was quashed and the case was remanded.

2. Valid Contract for Sale of Assets of Business Existed: No Unjust Enrichment Remedy

“The parties were at one point good friends and business associates,” said the Fourth District Court of Appeal before it explained the events leading up to the litigation. Mr. Brancato and Mrs. Brancato (“Surviving Spouse Seller”) sold the assets of a business to Valerie Fulton’s insurance agency, Fulton Insurance Agency, Inc. ("Insurance Agency Purchaser"), and Dean Fulton. Payment was to be based on commissions for the twelve-
month period following the date of [the] [a]greement.146 When payments were not made as expected, Surviving Spouse Seller sued Valerie Fulton and Insurance Agency Purchaser alleging breach of contract.147 The jury found that Insurance Agency Purchaser had breached the contract which was the legal cause of the damage.148 However, the jury also found that Valerie Fulton and Insurance Agency Purchaser were unjustly enriched by getting the assets and not paying “the reasonable value of those assets,” and that they had converted the assets.149 The jury awarded total damages of $98,000 to Surviving Spouse Seller.150 On appeal, Valerie Fulton and Insurance Agency Purchaser contested the unjust enrichment and conversion verdicts, as well as Surviving Spouse Seller’s efforts to have the court pierce the corporate veil in order to hold Valerie Fulton personally liable.151 The appellate court said that a directed verdict should have been entered against Surviving Spouse Seller on the unjust enrichment count.152 If an express contract exists, as here, “an equitable theory, such as unjust enrichment or quantum meruit” cannot be entertained.153 As to the conversion claim and damages, the appellate court held that the damages were to be confined to the $98,000 jury award for breach of contract, as “[t]here was no evidence that the seller sustained any additional damages by the buyer and the buyers’ agency’s conversion of other assets.”154

146. Fulton, 189 So. 3d at 968.
147. Id. at 969.
148. Id.
149. Id.
150. Id.
151. Fulton, 189 So. 3d at 969–70.
152. Id. at 970.
153. Id. at 969 (quoting Ocean Commc’ns, Inc. v. Bubeck, 956 So. 2d 1222, 1225 (Fla. 4th Dist. Ct. App. 2007)).
154. Id. at 970. Does the such as limit the term equitable theory? Id. at 969. The Fourth District Court of Appeal in Ocean Communications, Inc. v. Bubeck held that restitution—which requires the existence of a contract—is available in cases where there has been a breach of an express contract. Ocean Commc’ns, Inc., 956 So. 2d at 1225; see also Barbara Landau, 2006–2007 Survey of Florida Law Affecting Business Owners, 32 NOVA L. REV. 21, 58 (2007). “A court of equity has the power to reform” a contract in the case of mutual mistake, scrivener’s error or inadvertence, and in cases of unilateral mistake of one party combined with inequitable conduct by the other party. Goodall v. Whispering Woods Ctr., 990 So. 2d 695, 699 (Fla. 4th Dist. Ct. App. 2008); Barbara Landau, 2008–2009 Survey of Florida Law Affecting Business Owners, 34 NOVA L. REV. 71, 97 (2009).
D. Non-Compete Agreements

1. Injunction: Where’s the Bond?

In the next case, the trial court issued a preliminary injunction on March 29, 2012 in favor of Vital Pharmaceuticals, Inc. ("Vital") and against two of Vital’s former employees ("Employees")—in an action against Employees and their new employer—Vital alleged breaches of non-compete clauses and tortious interference.\(^{155}\) In May 2012, the circuit court dissolved the injunction for reasons that are not stated in the court’s order.\(^{156}\) Employees then sought damages and attorneys’ fees in the same action.\(^{157}\) Damages were granted, Vital appealed the trial court’s order and was successful on appeal.\(^{158}\) This case stands for the proposition that if a temporary injunction is wrongfully issued, the persons wrongfully enjoined may sue for damages in the amount of the bond under Rule 1.610(b) of the Florida Rules of Civil Procedure; but if a bond is not posted, damages cannot be collected, at least not pursuant to section 60.07 of the Florida Statutes.\(^{159}\) It seems that no bond was required when the preliminary injunction was granted.\(^{160}\) Thus, the Fourth District Court of Appeal reversed the trial court’s award of damages to Vital.\(^{161}\) Of course, in the absence of the bond, the injunction was not enforceable in the first place.\(^{162}\)

2. Breach During Term of Employment

_Telemundo Media, LLC v. Mintz\(^{163}\) was an interesting non-compete temporary injunction case.\(^{164}\) Joshua Mintz ("Mintz") was employed by Telemundo ("Telemundo").\(^{165}\) The term of employment was from January 1,
2015 through December 27, 2017. Mintz signed a non-compete agreement with Telemundo barring certain employment for six months after Mintz’s termination of employment with Telemundo. That part of the agreement provided that Mintz agreed he would “not, either directly or indirectly, provide services—as an employee or in any other status or capacity—to any Spanish-language media competitor of Telemundo in the news, entertainment, new media—e.g. the Internet, etc.—and telecommunications industries, within the United States.” The employment agreement contained an alternative dispute resolution provision in which Mintz agreed to follow Telemundo’s dispute resolution process. Mintz advised Telemundo that he was leaving to take a job in Mexico with a competitor of Telemundo. Mintz planned to start work at his new job within two months after he informed Telemundo that he was leaving. Telemundo sought injunctive relief to prevent Mintz from starting his new employment before the arbitration proceedings were complete. The trial court denied the motion, concluding that Mintz could work in Mexico because the covenant not to compete provision “only applied within the United States.” The Third District Court of Appeal reversed, directing the trial court to enter an order granting the temporary injunction. The appellate court reviewed the elements necessary for a temporary injunction and concluded that all elements necessary were present. The parties’ agreement provided that services to be provided by Mintz “were ‘of a special, unique, unusual, extraordinary, and intellectual character, giving them a peculiar value, the loss of which the Company cannot be reasonably or adequately compensated for in damages.’” It is apparent from the decision that the district court

166. Id. Employer had an “irrevocable option to extend the term” for an additional year. Id.

167. Telemundo Media, LLC, 194 So. 3d at 435. The allegations in this case were as follows: In November 2015, Mintz told Telemundo that Mintz planned to accept a job with one of Telemundo’s major competitors, at which point, Telemundo set the contractual alternative dispute resolution process in motion in late December. Id. Then, on January 7, 2016, Mintz told Telemundo that he was planning to leave to start working for the competitor on June 13, 2016. Id. This action was filed by Telemundo on January 11, 2016. Id.

168. Id.

169. Id.

170. Id.

171. See id.

172. Id.

173. Id.

174. Telemundo Media, LLC, 194 So. 3d at 436.

175. Id. at 435–36.

176. Id. at 436.

177. Id. at 435.
concluded that the within the United States limitation did not apply to a breach of Mintz’s obligation “to provide his unique personal services exclusively to Telemundo for the contractually specified period,” as opposed to after the termination of the employment contract.\textsuperscript{178}

3. Failure to Establish the Absence of Irreparable Harm

In 2015, Mr. Given (“Employee”), a regional sales manager in Georgia, while working for Allied Universal Corporation, a Florida corporation (“Former Employer”), signed a non-compete agreement “as a condition of continued employment.”\textsuperscript{179} Employee, who had been responsible for all of Former Employer’s sales territory north of Florida, resigned from his position with Former Employer in March 2016, and accepted a new position as a strategic account manager at a Georgia company that directly competed with Former Employer.\textsuperscript{180} Former Employer sought a temporary injunction to enforce the non-compete agreement.\textsuperscript{181} The motion was denied and Former Employer appealed.\textsuperscript{182} The Third Circuit reversed, directing the trial court to grant the temporary injunction requested.\textsuperscript{183} Former Employer presented evidence that Employee’s new employment would cause Former Employer irreparable harm in the absence of a temporary injunction.\textsuperscript{184} This “create[d] a rebuttable presumption of irreparable injury” supporting the relief requested under section 542.335(1)(j) of the Florida Statutes.\textsuperscript{185} Employee provided no evidence that would establish the absence to the Former Employer of the injury—contemplated by section 542.335(1)(b) of the Florida Statutes.\textsuperscript{186}

\textsuperscript{178} Id. at 435–36. The district court stated that “[t]his is notwithstanding the language in the exclusivity provision that the trial court construed to mean that [Employee] could provide his services to [Employer’s] competitor outside of the United States.” Telemundo Media, LLC, 194 So. 3d at 436 n.1.

\textsuperscript{179} Allied Universal Corp. v. Given, No. 3D16-1128, slip op. at 2 (Fla. 3d Dist. Ct. App. Mar. 15, 2017). Employee was hired in 2010. Id.

\textsuperscript{180} Id. The parties did not dispute the existence of a valid agreement not to compete, Employee had become an employee of Univar, that the new employment happened within one month after Employee resigned from his job with Former Employer, or that Univar competed with Former Employer. See id. at 5 n.2. The agreement called for an eighteen-month non-compete period within 150 miles of any operational facility of Former Employer. Id. at 2.

\textsuperscript{181} Allied Universal Corp., slip op. at 3.

\textsuperscript{182} Id. at 1.

\textsuperscript{183} Id. at 8.

\textsuperscript{184} Id. at 7.

\textsuperscript{185} Id. at 6 (discussing FLA. STAT. § 542.335(1)(j) (2016)).

\textsuperscript{186} Allied Universal Corp., slip op. at 6 (discussing FLA. STAT. § 542.335(1)(b)).
fact, Employee admitted that absent an injunction “he would begin managing a sales territory” for his new employer. The Third District Court of Appeal reminded us that it is not necessary that Former Employer actually prove irreparable harm before injunctive relief may properly be granted; quoting the Supreme Court of Florida in Capraro v. Lanier Business Products, Inc., that “[i]t truly can be said in this type of litigation that relief delayed is relief denied.”

III. ACTIONS BY OR AGAINST THIRD PARTIES

A. Tax Cases

The constitutional challenge presented in Florida Department of Revenue v. DIRECTV, Inc. arose out of the imposition of a sales tax by the State of Florida on satellite TV services at 10.8% while cable TV services were taxed at 6.8%. DIRECTV, Inc. and EchoStar, LLC (“Satellite Companies”) sued the Florida Department of Revenue (“DOR”), the Florida Cable Telecommunications Association (“FCTA”), and others alleging that the Communications Services Tax (“CST”) is unconstitutional under the [D]ormant Commerce Clause. The relief sought, in addition to a declaratory judgment as to the unconstitutionality of the tax, was a permanent injunction and a refund of the tax. The trial court agreed with the DOR, thus denying the tax refund and injunctive relief, but the First District Court of Appeal reversed, finding an as applied violation of the Commerce Clause; that is, the tax was found to be discriminatory in effect, although not in purpose. In so doing, the district court found that cable companies and Satellite Companies “were similarly situated because they both ‘operate in the same market and are direct competitors within that

187. Id.
188. 466 So. 2d 212 (Fla. 1985).
189. Allied Universal Corp., slip op. at 7–8 (quoting Capraro, 466 So. 2 at 213).
190. 215 So. 3d 46 (Fla. 2017). As of the date of submission of this Article, a petition for certiorari is pending before the Supreme Court of the United States. See 28 U.S.C. § 2101(c) (2012).
191. DIRECTV, Inc., 215 So. 3d at 49; see also FLA. STAT. § 202.12(1) (2006). This discrepancy began with the enactment of the Communications Services Tax. DIRECTV, Inc., 215 So. 3d at 49. That statute currently imposes a tax of 9.07% on satellite service, while cable service is taxed under that statute at a rate of 4.92%. FLA. STAT. § 202.12(1) (2015).
192. DIRECTV, Inc., 215 So. 3d at 49; see also FLA. STAT. § 202.12.
193. DIRECTV, Inc., 215 So. 3d at 49.
194. Id.
195. Id. at 49–50.
market."\textsuperscript{196} The district court also concluded that cable companies are \textit{in-state interests} because of the extent of "their local infrastructure and local employment."\textsuperscript{197} The First District Court of Appeal then held that "because the CST favors communications that use local infrastructure, it has a discriminatory effect on interstate commerce."\textsuperscript{198} The DOR and the FCTA appealed, and the Supreme Court of Florida reversed, holding that the Dormant Commerce Clause had not been violated.\textsuperscript{199}

The Commerce Clause of the United States Constitution grants to the United States Congress the authority "[t]o regulate Commerce . . . among the several [s]tates."\textsuperscript{200} In addition, the Supreme Court of the United States has long recognized that even on matters with respect to which the United States Congress has not legislated, \textit{certain state taxation} may be barred by the \textit{Dormant Commerce Clause}.\textsuperscript{201} Under the test set forth in \textit{Complete Auto Transit, Inc. v. Brady} \textsuperscript{202} ("Complete Auto test"), a state tax will not offend the Commerce Clause if the tax "[(1)] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State."\textsuperscript{203} Satellite Companies relied on the third requirement and claimed that the tax had a discriminatory effect benefiting in-state commerce versus out-of-state interests.\textsuperscript{204}

The Supreme Court of Florida said that "[s]tatutes that openly discriminate against out-of-state economic interests in order to protect in-state interests are subject to a per se rule of invalidity."\textsuperscript{205} However, before discrimination against interstate commerce may be found, entities subject to disparate tax treatment must be determined to be similarly situated.\textsuperscript{206} The DOR took the position that satellite and cable companies are not similarly situated, but the Supreme Court of Florida did not agree.\textsuperscript{207} The Court, after noting that "[w]hat is required for entities to be considered \textit{substantially similar} has not been extensively considered by the courts," stated that "[i]t

\begin{itemize}
  \item \textsuperscript{196} Id. at 49.
  \item \textsuperscript{197} Id.
  \item \textsuperscript{198} \textit{DIRECTV, Inc.}, 215 So. 3d at 49.
  \item \textsuperscript{199} Id. at 50, 55.
  \item \textsuperscript{200} U.S. CONST. art. 1, § 8.
  \item \textsuperscript{201} \textit{DIRECTV, Inc.}, 215 So. 3d. at 50 (citing Okla. Tax Comm’n v. Jefferson Lines, Inc., 514 U.S. 175, 179 (1995)).
  \item \textsuperscript{202} 430 U.S. 274, 279 (1977).
  \item \textsuperscript{203} \textit{DIRECTV, Inc.}, 215 So. 3d at 50 (quoting \textit{Complete Auto Transit, Inc.}, 430 U.S. at 279).
  \item \textsuperscript{204} Id. at 51.
  \item \textsuperscript{205} Id. (quoting Simmons v. State, 944 So. 2d 317, 330 (Fla. 2006)).
  \item \textsuperscript{206} Id.
  \item \textsuperscript{207} Id. at 51–52.
\end{itemize}
appears that, at the very least, the entities must be in competition with one another." The Court concluded that cable TV and satellite TV were substantially similar businesses competing for the same customers. The Court then discussed whether cable companies were in-state entities, as argued by Satellite Companies. The Court found that both were out-of-state businesses, holding that “[c]able is not a local, in-state interest any more than satellite.” Because both are out-of-state for Dormant Commerce Clause purposes, the Court said that Satellite Companies’ argument of discriminatory effect could not succeed. As to the discriminatory purpose argument made by Satellite Companies, the Court concluded that, notwithstanding the difference in tax rates, the applicable statute was not enacted for a discriminatory purpose and there was no intent to favor cable TV.

In the context of its discussion on whether cable companies are in-state, the Court noted that “every state and federal court considering [satellite companies’ Dormant Commerce Clause] challenges brought by the satellite industry . . . has held that these [tax measures that favor cable] do not violate the Dormant Commerce Clause.” The Court noted that some cases have done so on the grounds that satellite and cable are not similarly situated, while others have found that “cable is not an in-state interest.” The Court said it agreed with the latter group of decisions.

*Florida Department of Revenue v. American Business USA Corp.* also involved a challenge based on the Dormant Commerce Clause, but in this case, the taxpayer, American Business USA Corp. (“Internet Corporation”), operated its business from Wellington, Florida. Internet Corporation was engaged in the online internet business of selling “flowers, gift baskets, and other items of tangible personal property.” Internet Corporation did not keep an inventory of goods for sale, but would instead use florists that were located near the place to which the order was to be

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208. *DIRECTV, Inc.*, 215 So. 3d at 51 (quoting Gen. Motors Corp. v. Tracy, Tax Comm’r of Ohio, 519 U.S. 278, 298–99 (1997)).

209. *Id.*

210. *Id.* at 52–53.

211. *Id.* at 53.

212. *Id.*


214. *Id.* at 53.

215. *Id.* at 53 n.1.

216. *Id.* at 53–54, 54 n.2.

217. *Id.* at 54.


219. *Id.* at 909 & n.1.

220. *Id.* at 909 n.1.
Internet Corporation charged sales tax when flowers and other items were to be delivered to Florida customers. Internet Corporation did not charge sales tax on items delivered to customers in other states.

The statute that was challenged by Internet Corporation, section 212.05(1)(l) of the Florida Statutes provides, in part, that “[f]lorists located in this state are liable for sales tax on sales to retail customers regardless of where or by whom the items are to be delivered.” Internet Corporation contested the DOR’s ruling that Internet Corporation was liable under this statute for tax on sales to non-Florida customers. The DOR’s ruling provided that “the tax required by [the statute was] a tax on the privilege of engaging in business in Florida and is not a tax on the property sold.” On appeal to the Fourth District Court of Appeal, Internet Corporation alleged that the imposition of the tax with respect to Internet Corporation’s sales to out-of-state customers was in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution and in violation of the Dormant Commerce Clause. The Fourth District Court of Appeal ruled that taxing internet “sales to out-of-state customers . . . violate[d] the [D]ormant Commerce Clause.” The DOR appealed to the Supreme Court of Florida, and the Court quashed the Fourth District Court of Appeal’s decision. The Supreme Court of Florida applied the Complete Auto test to determine if the imposition of the tax violated the Dormant Commerce Clause. After a lengthy examination of the facts of the case, the Court determined that the tax passed muster—satisfying the four prongs of the Complete Auto test—and thus, the tax did not violate the Dormant Commerce Clause.

The Supreme Court of Florida acknowledged that if Internet Corporation did not have any physical presence in Florida, the imposition of the tax on sales to out-of-state customers would have clearly violated the Dormant Commerce Clause. But, based on Internet Corporation’s presence in Florida, with its headquarters being located in Wellington, Florida, and Internet Corporation “doing business in Florida since 2001 . . .
accept[ing] internet orders” from that location, the Court found that the substantial nexus prong of the Complete Auto test was satisfied.233 Those facts also served to defeat Internet Corporation’s due process argument of lack of minimum contacts.234

In the next case, the First District Court of Appeal certified the following question to the Supreme Court of Florida as a matter “of great public importance: Does the ‘Local Option Tourist Development Act,’ Codified at Section 125.0104, [of the] Florida Statutes, impose a tax on the total amount . . . received by an . . . on-line travel company’s website, or only on the amount the property owner re[covers] for the rental of the accommodations?”235

The Supreme Court of Florida rephrased the question as follows: “Are the total monetary amounts that [online travel companies] charge their customers to secure reservations for transient accommodation rentals in Florida . . . subject to taxation under section 125.0104 [of the] Florida Statutes?”236

The Supreme Court of Florida answered the question in the negative, holding that the tax can only be imposed on the amount paid to the transient lessor—the hotel, motel, or other provider of accommodations—and not on the total amount paid to the online travel company, that difference being referred to as the mark-up.237 Justices Labarga and Quince concurred with

233. Id.
234. Id. at 914, 917. The Court, discussing Quill Corp. v. North Dakota, stated that “[d]ue process requires only that there be some minimal connection between the state and the transaction it seeks to tax.” Am. Bus. USA Corp., 191 So. 3d at 917; Quill Corp. v. North Dakota, 504 U.S. 298, 306–07 (1992). The Florida Supreme Court, relying on Quill Corp. and National Bellas Hess, Inc. v. Department of Revenue stated the following with respect to the alleged due process violation: “We have concluded that American Business’[] activities have a substantial nexus to Florida. Thus, the minimum connection required to satisfy due process is also met.” Am. Bus. USA Corp., 191 So. 3d at 917; Quill Corp., 504 U.S. at 307; Nat’l Bellas Hess, Inc. v. Dep’t of Revenue, 386 U.S. 753, 758 (1967), abrogated by Quill Corp. v. North Dakota 504 U.S. 298 (1992). Of course, the converse is not necessarily the case, as the district court pointed out, again, citing Quill Corp. for the proposition that a violation of the Dormant Commerce Clause may exist even where there is no due process violation. Am. Bus. USA Corp., 191 So. 3d at 910.

236. Id. at 733; see also Broward Cty. v. Orbitz, LLC, 135 So. 3d 415 (Fla. 1st Dist. Ct. App. 2014) (per curiam), review denied, 192 So. 3d 35 (Fla. 2015) (unpublished table decision); Leon Cty. v. Expedia, Inc., 128 So. 3d 81, 82 (Fla. 1st Dist. Ct. App. 2013) (mem.) (per curiam), review denied, 192 So. 3d 39 (Fla. 2015) (unpublished table decision).
237. Expedia, Inc., 175 So. 3d at 732, 737. The mark-up was said to be “between [25%] and [45%].” Id. at 738–39. The Appellate Court of Illinois, First District, Third Division, in City of Chicago v. Expedia, had before it a controversy regarding the
the opinion of Justice Perry, Justice Pariente concurred in the result and wrote a separate opinion, and Justice Canady concurred in the result; while Justice Lewis dissented with the opinion with Justice Polston concurring in the dissent. 238

The next two cases are district court decisions involving sales taxes. 239 In the first, an agreement was reached during the DOR’s sales tax audit of Verizon Business Purchasing, LLC (“LLC”), by which the parties agreed to extend the statute of limitations on the tax assessment until March 31, 2011. 240 On February 8, 2011, the DOR sent LLC a Notice of Proposed Assessment (“NOPA”) for more than $3 million plus interest. 241 The DOR advised LLC that an informal protest could be filed by April 11, 2011, administrative review could be sought, or judicial proceedings could be instituted by LLC, but if LLC did not file a protest, the assessment would become final on April 11, 2011. 242 LLC was also informed that in the absence of an informal protest, “an administrative hearing or judicial proceeding, . . . [had to be brought] no later than [June 8, 2011] or [sixty] days from the date the assessment” became final. 243 LLC was also advised that if a protest was not filed, “the proposed assessment [would] become a

Chicago Hotel Accommodations Tax (“CHAT”), under Chicago Municipal Code § 3-24-010 (1990). City of Chi. v. Expedia, Inc., No. 1-15-3402, 2017 WL 1511961, at *1 (Ill. App. Ct. Apr. 26), withdrawn, May 16, 2017. The court in Illinois stated that “[w]ell after the CHAT ordinance was enacted, the Internet was invented and, eventually, profitable [online travel companies] began operating. The [City of Chicago] has joined numerous taxing authorities who have attempted to apply established tax provisions to [online travel companies’] online business model.” Id. at *2. The court went to explain that the results from cases in other jurisdictions may be of limited assistance because of differences in statutory language. Id. For example, in Orbitz, LLC v. Indiana Department of State Revenue, the Tax Court of Indiana declined to “rely on [out of state decisions] or find them persuasive” because of state-specific statutory language upon which the case’s resolution was dependent. Orbitz, LLC v. Ind. Dep’t of State Revenue, 66 N.E. 3d 1012, 1015–16 n.4 (Ind. T.C. 2016). Just a word of caution—as true today in the age of immediate and magic cite checking as it was in the days of only paper books and supplements: Orbitz, LLC did not expressly cite Alachua County, although the parties’ briefs may have, but a cite check of Alachua County disclosed that Orbitz, LLC declined to follow the Florida Supreme Court’s Alachua County decision. Id. at 1015 n.4; see also Expedia, Inc., 175 So. 3d at 737. But did it? Compare Orbitz, LLC, 66 N.E. 3d at 1018 with Expedia, Inc., 175 So. 3d at 737.

238. Expedia, Inc., 175 So. 3d at 737.
241. Id. at 808.
242. Id.
243. Id.
FINAL ASSESSMENT on [April 11, 2011].” LLC filed suit against the DOR challenging the NOPA on statute of limitations grounds, asserting that the DOR had been required to make an assessment before March 31, 2011. The DOR successfully moved for summary judgment and LLC appealed. The district court concluded that the DOR’s assessment of the tax was barred by the statute of limitations on assessment. The statute of limitations contained in section 95.091(3)(a)1.b. of the Florida Statutes requires that any tax due under section 72.011 of the Florida Statutes must be “determine[d] and assess[ed] . . . within [three] years after the date the tax is due, any return with respect to tax is due, or such return is filed, whichever occurs later.” Thus, the question presented was whether the DOR’s assessment was timely. As noted above, the DOR had, by agreement, until March 31, 2011, to assess the tax. The NOPA was issued on February 8, 2011. The DOR argued that the date the NOPA was issued, February 8, 2011, was the date it assessed the tax against LLC. Thus, according to the DOR, the assessment was timely. It was conceded by “the parties [that] section 95.091 does not define the [term] assess.” LLC pointed out that under section 213.21(1)(b) of the Florida Statutes, the statute of limitations on assessments is tolled when informal protests are filed. LLC argued, in effect, and the district court agreed, that there would be no purpose for that tolling provision if the NOPA was the assessment, as the assessment would have been made. The First District Court of Appeal agreed “that the assessment contemplated in [section 95.091(3)(a)] is a final assessment.” As the district court pointed out, since there is a sixty-day period between the NOPA and the date the NOPA becomes final, if the taxpayer does not file a protest, all the DOR would have had to do in this case was to issue the NOPA at least “sixty days prior to . . . March 31, 2011.” In answering the

244. Id. (alteration in original).
245. Verizon Bus. Purchasing, LLC, 164 So. 3d at 808.
246. Id. at 808–09.
247. Id. at 812–13.
248. Id. at 809; see also Fla. Stat. § 95.091(3)(a)1.b (2010).
249. Verizon Bus. Purchasing, LLC, 164 So. 3d at 809.
250. Id. at 808.
251. Id.
252. Id.
253. Id. at 809–10.
255. Verizon Bus. Purchasing, LLC, 164 So. 3d at 808; see also Fla. Stat. § 213.21(1)(b) (2010).
257. Id. at 811; see also Fla. Stat. § 95.091(3)(a).
question presented, that is, whether NOPA was the assessment contemplated by section 95.091(3)(a) of the Florida Statutes, or whether the date the NOPA became final was the assessment, the district court, as a matter of statutory interpretation, concluded that the pertinent statute of limitations referred to a final assessment and the NOPA was not a final assessment.259

American Heritage Window Fashions, LLC v. Department of Revenue260 involved an assessment of sales tax and interest against American Heritage Window Fashions, LLC (“LLC”) for more than $220,000.261 On March 29, 2010, the DOR served a NOPA on LLC, and pursuant to section 72.011(1)(a) and (2)(a) of the Florida Statutes, informed LLC of its options to contest the assessment.262 LLC did not avail itself of any of the options.263 Collection efforts by the DOR began at the end of 2010, and on April 1, 2013, almost three years after the relevant periods stated in the NOPA expired, the DOR obtained $7,507.58 from an account that the DOR had ordered frozen back on May 10, 2011, “of which $6,525.95 was applied to the . . . deficiency, roughly [3%] of the assessed sum.”264 On July 10, 2013, LLC requested a refund of the amount applied to the deficiency, alleging “that it was an audit overpayment.”265 The DOR declined “the request on August 26, 2013, and [LLC] filed a written protest on September 25, 2013 . . . [seeking] ‘to appeal the Notice of Proposed Assessment’” based on its argument regarding the underlying liability.266 The DOR denied the protest on the merits which “made final the [DOR’s] denial of [the LLC’s] refund application.”267 LLC sought further administrative review, and eventually the matter found its way to the Second District Court of Appeal.268 The district court affirmed the DOR’s determination that LLC’s challenge was untimely.269 To bring what amounted to an untimely action to contest a tax assessment through a petition to review a refund denial under circumstances, like those presented in this case, would, said the court, “render the statute’s sixty-day limitation on actions brought to contest tax assessments

259. Id. at 811–12; see also Fla. Stat. § 95.091(3)(a).
261. Id. at 517.
262. Id. at 517–18; see also Fla. Stat. § 72.011(1)(a), (2)(a) (2010).
263. Am. Heritage Window Fashions, LLC, 191 So. 3d at 518.
264. Id.
265. Id.
266. Id.
267. Id.
268. Am. Heritage Window Fashions, LLC, 191 So. 3d at 518.
269. Id. at 524.
meaningless.”270 Section 72.011(5) of the Florida Statutes “is the language of a jurisdictional statute of nonclaim.”271 ValleyCrest Landscape Maintenance, Inc. (“ValleyCrest”) sued the DOR for a refund of motor fuel tax paid.272 ValleyCrest, which is in the business of residential and commercial landscaping, uses lawn equipment that runs on diesel fuel and gas, both purchased by ValleyCrest at retail fuel stations.273 ValleyCrest argued that the second gas tax authorized under the Article XII, section 9(c) of the Florida Constitution applies only to motor vehicles, and the tax under section 206.41(1)(a) of the Florida Statutes applies only to vehicles operated on public roads and not “to off-road uses of gasoline.”274 ValleyCrest also argued that not giving it an exemption, and hence a refund of the taxes, amounts to a violation of the Equal Protection Clauses of the Florida and United States Constitutions.275 The trial court ruled in favor of the DOR, and the First District Court of Appeal affirmed.276

Section 206.41(4)(c) of the Florida Statutes exempts from the motor fuel tax on gasoline anyone “‘who uses any motor fuel for agricultural, aquacultural, commercial fishing, or commercial aviation purposes,’” provided that the fuel is not “‘used in any vehicle or equipment driven or operated on public highways of [Florida],’” and provided that a refund is requested.277 ValleyCrest was being taxed on fuel it used operating its off-road equipment.278 The district court of appeal first noted that “there is no use-based exemption for landscaping equipment” as there is for the other enumerated uses.279 The legislature has broad power to create distinctions and classifications in tax statutes.280 These distinctions can be upheld without violating the Equal Protection Clause so long as there are non-arbitrary reasons for so doing.281 As an example, in this case, the district court also noted that the landscaping business did not have the same

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270. Id. at 521.
271. Id. at 522 (citing Markham v. Neptune Hollywood Beach Club, 527 So. 2d 814, 815 (Fla. 1988) (per curiam)); see also Fla. Stat. § 72.011(5) (2010).
273. Id.
274. Id.; see also Fla. Stat. § 206.41(1)(a) (2016).
275. ValleyCrest Landscape Maint., Inc., 213 So. 3d at 994.
276. Id.
278. See ValleyCrest Landscape Maint., Inc., 213 So. 3d at 994.
279. Id. at 994–95.
280. Id. at 995.
281. See id.
economic impact on the state as did the agricultural, commercial fishing, and aviation industries.\textsuperscript{282}

Forest Brooke/Hillsborough, LLC ("LLC") challenged its 2008 ad valorem tax assessment by filing suit in the circuit court in 2009 against Hillsborough County.\textsuperscript{283} LLC paid the "2008 taxes in an amount . . . admitted in good faith was due and owing" pursuant to section 194.171(3) of the Florida Statutes.\textsuperscript{284} LLC did not timely pay the 2009 real estate tax, but it did timely pay real estate taxes assessed after 2009.\textsuperscript{285} The property appraiser successfully moved to have LLC’s 2009 complaint dismissed based on section 194.171(5) of the Florida Statutes because the 2009 tax was not timely paid.\textsuperscript{286} LLC appealed, and the Second District Court of Appeal reversed the trial court’s decision.\textsuperscript{287} The statute requires only that all taxes assessed for years after the year the taxpayer’s action is brought be timely paid, not that taxes for the year in which the taxpayer’s action is brought be timely paid.\textsuperscript{288}

B. Contracts for the Sale of Real Estate, Deeds, and Landlord-Tenant Cases

1. Real Estate Contract: Specific Performance Denied

Real estate developer ("Seller") entered into an agreement with Appellees ("Purchaser") for the sale and purchase of property "adjacent to the Mardi Gras, a Daytona Beach business"\textsuperscript{289} having "a minimum of [fifty] frontage feet on the Boardwalk and [also having] 'sufficient land to build a

\textsuperscript{282} Id. at 995–96.
\textsuperscript{283} Forest Brooke/Hillsborough, LLC v. Henriquez, 194 So. 3d 1091, 1091–92 (Fla. 2d Dist. Ct. App. 2016).
\textsuperscript{284} Id. at 1092; see also Fla. Stat. § 194.171(3) (2009).
\textsuperscript{285} Forest Brooke/Hillsborough, LLC, 194 So. 3d at 1092.
\textsuperscript{286} Id.; see also Fla. Stat. § 194.171(5).
\textsuperscript{287} Forest Brooke/Hillsborough, LLC, 194 So. 3d at 1092.
\textsuperscript{288} Id. at 1093.
\textsuperscript{289} Boardwalk at Daytona Dev., LLC v. Paspalakis, 220 So. 3d 457, 459 (Fla. 5th Dist. Ct. App. 2016), reh’g denied, 212 So. 3d 1063 (Fla. 5th Dist. Ct. App. 2017), review denied, No. SC17-568, 2017 WL 2438408 (Fla. 2017). This was a “public-private economic development project,” but the events here apparently predated the amendment of Article X § 6(a) of Florida’s Constitution in 2007. Fla. Const. art X § 6; Boardwalk at Daytona Dev. LLC, 220 So. 3d at 459 n.1; see also Eileen Zaffiro-Kean, Daytona Boardwalk Property Fight Continues, DAYTONA BEACH NEWS-J. (Nov. 26, 2016, 2:57 PM), http://www.news-journalonline.com/news/20161126/daytona-boardwalk-property-fight-continues. There are no dates set forth in the district court’s opinion with respect to the transactions or the proceedings in the trial court. Boardwalk at Daytona Dev., LLC, 220 So. 3d at 459; Zaffiro-Kean, supra.
7500 square foot, one story building.”290 As it turned out, three parcels of real estate potentially fit this description.291 Seller requested declaratory relief that a parcel of real estate that it tendered to the Purchaser was in conformance with the parties’ agreement, while Purchaser filed a counterclaim seeking an order requiring the transfer to Purchaser by Seller of a different parcel.292 The trial court ordered specific performance as to one of these parcels and Seller appealed.293 The Fifth District Court of Appeal reversed, holding that it was error to order specific performance in this case because “[s]pecific performance is only available to compel the transfer of land that is specifically described in the parties’ agreement alone or where its identity is clear from an agreement that is appropriately supplemented by parol evidence,”294 which was not something that could be satisfied on this record.295 The appellate court reversed the trial court’s order of specific performance and Purchaser filed a motion for rehearing.296 On motion for rehearing, which was denied, the Fifth District Court of Appeal concluded that Purchaser had chosen to pursue one remedy in its litigation, that is, specific performance.297 The Fifth District Court of Appeal said that Purchasers “freely made their choice . . . to not pursue different causes of action or other remedies, such as money damages, reformation, or rescission.”298

2. Arbitration Requirement Contained in Real Estate Contract Not Waived

The contract for sale to Appellees (“Purchasers”) of an outparcel of Timber Pine’s (“Seller”) shopping mall contained a binding arbitration clause, and the amended deed restrictions contained restrictions that gave Seller certain approval rights over construction on the property it sold to

290.  Boardwalk at Daytona Dev., LLC, 220 So. 3d at 459.
291.  Id. at 459.
292.  Id. at 460. There was a claim for damages exceeding $15,000 contained in Purchaser’s amended counterclaim, but the appellate court noted that such damages were not mentioned again in the counterclaim.  Id. at 460 n.2.  Purchaser’s claim for money damages becomes the subject of the appellate court’s comments on denial by the court of Purchaser’s motion for rehearing on the appeal.  Boardwalk at Daytona Dev., LLC v. Paspalakis, 212 So. 3d 1063, 1063–64 (Fla. 5th Dist. Ct. App. 2017).
293.  Boardwalk at Daytona Dev., LLC, 220 So. 3d at 460.
294.  Id. at 459.
295.  Id.
296.  Boardwalk at Daytona Dev., LLC, 220 So. 3d at 1063; Boardwalk at Daytona Dev., LLC, 220 So. 3d at 459.
297.  Boardwalk at Daytona Dev., LLC, 212 So. 3d at 1063–64.
298.  Id. at 1064.
Purchasers consented in writing to these amendments. The injunction was denied, and the Fifth District Court of Appeal affirmed the trial court's denial. Purchasers meanwhile answered the complaint and counterclaimed alleging Seller breached the contract by failing to provide input on the plans for Purchasers' building and failure to provide a cross-parking easement. Seller moved to compel arbitration of Purchasers' counterclaim. The trial judge denied the motion without explanation; the Seller appealed, and the Fifth District Court of Appeal reversed and remanded with instructions.

The right to arbitration can be waived, and such waiver may be deemed to have occurred if the party demanding arbitration has resorted to the courts to enforce its claims otherwise subject to arbitration. However, here, there was no significant relationship between Seller's rights under the amended deed restrictions and the arbitration clause in the antecedent contract. Therefore, Seller's suit against Purchasers did not constitute a waiver of arbitration under the contract with respect to Purchasers' counterclaim alleging breach of contract. “[T]he mere coincidence that the parties in dispute have a contractual relationship will ordinarily not be enough to mandate arbitration of the dispute.”

3. No Merger in Deed

The next case provides a discussion of an exception to the general rule that “preliminary agreements concerning the sale of [real] property merge into the deed executed pursuant to the sale.” Mr. Harkless, in 2008,

300. Id.
301. Id.
302. Id. (citing Timber Pines Plaza, LLC v. Zabrzyski, No. 5D16-95, 2016 WL 7405671, at *1 (Fla. 5th Dist. Ct. App. Dec. 20, 2016) (per curiam) (unpublished table decision)).
303. Id.
304. Id.
305. Id. at 1150–51.
306. See id.
307. Id. at 1151.
308. Id.
309. Timber Pines Plaza, LLC, 211 So. 3d at 1150 (alteration in original) (quoting Seifert v. U.S. Home Corp., 750 So. 2d 633, 638 (Fla. 1999)).
leased part of his real estate to Verizon Wireless and granted it an easement for the construction of a cell tower, but the construction did not begin until May 2012.\footnote{311} In the interim, the property on which the tower was to be located, and with respect to which the easement was granted, was transferred twice.\footnote{312} The first transfer occurred in April 2011 when Mr. Harkless sold to Mr. and Mrs. Lolly ten acres of his property—including the land leased to Verizon Wireless and subject to the easement.\footnote{313} There was an addendum (“the Addendum”) to the Harkless-Lolly contract that stated, in part, that Mr. Harkless would continue to own the “easement and Verizon cell tower lease.”\footnote{314} No mention was made in the warranty deed to the Lollys from Mr. Harkless of any right on the part of Mr. Harkless to receive lease payments from Verizon.\footnote{315} The Lollys, just three months after the transfer to them, sold the real estate to Mr. and Mrs. Laubhan.\footnote{316} The language in the contract, between the Lollys and the Laubhans, differed from the language in the Addendum to the Harkless-Lolly contract.\footnote{317} The Lolly-Laubhan contract stated, in part, that “[b]uyer is aware of Verizon tower lease and has received a copy of the survey and lease.”\footnote{318} By warranty deed in July 2011, the Lollys transferred the property to the Laubhans—the deed making no mention of any right of Mr. Harkless to receive lease payments from Verizon.\footnote{319} But that was not all that happened in the interim, as Mr. Harkless, sometime prior to May 2012, gave a third party, Communications Capital Group, LLC, an “option to purchase his interest in the Lease for $175,000.”\footnote{320} Communications Capital Group, LLC then sought signed and notarized confirmation from the Laubhans that they acknowledged Mr. Harkless’ rights to continue to receive rent from Verizon Wireless pursuant to the lease.\footnote{321} Because the requested response was not forthcoming and the response instead was that “they owned the Parcel free and clear of Mr. Harkless’ right to receive rent,” the option was not exercised.\footnote{322} At this point, Mr. Harkless sought declaratory relief regarding his right to the rent,
plus reformation of both deeds reflecting his rights under the Verizon Wireless lease.\(^\text{323}\)

The Laubhans filed a motion for summary judgment, relying on the deeds and another agreement mentioned in both deeds, and argued that there was no ambiguity that would permit the consideration of parol evidence.\(^\text{324}\) They also claimed that they were not aware, prior to the litigation, that there was a Harkless-Lolly agreement that Mr. Harkless retained his right to the rent.\(^\text{325}\) The trial court granted summary judgment in favor of the Laubhans, and Mr. Harkless appealed.\(^\text{326}\) The appellate court decided that because the Lollys and Mr. Harkless, being all the parties to the agreement that reserved the rent to Mr. Harkless, agreed that the Addendum language “was intended to reserve Mr. Harkless’s right to” the lease payments, that the right did not merge into the deed to the Lollys “as a matter of law.”\(^\text{327}\) Mr. Harkless effectively reserved his right to receive rent, that is, his contract with the Lollys and the reservation of the right to the rent did not merge into the deed.\(^\text{328}\) The district court concluded that summary judgment should not have been granted because the question remaining on remand as to whether the Laubhans were bona fide purchasers for value, created a “genuine issue of material fact.”\(^\text{329}\) At this point, the Second District Court of Appeal addressed the issue of whether the Laubhans could be bona fide purchasers under Florida’s recording statute, section 695.01(1) of the Florida Statutes.\(^\text{330}\) The court, after noting that the parties had not identified any cases addressing whether the recording statute applies to the right to receive rent and the court had found none, held that the plain language of the statute provides that “[n]o conveyance . . . of real property, or of any interest therein” shall be valid against bona fide purchasers unless properly recorded.\(^\text{331}\) The Second District Court of Appeal concluded that the right to receive rent is covered

\begin{footnotes}
\item[323]\textit{Id.}
\item[324]\textit{Harkless}, 219 So. 3d at 903–04. The other agreement that was referred to in both deeds was “the Amended Memorandum of Lease Agreement” which the district court described as “essentially an abridged version of the Lease” that did not mention any right retained by Mr. Harkless to receive payments under the Verizon Wireless lease. \textit{Id.} at 903. The district court declined to accept any line of decision out of other district courts, citing cases from the Third District and the Fourth District, that the words subject to in a deed could result in the deed being rendered generally ambiguous. \textit{Id.} at 906.
\item[325]\textit{Id.} at 903.
\item[326]\textit{Id.} at 902, 904.
\item[327]\textit{Harkless}, 219 So. 3d at 905.
\item[328]\textit{Id.} at 909.
\item[329]\textit{Id.} at 902, 909.
\item[330]\textit{Id.} at 908–09; see also Fla. Stat. § 695.01(1) (2011).
\item[331]Fla. Stat. § 695.01(1); \textit{Harkless}, 219 So. 3d at 908.
\end{footnotes}
by the statute and remanded for a determination of the Laubhans status as bona fide purchasers.\textsuperscript{332}

4. Denial of Temporary Injunction in Suit Based on Deed Restrictions

Planned Parenthood of Greater Orlando, Inc. ("Planned Parenthood") bought real property subject to deed restrictions.\textsuperscript{333} MMB Properties ("MMB"), a general partnership that runs a cardiology practice in the same medical complex, is subject to the same deed restrictions.\textsuperscript{334} Planned Parenthood intended to offer abortion services at the facility, and MMB—claiming that performance of such services violated the deed restriction—sought and obtained from the circuit court a temporary injunction that enjoined Planned Parenthood from performing abortions at the facility.\textsuperscript{335} On appeal, the Fifth District Court of Appeal upheld the temporary injunction, finding that the trial court’s decision was supported by substantial and competent evidence.\textsuperscript{336} The district court also found that in order to have the temporary injunction dissolved, as had been sought by Planned Parenthood, it “needed to establish changed circumstances which it did not do.”\textsuperscript{337} The Supreme Court of Florida quashed the Fifth District Court of Appeal’s affirmance of the temporary injunction and remanded the case to the trial court for a hearing on a permanent injunction.\textsuperscript{338} The Court claimed conflict jurisdiction involving the standard for modifying or dissolving a temporary injunction; the Court noting that the First, Second, Third, and Fifth Districts all require changed circumstances, while the Fourth District does not.\textsuperscript{339} The Court adopted the position of the Fourth District, noting that the purpose of a temporary injunction is to preserve the status quo pending final injunctive proceedings.\textsuperscript{340} The principle has developed that a party seeking to modify or dissolve a temporary injunction must show \textit{changed conditions} or \textit{changed circumstances} to justify modification or dissolution of the injunction.\textsuperscript{341} However, there is no such requirement in Rule 1.610(d) of the Florida Rules of Civil Procedure.\textsuperscript{342} The Court

\textsuperscript{332} Harkless, 219 So. 3d at 908–09.
\textsuperscript{333} Planned Parenthood of Greater Orlando, Inc. v. MMB Props., 211 So. 3d 918, 920 (Fla. 2017).
\textsuperscript{334} See id.
\textsuperscript{335} Id. at 920–22.
\textsuperscript{336} Id. at 923–24.
\textsuperscript{337} Id. at 923.
\textsuperscript{338} Planned Parenthood of Greater Orlando, Inc., 211 So. 3d at 929.
\textsuperscript{339} Id. at 924–25.
\textsuperscript{340} Id. at 924–26.
\textsuperscript{341} Id. at 924.
\textsuperscript{342} Id.; see also Fla. R. Civ. P. 1.610(d).
concluded that it was within the trial court’s discretion “to reconsider, on a motion to dissolve, a temporary injunction entered after notice and a hearing, . . . regardless of whether the arguments or evidence could have been brought to the attention of the court at the hearing on the injunction.” In other words, the changed circumstances rule in this context is no more. The Court went beyond the conflict jurisdiction issue and found that the trial court’s decision, granting the temporary injunction and declining to dissolve it, was not supported by competent substantial evidence—particularly with respect to the likelihood of MMB succeeding on the merits.

5. Self-Help Provision in Lease Invalid

The lease between (“Landlord”) and (“Tenant”) gave Landlord certain self-help authority if an Event of Default occurred, including the authority “after the continued Tenant default after the expiration of the time to cure” and “without further written notice to Tenant . . . enter upon and take possession of the Leased Premises and expel or remove Tenant and any other occupant therefrom with or without having terminated the lease.”

The agreement further provided that “[l]andlord shall not be deemed to have violated any right of Tenant and shall not be deemed to be guilty of trespass, conversion or any other criminal or civil action as a result of such action.”

The day came when Landlord found it necessary to lock Tenant out of much of the leased premises and obtain police help in escorting Tenant’s employees off the premises.

343. Planned Parenthood of Greater Orlando, Inc., 211 So. 3d at 925.
344. Id. at 926.
345. See id. at 928. Justice Canady, joined by Justice Polston, dissented. Id. at 929 (Canady, J., dissenting).
347. Id. The appellate court did not discuss the introductory provision of the language quoted in the text above. See id. The provision began as follows: “[I]f and whenever any Event of Default by Tenant shall occur, Landlord may after the continued Tenant default after the expiration of the time to cure . . . at its option and without further written notice to Tenant.” Id. Presumably, the language was deemed not crucial to the court’s conclusion. See id.
348. Palm Beach Fla. Hotel & Office Bldg. Ltd. P’ship, 211 So. 3d at 44. The leased premises included a restaurant and office space. Id. The restaurant was closed by the City of Palm Beach Gardens based on Tenant not obtaining the right permits. Id. The city posted “red tags on the doors, which indicated the restaurant was unsafe for occupancy.” Id. “The same day, Landlord [installed] chains and locks on the . . . kitchen [doors], the restaurant,” and the office doors. Id. Several days later, the lease was terminated by Landlord, and the Landlord “had the police escort Tenant’s employees from the restaurant.” Palm Beach Fla. Hotel & Office Bldg. Ltd. P’ship, 211 So. 3d at 44. It is not clear from the
Each party filed claims against the other. Landlord alleged that Tenant breached the terms of the lease, and Tenant alleged conversion in addition to wrongful eviction. A directed verdict on the claim of wrongful eviction was entered by the court against Landlord on Tenant’s motion, and the jury awarded $8.8 million in damages against Landlord plus found liability as to the conversion claim and awarded $2 million to Tenant. The jury also ruled against Landlord on its breach of contract claim. On appeal, Landlord challenged the propriety of the directed verdict against it. The Fourth District Court of Appeal upheld the directed verdict under the authority of section 83.05(2) of the Florida Statutes, which sets out the only methods by which a landlord may repossess, leased premises from a defaulting tenant. The methods are by an action based on section 83.20 or other civil action that determines the right to possession, or where the tenant has surrendered or abandoned the rented space. Landlord did not employ any of the approved eviction methods, and the self-help provisions in the lease agreement availed the Landlord nothing. Tenant also challenged the trial judge’s decision not to award pre-judgment interest on the eviction damages award. The Fourth District held that since Tenant received an award purely of a fixed amount of money damages, the trial court had no discretion in the matter and should have awarded pre-judgment interest “from the date of the loss or the accrual of [the] cause of action.” Tenant, however, did not fare as well on the issue of the $2 million in damages awarded on its conversion claim. Conversion requires the exercise of control over and acts that are not consistent with “another’s possessory rights in personal property.” There was lack of proof to support the award.

opinion how Tenant’s employees were still in the restaurant, which was padlocked several days earlier, but there were other leased areas including an atrium, a ballroom, and two meeting rooms, which may be where the employees were. See id. 349. Id. 350. Id. 351. Id. 352. Palm Beach Fla. Hotel & Office Bldg. Ltd. P’ship, 211 So. 3d at 44. 353. See id. 354. Id. at 44–45; see also Fla. Stat. § 83.05(2) (2006). 355. Palm Beach Fla. Hotel & Office Bldg. Ltd. P’ship, 211 So. 3d at 44–45; see also Fla. Stat. § 83.05(2), 83.20 (2006). 356. See Palm Beach Fla. Hotel & Office Bldg. Ltd. P’ship, 211 So. 3d at 45. 357. Id. at 46. 358. See id. (quoting Bosem v. Musa Holdings, Inc., 46 So. 3d 42, 46 (Fla. 2010) (per curiam)). 359. See id. at 45–47. 360. Id. at 45 (quoting Joseph v. Chanin, 940 So. 2d 483, 486 (Fla. 4th Dist. Ct. App. 2006)). 361. Palm Beach Fla. Hotel & Office Bldg. Ltd. P’ship, 211 So. 3d at 46.
Furthermore, the court held that “an action in tort is inappropriate where the basis of the suit is a contract, either express or implied.” The directed verdict, as to the eviction damages, was affirmed, the conversion damages award was reversed, and the denial of pre-judgment interest on eviction award was reversed and remanded.

Landlord raised an interesting argument in support of its position that the directed verdict on the wrongful eviction claim was improper. The argument was that this was not a total eviction, but rather just a partial eviction, since Tenant was not locked out of all of the leased premises. The court responded that “[a]lthough the issue of whether a tenant can be partially evicted appears to be an issue of first impression in Florida, we need not address it here.” The court then stated that it found “no evidence to support Landlord’s contention that it intended to allow Tenant to use that part of the leasehold . . . or that Tenant could still maintain its other business operations without the restaurant.”

C. Torts

1. Construction Defects: Applicable Statute of Limitation

Almost ten years after the closing on property upon which Lennar Homes (“Builder”) constructed a home for the homeowner (“Purchaser”), Builder was served by Purchaser with the required notice pursuant to Section 558 of the Florida Statutes. Purchaser subsequently filed suit against Builder alleging home construction defects. When the suit was filed, more than ten years had elapsed since the date of the closing, and Builder defended citing section 95.11(3)(c) of the Florida Statutes, the ten-year statute of repose applicable to construction defect claims. Section 95.11(3)(c) provides, in part, that

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362. Id. (quoting Belford Trucking Co. v. Zagar, 243 So. 2d 646, 648 (Fla. 4th Dist. Ct. App. 1970)).
363. Id. at 47.
364. Id. at 45.
365. Id.
366. Palm Beach Fla. Hotel & Office Bldg. Ltd. P’ship, 211 So. 3d at 45.
367. Id.
368. Busch v. Lennar Homes, LLC, 219 So. 3d 93, 94 (Fla. 5th Dist. Ct. App. 2017); see also Fla. Stat. § 558.004 (2016). Section 558.004(1) of the Florida Statutes requires that in cases of construction defect claims not involving personal injury, a claimant, “at least [sixty] days before filing” suit, is required to serve a “written notice of claim on the contractor.” Fla. Stat. § 558.004(1).
369. Busch, 219 So. 3d at 94–95.
370. Id. at 94; see also Fla. Stat. § 95.11(3)(c) (2016).
“[i]n any event, the action must be commenced within [ten] years after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, . . . the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest.”371

Builder claimed that the contract was complete as of the closing so the ten-year period started to run at closing of the sale which would mean that the period had expired.372 The complaint was dismissed, and Purchaser appealed.373 The Fifth District Court of Appeal reviewed the contract attached to the complaint that contained language indicating that it was possible for the contract not to be completed until after closing, and the court ruled that “[b]ecause the contract expressly contemplated that closing could occur even if work required by the contract remained incomplete, and the complaint did not allege that no work was completed after closing, the allegations of the complaint do not conclusively establish that the contract was completed upon closing.”374 In other words, the District Court concluded that the complaint failed to conclusively establish that the ten-year period started to run at closing.375 Therefore, the complaint should not have been dismissed, and the appellate court reversed and remanded.376

On a related note, in Altman Contractors, Inc. v. Crum & Forster Specialty Insurance Co.,377 the United States Court of Appeal for the Eleventh Circuit certified the following question of first impression to the Supreme Court of Florida: “Is the notice and repair process set forth in Chapter 558 of the Florida Statutes a suit within the meaning of the [commercial general liability] policies issued by [insurance company] to [contractor]?378

While it is impossible to predict how the Supreme Court of Florida will decide Altman Contractors, Inc., or whether that decision dealing with insurer’s duty to defend will have an impact on construction defect claims subject to section 95.11(3)(c), or the tolling statute under section 558.004(10) of the Florida Statutes, remains to be seen.379 The latter section provides that

371. FLA. STAT. § 95.11(3)(c).
372. Busch, 219 So. 3d at 95.
373. Id.
374. Id. at 95–96 (emphasis added).
375. See id. at 94.
376. Id. at 94, 96.
377. 832 F.3d 1318 (11th Cir. 2016).
378. Id. at 1326.
379. See id.; FLA. STAT. § 95.11(3)(c) (2016); FLA. STAT. § 558.004(10) (2016).
service by a claimant of written notice of claim under section 558.004(1) “tolls the applicable statute of limitations.” It should be noted that there is no express reference in section 558.004(10) to the statute of repose contained in section 558.004(1).

2. Slip and Fall: Invitee, Uninvited Licensee, or Trespasser

While walking home at about 11:00 P.M., after an evening out, Mrs. Arp (“Mrs. Arp”) took a cut through shortcut “over a pathway of paver stones located in the area of a utility easement on property owned by W.E. Association and operated as a shopping center.” Plaintiff stepped on a cracked stone, turned her ankle, and fell. “The [shortcut] did not have a No Trespassing sign,” and Plaintiff’s testimony was to the effect that she witnessed other people taking the shortcut regularly. She did not go into any of the shopping center stores that evening, and was using the shortcut “because she ‘just wanted to get home.’” She sued Waterway East Association, Inc. (“Waterway”), among others, alleging negligence. The trial court granted Waterway’s motion for summary judgment, and the Fourth District Court of Appeal affirmed.

The appellate court first noted that under common law, there are three categories of persons who enter onto private property, specifically, “an invitee, a licensee, or a trespasser.” After defining the invitee as “a visitor on the premises by invitation, either express or reasonably implied, of the owner,” the district court defined “[a]n uninvited licensee [as] a person who chooses ‘to come upon the premises solely for [his or her] own convenience without invitation either expressed or reasonably implied under the circumstances.’” The district court defined a trespasser as one “who enters the premises of another without license, invitation, or other right, and intrudes for some definite purpose of his own, or at his convenience, or merely as an idler with no apparent purpose, other

380. FLA. STAT. § 558.004(1), (10).
381. See id.
383. Id.
384. Id.
385. Id.
386. Id.
387. Id.
388. Id. at 119, 122.
389. Id. at 120.
390. Id. at 120–21 (alteration in original); see also Wood v. Camp, 284 So. 2d 691, 695 (Fla. 1973) (explaining the difference between licensees by invitation and uninvited licensee).
than perhaps to satisfy his curiosity.” To the trespasser and uninvited licensee, the court concluded, “[t]he only duty a [property owner] owes . . . is to avoid willful or wanton harm to him and, upon discovery of his presence, to warn him of any known dangers which would not be open to his ordinary observation.” The facts did not show that Waterway breached its duty to Mrs. Arp, who “was, at best, an uninvited licensee.”

3. Slip and Fall: No Notice

Ms. Wilson-Greene (“Plaintiff”) brought a negligence action related to a fall that occurred in a City of Miami owned building. The maintenance contract for the building was between the City of Miami and Vista Maintenance Services, Inc. Plaintiff testified that she had business on the second floor, which Plaintiff said took more than fifteen minutes, and that she used the elevator from the second floor to return to the lobby. Her testimony was to the effect that when she stepped off the elevator, she slipped on a green substance, fell, hit her head, lost consciousness, and when she became conscious again, she had a green substance on her body that was not hot. Plaintiff testified that “[s]he did not see any substance on the floor before she entered the elevator” in the same group of elevators to go up to the second floor. Plaintiff lost on a motion for summary judgment and she appealed. The Third District Court of Appeal affirmed, holding that the language of the contract between the defendants, the City of Miami and Vista Maintenance Services, Inc., “did not create a contractual duty on Vista [Maintenance Services, Inc. to] constantly . . . patrol the building” for dangerous conditions. Neither the City of Miami nor Vista Maintenance Services, Inc. had actual notice of the dangerous condition, and a permissible inference of constructive notice was not supported by the facts. The

390. Arp, 217 So. 3d at 121 (quoting Post v. Lunney, 261 So. 2d 146, 147 (Fla. 1972)).
391. Id. at 120 (quoting Nolan v. Roberts, 383 So. 2d 945, 946 (Fla. 4th Dist. Ct. App. 1980)).
392. Id. at 121–22.
394. Id.
395. Id.
396. Id.
397. Id.
398. Wilson-Greene, 208 So. 3d at 1273.
399. Id. at 1274.
400. Id. at 1275.
district court distinguished melting substances from hot substances, which “requires a jury to impermissibly stack inferences,”\textsuperscript{401} stating:

We conclude that where melting substances are involved, there is no need to infer the substance was previously frozen. Logic tells us that is a given. In the instant case, the jury first would need to infer that the substance was hot prior to spilling on the floor and infer from this that it was on the floor for a sufficient amount of time for it to have cooled.\textsuperscript{402}

The district court held that “[t]he mere presence of soup which is ‘not hot’ on the floor is not enough to establish constructive notice.”\textsuperscript{403} Nor was there actual notice.\textsuperscript{404} The court noted that the contract did not have the type of language that would have required a \textit{heightened duty of care} on the part of Vista Management Services, Inc.\textsuperscript{405}

D. \textit{UCC and Other Debtor-Creditor Disputes}

1. Perfected Security Interest

In \textit{Beach Community Bank v. Disposal Services, LLC},\textsuperscript{406} Beach Community Bank (“Creditor”) held a perfected security interest under the Uniform Commercial Code in certain containers that secured a debt owed to Creditor by Solid Waste Haulers (“Debtor”).\textsuperscript{407} Debtor sold the containers to Disposal Services, LLC (“Transferee”), but Debtor did not apply the sales proceeds to its debt to Creditor.\textsuperscript{408} Debtor eventually defaulted on payments to Creditor, and Creditor then made written demand of Transferee that it pay Debtor’s debt in full or turn over the containers to Creditor.\textsuperscript{409} Transferee did neither, and Creditor sued Transferee alleging conversion of the containers.\textsuperscript{410} On motion by Transferee, the trial court entered an order granting summary judgment in favor of Transferee, opining that Creditor could not sue for conversion because the remedy of replevin was still available to it.\textsuperscript{411} Creditor appealed and the First District Court of Appeal

\begin{thebibliography}{9}
\bibitem{401} \textit{Id.} at 1276.
\bibitem{402} \textit{Id.}
\bibitem{403} \textit{Wilson-Greene}, 208 So. 3d at 1275.
\bibitem{404} \textit{Id.}
\bibitem{405} \textit{Id.} at 1274.
\bibitem{406} 199 So. 3d 1132 (Fla. 1st Dist. Ct. App. 2016).
\bibitem{407} \textit{Id.} at 1133.
\bibitem{408} \textit{Id.}
\bibitem{409} \textit{Id.}
\bibitem{410} \textit{Id.} at 1133–34.
\bibitem{411} \textit{Beach Cnty. Bank}, 199 So. 3d at 1134.
\end{thebibliography}
reversed. Creditor had alleged in its complaint all of the elements necessary to sustain a cause of action for conversion. “When an unauthorized disposition of collateral occurs, a secured party has numerous cumulative remedies at its disposal; it is not forced to elect a single remedy.”

2. Assignment of Accounts Receivable

The Florida Department of Transportation (“DOT”) contracted with Arbor One, Inc. (“Assignor”) for certain work to be done. Assignor sold to United Capital Funding Corp. (“Assignee”) Assignor’s accounts receivable from the DOT. Assignee, pursuant to section 679.4061 of the Florida Statutes, notified the DOT in writing, of the assignment and the amount of the receivables and advised the DOT to make contract payments due to Assignee—not to Assignor. The DOT continued to pay Assignor. Assignee sued the DOT and obtained a summary judgment declaring the DOT to be legally obligated to Assignee for payment of the Arbor One accounts receivable. The Second District Court of Appeal affirmed, concluding that the DOT was an account debtor like any other subject to the above cited statute. The court also determined that the DOT did not come within the so-called transfer exception of sections 679.1091 to 679.4061(1). Finally, the Second District ruled that the DOT’s claim of sovereign immunity was barred by section 337.19(1) of the Florida Statutes.

3. Homestead Sales Proceeds

*JBK Associates, Inc. v. Sill Bros., Inc.* involved a judgment creditor’s claim to the proceeds of the sale of the judgment debtor’s

412. *Id.* at 1135.
413. *Id.*
414. *Id.*
416. *Id.*
417. *Id.* at 128–29; *see also Fla. Stat.* § 679.4061 (2012).
418. *United Capital Funding Corp.*, 219 So. 3d at 129.
419. *Id.*
420. *Id.* at 130, 136.
421. *Id.* at 133, 136; *see also Fla. Stat.* § 679.1091, 4061(1).
422. *United Capital Funding Corp.*, 219 So. 3d at 136; *see also Fla. Stat.* § 337.19(1) (2012).
423. 191 So. 3d 879 (Fla. 2016).
homestead.\textsuperscript{424} Creditor obtained a judgment against debtor in 2010.\textsuperscript{425} In 2013, due to Debtor’s divorce, the marital homestead was sold and Debtor’s portion of the proceeds was deposited in a \textit{Florida} Homestead Account ("Account") at Wells Fargo Advisors, LLC ("Garnishee").\textsuperscript{426} The account was subdivided into a cash portion and two securities portions.\textsuperscript{427} The account was kept separate from Debtor’s other assets.\textsuperscript{428} In 2014, Creditor served writs of garnishment on Garnishee in an effort to apply the assets of the account toward satisfaction of its judgment.\textsuperscript{429} In the trial court, Debtor successfully moved to have the writs dissolved.\textsuperscript{430} The trial court’s order was affirmed by the Fourth District Court of Appeal on the strength of the Supreme Court of Florida’s decision\textsuperscript{431} in \textit{Orange Brevard Plumbing & Heating Co. v. La Croix}.\textsuperscript{432} The Fourth District’s decision was affirmed by the Supreme Court of Florida.\textsuperscript{433} The Supreme Court reiterated the basic principle that proceeds from the sale of one’s Florida homestead continues to enjoy protection from the claims of most creditors and provided:

(1) [T]here must be a good faith intention, prior to and at the time of the sale, to reinvest the proceeds in another homestead within a reasonable time; (2) [t]he funds must not be commingled with other monies; (3) [t]he proceeds must be kept separate and apart and held for the sole purpose of acquiring another home.\textsuperscript{434}

The Court found that Debtor had kept faith with the requirements of \textit{Orange Brevard Plumbing and Heating}.\textsuperscript{435}

\textsuperscript{424} Id. at 880.
\textsuperscript{425} Id.
\textsuperscript{426} Id.
\textsuperscript{427} Id.
\textsuperscript{428} \textit{J BK Assocs., Inc.}, 191 So. 3d at 880.
\textsuperscript{429} Id.
\textsuperscript{430} Id.
\textsuperscript{431} Id.
\textsuperscript{432} 137 So. 2d 201 (Fla 1962).
\textsuperscript{433} \textit{J BK Assocs., Inc.}, 191 So. 3d at 882.
\textsuperscript{434} Id. at 881.
\textsuperscript{435} Id.
GOING UNDER THE HOOD: THE WINNERS AND LOSERS OF FLORIDA’S TRANSPORTATION NETWORK COMPANIES LAW

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I. INTRODUCTION

Florida House Bill 221 was signed into law on May 9, 2017.1 With the enactment of the Bill, Florida joins forty-six other states, and the District

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of Columbia, in enacting statewide legislation to legalize and regulate transportation network companies ("TNC"), such as Uber and Lyft. The law will provide these companies with a uniform set of operating standards throughout the state. The new law contains provisions addressing key policy arguments, which include the classification of TNC drivers, insurance requirements, background check requirements, administrative and reporting requirements, and the regulatory authority under the new regulatory scheme. The law, which preempts all local regulations enacted before the law’s effective date and puts TNCs exclusively under state regulation going forward, carves out a small, but significant, exception allowing the operating authorities of airports and seaports to retain control over setting pickup fees and logistics within such locations.

This Comment will provide an overview of Florida’s TNC law and the current landscape of TNC regulations in Florida’s airports. Part II will provide background on the local regulatory landscape before the arrival of the state’s law and will give a brief background on statewide laws in the United States. Part III will provide a brief overview on key policy issues in Florida law. Part IV will analyze the operation and the impact of TNCs at airports. Part V will discuss potential gaps in Florida’s law. Lastly, Part VI will present a conclusion.

4. See id. § 1(7)–(11).
5. See id. § 1(15)(a)–(b).
6. See infra Parts II–VI.
7. See infra Part II.
8. See infra Part III.
9. See infra Part IV.
10. See infra Part V.
11. See infra Part VI.
II. The Arrival of Florida’s TNC Law

A. Background: The Road to State Law

The regulation of TNCs has been a hotly contested subject, not only in Florida, but also throughout the United States and the world.\textsuperscript{12} The arrival of TNCs in Florida created a political storm for local politicians and regulators.\textsuperscript{13} Uber, the largest of the TNCs, and its close rival, Lyft, arrived first in Miami, Florida around 2014.\textsuperscript{14} When they arrived, there were no transportation or for-hire regulations that fit the operating model of TNCs.\textsuperscript{15} For-hire regulations, those applicable to taxicabs, appeared to be the closest fit, and thus were applied.\textsuperscript{16} However, TNCs did not conform to these regulations and continued to operate illegally.\textsuperscript{17} In willfully choosing to not abide by for-hire regulations, the TNCs gained a competitive advantage over

\textsuperscript{12} See GOODIN & MORAN, supra note 2, at 1; Brian O’Keefe & Marty Jones, Uber’s Tax Shell Game, FORTUNE, Nov. 1, 2015, at 115, 117.


\textsuperscript{14} Douglas Hanks, Miami-Dade Chairman Backs Off in Uber Fight, But Sticking Points Remain, MIAMI HERALD (Jan. 15, 2016, 5:46 PM), http://www.miamiherald.com/news/local/community/miami-dade/article54953260.html; Brian Solomon, Lyft Rides Tripled Last Year, but Remains Far Behind Uber, FORBES: TECH (Jan. 5, 2017, 3:05 PM), http://www.forbes.com/sites/briansolomon/2017/01/05/lyft-rides-tripled-last-year-but-remains-far-behind-uber/. Because both Lyft and Uber are privately held companies, there is limited information on their financials and operations:

Lyft remains a distant second place to Uber. In the month of December, Uber completed 78 million rides in the U.S. compared with Lyft’s 18.7 million. That means Uber is more than four times bigger than Lyft in each company’s home market. Abroad, Uber has tens of millions of more rides. FORBES estimates Uber completed more rides globally in the first two months of 2016 than Lyft did all year.


\textsuperscript{15} See GOODIN & MORAN, supra note 2, at 1; Patricia Mazzei, Miami-Dade Looks to Other Cities in Struggle to Deal with Lyft, Uber, MIAMI HERALD (June 21, 2014, 6:16 PM), http://www.miamiherald.com/news/local/community/miami-dade/article1967467.html. Lyft’s director of government relations stated that local regulations did not address the business model of TNCs. Mazzei, supra.

\textsuperscript{16} See Mazzei, supra note 15. “Miami-Dade has treated the companies as unlicensed taxi services — and [it is] hardly the only government to do so.” Id.

the local for-hire transportation industry, in part, through the cost-savings derived from their non-compliance with regulatory costs. The management-led rebellion against the application of local regulations to TNC drivers, promoted by the payment of fines for drivers, appeared to be the predetermined and highly criticized strategy behind the entry to all new markets. Pushing local regulations aside, TNCs aimed to hook their users with low fares and better service. Once hooked, TNCs would supplement their regulatory crusade by mobilizing their loyal user to demand regulatory change from lawmakers. Grassroots lobbying was effective and led to the creation of local TNC regulations; these regulations allowed TNCs to operate legally, if they met the requirements.

The enactment of local ordinances was not widespread and some Florida counties refused to provide TNCs a pathway to operate legally. Even within the municipalities that enacted local TNC regulations, the regulations varied significantly; in 2016, state legislators sought to put an end to the chaos by suggesting the first proposals for the statewide regulation of TNCs. However, the Senate struck it down after the bill passed the House. Undeterred, and with a new pro-TNC Senate President, the Florida Legislature was able to pass House Bill 221 and bring the TNC regulatory landscape to its current form. The Bill was signed into law on May 9, 2017.

21. See id.
22. Order Granting Defendant’s Motion to Dismiss at 9, Miadeco Corp. v. Miami-Dade Cty., No. 16-21976-CIV (S.D. Fla. Apr. 10, 2017). “In response to lobbying and changes in the for-hire transportation market, the County exercised its legislative prerogative to create a separate system of regulations for TNEs.” Id.
25. Id.
B. Florida Joins the Ninety Percent

In 2013, the California Public Utilities Commission used its authority to legalize TNCs statewide “and define[d] the term transportation network company,” now commonly used to define ride-sharing companies such as Uber and Lyft. Soon after, in 2014, Colorado became the first state to enact state-level legislation authorizing and regulating TNCs. Statewide TNC legislation grew from thirty-three in May 2016 to forty-three in March 2017. As of October 2017, forty-eight states, and the District of Columbia, have enacted some level of TNC legislation. The lonely hold-out states are Oregon and Vermont. No two TNC state laws are the same; some laws have similar or equivalent provisions while others differ, but the key policies in all legislative efforts involve the level of regulation, power of local authorities, the taxicab industry, and public safety. State lawmakers faced a challenging task in writing a comprehensive law that did not overly interfere with a free-market economy.

Florida’s TNC law established a uniform set of regulations for TNCs across the state. The key policies addressed in the law include the classification of TNC drivers as independent contractors and minimum insurance requirements. Notably, the law does not require TNCs or TNC drivers to obtain an initial or annual permit fee before beginning to operate; lawmakers only mandated a bi-annual submission of a compliance report prepared by an independent auditor. In addition, the law expressly preempts all existing and future local law, with the exception of airports and seaports, which have the authority to set reasonable pickup fees.


28. GOODIN & MORAN, supra note 2, at 4.
29. Id. at 9.
30. See id. at 1, 5.
32. See id.
33. See GOODIN & MORAN, supra note 2, at 6–8.
34. See Editorial, supra note 13.
36. Id. § 1(9)(c)–(d); GOODIN & MORAN, supra note 2, at 9.
38. Id. § 1(15)(a)–(b).
III. FLORIDA’S TNC LAW

A. TNC Drivers as Independent Contractors

Uber has vehemently stressed that it is a technology company, not a transportation provider, and Florida lawmakers agree. The ramifications, both legal and financial, between the classification of independent contractor and employee for the TNCs are tremendous. Under Florida’s TNC law, TNC drivers are classified as independent contractors, if the following four conditions are satisfied:

(a) The TNC does not unilaterally prescribe specific hours during which the TNC driver must be logged on to the TNC’s digital network.
(b) The TNC does not prohibit the TNC driver from using digital networks from other TNCs.
(c) The TNC does not restrict the TNC driver from engaging in any other occupation or business.
(d) The TNC and TNC driver agree in writing that the TNC driver is an independent contractor with respect to the TNC.

Two parts of the test, sub-subsections (a) and (c), share TNC’s marketing efforts towards drivers: the liberty to decide when to drive and to do so as a supplemental income. Furthermore, providing a source of supplemental income for constituents was one of the purposes behind enacting the law, enabling TNCs to operate under a set of uniform regulations. Moreover, the liberty of TNC drivers to schedule their driving

43. See Florida House, Senate Pass Rideshare Legislation with Overwhelming Support, supra note 42; Hogan, supra note 39.
times, as required by the statute, is in line with Florida case law previous to the passing of law. 44

Sub-section (b) of the test touches the highly competitive nature of TNCs. 45 TNC rivals, Uber and Lyft, have always looked to gain a competitive advantage over the other, though the rivalry reached new heights when it was alleged that the TNCs participated in potentially illicit recruitment practices. 46 It is unknown whether these practices, or similar ones, remain in effect or, if they are, whether courts would find them to be in violation of the statute. 47

The last sub-subsection, (d), was expressly addressed in McGillis v. Department of Economic Opportunity, 48 where the court affirmed the decision of Florida’s Department of Economic Opportunity that a former Uber driver was not an employee for purposes of reemployment assistance “[b]ecause the parties’ contract explicitly provides that an Uber driver is not an employee and the nature of the parties’ relationship was consistent with this classification.” 49 Similar agreements between Uber and its drivers have been upheld by courts to compel arbitration. 50 As of now, no court has ruled TNC drivers as employees, though the issue is being litigated in federal courts. 51 It appears TNC drivers will be categorized as independent contractors under Florida’s TNC law, although any change in case law or

44. See Act effective July 1, 2017, ch. 2017-12, § 1(9)(a), 2017 Fla. Laws 7; McGillis v. Dep’t of Econ. Opportunity, 210 So. 3d 220, 222 (Fla. 3d Dist. Ct. App. 2017); Hogan, supra note 39.
46. See Kossoff, supra note 45.
47. See Act effective July 1, 2017, ch. 2017-12, § 1(9)(a)–(d), 2017 Fla. Laws 7–8; McGillis, 210 So. 3d at 222. It is unknown whether a Florida court, which held that an Uber driver was not an employee, before the enactment of Florida’s TNC statute, considered the sabotage allegations against Uber and Lyft. McGillis, 210 So. 3d at 222. “Drivers are free to switch between using Uber’s driver application and the application of a competitor, such as Lyft.” Id.; Kossoff, supra note 45; Casey Newton, This Is Uber’s Playbook for Sabotaging Lyft, VERGE (Aug. 26, 2014, 3:42 PM), http://www.theverge.com/2014/8/26/6067663/this-is-ubers-playbook-for-sabotaging-lyft (detailing Uber’s Operation SLOG).
49. Id.; see also Fla. CS for HB 221, § 1(9)(d).
federal law could retroactively entitle a TNC driver to rights under state and federal employment statutes.  

B. Minimum Insurance Requirements

When it came to regulating TNCs, TNCs and insurance were inseparable. The new law clearly details insurance requirements and both operational and legal clarifications for insurers. The clarification provides relief to TNC drivers and insurers. In the past, insurance issues included coverage gaps and amounts, and the absence of a regulatory framework led drivers to commit fraud by omitting information from insurers. The law aims to combat omissions to insurers by mandating that a TNC driver, or the TNC on behalf of the driver, carry insurance which “[r]ecognizes that the TNC driver is a TNC driver or otherwise uses a vehicle to transport riders for compensation.” Moreover, the insurance requirement provision of the law adopts a similar classification of TNC activity to that of the one provided as guidance by the National Association of Insurance Commissioners (“NAIC”) and mirrors that of other states’ TNC laws. Florida’s law establishes the minimum insurance amounts to be maintained during two distinct TNC activity periods: (1) when “a participating TNC driver is logged on to the digital network but is not engaged in a prearranged ride” and (2) when a “TNC driver is engaged in a prearranged ride.” The insurance maintained by either the TNC, the TNC driver, or a combination of both can satisfy the requirements.

52. McGillis, 210 So. 3d at 221, 225–26; see also SCHILLER & DAVIS, supra note 40, at 4, 7.
53. See Editorial, supra note 13.
55. See Ducassi, supra note 26.
56. See Huet, supra note 54.
57. Act effective July 1, 2017, ch. 2017-12, § 1(7)(a)(1), 2017 Fla. Laws 4; see also Huet, supra note 54.
58. See GOODIN & MORAN, supra note 2, at 8–9.
59. Id.
61. Id. § 1(7)(c)(2)(a)–(c).
C. Reporting Requirements

Florida’s TNC law does not require TNCs to receive approval of new law.62 The only administrative regulatory compliance required of TNCs is the submission of “an examination report prepared by an independent certified public accountant for the sole purpose of verifying that the TNC has maintained compliance with” two provisions of the law for the preceding two years of operation, to the Department of Financial Services.63 The first provision covers insurance disclosures, and the second, exclusions and TNC driver requirements.64 If the report discloses that the TNC is found to have been non-compliant during the examination period, the TNC will be fined $10,000.65 In the case of non-compliance, another report due the following January, is required.66 A $20,000 fine is imposed for non-compliance discovered in the additional report.67

D. Pay to Operate: Fees and Tailor-Made Taxes

1. The Regulatory Cost to Operate for TNCs

The costs and administrative requirements necessary to begin operating legally under enacted state TNC laws vary, as does the regulatory authority assigned to oversee permitting.68 Typically, before a permit to operate is granted, the TNC must submit to the relevant authority “proof of compliance with requirements outlined in the legislation, such as insurance or driver information requirements.”69 In addition, some states require TNCs to pay a fee as part of the initial application process.70 The fee is referred to,

62. See id. § 1(2). TNCs do not have to submit the examination report required by law until January 1, 2019. Id. § 1(11)(e).
63. Id.
64. See Act effective July 1, 2017, ch. 2017-12, § 1(8), (11), 2017 Fla. Laws 6, 8.
65. Id. § 1(11)(f).
66. Id.
67. Id.
68. Compare N.C. GEN. STAT. § 20-280.3 (2017) ($5000 application fee plus an annual permit fee of $5000), with COLO. REV. STAT. § 40-10.1-606 (2016) (annual permit fee of $111,250). Examples of regulatory authorities under TNC state laws include: Virginia and West Virginia use the Department of Motor Vehicles; Arizona, Delaware, and South Carolina use the Department of Transportation; California and Ohio use the Public Utilities Commission; Nevada used the Transportation Authority. GOODIN & MORAN, supra note 2, at 8.
69. GOODIN & MORAN, supra note 2 at 8.
70. See id.
generally, as a license or permit fee.\textsuperscript{71} Annual fees range from $500 in Montana to $111,250 in Colorado.\textsuperscript{72} Though Colorado’s flat annual fee is currently the highest, and may be adjusted to cover the direct and indirect costs associated with implementing the TNC law, the formulation of annual permit fees prescribed by some states may surpass that figure.\textsuperscript{73} That is because “[i]n some states the permit fees are proportional to the size or extent of a TNC operation.”\textsuperscript{74} For example, Georgia, Michigan, and Kentucky base their annual fee on a tier-system categorized by the number of cars operating under the TNC.\textsuperscript{75} Of these, Georgia’s \textit{master license fee} is the most expensive of the three states, costing $300,000 to register 1001 cars or more, which is ten times more expensive than the cost to register the same amount of cars in Michigan, and over thirteen times more expensive than Kentucky.\textsuperscript{76}

2. Custom Made TNC Taxes

With only eight states currently applying sales or a gross receipt tax on taxi fares, TNCs do not have an overwhelming exposure to such tax.\textsuperscript{77} As such, some states have taken the initiative to design TNC specific taxes to go along with TNC laws.\textsuperscript{78} Nevada and South Carolina levy, on TNCs, an assessment fee based on their gross revenue.\textsuperscript{79} South Carolina has set the fee at 1\% of gross trips, while Nevada has set the amount at 3\%.\textsuperscript{80} Some states and cities have imposed a per-ride fee or a variation thereof on TNCs.\textsuperscript{81}

\begin{itemize}
\item \textsuperscript{71} \textit{Id.} (license in Georgia and permit in Colorado).
\item \textsuperscript{72} \textit{Id.}
\item \textsuperscript{73} \textit{See id.} If a TNC had over 1000 cars in Georgia, the annual license fee would cost $300,000, surpassing Colorado’s flat annual fee of $111,250. \textit{GOODIN & MORAN, supra} note 2, at 8.
\item \textsuperscript{74} \textit{Id.}
\item \textsuperscript{75} \textit{MICH. COMP. LAWS § 257.2104(3) (2016); 601 KY. ADMIN. REGS. 1:113 § 2(4)(c) (2017); GOODIN & MORAN, supra} note 2, at 8.
\item \textsuperscript{76} \textit{See MICH. COMP. LAWS § 257.2104(3) ($30,000 for more than 1000 vehicles); 601 KY. ADMIN. REGS. 1:113 § 2(4)(c) ($22,500 for 501 or more vehicles); GOODIN & MORAN, supra} note 2, at 8.
\item \textsuperscript{77} \textit{See SCHILLER & DAVIS, supra} note 40, at 3.
\item \textsuperscript{78} \textit{Id.} at 4.
\item \textsuperscript{79} \textit{See GOODIN & MORAN, supra} note 2, at 8; \textit{SCHILLER & DAVIS, supra} note 40, at 4.
\item \textsuperscript{80} \textit{See GOODIN & MORAN, supra} note 2, at 8; \textit{SCHILLER & DAVIS, supra} note 40, at 4–5.
\item \textsuperscript{81} \textit{SCHILLER & DAVIS, supra} note 40, at 4–5. Massachusetts imposes a twenty-cent per-ride fee, while Pennsylvania imposes a 1.4\% gross receipt tax only on rides that originate in Philadelphia; Seattle, which has not been preempted by state law, imposes a similar fee at twenty-four cents per-ride. \textit{See id.; Transportation Network Companies,}
These variable annual fee structures tie fee amounts to the growth and success of TNCs, thus if the exponential growth of TNCs continues, so will the fee revenue of these states. The regulatory enforcement of TNCs comes at a cost, hence, states use the fees collected to help cover those costs. In states where annual fees could become significant and surpass enforcement costs, fee funds are distributed back to municipalities in proportion to population or TNC trip origination. Aside from administrative and operational enforcement, TNC fees can be applied in ways that promote the public welfare. Seattle has mandated, in addition to a fourteen-cent share on all TNC rides originating in the city, that TNCs pay ten cents per-ride for the Wheelchair Accessible Services Fund.

IV. AIRPORTS & TNCs: A LOVE-HATE RELATIONSHIP

A. Background: Airports and Revenue

Local governments, generally, are concerned only with activities that are in the best interest of the people they represent. One such interest is the establishment, operation, and management of a public airport. The government units, which own and operate public airports across the United States, vary, but they are essentially cities or counties. A popular form of airport governance has been the creation of subunits of local governments, commonly known as airport authorities. The authority may also possess the power to raise funds by taxation or the issuance of bonds, if expressly provided by the statute creating the airport authority. Airport authorities are given wide latitude on their management of day-to-day operations,
though "the U.S. Federal Aviation Administration ("FAA") has significant input into airport operations through regulatory direction." To receive federal funding, airports must comply with assurances tied to the grants. In the case of FAA grants, the airport must "maintain a schedule of charges for use of facilities and services at the airport—[] that will make the airport as self-sustaining as possible under the circumstances existing at the airport, including volume of traffic and economy of collection." In light of all the applicable restrictions, airport operators have become cost-effective and have looked to increase non-aeronautical revenue.

Almost all airports in the United States receive federal funding, but the majority of "their operational revenue come[s] . . . from rents and fees paid by . . . aeronautical and non-aeronautical" entities. As operators, airport authorities have the power to impose fees and other operational directives on commercial businesses operating within the airport facilities.

Airports receive revenue from two general groups of users: aeronautical users, which are commercial airlines, and non-aeronautical users. Non-aeronautical businesses include car rental companies, parking lots, restaurants, gift shops, and ground transportation services.

Non-aeronautical revenue is not regulated as aeronautical revenue, coming from commercial airlines, is regulated. "[F]ees charged to non-aeronautical users are not subject to the [FAA] reasonableness requirement or the Department of Transportation Policy on airport rates and charges . . . ." The FAA has limited its input regarding non-aeronautical revenues to interpreting the self-sustaining requirement to mandate that airports charge non-aeronautical users fair market value for the use of the airport’s facilities. The flexibility and ability of airlines to challenge fees can serve as a deterrent to airports overcharging since an airport’s non-compliance with the reasonable fee assurance can result in a breach of the contractual

93. Id.
96. Id.
97. See id. at 7.
98. Id. at 6.
100. See Policy and Procedures Concerning the Use of Airport Revenue, 64 Fed. Reg. 7696, 7721 (Feb. 16, 1999).
101. Id.
102. Id.
grant. Unlike airlines, non-aeronautical businesses do not have the same recourses available to challenge airport fees, which has resulted in litigation. Courts have given airport regulations great deference, holding them to be constitutional so long as the authority promulgating them can point the regulation to being rationally related to a legitimate objective.

B. The Arrival of TNCs at Airports

The growth of TNCs, such as Uber and Lyft, has been exponential, reportedly gathering up “as much as one-fourth of the U.S. ride-hailing market.” One customer segment TNCs have been aggressively pursuing has been business travelers, successfully beating out taxis in the competition for the profitable customer segment. A component behind the success of TNCs in capturing the business traveler segment has been their slow, but persistent, entry into airports. Airports represent lucrative opportunities for TNCs, but airports have been reluctant in opening their doors to TNCs. Though it is not a one-way street, airports also look at TNC fees as a potential significant revenue stream. TNC fees provide a new revenue stream for airports, but it is not always at a net increase to the airport’s overall revenue. More passengers taking TNCs to the airport translates into fewer parking, taxicab, and car rental fees for airports. These fees are major components of an airport’s non-aeronautical revenue; “[l]ast year, the

103. See id. at 7720, 7723.
104. See Alamo, 825 F.2d at 370.
106. SCHILLER & DAVIS, supra note 40, at 10.
109. Close, supra note 107. Airports represent a key portion of the travel market that TNCs are aggressively pursuing, in part, by focusing on business travelers because 11% of them use TNCs. Id.
110. See Andrea Ahles, DFW Won’t Raise Parking Rates Again, and You Can Thank Uber and Lyft, FORT WORTH STAR-TELEGRAM (June 29, 2017, 10:57 AM), http://www.star-telegram.com/news/business/aviation/sky-talk-blog/article158814344.html (explaining that revenue from TNC fees will have nearly doubled in three years).
111. Bergal, supra note 108.
112. Id.
$3.5 billion in fees represented 41% of the $8.5 billion in U.S. airport revenue not related to airlines.113

Parking related fees have been a large revenue stream for airports for many years, and now make up nearly 20% of non-aeronautical revenue for airports in the United States.114 In some cases, car rental fees provide an even larger revenue stream for airports.115 For example, at Fort Lauderdale-Hollywood International Airport (“FLL”), revenue from car rental fees is “the largest source of revenue[],” making up about 30% of the airport’s total operating revenue.116 Likewise, parking fees also provide a significant revenue stream for airports, “typically represent[ing] between one-fifth and one-quarter of that revenue category.”117 The impact of TNCs on airport revenues has not been fully determined because TNCs have only been operating under formal agreements with airports for a short period of time.118 Nonetheless, the current reduction in fees, whether short or long term, have airport operators looking to offset the losses with TNC fees.119 In addition, as airport operators, authorities must ensure that TNCs are abiding by the regulations of the airport, not only for economic reasons, but also for safety, security, and general operational matters.120 The enforcement of TNCs requires “increased staffing costs to oversee ride-hailing operations and increased curbside congestion, mean[ing] less money for the airport and other public transportation services that airport revenue subsidizes.”121

Maintaining certain revenue levels for airports is also of critical importance to maintaining operations, covering debt-servicing, and fulfilling certain federal grant assurances.122 The reductions in revenue seen from increases in the use of TNCs have not yet proved to be a financial risk for airports, in part, because airports are subsidizing the reductions with fees charged to TNCs.123 For example, the Dallas/Fort Worth Airport faced a

113. Id.
114. Id.
116. Id.
117. Bergal, supra note 108.
118. Id.
119. Id.
123. See Bergal, supra note 108.
shortfall in parking fee projections, but will not raise parking rates for the first time in five years thanks to the increase in the airport’s ground transportation revenue, which has benefitted from TNC fees.\footnote{Ahles, supra note 110.} For airport authorities looking at the long term coexistence of the economic demands of their airports and TNC fees, it is “appropriate for the [a]uthority to factor in future development plans when setting user fees.”\footnote{Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth., 906 F.2d 516, 522 (11th Cir. 1990); Bergal, supra note 108.} The relationship between ground transportation revenue and capital expenditures does not have to be perfectly aligned since one revenue stream can be used to complement or subsidize other unrelated revenue streams, like fees charged to airlines.\footnote{BROWARD CTY. AVIATION DEP’T, supra note 115, at 12.} In subsidizing airline fees, the airport becomes more attractive to airlines.\footnote{See id.} For instance, at FLL in Florida:

Non-airline revenues, represented 71.1% of total operating revenues in fiscal year 2016. The main categories of non-airline revenues, rental car revenues, parking revenues, and concessions, have steadily been increasing over the last few years, due to increases in passenger activity and also increases in sales per passenger. This increase in non-airline revenues has contributed to the ability to maintain low terminal rents and landing fees that result in a low CPE [Cost Per Enplanement]. This low-cost structure makes the Airport attractive to air carriers, especially low-cost carriers.\footnote{See id.}

Where state laws have not preempted local authorities from setting TNC airport fees, many airports have reached agreements with the TNCs.\footnote{See GOODIN & MORAN, supra note 2, at 14; e.g., Bergal, supra note 108 (Buffalo Niagara International Airport in New York will charge Lyft a three-dollar fee per-ride and Uber a flat fee of $180,000); Taylor, supra note 14 (Newark Airport signed a $10 million dollar deal with Uber).} The agreements vary in structure, such as a flat fee or a per-ride fee, and in amounts.\footnote{See Bergal, supra note 108. Lyft is charged on a per-ride basis, while Uber is charged a flat fee, both agreements were for one year. Id.} The agreements are products of often tense and lengthy negotiations between policymakers and the TNCs.\footnote{See GOODIN & MORAN, supra note 2, at 4.} Airport authorities bargain for an agreement that considers the effect of TNCs on the airport, which includes lost revenue from reduced ground transportation, parking,
and car rental fees, as well as enforcement costs. TNCs look for a fee structure that best reflects its operation at that airport and, ultimately, as for-profit entities with shareholders, looking for the lowest cost possible.

C. Landscape of TNC Laws at Airports

Broad preemption language eliminating or limiting the authority of local governments to regulate TNCs is not uncommon in enacted state laws. However, a significant amount of states carve out exceptions to the preemption for airport and seaport authorities. Only a small number of states have left their state’s airport operator without any authority to impose on TNCs fees or other operational directives. Within those states, the authority left to airport authorities varies. The majority of those states allow the airport to set pickup fees and operational directives. In some instances, states provide parameters under which airport authorities must abide by when setting TNC fees.

132. See Bergal, supra note 108. “[O]fficials estimate they could lose more than $2 million in revenue a year from parking, taxi, and car rental fees because of TNCs . . . .” Id.


134. GOODIN & MORAN, supra note 2, at 14.

135. Id. at 7, 14.

136. Id. at 7. Of the states that have left no authority to airport authorities under respective TNC laws, Colorado is the only state home to a major airport, Denver International Airport. See id. at 3; FED. AVIATION ADMIN., CALENDAR YEAR 2016 PRELIMINARY REVENUE ENPLANEMENTS AT COMMERCIAL AIRPORTS 1 (2017), http://www.FAA.gov/Airports/planning_capacity/passenger_allcargo_stats/passenger/media/preliminary-cy16-commercial-service-enplanements.pdf [https://web.archive.org/web/20170715205149/https://www.faa.gov/airports/planning_capacity/passenger_allcargo_stats/passenger/media/preliminary-cy16-commercial-service-enplanements.pdf]

137. Compare Act effective July 1, 2017, ch. 2017-12, § 1(15)(b), 2017 Fla. Laws 11 (codified at FLA. STAT. § 627.748(15)(b)) (authority to set pickup fees that must be consistent with those charged to taxicabs), with GA. CODE ANN. § 40-1-191 (2016).

138. See GOODIN & MORAN, supra note 2, at 7–14.

139. See GA. CODE ANN. § 40-1-191. One such state is Georgia, home to the busiest airport in the world. FED. AVIATION ADMIN., supra note 136, at 1. Georgia limits the fees charged to TNCs—ride share network services—and taxi services alike, to “not exceed airport’s approximate cost” of regulating the operation of the entities at the airport. GA. CODE ANN. § 40-1-191.
D. Florida’s Airports & TNCs

1. Florida’s Valuable Airport Opportunity

Florida recently moved ahead of Texas to the number two spot for “overall number of passengers boarding airplanes” in the nation. Since Uber’s arrival in Miami, the company’s share of the business travelers segment increased from 17% to 67% in just two years. As an important and profitable client base for TNCs, the positive trend underlies the importance of TNCs gaining access to Florida’s airports. Florida is home to four large hub airports—airports that represent at least 1% of total enplanements in the United States. All four airports are within the top thirty airports, according to total passenger enplanements 2016. Since Miami-Dade—Florida’s most populous county—legalized TNCs in May 2016, the $2 pickup fee imposed on Uber by MIA has translated into over $2 million in revenue for the airport in one year.

2. Airport Authorities Under Florida’s TNC Law

Florida is divided by law into sixty-seven political subdivisions called counties. As in the rest of the United States, subunits of local governments have been created by law to operate airports in Florida. Florida’s airport authorities, through the power derived from their Legislature, “have the right, power, and authority to enter into contracts with one or more motor carriers for the transportation of passengers for hire

142. See Close, supra note 107.
143. See FED. AVIATION ADMIN., supra note 136, at 1. Florida’s Large Hub Airports listed by total enplanements in 2016: Miami International Airport (“MIA”), Orlando International Airport (“MCO”), Fort Lauderdale-Hollywood International (“FLL”), and Tampa International (“TPA”).
144. Id.
146. FLA. CONST. art. VIII, § 1(a) (amended 2014); Auslen et al., supra note 23.
between such airport or airports and points within such county. Courts have ruled that airport authorities may charge different fee amounts to different categories of businesses operating in the airport. The airport authority’s justification for the difference in fees is “based upon its rational assessment of the relative benefits and the extent of use of each category of vehicles that enter the airport.” The legitimate purposes supporting the different fees could be many—including the regulation and control of airport roadway traffic, the protection of the public safety, and the need to generate revenue from commercial users of the airport to support the provision of the airport facilities to the public—of which only one is needed to uphold the regulation.

In general, the main benefit conferred upon a business operating in the airport is the client base of travelers using the airport. In assessing extent of use, courts have considered the volume of vehicles that can be accommodated on the airport’s roadways, the number of passengers the vehicle can carry, the safety and security costs associated with the increased traffic congestion, and designated pickup areas as necessary to accommodate the category of users. Overall, the fees assessed on businesses operating within the airport are formulated by a form of benefit-use analysis. The benefits conferred on each business are not always the same, which typically gives rise to different fee amounts; in upholding differing fee schedules, the Court reasoned:

As the district court found, the on-airport companies receive substantial advantages from their presence in the airport, including overall customer convenience and access to walk up customers, i.e., customers who do not have reservations to rent a car from a particular company. The on-airport companies, however, pay negotiated rents for the space they lease in the airport terminal and on the airport grounds. Although these rents may be below the actual market value of the property, they do compensate the Authority for the benefits that the on-airport companies receive.

148. Fla. Stat. § 331.15(2) (2016); Bacot & Christine, supra note 87, at 242, 244.
149. Alamo Rent-A-Car, Inc., 825 F.2d at 372 (upholding different fee schedules for different airport businesses).
150. Id. at 371.
151. Id. at 371 n.3–4.
152. Id. at 373.
154. See id.
Even though a TNC is “not a common carrier, contract carrier, or motor carrier,” eliminating the statutory application provided, the TNC law allows airport and seaport authorities to charge reasonable pickup fees. The pickup fees must be “consistent with any pickup fees charged to taxicab companies at that airport or seaport for their use of the airport’s or seaport’s facilities.” In comparing the benefits conferred to TNCs and taxicabs—one being the “prime curbside real estate when it comes to picking up passengers” that taxis and other ground transportation have access to in comparison to the designated locations that TNCs are limited to—there are substantial advantages to both. Taxicabs, unlike TNCs—which are solicited via smartphone application—rely on street hails or, in the case of airport pickups, hails made at the taxicab stand. But, TNCs do not have to wait around in lines to pick up passengers. Furthermore, taxicabs do not pass on the pickup fee to the rider, unlike TNCs; thus, profitability of taxicab companies are affected whereas TNCs are not.

It is presumed, by the plain and ordinary meaning of the statute’s text, that the Legislature intended to give airport authorities leeway in setting the fee amount because the terms reasonable and consistent with are imprecise. But with the phrase consistent with being used to set the relationship between two monetary amounts, of which the baseline number is less than $5, it should not result in too big of a difference. However, when

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157. Id. § 1(15)(b), at 11. The preemption exception provided in Florida’s law is as follows:

(b) This subsection does not prohibit an airport or seaport from charging reasonable pickup fees consistent with any pickup fees charged to taxicab companies at that airport or seaport for their use of the airport’s or seaport’s facilities or prohibit the airport or seaport from designating locations for staging, pickup, and other similar operations at the airport or seaport.

Id.

159. See Taxis Suing Miami-Dade, supra note 158.
160. Id.
163. See Act effective July 1, 2017, ch. 2017-12, § 1(15)(b), 2017 Fla. Laws 11; Robinson, supra note 161 (explaining the airport rates set across some of Florida’s airports
these nominal amounts are applied to the volume of rides currently given, and the exponential growth rate of TNC rides at airports, they amount to large sums of money.\textsuperscript{164} Ultimately, despite the potential disparity in the total amount paid, mandating airports to align the fees charged to TNCs with those of taxicabs, fits squarely into the benefits and extent of use formulation previously used by the courts.\textsuperscript{165} Furthermore, in setting different regulatory frameworks applicable to different users, the airport authorities do not need to "achieve perfection or mathematical exactitude," which is in line with the statutory text in Florida’s TNC law.\textsuperscript{166}

Moreover, the criteria set by Florida’s TNC law on airport pickup fees is in accordance with the limited input from the FAA on non-aeronautical fees.\textsuperscript{167} The FAA, in reference to the \textit{self-sustaining} requirement for receipt of grants, has provided that "[f]air market fees for use of the airport are required for non-aeronautical use of the airport."\textsuperscript{168} Though the FAA guidance is centered more on market fees for rental rates of airport facilities, it could be construed to have a general application on airport facilities for non-aeronautical use as a whole.\textsuperscript{169} For instance, a TNC law expressly requires that the fees charged at airports must be in line with FAA regulations.\textsuperscript{170} In general, the \textit{self-sustaining} assurance tied to FAA grants goes hand in hand with airports charging competitive market-based pricing for all non-aeronautical fees.\textsuperscript{171} Such fees "can be determined by reference to negotiated fees charged for similar uses of the airport," which is precisely the criteria provided in Florida’s TNC law.\textsuperscript{172}
V. WHY FLORIDA’S TNC LAW GIVES TNCs A FREE RIDE

A. Potential Issues: Oversight

The TNC driver requirement provision, included in the bi-annual research report, is the most important safeguard of the public, because before the TNC driver can begin driving, the driver must submit: an application containing basic personal and vehicle information to the TNC, a local and national background check is conducted by the TNC or third-party, and a driving history research report is obtained and reviewed. The law prohibits TNCs from authorizing a TNC driver to operate if the information obtained on the driver through the background check reveals certain convictions and driving infractions. But since the TNC’s compliance with the provision would not be confirmed until the bi-annual check, the TNC’s non-compliance could expose riders and other drivers to harm, especially because the law leaves it up to the TNC or a third-party not specified in the law’s text, to conduct the criminal and driving check. The foregoing state conducted background checks revealed the degree of confidence state legislators have in TNCs, which have been shown to be a mistake. Furthermore, the law mandates that TNCs retain individual ride records and driver records for one year after the date of the ride and for one year after the

174. Act effective July 1, 2017, ch. 2017-12, § 1(11)(d), 2017 Fla. Laws 9. If an initial or subsequent background check of a prospective driver reveals any of the following, the TNC may not authorize the driver to operate on the TNC’s platform:
1. Has been convicted, within the past 5 years, of:
   a. A felony;
   b. A misdemeanor for driving under the influence of drugs or alcohol, for reckless driving, for hit and run, or for fleeing or attempting to elude a law enforcement officer;
   c. A misdemeanor for a violent offense or sexual battery, or a crime of lewdness or indecent exposure under chapter 800;
2. Has been convicted, within the past 3 years, of driving with a suspended or revoked license;
3. Is a match in the National Sex Offender Public Website maintained by the United States Department of Justice;
4. Does not possess a valid driver license; or
5. Does not possess proof of registration for the motor vehicle used to provide prearranged rides.

Id.

175. See id. § 1(11)(a)(2), (b) at 8–9 (requiring TNCs to conduct background checks for TNC drivers every three years); Vaccaro & Adams, supra note 173 (stating that Uber conducts criminal background checks on its drivers twice a year).
176. See Vaccaro & Adams, supra note 173.
date that a TNC driver’s relationship with the TNC ends, respectively.\footnote{Act effective July 1, 2017, ch. 2017-12, § 1(14)(a)–(b), 2017 Fla. Laws 11.} If a bi-annual compliance check were to reveal non-compliance regarding driver authorization one year after a bi-annual check, relevant ride records or driver records—or both—would not, by law, be required to be maintained by the TNC.\footnote{See id. § 1(11)(d), (14)(a)–(b), at 9, 11.}

B. Lack of Economic Support

Before Florida enacted its TNC law, most of the local governments in the state had put together TNC regulations that allowed the companies to operate legally.\footnote{See Auslen et al., supra note 23.} Though the local regulations had created “a patchwork of local regulations that were in conflict to each other,” the regulations, in general, provided the local governments that would be enforcing the operation of TNCs with funds to defray the administrative and operational oversight required.\footnote{See id.; e.g., Garin Flowers, Hillsborough Reaches Deal with Uber, Lyft, WTSP (Nov. 9, 2016, 11:25 PM), http://www.wtsp.com/news/local/hillsborough-reaches-deal-with-uber-lyft/350501652.} Miami-Dade County adopted a TNC license fee of $26 per vehicle that generated about $1.8 million for the County.\footnote{Charles Anderson, Office of Comm’n Auditor, Board of County Commissioners Meeting 4 (May 3, 2016, 9:30 AM), http://www.miamidade.gov/auditor/library/2016-05-03-board-of-county-commissioners.pdf; Auslen et al., supra note 23.} Similarly, Hillsborough County came to an agreement with Uber and Lyft to pay $250,000 and $125,000 in annual fees, respectively.\footnote{Flowers, supra note 180.} However, Florida’s TNC law excludes any permit, fee, or license requirements for TNCs to operate, except for pickup fees at airports.\footnote{Act effective July 1, 2017, ch. 2017-12, § 1(15)(a), 2017 Fla. Laws 11.}

The preemption provision in Florida’s TNC law states that “TNCs, TNC drivers, and TNC vehicles are governed exclusively by state law, including in any locality or other jurisdiction that enacted a law or created rules governing TNCs, TNC drivers, or TNC vehicles before July 1, 2017;” essentially eliminating all local regulations, including licensing requirements enacted before the law’s effective date.\footnote{Id.} The law further prohibits local governments from imposing any future economic or administrative regulation on TNCs.\footnote{See id.}
A county, municipality, special district, airport authority, port authority, or other local governmental entity or subdivision may not:
1. Impose a tax on, or require a license for, a TNC, a TNC driver, or a TNC vehicle if such tax or license relates to providing prearranged rides;
2. Subject a TNC, a TNC driver, or a TNC vehicle to any rate, entry, operation, or other requirement of the county, municipality, special district, airport authority, port authority, or other local governmental entity or subdivision; or
3. Require a TNC or a TNC driver to obtain a business license or any other type of similar authorization to operate within the local governmental entity’s jurisdiction.186

Florida is not the only state that does not charge TNCs an upfront annual cost to operate, but is one of the few among comparable states not to.187 The decision to not impose any administrative or operational costs on TNCs foregoes source funds for local governments that could have been allocated to defray costs associated with the significant and increasing presence of TNCs across the state.188 Like airports, local governments must harmonize capital expenditures with available and potential sources of funds, but unlike airports, local governments were not afforded the same discretion under Florida’s TNC law.189 An analysis provided by the House of Representative Staff concluded that as a result of the revenue elimination from fees imposed on TNCs by local governments after the law’s preemption, local governments “will experience an indeterminate, but likely insignificant, negative fiscal impact.”190 The same report concluded that the airport preemption exception “may provide a positive fiscal impact to

186. Id.
188. See Auslen et al., supra note 23; Tan, supra note 121.
189. See Auslen et al., supra note 23; Kevin Spear, Orlando Airport Officials OK $350 Million Price Hike for New Terminal, ORLANDO SENTINEL (June 21, 2017, 4:50 PM), http://www.orlandosentinel.com/travel/news/os-airport-terminal-cost-vote-20170621-story.html. At Orlando International Airport in Florida, airport officials met and approved a $350 million cost increase in the construction of a new terminal; in that same meeting, officials set TNC pick up fees at $5.80, which is the highest fee in the United States and significantly higher than the $3.30 charged to on-demand taxi services. Uber, Lyft Pick Up Now Allowed at Orlando Airport, CBS MIAMI (June 22, 2017, 2:26 PM), http://miami.cbslocal.com/2017/06/22/ubert-lyft-pick-up-now-allowed-at-orlando-airport/.
airports;” the assertion has proved accurate in 2016, Miami International Airport received over $2 million from Uber in pickup fees.191

VI. CONCLUSION

The arrival of TNCs to the Sunshine State has been a blessing for some; for others, it has been a lesson in how dynamic, technology-driven business can disrupt and cripple an established player in an established market.192 For local and state lawmakers, it is only one of the many regulatory battles to come as technology companies continue to emerge and disrupt outdated regulations.193 No longer should legislators be reluctant adopters of new technologies and businesses in an effort to save the old because “[w]here the old deemed to have a constitutional right to preclude the entry of the new into the markets of the old, economic progress might grind to a halt.”194

Whether Florida’s TNC law will be considered an example of a successful statewide TNC regulation remains to be seen.195 What the law provided—much to the satisfaction of the TNCs—was rational insurance requirements, parameters on TNC driver authorizations that mirrored those the TNCs currently had in effect, minimal administrative and regulatory costs, and oversight limited to a bi-annual retroactive compliance check.196 The law is extremely favorable to TNCs, but it ultimately enables thousands of Floridians to gain a supplemental income, allows millions to continue utilizing their preferred means of transportation, and injects millions of dollars into Florida’s airports, but nothing into the municipalities whose infrastructures and resources feed the exponential growth of TNCs.197

192. See Douglas Hanks & Rene Rodriguez, For Uber, Loyal Drivers and a New Fight for Benefits, MIAMI HERALD (May 21, 2015, 4:17 PM), http://www.miamiherald.com/news/business/article21599697.html. “Since the company launched in Miami-Dade in June 2014, more than 10,000 active driver-partners have taken home more than $30 million through more than three million rides the company said this week — net which [does not] include above the company’s commission, typically less than [twenty] percent.” Id.; see also Video clip: Univision Report, supra note 145, at 2:08–2:47.
193. See Ducassi, supra note 26.
LEFT, LEFT, LEFT RIGHT LEFT: SHOULD FLORIDA EMBRACE REHABILITATION BOOT CAMP PROGRAMS FOR JUVENILE AND YOUTHFUL OFFENDERS?

JOHN PATRIKIS*

I. INTRODUCTION

The State of Florida and the United States of America, by and large, have experienced significant prison overcrowding, which has led to the development of various sentencing options.¹ The criminal justice system has become increasingly punitive, but many states have not abandoned the idea of rehabilitation as an important goal, especially for juvenile and youthful offenders.

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¹ FLA. STAT. § 958.04(4) (2016); Carol Ann Nix, Boot Camp/Shock Incarceration — An Alternative to Prison for Young, Non-Violent Offenders in the United States, 28 PROSECUTOR 15, 15 (1994).

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Some state statutes continue to present a commitment to rehabilitation by including practices and programs promoting the best interest of young offenders through services meant to create productive, law-abiding citizens. The Supreme Court of the United States has established that young people uniquely possess an “antithetical—constitutional right to a meaningful opportunity to be rehabilitated.” This right is based on the Court’s identification of adolescents as . . . singularly amenable to rehabilitation,” which designates them as a separate class from adults. “Where punishment entails the purposeful inflict[ing] of suffering upon its recipient, rehabilitation involves a beneficent response aimed at overcoming unwelcome aspects of its recipient’s life.”

Faced with the growing issue of prison overcrowding and juvenile crime, lawmakers developed intermediate sanctions “to fill the gap between regular probation and prison.” One type of intermediate sanction is boot camp or shock incarceration. Boot camp programs have various names in different states including: “Special Alternative Incarceration, . . . Basic Training Program, . . . Regimented Inmate Discipline, . . . and Challenge Incarceration,” among others. Boot camp programs are considered a “constructive approach to . . . rehabilitation. . . . [and are] modeled after military basic training.” These programs are designed for young offenders who have been convicted of a felony and would be facing prison time without this rehabilitative option. Studies show that “public support for intermediate sanctions like boot camps is high when applied to [youthful], nonviolent offenders.” Typically, these programs last between “three to six months, depending on the state.” “Brief confinement in a boot camp” program serves the purpose of shocking participants and teaching the “harsh

3. Id. at 504–05.
4. Id. at 458–59. Supreme Court cases have classified capital punishment and life sentences without parole for juvenile offenders as cruel and unusual under the Eighth Amendment, which makes them a distinct class from adults. Id. at 458–60.
5. Id. at 459–60.
6. Gardner, supra note 2, at 466.
7. Nix, supra note 1, at 15.
8. Id.
9. Id. at 15–16.
10. Id. at 16.
11. Id.
reality of prison life without subjecting them to long prison sentences and
direct contact with hardened criminals.”14 Promising programs across the
country include non-military rehabilitative services, as well as including
forming close relationships with department staff and other participants,
providing “education, vocational training, counseling, . . . drug treatment,
and creating a structured environment.”15 Rehabilitation boot camp
programs give young offenders “one last chance to change his or her
criminal way of life” and puts the offender in the proper state of mind and
body to make a commitment to personal growth.16 Some of the many
objectives are to instill “self-discipline, self-responsibility, self-respect, self-
esteeom, self-motivation, and . . . work ethic.”17 “Boot camps are not
designed to graduate model citizens. They are designed to provide young
offenders with a sound foundation upon which to build new lives.”18

This Comment will evaluate the history, effectiveness, costs, and
practices of boot camp rehabilitation programs to consider if the State of
Florida should embrace this type of rehabilitation for juvenile and youthful
offenders.19 Furthermore, it will explain the Florida statutory process and
regulations that all programs must abide by within the state.20 Finally, this
Comment will discuss the final standing boot camp rehabilitation program in
Florida to view its progress and determine if Florida should expand the
resources put into rehabilitation boot camp programs for youthful
offenders.21

II. FLORIDA STATUTES

Florida statutory law provides the standards for the process of
allowing an offender to replace a sentence with an alternative sanction.22
Florida statutes also provide the requirements for an offender to be classified
as a youthful offender, and the process of enrollment in a rehabilitation basic
training program.23 In order to serve the statute’s purpose of alleviating
extreme prison overcrowding, the particular rehabilitative methods and

14. Id.
17. Id.
18. Id.
19. See infra Part III.
20. See infra Part II.
21. See infra Part IV.
programs are detailed within the statute along with policies used after successful completion of the program to limit and track recidivism.  

A. Downward Departure and Judicial Disposition

According to section 921.0026 of the Florida Statutes, “[a] downward departure from the lowest permissible sentence . . . is prohibited unless there are circumstances or factors that reasonably justify the downward departure.” One of the listed mitigating circumstances, that reasonably justifies “departure from the lowest permissible sentence,” is a defendant being sentenced as a youthful offender. Pursuant to section 958.04 of the Florida Statutes:

The court may sentence [any person] as a youthful offender . . . [w]ho is at least [eighteen] years of age or who has been transferred for prosecution to the criminal division of the circuit court, . . . [any person w]ho is found guilty of or . . . tendered . . . a plea . . . to a crime that is . . . a felony if the offender is younger than [twenty-one] years of age at the time [the] sentence is imposed, and [any person w]ho has not previously been classified as a youthful offender . . . [A] person who has been found guilty of a capital or life felony may not be sentenced as a youthful offender . . . .

Furthermore, the statute allows the court to place a youthful offender into the custody of the department for a period of less than six years, and the commitment cannot surpass the maximum sentence for the convicted offense.

If an offender successfully participates in the youthful offender program, the court may modify the sentence or provide “early termination of probation, community control, or the sentence at any time prior to the scheduled expiration of [the] term.” If the court modifies a sentence and imposes probation or community control, the duration—including the term of incarceration—cannot exceed the original sentence. According to the statute, prison overcrowding is an emergency situation and the creation of a

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25. Fla. Stat. § 921.0026(1).
26. Id. § 921.0026(2).
27. Fla. Stat. § 958.04(1)(a)–(c).
28. Id. § 958.04(2)(d).
29. Id.
30. Id.
basic training program is “necessary to aid in alleviating” this extremely problematic issue.\textsuperscript{31}

B. \textit{Youthful Offender Basic Training Program}

Florida Statute section 958.045 gives the department authority to “implement a basic training program for youthful offenders.”\textsuperscript{32} Youthful offenders enrolled in the basic training program must actively participate for at least 120 days.\textsuperscript{33} “The program shall include marching drills, calisthenics, a rigid dress code, manual labor assignments, physical training with obstacle courses, training in decision making and personal development, high school equivalency diploma and adult basic education courses, and drug counseling and other rehabilitation programs.”\textsuperscript{34} In order to be enrolled into the program, an offender must be screened to ensure they are capable of participating in the physically demanding activities of the program and must not have a prior incarceration.\textsuperscript{35} During the screening, “the department [must] consider the offender’s criminal history and the possible rehabilitative benefits of shock incarceration.”\textsuperscript{36} “If an offender meets the specified criteria and space is available, the department [may] request . . . approval for the offender to participate in the basic training program.”\textsuperscript{37} According to the statute:

The program shall provide a short incarceration period of rigorous training to offenders who require a greater degree of supervision than community control or probation provides . . . .

The program is not intended to divert offenders away from probation or community control but to divert them from long periods of incarceration when a short shock incarceration could produce the same deterrent effect.\textsuperscript{38}

After being admitted into the program, each offender is given a \textit{full substance abuse assessment} to provide the department with the ability to decide if substance abuse treatment is necessary for the offender’s rehabilitation.\textsuperscript{39} Additionally, “each offender who has not obtained a high school diploma [will] be enrolled in an adult education program designed to

\begin{itemize}
\item {31. Id. § 958.04(4).}
\item {32. FLA. STAT. § 958.045(1) (2016).}
\item {33. Id.}
\item {34. Id. § 958.045(1)(a).}
\item {35. Id. § 958.045(2).}
\item {36. Id.}
\item {37. FLA. STAT. § 958.045(2).}
\item {38. Id. § 958.045(3).}
\item {39. Id. § 958.045(4).}
\end{itemize}
aid the offender in improving his or her academic skills and earning a high school diploma.” 40 The progress of each participant is repeatedly evaluated to track improvements in educational and career skills. 41 In the event that an offender in the “program becomes [problematic and] unmanageable, the department may revoke the offender’s gain-time and place the offender in disciplinary confinement for up to [thirty] days.” 42 Once the disciplinary process is completed, the offender may continue to participate in the program unless they were disciplined for an act or threat of violence. 43 In the case of a termination from the basic training program, the offender is removed and must complete their original sentence in the general population. 44

After completion of the basic training program, successful participants are sent to a community residential program where they will stay for a term decided by the department. 45 “If the . . . program director determines that the offender is not suitable for the community residential program but is suitable for an alternative post release program, . . . within thirty days prior to program completion the department [may] evaluate the offender’s needs and determine an alternative post-release program or plan.” 46 During the community residential program, the offender must be employed and pay restitution to the victim of the offense. 47 After they are released from the community residential program, offenders are put on probation, or post-release supervision, and must comply with various conditions. 48 Successful offenders may also continue their unfinished educational programs after their release. 49

Furthermore, the statute requires “[t]he department [to] provide a special training program for staff selected for the basic training program.” 50 The statute also states that the department can incentivize activities to encourage active participation and dedication to the program. 51 Lastly, the statute requires the department to track recidivism of the offenders after they are released to compile statistics on rearrests and recommitment. 52

40. Id.
41. Id.
43. Id.
44. Id.
45. Id. § 958.045(6)(a).
46. Id.
48. Id.
49. Id.
50. Id. § 958.045(10).
51. Id. § 958.045(13).
III. SHOCK INCARCERATION AND BOOT CAMP PROGRAMS

The correctional policies of the last 150 years can be described as a “proverbial pendulum that swings back and forth” depending on prominent political ideologies and practices of different time periods. An era of optimism occurred in the 1950s and 1960s involving “a social movement away from strictly punitive responses” and towards “interventions with treatment, rehabilitation, and reintegration” practices. The Great Society programs of this time period sought to “prevent and [change] criminal patterns in early adulthood.” A major “goal was to avert and . . . mitigate unlawful behavior” in young people before they became habituated to crime. Adolescent and youthful offenders were thought to be more responsive and malleable than adult offenders, which made them “the primary targets of rehabilitat[ion] services.” However, a rise in crime occurred between 1960 and 1975 and consistently high crime rates through the 1990s changed the country’s perspective. The accepted rhetoric was that “lenient [rehabilitative] sanctions had encouraged more crime and . . . a tougher response to law-breaking was” sought. During this time, rehabilitation programs and practices were largely abandoned with a few exceptions.

The currently fashionable suggestion that society abandon efforts to find more effective programs to rehabilitate offenders is, we believe, irresponsible and premature. . . . The promise of the rehabilitative ideal . . . is so compelling a goal that the strongest possible efforts should be made to determine whether it can be realized and to seek to realize it.

54. Id.
55. Id.
56. Id. at 7–8.
57. Id. at 8.
58. See Benda, supra note 53, at 8.
59. Id. at 8.
60. See id. at 11.
61. Id. at 11 (quoting PANEL ON RESEARCH ON REHAB. TECHNIQUES, NAT’L ACAD. OF SCI., NEW DIRECTIONS IN THE REHABILITATION OF CRIMINAL OFFENDERS 22 (Susan E. Martin et al. eds., National Academy Press 1981)).
A. History of Boot Camp Rehabilitation

The first boot camp program opened in Chester, Georgia in December of 1983. This era was during a time period heavily focused on a punitive response to crime rather than rehabilitation, however, boot camps “promised both punishment and rehabilitation in the same sanction.”

Momentum “for the development of boot camp[] [programs have] generally . . . come from judges, governors, and legislators.”

Boot camp programs “enjoyed extensive favorable media coverage” for years after 1983, because they portrayed themes that were consistent with the “popular demand for harsh punishment, discipline, and deterrence.”

Boot camp programs were derived from previous correctional programs, including Scared Straight and Shock Probation programs. Both of these programs were specifically aimed at deterrence of crime, and Scared Straight programs attempted to accomplish this “by causing juvenile offenders to fear prison through short . . . performances staged inside [of] a prison by . . . groups of [intimidating] inmates serving life sentences.”

The Shock Probation method involved an offender being confined in the general prison population for short periods of time to experience the prison lifestyle firsthand. These programs were similar to modern boot camp programs, in that “after serving the term, th[e] remainder of the offender’s sentence [was] suspended and he [or she was] placed on probation” or supervision.

Another correctional program with roots in boot camp rehabilitation includes Challenge programs for juveniles, which are modeled after Outward Bound programs. Outward Bound programs were created to give offenders “a physically and emotionally challenging experience,” which is structured to test and expand the individual’s capabilities.

The small group of offenders, consisting of “[nine] to [twelve people] live together, act as a team, and develop cooperative skills” to aid and motivate them to succeed later in life.

Similar to boot camp, physical challenges are not the goals in themselves, but are used as an instrument through “which personal growth

63. Muscar, supra note 12, at 11; see also Benda, supra note 53, at 8.
64. Nix, supra note 1, at 16.
65. Id.
66. Id.
67. Id.
68. Id.
69. Nix, supra note 1, at 16.
70. Id. at 16.
71. Id.
72. Id.
takes place.”

Furthermore, as the program strives for personal growth, these programs provide opportunities for offenders “to develop self-reliance and trust in [their peers].”

A prominent belief of youthful and juvenile crime is that “delinquents suffer from deficiencies in problem-solving skills and from dysfunctional views of self.”

Due to this, the practice of physical fitness is especially rehabilitative for youthful offenders because it “has a significant impact on self-perception.”

High self-esteem and self-confidence increases motivation and correlates with performance variables including academic grades and work responsibility.

Research indicates that youthful offenders who have successfully completed rehabilitative programs have significantly lower recidivism rates than adult offenders.

1. Rise and Fall of Florida Boot Camp Programs

“Florida was one of the first states to embrace ... boot camp[]” rehabilitation after implementing a statute in 1989 allowing their operation, and opening of its first juvenile boot camp program in 1992.

In the mid-1990s, Florida operated the most juvenile boot camps in the country with six programs.

Even though “criticism of the effectiveness of boot camp” rehabilitation began around 1999 in Florida, most programs “continued to operate until 2006.”

A turning point in Florida’s boot camp programs “was the highly publicized death of a fourteen-year-old boy at one of the camps.”

“Martin Lee Anderson was arrested for stealing his grandmother’s [vehicle and] ... was sent to boot camp after violating his probation for trespassing at school.”

In January of 2006, Anderson died at the program after he collapsed while running laps, which led staff members to beat and mistreat the young offender until he eventually died of suffocation.

Initially, the Florida Governor at the time, Jeb Bush, did not move to close the state’s boot

73. Id.
74. Nix, supra note 1, at 16.
75. Id.
76. Id.
77. Id.
78. Id.
79. Id.
80. Id. at 21–22.
81. Id. at 22.
82. Id.
83. Id.
84. Muscar, supra note 12, at 22.
camp program, and instead, called the death one tragic incident.\textsuperscript{85} Months of national coverage, and a growing concern about the safety of boot camps, followed and led the Florida Legislature to terminate the programs.\textsuperscript{86} These highly publicized, but rare, incidents of abuse caused “a national trend to move away from boot camps.”\textsuperscript{87} Specifically, because of changing public opinion and unclear data on the effectiveness of boot camp programs, legislators sought to reallocate funds used for rehabilitation elsewhere, causing a lack of rehabilitation programs for youthful offenders throughout the country.\textsuperscript{88}

B. Summary of Boot Camp Rehabilitation

In large, the specific methods and practices of boot camp programs vary from state to state, depending on whether the program is punishment or rehabilitation-based.\textsuperscript{89} “Punishment-centered boot camp [programs primarily focus] on physical tasks and military training,” while rehabilitation-focused programs place more emphasis on “supportive programs, such as education, counseling, and drug treatment.”\textsuperscript{90} Boot camp programs for juvenile and youthful offenders typically use elements from both.\textsuperscript{91} Most boot camp rehabilitation programs begin at intake, and the arrival to the program is described as a rude awakening for the participants.\textsuperscript{92} Many military-style programs begin with a “ceremony where participants shave their heads” and are organized into squads or platoons.\textsuperscript{93} During the course of the program, the “participants engage in a rigid schedule . . . of strict discipline, hard labor, drills, and physical training, simulating military basic training.”\textsuperscript{94} The department staff also creates a “militaristic environment by requiring participants to address the staff using military titles,” such as sir and ma’am, and “requiring . . . the staff and participants to wear [appropriate military] uniforms.”\textsuperscript{95} Some programs use intimidation and humiliation methods during the beginning of the course to ensure that the participants take the program seriously and are vulnerable to change, while others “prohibit[]
verbal abuse and corporal punishment.” However, in most of the military-style rehabilitation boot camp programs, staff members make sure that they get the offender’s attention and unambiguously show that they have control over the participants. Intake may be frightening and eye-opening to the participants, but “it is the only . . . way to strip away the old street attitudes” that are common amongst the participants. Many of the offenders that are enrolled into boot camp programs have low self-esteem and have few accomplishments in their lives. Most have been raised without a structured environment and have a lack of positive influences. The sometimes harsh methods used are a last-chance attempt at reforming young criminals into law abiding citizens by breaking them down to build them back up with motivation and confidence.

Rehabilitation programs, that are semi-militaristic and heavily focused on supportive and positive rehabilitation, are the most successful in terms of recidivism and impact on the offenders. Elements that have been identified in successful correctional rehabilitation programs are “formal rules, anti-criminal modeling and reinforcement, problem solving, use of community resources, quality interpersonal relationships, relapse prevention and self-efficacy, and therapeutic integrity.” Many of the methods used are focused on psychological behavior modification. Some of the defined target behaviors are “attention to detail, hygiene, attitude, communication, and physical training.” Typically, the relationships formed between the department staff and the participant plays a large role in offender rehabilitation. Group support and teamwork are taught in all aspects of the program, including “military drill and . . . group counseling sessions.” Other important qualities for rehabilitation, like problem solving, are taught in an intensive supervision phase where offenders may “work, complete community service, [take classes toward their education], and abide by a curfew.” Historically, offenders who successfully complete these programs display a deep loyalty to the program and the individuals who

96. See id. at 3, 5–7.
97. Nix, supra note 1, at 20.
98. Id.
99. Id.
100. Id.
101. Id. at 16, 20.
102. See Nix, supra note 1, at 21–22.
103. Id. at 21.
104. Id.
105. Id.
106. Id.
108. Id.
aided in their rehabilitation. One of the most influential aspects of these programs is the realization that the staff cares for them because many of the participants have not experienced caring relationships before. It is imperative that staff members push the offenders to put their full effort into their progress and motivate them to have something to look forward to when they graduate. The “key question in juvenile [and youthful offender] justice is how to effectuate lasting psychological and behavioral changes that will lead to rehabilitation and reduced recidivism.”

Treatment programs offered by the department staff, as well as an extensive aftercare phase, are essential for successful rehabilitation and must not be overlooked. According to research on the topic, treatment programs are successful if they “target offenders who are at risk for recidivism, are modeled after cognitive-behavior theoretical models and are sensitive to juveniles’ learning styles and characteristics, and address the characteristics of youth directly associated with criminal activity.” Because of this, participants are most affected by plans that address their individual history and needs. An offender who struggles with drug addiction or abuse may benefit from supportive programs like drug abuse counseling more than an offender whose lack of social skills are attributed to the offense. Due to this, it is important that the particular characteristics and histories of the offenders must be considered to maximize the rehabilitative effects. Furthermore, aftercare and supervision programs are especially beneficial in reducing recidivism for offenders with drug abuse problems.

1. Importance of Aftercare on Recidivism

A major reason boot camp programs across the country have failed is due to a lack of follow-up or aftercare for participants when they return to

109. Id. at 20.
110. Id.
111. See id. at 20–21.
112. Muscar, supra note 12, at 38.
113. See id.
115. Id.
116. Id. at 38–39.
117. See Muscar, supra note 12, at 38–39.
118. See id.
the community.\textsuperscript{119} This conclusion is made from studies that have compared the criminal activities of boot camp graduates who participated in aftercare programs to those who have not.\textsuperscript{120} “[One] study compared the recidivism [rates] of 337 offenders who received a mandatory [ninety]-day . . . aftercare program to [the recidivism rate of] 383 offenders . . . who did not receive [any sort of] aftercare.”\textsuperscript{121} Both of these groups participated in a six-month boot camp program “modeled after military basic training but also included an emphasis on [supportive] rehabilitation” methods and practices.\textsuperscript{122} This study concluded that “[t]he offenders who received aftercare had [significantly] lower recidivism than [the group that] did not.”\textsuperscript{123} The statistics displayed that after one year of release, 16\% of the group who received aftercare reoffended, compared to the 21\% rate for the group who did not.\textsuperscript{124} Two years after the programs were completed, 22\% of the aftercare group reoffended while 33\% of the group without aftercare reoffended.\textsuperscript{125} These statistical differences emphasize the need for boot camp programs to include follow-up practices to supervise the offenders and ensure they stay on the right track.\textsuperscript{126} However, like most other aspects of boot camp, aftercare practices can vary greatly between states and jurisdictions, which lead to varying results.\textsuperscript{127}

The specific aspects of aftercare programs have an impact on their success in reducing recidivism.\textsuperscript{128} Supervision in itself may not be significant enough to have an impact on recidivism; whereas, programs with close supervision and individually tailored rehabilitation methods have more success.\textsuperscript{129} A previous Florida boot camp program, in Pinellas County, had staff members stay in contact with the participants for at least six months after graduation to track their behavior and success in school.\textsuperscript{130} Another example of an aftercare program that experienced success in recidivism is the New York shock parole aftercare program.\textsuperscript{131} This program mainly
consisted of “employment, drug treatment, and counseling opportunities.”

One factor that likely contributed to this program’s success was the light caseload of the officers assigned to the program. Two officers were assigned to thirty graduates personally in order to individualize treatment and more effectively supervise and monitor the graduates. While statistics are often scarce and vary depending on many factors, the consensus is that aftercare programs are a key aspect of successful rehabilitation, and the specific practices and methods used by each program play a large role in the results.

C. Goals of Boot Camp Rehabilitation

Besides the primary goal of rehabilitation for youthful offenders to change their lives and reduce crime, other goals of boot camp rehabilitation to consider are deterrence, punishment, incapacitation, and cost control. Generally, boot camp administrators use “rehabilitation, deterrence, and cost control” as their primary goals, while the public and policymakers tend to prioritize deterrence and punishment. The goals and purposes of boot camp rehabilitation are similar to those of a traditional correctional facility, but supporters believe boot camp programs are a better fit to meet these goals. Legally, deterrence is considered in two ways: General and specific deterrence.

Specific deterrence refers to a sanction deterring the particular individual punished, whereas general deterrence refers to vicariously learning from seeing other people punished. The assumption underlying shock incarceration is that the unpleasant experience per se will be a potent disincentive to further commission of unlawful behavior. Many boot camps are even located in close geographical proximity to more traditional prisons to emphasize the potential for serving hard time.

A common belief among administrators, legislators, and the public is that the harsh nature of boot camp will prevent recidivism of the individual—specifically by providing a life-changing experience, while also

132. Muscar, supra note 12, at 41.
133. Id.
134. See id. at 39–41.
135. Id. at 40–42.
137. Muscar, supra note 12, at 9.
138. Id.
140. Id.
deterring the general public from committing crimes.  

The media coverage of boot camps involving early wake-up calls, physical conditioning, and yelling drill sergeants can cause young offenders who know of the possibility of boot camp or prison to refrain from breaking the law.  

Punishment and incapacitation are also goals viewed favorably by legislators and the public because of the retribution aspect and keeping offenders out of the community until their desires for criminal behavior have decimated.  

Punishment is defined as “impos[ing] unpleasantness upon a person as a response to his or her commission of a wrongful act.”  

So long as rehabilitation boot camp programs are successful, they provide a way to incarcerate and punish young offenders in shorter periods of time, creating a more effective way to meet the goals of the criminal justice system.  

Furthermore, boot camp programs can reduce prison overcrowding and result in significant cost savings due to the considerably shorter sentences of participants in the programs.  

According to the National Institute of Justice, “[b]oot camps could reduce the number of prison beds needed in a jurisdiction, which would lead to modest reductions in correctional costs.”  

Conversely, boot camp programs have the potential to widen the net, or to confine offenders who would otherwise be given probation, which could lead to boot camp programs becoming as expensive as prison.  

The primary reason boot camp numbers have dwindled across the country is a result of economic concerns—widening the net may be a reason for this because boot camp rehabilitation is more costly than probation.  

It is also difficult to analyze the economic impact of these programs because “states vary in [their budgets and] how they determine costs.”  

Because of these economic concerns, it is imperative that states are selective in determining enrollment of offenders, and someone who would likely be given probation should not be enrolled to prevent unneeded costs.  

Overall, while it may vary from state to state, boot camp programs provide an opportunity to lower costs on individual offenders and can be a benefit to
the economy so long as the programs successfully rehabilitate the offenders.152

D. Controversy and Political Climate

The effectiveness and practice of military-style boot camp rehabilitation has been a topic of debate for years and requires a multidimensional analysis.153 Proponents of the programs believe that rehabilitation, especially for youthful offenders, is a necessary and important aspect of the criminal justice system.154 Most believe that while supportive programs like drug counseling and education are crucial to their success, the military aspect of the programs are also important to instill self-control and discipline in the offenders and to ensure they are dedicated to changing their way of life.155 Those opposed to the programs view the military aspect as undermining rehabilitative efforts by putting the participants in an environment of aggression and intimidation.156 Those against military boot camp programs believe that the nonmilitary aspects are the reason some programs have success and the military boot camp itself is inefficient and a waste of already limited resources.157

The perceived problems facing boot camp programs are largely based on individual programs rather than the effectiveness of boot camp programs as a whole.158 Perhaps the most significant reason for the lack of rehabilitation programs in the United States is inadequate, or lack of, funding.159 Further, if programs are being questioned for effectiveness, they often end up on the chopping block of budgets.160 Another cited problem that has caused a political shift away from these programs is the potential for abuse.161 Like the incident in Florida, there are cases of staff members abusing offenders and causing significant injury, leading to the closure of programs.162 Many citizens view military boot camps unfavorably due to their perception that the military mentality may not be appropriate as a

152. See Benda, supra note 53, at 7; Nix, supra note 1, at 21–22.
154. See Nix, supra note 1, at 20–21.
155. Id. at 21; Muscar, supra note 12, at 8, 29–30.
156. Muscar, supra note 12, at 3.
157. Id. at 3–4.
159. See Nix, supra note 1, at 18–19.
161. Nix, supra note 1, at 18.
162. Muscar, supra note 12, at 19, 22–23.
rehabilitation tool for young offenders. One example of a reported extreme initiation practice is as follows:

You are nothing and nobody, fools, maggots, dummies . . . and you have just walked into the worst nightmare you ever dreamed. I [do not] like you. I have no use for you, and I [do not] give a . . . who you are on the street. This is my acre, hell’s half acre, and it matters not one damn to me whether you make it here or get tossed out into the general prison population, where, I promise you, you [will not] last three minutes before [you are] somebody’s wife. Do you know what that means, tough guys? 

While most programs prohibit the use of intimidation and humiliation practices, and have become heavily regulated, many believe that the risk of abuse in a hostile environment, such as this, is too great. A potential problem with these practices is giving the participants a perception that their environment is unsafe, which could potentially have an impact on their rehabilitation. Furthermore, some critics believe that boot camp practices and environments may be counterproductive because they could create a hardened, more disciplined criminal. “One critic [stated] that people go in feeling like Rambo and come out feeling a whole lot like Rambo.” Another potential issue that must be considered by administrators and legislators debating boot camp rehabilitation is limited positive interactions with the staff. As previously stated, pro-social interactions with department staff are crucial to a program’s success, and the nature of these programs may limit this aspect of the rehabilitation. “[R]esearch [has] indicate[d] that there is a high rate of staff turnover in boot camp[] [programs].” In programs where this occurs, it would be difficult for participants to bond with staff members, which is a rehabilitative aspect boot camp programs are built on.

Another perceived psychological issue with boot camp programs for juvenile and youthful offenders is described by psychologist Dr. Marty Beyer in her review of a pilot program. Dr. Beyer conducted research on

163. Nix, supra note 1, at 18.
165. Id. at 23, 31.
166. Id. at 31–32.
167. Nix, supra note 1, at 18.
168. Id.
169. Muscar, supra note 12, at 31–32.
170. Id. at 32.
171. Id.
172. Id. at 4, 32.
173. Id. at 28.
adolescent development and delinquent juveniles in boot camp programs.\textsuperscript{174} Her research presented the idea that adolescents “are fairness fanatics and are ‘very sensitive to anything they perceive as unfair.’”\textsuperscript{175} Dr. Beyer was concerned that participants would perceive the program as unfair, which would lead offenders to be resistant to assistance.\textsuperscript{176} Her stance is that young offenders respond to encouragement rather than punishment, and the underlying attitudes and long-term behaviors are not changed from punishment.\textsuperscript{177} There is a risk of offenders temporarily adjusting their behavior in order to avoid unwanted punishment, but ultimately not being rehabilitated once they are released from the program.\textsuperscript{178}

While there are some perceived risks, boot camp rehabilitation programs have, in their nature, a reliable source for the effectiveness of these programs, the participants, and graduates themselves.\textsuperscript{179} Studies indicate past participants strongly support boot camp programs and have a more positive attitude about their situation than offenders in traditional detention centers.\textsuperscript{180} One reason for this perceived satisfaction with boot camp programs is the structured, safe environment compared to traditional correctional facilities.\textsuperscript{181} Current boot camp participants also reported feeling “less impulsive and less anti-social” than offenders in other facilities.\textsuperscript{182} Studies indicate that participants perceive boot camps as caring and just and more therapeutic.\textsuperscript{183} For example, a previous Florida boot camp program that was in operation for twelve years before closing due to economic reasons, left a lasting impact on many of its graduates.\textsuperscript{184} Five years after the program’s closure, one graduate said that “his greatest memory from the camp [was] the relationships he formed that changed his life forever.”\textsuperscript{185} The graduate, Andre Edmonds, also reflected on what his life would be like without having the opportunity of boot camp

\begin{enumerate}
\item \textsuperscript{174} Muscar, supra note 12, at 28.
\item \textsuperscript{175} Id. (quoting Michael Peters et al., \textsc{Boot Camps for Juvenile Offenders} 8 (1997)).
\item \textsuperscript{176} Id.
\item \textsuperscript{177} See id.
\item \textsuperscript{178} See id. at 28–29.
\item \textsuperscript{179} See id.
\item \textsuperscript{180} See MacKenzie et al., supra note 114, at 10–11; Christin Erazo, \textit{Five Years After Closing, Martin County Boot Camp Leaves Legacy of Success}, TCPalm (June 29, 2011), http://archive.tcpalm.com/news/five-years-after-closing-martin-county-leaves-legacy-of-success-ep-385104747-344433722.html#.
\item \textsuperscript{181} See Muscar, supra note 12, at 43; Erazo, supra note 179.
\item \textsuperscript{182} Muscar, supra note 12, at 44–45.
\item \textsuperscript{183} Id. at 44.
\item \textsuperscript{184} See Erazo, supra note 179.
\item \textsuperscript{185} Id.
\end{enumerate}
rehabilitation. Edmonds, who is “now a [law-abiding] construction worker in Coconut Creek,” stated, “[w]ithout the camp, [I would] be dead or in prison; no doubt . . . . Kids who need that program are missing out.”

This particular program served the Treasure Coast, Palm Beach, and Okeechobee counties, and provided its young participants with structure and education to earn high school diplomas. “[The program] was also successful in [recidivism and] prevent[ed] about [eighty] percent of its graduates, who were [not always] first-time offenders, from committing [crimes in their future.]”

The Martin County Florida program is another example of a successful rehabilitation boot camp program for juvenile and youthful offenders that closed for economic reasons. “Pam Roebuck, [the] assistant state attorney in charge of Martin County’s juvenile division,” stated “[there is] always a danger when the really good programs close . . . . State statistics show—the boot camps—were the better programs; they were good accountability partners.”

Roebuck believes that the key to success of any rehabilitation program must begin “with dedicated individuals who form [positive] relationships” with offenders. A Martin County Sheriff, Robert Crowder, commented on the program and stated “[w]e focused on education, self-improvement and responsibility, and other good qualities we want to see in young men . . . . People think boot camp is all about screaming and hollering and doing push-ups; it was much more focused on developing the individual.”

Another Martin County Sheriff, Captain Lloyd Jones, worked with young offenders at the boot camp program and also expressed the importance of a dedicated staff.

I just think we need better people working in the system . . . . It [is not] the [boot camp] program, [it is] the people. To make people responsible and hold them to those life skills, and care about children and see these kids become successful, I think [that is] the key to making any program successful.

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186. See id.  
187. Id.  
188. Id.  
189. Erazo, supra note 179.  
190. See id.  
191. Id. (alteration in original).  
192. Id.  
193. Id.  
194. Erazo, supra note 179.  
195. Id.
Captain Jones’ statement is consistent with the research that the success of programs is largely based on the personal relationships formed from the program and the dedication of the staff. At the end of the day, boot camp rehabilitation programs must be viewed individually to determine their effectiveness, and the now-closed Martin County program emphasized that there is potential in these programs to meet their objective goals.

IV. CURRENT FLORIDA BOOT CAMP PROGRAMS

Currently, the State of Florida is down to one remaining rehabilitation boot camp program. As a state that once embraced rehabilitation and led the country in its amount of boot camp programs, economic and budgetary concerns have caused all but one program to cease operations. The last boot camp program in Florida is a county-operated program in Miami-Dade County that has been successful with regards to recidivism and public preference. However, this program has also been at risk of closure for economic reasons as well, regardless of its success. Recently, this program has been popularized by celebrity endorsements and published success stories. This program involves practices including a “semi-military training regimen, education and job training,” “drug and life skills counseling,” and an extensive aftercare phase to reduce recidivism.

196. See id.; Nix, supra note 1, at 20–21.
197. See Muscar, supra note 12, at 25–26; Erazo, supra note 179.
199. Id.; Muscar, supra note 12, at 21–23, 36.
200. See Rodriguez, supra note 198.
201. See id.
A. Miami-Dade Boot Camp Program

The Miami-Dade Boot Camp Program was opened in 1995 and has enrolled over two thousand youthful offenders into the program ever since.\(^{204}\) Both young men and women can participate in the program if they are classified as a youthful offender and are between the ages of fourteen and twenty-four.\(^{205}\) Furthermore, “[t]o be eligible for the program, [participants] cannot be convicted of rape or murder,” but many cadets “have been convicted of charges such as resisting officers, possession of a controlled substance, or grand theft, among others.”\(^{206}\) According to an order form used to place defendants into the program, “[i]nmates are required to serve a minimum of . . . 120 days at the camp as an alternative to prison or county jail time, followed by [a two-month] [w]ork [r]elease” program, then finally a ten-month aftercare.\(^{207}\) The program description lists the function of the program and the objective goals the program serves to satisfy.\(^{208}\) These goals are behavior modification, education and job training, work details, and drug and life skills counseling.\(^{209}\) Behavior modification is used to “provide a restructured life style patterned to reorient inmates [mentally] in a way [that] best conforms to societal needs.”\(^{210}\) The educational programs provided are “access to Adult Basic Education (“ABE”), General Educational Diploma (“GED”), computer science training, college preparation, and the [learning] of basic economic skills necessary for future employment.”\(^{211}\) The inmates in the program also participate in community service based activities.\(^{212}\) Finally, the program provides “drug counseling, psychological counseling and training,” and training “in financial management, employment applications, job management, and basic social skills.”\(^{213}\)

One component of the Miami-Dade Boot Camp Program “is the structured semi-military training regimen,” which involves strenuous activity

\(^{204}\) Odzer, supra note 202.

\(^{205}\) Rodriguez, supra note 198.


\(^{207}\) Order for Defendant’s Placement in Miami-Dade County Corrections & Rehabilitation Department Boot Camp Program, supra note 203, at 1–2.

\(^{208}\) See id. at 1.

\(^{209}\) Id.

\(^{210}\) Id.

\(^{211}\) Id.

\(^{212}\) Order for Defendant’s Placement in Miami-Dade County Corrections & Rehabilitation Department Boot Camp Program, supra note 203, at 1.

\(^{213}\) Id.
used to safeguard physical and psychological well-being for the participants.\footnote{Id.} In this phase of the program, the inmates participate in sixteen weeks of military drills and practices, including push-ups and “precise sequences for showering, meals, and bedtime.”\footnote{Id.} The participants also have their heads shaved, are woken up at 4 AM for jogs, and refer to the department staff as sir and ma’am.\footnote{Id.} Certain practices during this phase are harsh and can be perceived as unfair.\footnote{See id.} For example, one published practice of the program is directing the inmates to “spend an hour making their beds, . . . shining their shoes,” and following other demands of the staff just so drill instructors can trash the rooms when the cadets leave.\footnote{Id.} These practices are not the focal point of the rehabilitation program, but are completed initially during this phase as a tool for turnarounds.\footnote{Id.} These practices are described as “an exercise in internalizing injustices rather than acting rashly” and potentially committing crimes.\footnote{See id.} Acknowledging potential issues in the criminal justice system, these methods can be used to teach emotional control and how to resist responding in a situation where they are pulled over by police and are being profiled in an unfair way.\footnote{See id.} However, when it appears that the cadet’s defenses have faded and they start to break down, the “drill-instructor regime can shift into something softer” and more personal.\footnote{See id.} When something like this happens, the staff will pull the participant aside and ask about the participant’s life and family.\footnote{See id.}

While the semi-military regimen used during this first phase is important to ensure the cadets are willing to be rehabilitated, the education and job training, drug counseling, and aftercare supervision are crucial to the success of this program.\footnote{See Order for Defendant’s Placement in Miami-Dade County Corrections & Rehabilitation Department Boot Camp Program, supra note 203, at 1–2.} “Miami-Dade County is one of the nine sites [nationally that is] awarded [a] $300,000 three-year grant called Project Restart: Improved Reentry Education . . . from the U.S. Department of Education . . . .”\footnote{Vizcaino, supra note 206.} This grant pays for the cadets’ educational classes at a local community college and GED classes for younger offenders who have
not obtained a high school diploma. Along with the educational aspect, the life skills and job training aspects of the program motivate the inmates and give them the skills needed to have something to look forward to once they graduate. Upon completion of the first phase of the program, the participants may be released on community control or probation to find employment or further their education. “To ensure a successful probation period, the boot camp staff holds an orientation where family members are informed of the conditions [their loved ones] must follow to graduate” from the program.

According to an order form, an example of the conditions that must be completed in the second phase of the program are obtaining a GED at the end of the term, a substance abuse evaluation, alcohol abuse evaluation, and an overall health evaluation. Once the participant graduates to the third phase of the program—the ten-month aftercare—they are still in the custody of the department and must abide by department conditions. The cadets “must call the facility three times a day and stay in school or find a job.”

When boot camp participants leave the program, many go back into “the same areas [and have] the same friends,” which can be problematic. Supervisors in this final phase of the program help keep the participants on track and focused.

Most importantly, the Miami-Dade Boot Camp Program has become part of the success stories of thousands of Miami youth, and has been successful in reducing recidivism. This program has an 11% recidivism rate for their graduates, compared to the 27% of regular prison inmates who reoffend. Largely because of the program’s success, it is also highly regarded amongst local judges, sheriffs, and previous graduates. A local judge and avid supporter of the program, Miami-Dade Circuit Court Chief Administrative Judge Nushin Sayfie, stated, “[t]he [b]oot [c]amp program is

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226. See id.
227. See Order for Defendant’s Placement in Miami-Dade County Corrections & Rehabilitation Department Boot Camp Program, supra note 203, at 1; Nix, supra note 1, at 16.
228. See Order for Defendant’s Placement in Miami-Dade County Corrections & Rehabilitation Department Boot Camp Program, supra note 203, at 1, 5.
229. Vizcaino, supra note 206.
230. Order for Defendant’s Placement in Miami-Dade County Corrections & Rehabilitation Department Boot Camp Program, supra note 203 at 1, 5.
231. Id. at 2.
233. See id.
234. See id.
235. See Odzer, supra note 202; Rodriguez, supra note 198.
236. Rodriguez, supra note 198.
237. See Rodriguez, supra note 198.
one of our success stories and a source of enormous pride . . . . When these young men and women leave [b]oot [c]amp, they are completely new individuals—respectful, confident, law-abiding, proud of themselves and thankful for the chance they have been given.”

One success story comes from current Florida Judge Jason Bravo, who owes his success to the Miami-Dade Boot Camp Program. When Judge Bravo was seventeen-years-old, he was going down the wrong path and was arrested for armed robbery. Bravo stated “[w]hat boot camp gave me was an opportunity . . . to better my life and move forward from a mistake that happened as opposed to pretty much rotting away in a jail cell.” After his graduation from the program, Bravo went on to attend college at Florida International University, obtain a law degree from Florida State University, and become an attorney at the same office that prosecuted him before becoming a judge. Jason Bravo is also an inspirational speaker at the program’s graduation ceremonies for the cadets. The program is also endorsed by celebrity Dwayne The Rock Johnson who appears in an HBO documentary on the program. In a speech to new cadets, Dwayne Johnson stated, “I know this [b]oot [c]amp program. I believe in it . . . . I want the world to see how powerful this program is.”

Notwithstanding the success stories and lowered recidivism rates of graduates, the Miami-Dade Boot Camp Program was facing closure to cut its $4 million budget. Realizing the success of the last standing boot camp rehabilitation program for youthful offenders, “Miami-Dade . . . Mayor Carlos Gimenez found a one-time revenue to save the . . . program” from closing. Regardless of the success of rehabilitation programs, these programs always face uncertainty and the potential for closure due to limited budgets. However, the Miami-Dade Boot Camp Program saves taxpayers money over time by lowering expensive prison terms. For example, “[a] five-year prison term costs taxpayers $86,690,” whereas “[t]he [sixteen]-

238. Id.
240. Id.
241. Id.
242. Id.; Vizcaino, supra note 206.
244. Hanks, supra note 202.
245. Id.
246. Rodriguez, supra note 198.
247. Id.
248. See id.; Muscar, supra note 12, at 23, 25.
month boot camp [program] costs . . . $46,453.'"250 While it still costs approximately $4 million a year to operate, the program has the potential to be cost effective over time, so long as it successfully rehabilitates the inmates, which it has been proven to do.251

V. CONCLUSION

Florida is a state that once led the country in rehabilitation boot camp programs but has recently followed a trend away from rehabilitation and is down to one remaining program.252 As discussed earlier, the reason for this is not the lack of success in recidivism, but rather a result of economic concerns and budget limitations.253 The success of these programs is dependent on many factors, including pro-social relationships with staff and peers, aftercare supervision upon release, and supportive programs for education and job training among others.254 The current Miami-Dade Boot Camp Program, and the everlasting impact previous Florida boot camp programs have, left behind show that these programs have the potential to lower crime rates and make a difference in the lives of thousands of youth.255

The juvenile and youthful offenders who enroll into rehabilitation boot camp programs often have backgrounds lacking structure and guidance.256 Many are headed down a life of crime that will only be accelerated by going to prison and being influenced by hardened criminals.257 The vicious cycle of crime starts at a young age, but young people also bare the most potential for change and rehabilitation before their lives become irreparable.258 With crime rates surging across the State and country, a significant step in reducing crime can be accomplished through rehabilitation of young offenders.259 The Miami-Dade Boot Camp Program is an example of the impact these programs can have on young people by providing positive influences and mentors, physical and mental conditioning to improve perceptions of self, and an aftercare program that continues to

250. Id.
251. Id.
252. See Muscar, supra note 12, at 21–23, 25; Rodriguez, supra note 198.
253. Muscar, supra note 12, at 36; see also Rodriguez, supra note 198; supra Part III.
254. See Nix, supra note 1, at 21; MacKenzie, supra note 119, at 359.
255. See Rodriguez, supra note 198; Erazo, supra note 179.
256. Nix, supra note 1, at 20.
257. See id. at 16.
258. See Gardner, supra note 2, at 459–60.
259. See Benda, supra note 53, at 8, 11; Erazo, supra note 179.
motivate the offenders long after their graduation.\textsuperscript{260} So long as the programs are operated similarly to proven programs like Miami-Dade, the State of Florida should embrace boot camp programs and restart its effort to lead the country in rehabilitation for juvenile and youthful offenders.\textsuperscript{261}

\textsuperscript{260} See MacKenzie, \textit{supra} note 119, at 359; Nix, \textit{supra} note 1, at 21; Rodriguez, \textit{supra} note 198.

\textsuperscript{261} See Nix, \textit{supra} note 1, at 21; Rodriguez, \textit{supra} note 198.
A VIOLATION OF THE ANTI-COMMANDEERING PRINCIPLE AND SPENDING POWERS JURISPRUDENCE OR A VALID EXERCISE OF FEDERAL POWERS? EXECUTIVE ORDER 13768 AND ITS EFFECTS ON FLORIDA LOCALITIES

DAVIDE MACELLONI*

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I. INTRODUCTION

On July 1, 2015, Kathryn Steinle was fatally shot on San Francisco’s Embarcadero.¹ The killing was by the hands of Juan Francisco Lopez-Sanchez, an illegal alien convicted of multiple felonies, who had already been deported from the United States on five different occasions.² The murder only added fuel to the fire of the immigration debate, shifting the general public’s attention to immigration policies and enforcement.³ The main object of discussion has since been sanctuary jurisdictions—and sanctuary policies in general.⁴ An obscure object to most, sanctuary policies define the relationship between states and local jurisdictions and the federal government with regards to immigrant residents.⁵ Specifically, sanctuary policies often limit cooperation with federal immigration enforcement actions and are implemented by many of the largest cities in the country.⁶ However, perception of sanctuary policies varies among different sides of the political spectrum.⁷ While some believe sanctuary policies foster criminal

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⁵ See Kopan, supra note 4.

⁶ Id.

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activities and hot-beds for gang violence and drug-trafficking, others affirm the exact opposite, claiming sanctuary jurisdictions to be safer and more cooperative with law enforcement.\(^8\) The Executive Branch of the federal government interprets the issue in agreement with the former position.\(^9\)

On January 25, 2017, the newly elected President of the United States, Donald J. Trump, signed Executive Order 13768 titled “Enhancing Public Safety in the Interior of the United States” (“Executive Order”).\(^10\) The Executive Order targets sanctuary jurisdictions in an attempt to foster cooperation between federal and state law enforcement agencies in the fight against illegal immigration.\(^11\) Sanctuary jurisdictions have in fact been accused by the White House of defying United States Immigration and Customs Enforcement (“ICE”) orders.\(^12\) The Executive Order specifically targets violations of 8 U.S.C. § 1373, which forbids restrictions on the sharing of information regarding citizenship or immigration status of individuals with ICE.\(^13\)

Advocates of the Executive Order argue that implementation of its policies would improve the safety of citizens throughout the United States and further allow a more efficient execution of federal laws and statutes regarding immigration.\(^14\) Critics, on the other hand, argue that the Executive Order infringes upon constitutional rights of state and local jurisdictions by exercising powers—not constitutionally granted to the Executive Branch of government—in violation of the fundamental principle of separation of

8. See Michelangelo Landgrave & Alex Nowrasteh, Criminal Immigrants: Their Numbers, Demographics, and Countries of Origin, 2017 CATO INST.: IMMIGR. RES. & POL. BRIEF 1–2; Lajeunesse, supra note 7.
11. See id. at 8799.
powers. Critics, in fact, affirm that ordering Congress to withhold federal funding, one aspect of the Executive Order, as punishment for the failure to comply with federal immigration laws, is an unconstitutional form of coercion in violation of the Tenth Amendment—which prohibits the federal government from forcing states and local governments to enforce federal laws.

Jurisdictions across the country have responded differently to President Trump’s Executive Order: Cities like Los Angeles and New York promised to stand behind their sanctuary policies, while Miami-Dade County retracted its sanctuary policy.

Part II of this Comment will illustrate the historical development of sanctuary jurisdictions from their biblical origin to the most recent application in the western legal system, specifically in the United States. Part III introduces the language of the Executive Order and its connections to the statute that it is designed to enforce. Part IV analyzes, in depth, the possible constitutional challenges to the Executive Order, and the arguments both in favor and against its constitutionality. Finally, Part V of this Comment will consider the possible repercussions of the provisions within the Executive Order in Florida, with particular attention paid to the South Florida region, historically home to thousands of immigrants.

II. SANCTUARY JURISDICTIONS

A. Historical Development: From Its Biblical Origin...

The concept of a sanctuary dates back to at least biblical times, and was originally rooted in the power of religious authorities to grant protection within an inviolable religious area or structure to persons fearing for their

18. See infra Part II.
19. See infra Part III.
20. See infra Part IV.
21. See infra Part V.
lives or liberty. Sanctuary practices existed in many Western societies, and were extensively used by ancient Hebrews after being freed from slavery in Egypt. Sanctuary practices were further used in both ancient Greece and Rome, with characteristics similar to the concept of asylum.

While originally granting asylum for all crimes, with many temples extending what was considered as divine protection, Greeks later reduced the use of asylum to individuals who had committed unpremeditated crimes. Contrarily, sacred edifices in Rome were not sanctuaries. In fact, Romans only extended asylum to give immunity and protection from violence throughout the inquisition process. Once judgment on the evidence was rendered, the asylum would be revoked and punishment would be inflicted on the defendant found guilty of a crime. With the emergence of Christianity, the concept of sanctuary extended to a wider range of individuals. In 303 A.D., Constantine’s Edict of Toleration granted Christian churches permission to extend protection to fugitives. Sanctuary was later recognized as a legal right through the promulgation of the Theodosian Code by the emperor Theodosius in 392 A.D. Extensively used in medieval times—enjoying recognition in both Canon law and Saxon law—sanctuaries suffered as centralized governments increased throughout Europe, and Church and State clashed over its control. Resulting from the
schism between the English Crown and the Catholic Church, the privilege of sanctuary came to an end in England in 1624.33

B. . . . To Its Modern American Application . . .

In the United States, sanctuaries by religious authorities against civil authorities were not invoked for almost 200 years.34 Prior to the American Civil War, clergymen and members of religious communities offered aid to slaves escaping bondage through an intricate system of routes known as the Underground Railroad.35 Although activism in the Underground Railroad was spread across religious figures and churches, no record exists of any church invoking the right to sanctuary.36 The first instance of the modern application of sanctuaries was during the Vietnam War, a military action that was strongly opposed by the religious community, which offered safe havens to draftees conscientiously resisting the draft.37 Although participants to the movement made no claim asserting legal recognition, the renewed concept of sanctuary was empowered by its characteristics of civil disobedience.38

The current sanctuary movement in the United States developed in the 1980s when, after the enactment of the Refugee Act, “thousands of immigrants from El Salvador and Guatemala” applied for asylum.39 As a consequence of asylum applications being routinely rejected by federal

33. Davidson, supra note 22, at 593; Feeley, supra note 22, at 810.
34. IGNATIUS BAU, THIS GROUND IS HOLY: CHURCH SANCTUARY AND CENTRAL AMERICAN REFUGEES 160 (1985); Davidson, supra note 22, at 594. Early colonial history of the United States makes no mention of sanctuary privileges. BAU, supra at 159. The inexistence of sanctuary privileges in the United States at the time was probably due to the fact that pilgrims considered America as a sanctuary in its entirety, and therefore saw no reason to formally adopt the privilege. Id. at 158–59; James H. Walsh & Mary Ellen O’Neill, Sanctuary - A Legal Privilege or Act of Civil Disobedience?, Fla. B.J., Feb. 1987, at 11, 13.
36. Davidson, supra note 22, at 595.
37. Id. at 597–98.
agencies, many churches across the country declared themselves sanctuaries to offer refuge to immigrants and protest against the policies of the federal government.\textsuperscript{40} In March of 1982, the Southside Presbyterian Church of Tucson, Arizona, was the first to publicly announce itself as a sanctuary for Central American immigrants fleeing war.\textsuperscript{41} In addition to offering protection, the churches and religious communities involved in the movement provided food, clothing, and legal services.\textsuperscript{42}

Following the wave of sanctuary initiatives ignited by churches and religious groups around the country, many local governments established sanctuary policies.\textsuperscript{43} Sanctuary laws passed by cities and states generally declared public places as sanctuaries.\textsuperscript{44} Jurisdictions that passed sanctuary laws during the 1980s included cities—Seattle, Los Angeles, Minneapolis, Chicago, Rochester—and states, including New Mexico, New York, and Massachusetts.\textsuperscript{45}

C. \textit{... And Its Contemporary Version}

Dissipating at the same pace as the political turmoils in Central America, the sanctuary movement regained momentum in the wake of the attack on the World Trade Center on September 11, 2001.\textsuperscript{46} A few months

\begin{itemize}
\item \textsuperscript{40} Villarruel, \textit{supra} note 35, at 1433; see also Feeley, \textit{supra} note 22, at 820.
\item \textsuperscript{41} Davidson, \textit{supra} note 22, at 603.
\item \textsuperscript{42} Villazor, \textit{supra} note 39, at 141.
\item \textsuperscript{43} Jennifer L. Gregorin, Comment, \textit{Hidden Beneath the Waves of Immigration Debate: San Francisco’s Sanctuary Ordinance}, \textit{6 Liberty U. L. Rev.} 175, 182 (2011).
\item \textsuperscript{44} Villazor, \textit{supra} note 39, at 142 (affirming that laws were indicative of political stands against federal immigration policies regarding the Central American crisis); Huyen Pham, \textit{The Constitutional Right Not to Cooperate?: Local Sovereignty and the Federal Immigration Power}, \textit{74 U. Cin. L. Rev.} 1373, 1383 (2006) (stating that local governments passed sanctuary laws allowing asylum-seekers to remain within their jurisdictions’ boundaries without threat of arrest for violation of federal immigration laws by local law enforcement).
\item \textsuperscript{45} Pham, \textit{supra} note 44, at 1383; see also Jorge L. Carro, \textit{Municipal and State Sanctuary Declarations: Innocuous Symbolism or Improper Dictates?}, \textit{16 Pepper L. Rev.} 297, 311–12 n.88–97 (1989) (describing the extended implementation of sanctuary policies across the country and listing, among others, Oakland, San Francisco, San Jose, and Sacramento, California; Rochester and Ithaca, New York; and Cambridge, Massachusetts as municipalities which also passed resolutions or city ordinances in favor of sanctuaries); Daniel D. McMillan, Note, \textit{City Sanctuary Resolutions and the Preemption Doctrine: Much Ado About Nothing}, \textit{20 Loy. L.A. L. Rev.} 513, 516–17 (1987) (affirming that the cities of Berkeley, California, and Madison, Wisconsin, also passed resolutions establishing themselves as “cities of refuge for Central American refugees”).
\item \textsuperscript{46} Laura Sullivan, Comment, \textit{Enforcing Nonenforcement: Countering the Threat Posed to Sanctuary Laws by the Inclusion of Immigration Records in the National Crime Information Center Database}, \textit{97 Cal. L. Rev.} 567, 572 (2009).
\end{itemize}
after the attack, answering concerns of the general public regarding national security and immigration, the Department of Justice (“DOJ”) released a memorandum announcing the **inherent authority** of local officials to arrest and detain illegal immigrants for both civil immigration and criminal violations.\(^{47}\) Disapproving the policies set forth by the memorandum, local enforcement authorities adopted new sanctuary policies.\(^{48}\) The trend of implementing favorable sanctuary policies has grown steadily since then, albeit the heinous crime committed against innocent civilians in New York on September 11, 2001 would have warranted otherwise.\(^{49}\) By 2008, many states throughout the country counted sanctuary jurisdictions within their territorial boundaries.\(^{50}\)

The Department of Homeland Security (“DHS”) responded to local jurisdictions’ implementation of sanctuary policies by creating “Secure Communities, [a program requiring] local law enforcement agencies to run fingerprints through the DHS illegal immigrant database upon booking.”\(^{51}\) When a match occurred, ICE would be alerted and a detainer would be issued.\(^{52}\) DHS discontinued the program in 2014 due to complications in its administration arising out of lawsuits for violation of arrestees’ Fourth Amendment rights.\(^{53}\) DHS substituted Secure Communities with the Priority Enforcement Program (“PEP”), a program designed to limit the applicability

\(^{47}\) Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep’t of Justice, on Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations 3–5 (Apr. 3, 2002) (on file with the U.S. Dep’t of Justice).


\(^{53}\) See Stubblefield, *supra* note 51, at 543.
of detainers merely to illegal immigrants convicted of a civil immigration priority offense].

The implementation of federal immigration detention mandated by ICE did not produce the results hoped for, leading cities across the country to once again implement counter-policies in opposition to the federal immigration regulations. Currently, approximately 400 local jurisdictions—with New York, San Francisco, and Los Angeles once again at the forefront of the movement—refuse to comply with federal immigration mandates and, either officially or unofficially, refuse to apply sanctuary regulations within their territories.

Modern sanctuaries do not conceal undocumented aliens nor shelter them from detection. “[W]hen a city says that it is being a sanctuary, it means that the city will not be an arm of federal immigration authorities.”

The lack of intent to physically protect individuals from law enforcement is what specifically separates modern sanctuaries from the original movement. In an interview released to Politico, the director of special projects at the New York Immigration Coalition contended that “the term sanctuary cities is a misnomer.” Shifting substantially from their historical meaning, nowadays sanctuary jurisdictions are considered to be cities, counties, or states, which limit government employees—specifically local law enforcement—from inquiring about the immigration status of immigrants they encounter; with an exception recognized for cases of serious criminal offense[s].

54. Id.
55. See id. at 542–43.
57. Chemerinsky, supra note 56, at 60.
58. Id.
59. See id.; Villazor, supra note 39, at 148–49.

“For people that are anti-immigrant, sanctuary cities are places where anyone can come and commit a crime and there is no law and order, and we know that is fiction” . . . . “At the same time, sanctuary cities are not places where we can stop the federal government from entering and using information they have access to.”

Id.

61. Corrie Bilke, Note, Divided We Stand, United We Fall: A Public Policy Analysis of Sanctuary Cities’ Role in the ‘Illegal Immigration’ Debate, 42 IND. L. REV. 165,
Although scholars and local policymakers have traditionally divided modern sanctuary policies into three major categories, such categories are often times combined by jurisdictions within one regulation.62 The first category, the so-called don’t ask policies, limits inquiries as to the nationality or immigration status of an individual by local law enforcement.63 The second category, don’t enforce policies, creates limitations on the power of local law enforcement to arrest or detain violators of immigration laws.64 Don’t tell regulations, the third category, establishes limitations on the authority by local enforcement agents to report immigration status information to federal agencies.65

States and municipalities, as well as individual police departments, have adopted diverse mechanisms to ensure that unauthorized aliens in their jurisdictions are not turned over to federal immigration authorities.66 For instance, Cook County, Illinois, home to Chicago, instructs its county jail system to deny compliance with ICE detainer requests;67 Los Angeles’ Special Order 40, the oldest city sanctuary ordinance, refrains police action for the mere purpose of determining a person’s immigration status;68 and San

180 (2009) (discussing the historical development of sanctuary cities in the United States and the potential hazards that nonfederal enforcement of immigration law that sanctuary cities seek to avert); Villazor, supra note 39, at 147–48 (examining the narrower scope of the definition of sanctuary cities compared to its original meaning).

62. Kittrie, supra note 49, at 1455; see also Sullivan, supra note 46, at 574.


64. Id.; see also Pham, supra note 44, at 1390 (dividing don’t enforce provisions between “[n]o [e]nforcement of [i]mmigration [[l]aws”—often reducing the resources available to officers to enforce federal immigration laws—and “[n]o [e]nforcement of [c]ivil [i]mmigration [[l]aws”—barring cooperation in immigration law enforcement when the alleged violation is exclusively a civil violation).


68. OFFICE OF THE CHIEF OF POLICE, SPECIAL ORDER NO. 40, UNDOCUMENTED ALIENS (1979); Kittrie, supra note 49, at 1469. Los Angeles was one of the first cities in the United States to promote sanctuary policies. Kittrie, supra note 49, at 1455. The Office of the Los Angeles Chief of Police promulgated Special Order 40 to stop local enforcement agents from initiating police action with the sole purpose of discovering the immigration status of a person. OFFICE OF THE CHIEF OF POLICE, supra. The Order, however, allowed officers to communicate to federal agencies arrest records when the person arrested had been previously convicted of a felony. Id.
Francisco Sheriff’s Department’s policy is that, absent a court issued warrant or signed order, contact with ICE representatives should be limited.69

III. PRESIDENTIAL PROMISE

Since officially entering the presidential race in June of 2015, President Trump focused his campaign leitmotif on issues of public safety and threats presented by illegal immigration.70 On several occasions during his campaign, President Trump vowed to crack down on sanctuary jurisdictions in an attempt to lower criminal rates and defeat criminal organizations operating in the United States.71 Highly critical of the federal immigration policies implemented by former President Barack H. Obama—his predecessor at the presidential helm—President Trump identified sanctuary policies as one of the main causes of the proliferation of criminal organizations.72 Since his election, as the forty-fifth President of the United States on November 8, 2016, President Trump’s position on immigration has not changed.73 Faithful to his campaign promises to the electorate, on January 25, 2017, exactly five days after taking the Oath of Office, President Trump signed the Executive Order.74

69. Letter from Ross Mirkarimi, Sheriff, S.F. Sheriff’s Dep’t, to All Personnel, S.F. Sheriff’s Dep’t (Mar. 13, 2015) (on file with San Francisco Sheriff’s Department).


74. Alvarez, supra note 73.
A. Enhancing Public Safety in the Interior of the United States

Composed of eighteen sections, the Executive Order lays out the presidential plan against illegal immigration. Specified in section one, “[t]he purpose of [the Executive Order] is to direct executive departments and agencies . . . to employ all lawful means to enforce immigration laws of the United States.” Further, affirming that aliens illegally entering the United States—and those aliens overstaying their visas—are a significant threat to both public safety and national security, the Executive Order asserts that faithful execution of federal immigration laws is impossible when exemptions apply to different classes and categories of removable aliens. In a direct attack on sanctuary jurisdictions, section one also stresses that “[s]anctuary jurisdictions across the United States willfully violate [f]ederal law in an attempt to shield aliens from removal from the United States. These jurisdictions have caused immeasurable harm to the American people and to the very fabric of our Republic.”

In an additional effort to equalize the categories of removable aliens, section five of the Executive Order lists multiple classes of aliens that fulfill the federal requirements for removal. In its language, the Executive Order allows the Secretary of Homeland Security to prioritize for removal, in addition to those recognized by congressional acts, aliens who:

a) Have been convicted of any criminal offense;
b) Have been charged with any criminal offense, where such charge has not been resolved;
c) Have committed acts that constitute a chargeable criminal offense;
d) Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency;
e) Have abused any program related to receipt of public benefits;
f) Are subject to a final order of removal, but who have not complied with their legal obligation to depart the United States; or
g) In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.

76. Id. at 8799.
77. Id.
78. Id.
79. Id. at 8800.
In order to implement the policies laid out in the Executive Order, in section eight, President Trump states that it is the intent of the Executive Branch to empower law enforcement agencies at both the state and local level to perform those functions generally employed by federal immigration officers. Attempting to foster cooperation between federal, state, and local agencies, the Executive Order further provides that the Secretary of State has the authority to enter into statutorily regulated agreements with state governors and local officials to permit local agencies to enforce federal laws. However, in opposition to the constructive language of section eight, the Executive Order provides punitive language in section nine for those jurisdictions that fail to enforce federal immigration policies.

B. Section Nine—The Source of Discord

Section nine of the Executive Order is titled Sanctuary Jurisdictions, and affirms that “[i]t is the policy of the [E]xecutive [B]ranch to ensure, to the fullest extent of the law, that a [s]tate, or a political subdivision of a [s]tate, shall comply with 8 U.S.C. § 1373.” Specifically, subsection 9(a) establishes that:

In furtherance of this policy, the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. § 1373—sanctuary jurisdictions—are not eligible to receive [f]ederal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary. The Secretary has the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction. The Attorney General shall take appropriate enforcement action against any entity that violates 8 U.S.C. § 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of [f]ederal law.

The stated goal of section 9(a) of the Executive Order is to take enforcement actions against any entity or jurisdiction that fails to comply

81. Id.
82. Id.; see also 8 U.S.C. § 1357(g) (2012). In 8 U.S.C § 1357(g), this section allows agreements between federal agencies and state or local agencies within the scope to permit local law enforcement to enforce federal laws and regulations. 8 U.S.C. § 1357(g)(1)—(2).
84. Id.
85. Id.
with federal law, specifically 8 U.S.C. § 1373. Stated within the language of section 9(a), and also confirmed by the language of section two, President Trump’s objective is to ensure that jurisdictions not in compliance with federal law do not receive federal funds and grants, with exceptions made for disbursements mandated by law.

C. 8 U.S.C. § 1373

Signed into law by President Bill Clinton in September of 1996—just a few months after another statute with similar language, the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”), was signed into law—the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) contained the provision which was later codified at Title 8 § 1373 of the United States Code. 8 U.S.C. § 1373 regulates communications between government agencies, including federal, state, and local agencies, and the Immigration and Naturalization Service (“INS”). Specifically, the statute prohibits any federal, state, or local government entity or official from restricting “any government entity or official[s] from sending to, or receiving from, the [INS] information regarding the citizenship or immigration status, lawful or unlawful, of any individual.” The statutory language further prohibits any person or agency

86. See id.
87. See id. at 8799, 8801.

Notwithstanding any other provision of [f]ederal, [s]tate, or local law, no [s]tate or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.

90. Id. § 1373(a). The Senate version of the bill noted in its report that the section:

Prohibits any restriction on the exchange of information between the [INS] and any [f]ederal, [s]tate, or local agency regarding a person’s immigration status. . . . The acquisition, maintenance, and exchange of immigration-related information by [s]tate and local agencies is consistent with, and potentially of considerable assistance to, the [f]ederal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act.
to “prohibit, or in any way restrict a [f]ederal, [s]tate, or local government entity from” sending, requesting, or receiving information regarding the immigration status, lawful or unlawful, of any individual from the INS; maintaining such information; and exchanging information with other government agencies.91 Although prohibiting restrictions on information-sharing between state and federal agencies, neither of these anti-sanctuary statutes renders cooperation with federal immigration authorities—or sharing of information—mandatory.92 As some scholars have noted, the characteristic of 8 U.S.C. § 1373 is to encourage cooperation among different levels of law enforcement by prohibiting certain conduct instead of directly requiring local cooperation.93

IV. CONSTITUTIONALITY ISSUES

The reaction from states and municipalities, to the signing of the Executive Order, was strong and immediate.94 On January 31, 2017, the City and County of San Francisco filed a suit in the United States District Court for the Northern District of California challenging the constitutionality of the Executive Order.95 The County of Santa Clara, California filed suit shortly thereafter on February 3, 2017, on similar grounds, seeking declaratory and injunctive relief against all named defendants, which included President Trump himself.96 The City of Richmond, California also filed suit challenging the Executive Order on March 21, 2017, and on March 23, 2017, moved to relate its case to the suits brought by the Counties of Santa Clara and San Francisco.97 An additional action seeking declaratory and injunctive relief...
relief was filed on February 8, 2017, by the City of Lawrence, Massachusetts, and the City of Chelsea, Massachusetts, in the United States District Court for the District of Massachusetts.\(^\text{98}\) The counties and cities specifically challenged section 9(a), the enforcement provision within the language of the Executive Order, on several grounds.\(^\text{99}\)

In general, the cities and counties each argue that section 9(a) of the Executive Order violates the Separation of Powers Doctrine by improperly seeking to exercise congressional spending powers.\(^\text{100}\) In addition, even if President Trump could exercise such spending powers, the cities and counties contend that the Executive Order would be in violation of those powers—and thereby unconstitutional under the Tenth Amendment—and, lastly, that section 9(a) violates the anti-commandeering clause of the Tenth Amendment.\(^\text{101}\)

On the other hand, support for the Executive Order—and the policies and objectives stated therein—has come from Patrick Morrisey, the Attorney General of West Virginia, and Jeff Landry, the Attorney General of Louisiana.\(^\text{102}\) In their amici curiae brief—filed in the action brought by the

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\(^{98}\) Complaint for Declaratory Judgment & Injunctive Relief, supra note 56, at 2.


\(^{100}\) Complaint for Declaratory Judgment & Injunctive Relief, supra note 56, at 16–22; Frankel, supra note 99; \textit{see also} Exec. Order No. 13768, 82 Fed. Reg. at 8801.

\(^{101}\) Complaint for Declaratory Judgment & Injunctive Relief, supra note 56, at 16; \textit{see also} Frankel, supra note 99; Exec. Order No. 13768, 82 Fed. Reg. at 8801.

\(^{102}\) \textit{See} Proposed Brief of Amici Curiae States of West Virginia, Louisiana, Alabama, Arkansas, Michigan, Nevada, Ohio, Oklahoma, South Carolina, & Texas at 1, 12, Cty. of Santa Clara v. Trump, No. 3:17-cv-00574-WHO (N.D. Cal. filed Feb. 3, 2017) [hereinafter Proposed Brief of Amici Curiae]. The Amici states supporting the Executive Order also include the states of “Alabama, Arkansas, Michigan, Nevada, Ohio, Oklahoma, South Carolina, and Texas.” \textit{Id.} at 1 n.1.
City and County of San Francisco and the County of Santa Clara—both maintain that the Executive Order is constitutional and challenges the validity of the action taken by these cities and counties based upon justiciability grounds.\textsuperscript{103} Without going into the specific merits of whether any of the plaintiffs have standing to bring the action, the following analysis will focus on the constitutionality of the Executive Order, including possible arguments in favor or against it.\textsuperscript{104}

A. Spending Clause

Article I, section 8 of the United States Constitution establishes what has been defined as the Taxing and Spending Clause.\textsuperscript{105} The Taxing and Spending Clause textually affirms that “Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.”\textsuperscript{106}

Vast jurisprudence has interpreted the language of the Taxing and Spending Clause, starting with United States v. Butler,\textsuperscript{107} which defines the federal spending power broadly to promote the \textit{general welfare}.\textsuperscript{108} The

\begin{footnotesize}
\begin{enumerate}
  \item Proposition Brief of Amici Curiae, supra note 102, at 2.  The first argument presented by the brief is the lack of standing to bring suit due to the absence of any injury to the jurisdictions. \textit{Id.}
  \item See Exec. Order No. 13768, 82 Fed. Reg. at 8799; Proposed Brief of Amici Curiae, supra note 102, at 3; State of California’s Administrative Motion for Leave to File an Amicus Curiae Brief in Support of Plaintiff’s Motion for Preliminary Injunction at 2, City & Cty. of S.F. v. Trump, No. 3:17-cv-00485-WHO (N.D. Cal. filed Jan. 31, 2017) [hereinafter State of California’s Administrative Motion].
  \item See U.S. CONST. art. I, § 8, cl. 1.
  \item 297 U.S. 1 (1936).
  \item \textit{Id.} at 65–66. “[T]he power of Congress to authorize expenditure of public money[] for public purposes is not limited by the direct grants of legislative power found in the Constitution.” \textit{Id.} at 66 (adopting Alexander Hamilton’s interpretation of the General Welfare Clause); \textit{see also The Federalist No. 34, supra note 106,} at 177–78 (Alexander Hamilton); Jeffrey T. Renz, \textit{What Spending Clause? (or the President’s Paramour): An}
Supreme Court of the United States further affirmed in *South Dakota v. Dole*\(^{109}\) that “Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power ‘to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.’”\(^{110}\) Articulating limitations to the applicable conditions, Chief Justice Rehnquist announced in *Dole* a four-part test stemming from previous, singular rulings of the Court.\(^{111}\) First, the use of spending power by Congress must be in furtherance of *the general welfare.*\(^{112}\) Reaffirming the principle established in *Helvering v. Davis*,\(^{113}\) the Chief Justice recognized that courts should observe some degree of deference to Congress in determining “whether a particular expenditure is intended to serve general public purposes.”\(^{114}\) Second, conditions imposed by Congress on grants must be unambiguous.\(^{115}\) Third, there must be a relation between the conditions imposed by Congress and the objectives of the federal funds awarded.

\(^{109}\) *Id.* at 206 (quoting Fullilove v. Klutznick, 448 U.S. 448, 474 (1980)).

\(^{110}\) *Id.* at 205. The United States District Court for the District of South Dakota dismissed the complaint, and the ruling was later confirmed by the Court of Appeals for the Eighth Circuit. *Id.* The Supreme Court affirmed the ruling of the lower court, finding the statute to be a constitutional exercise of Congress’ spending power. *Id.* at 212. “Congress can trade things within its power—like money, or regulatory authority, or forbearance from preemption—for state assistance that would otherwise lie beyond its reach.” Spencer E. Amdur, *The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism*, 35 YALE L. & POL’Y REV. 87, 120 (2016).


\(^{112}\) *Dole*, 483 U.S. at 207 (quoting *Helvering*, 301 U.S. at 640; *Butler*, 297 U.S. at 65).

\(^{113}\) 301 U.S. 619 (1937).

\(^{114}\) *Dole*, 483 U.S. at 207. Changing the terms of an existing funding agreement would be a breach similar in nature to changing the terms of an existing contract. Andrew Hanson, “Economic Dragooning”: Limiting Trump’s Ability to Punish Sanctuary Cities, HARV. L. & POL’Y REV. (Dec. 1, 2016), http://www.harvardlpr.com/2016/12/01/economic-dragooning-limiting-trumps-ability-to-punish-sanctuary-cities/.

\(^{115}\) *Dole*, 483 U.S. at 207.
and the purpose of the federal program—a limitation of germaneness.\textsuperscript{116} Fourth, congressional intent in establishing the program cannot constitute a violation of other specific restrictions imposed on the federal government by the Constitution.\textsuperscript{117} Chief Justice Rehnquist also interestingly affirmed near the end of the opinion “that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion.”\textsuperscript{118} Although no compulsion was found in \textit{Dole}, the opinion created a new threshold for congressional legislative acts to be deemed constitutional—opening the gates to additional challenges.\textsuperscript{119} Although not all parts of the four-part test are allegedly challenged by the language of the Executive Order, arguments can be made as to at least three parts.\textsuperscript{120}

1. Clarity of Intent

In the specific words of Chief Justice Rehnquist, when “Congress desires to condition the [s]tates’ receipt of federal funds, it ‘must do so unambiguously . . . , enable[ing] the [s]tates to exercise their choice knowingly, cognizant of the consequences of their participation.”\textsuperscript{121} The contractual nature of the Taxing and Spending Clause enables jurisdictions to know the requirements and expectations set forth by Congress before accepting their end of the bargain.\textsuperscript{122} Thus, it is counter-intuitive that Congress’ legitimate use of its spending power depend on whether acceptance of conditions on funds by local jurisdictions is made


\textsuperscript{117} \textit{Dole}, 483 U.S. at 208. Language in previous rulings of the Supreme Court of the United States uncontrovertibly affirms the “proposition that the [spending] power may not be used to induce the [s]tates to engage in activities that would themselves be unconstitutional.” \textit{Id.} at 210.

\textsuperscript{118} \textit{Id.} at 211 (quoting \textit{Steward Mach. Co. v. Davis}, 301 U.S. 548, 590 (1937)).


voluntarily.\textsuperscript{123} Voluntary and knowing acceptance of federal funds implies that no implementation of after-the-fact conditions are permitted.\textsuperscript{124} In fact, “[t]hough Congress’ power to legislate under the spending power is broad, it does not include surprising participating [s]tates with post-acceptance or retroactive conditions.”\textsuperscript{125} The Court in \textit{National Federation of Independent Business v. Sebelius}\textsuperscript{126} clearly states that Congress is not free to penalize States for their choice to not participate in new programs by taking away existing funding—a decision that resembles less of a constitutional use of spending powers, and more of an abuse of it.\textsuperscript{127}

The jurisdictions challenging the Executive Order affirmed that the main purpose of the Executive Order is to retroactively condition all federal grants to comply with 8 U.S.C. \$ 1373.\textsuperscript{128} Doubting the clarity of the Executive Order, the cities and counties bringing the action claimed that the conditions, being inexistent at the time federal grants were accepted, could not be accepted knowingly and willingly—as is required by the \textit{Dole} test—thus creating forcible conditions on federal grants in violation of the Constitution.\textsuperscript{129} These jurisdictions further contended that the ambiguity of the Executive Order extends to the exact nature of the grants being conditioned.\textsuperscript{130} If the Executive Order applies conditions on federal grants, both the nature of the grants and the amount of federal funds being conditioned need to be stated clearly, thus allowing the voluntary choice by States and municipalities to either accept or reject the federal grants.\textsuperscript{131}

Additionally, the ambiguity of the Executive Order extends to the conduct being specifically targeted.\textsuperscript{132} If no clear directions are given by the federal government on whether a certain conduct would fall under the umbrella of conduct that the Executive Order is trying to limit, then it becomes nearly impossible for jurisdictions to avoid penalties through policy adjustments.\textsuperscript{133}

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\item \textsuperscript{123} \textit{See Nat’l Fed’n of Indep. Bus.}, 132 S. Ct. at 2602.
\item \textsuperscript{124} \textit{Id.} at 2606.
\item \textsuperscript{125} \textit{Id.}
\item \textsuperscript{126} 132 S. Ct. 2566 (2012).
\item \textsuperscript{127} \textit{See id.} at 2607.
\item \textsuperscript{128} \textit{See} 8 U.S.C. \$ 1373 (1996); Complaint for Declaratory & Injunctive Relief, \textit{supra} note 56, at 12.
\item \textsuperscript{129} \textit{See} South Dakota v. Dole, 483 U.S. 203, 207 (1987); Complaint for Declaratory & Injunctive Relief, \textit{supra} note 56, at 12.
\item \textsuperscript{130} \textit{See} Complaint for Declaratory & Injunctive Relief, \textit{supra} note 56, at 12.
\item \textsuperscript{131} \textit{Cf.} Dole, 483 U.S. at 207.
On the other hand, although refraining from discussion about whether any existing grant program meets the Dole criteria—compliance strongly denied by those jurisdictions bringing the lawsuit—the states in support of the Executive Order confirm the validity of the Executive Order. According to the filed Amici Brief, an authorization by Congress allowing the Attorney General and Secretary of State to administer grant programs, conditioning receipt on compliance with specific federal immigration laws, is well within constitutional boundaries. A memorandum issued by Attorney General Jeff Sessions also helps further clarify the essence of federal grants potentially conditioned on compliance with federal immigration laws, thereby rendering meritless the claims of ambiguity with regard to the nature of the grants. The memorandum affirms that “section 9(a) of the Executive Order . . . will be applied solely to federal grants administered by the [DOJ] or the [DHS], and not to other sources of federal funding.” However, the memorandum arguably fails one of its main objectives—specifying the conduct leading to denial of federal funds. Although limiting the term sanctuary jurisdiction to those jurisdictions that “willfully refuse to comply with 8 U.S.C. § 1373,” the memorandum fails to clarify the characteristics of a willful refusal, leaving states and localities in the dark as to the exactitude of the targeted conduct.

2. Nexus Requirement

As a third requirement to achieve constitutionality, Dole affirmed that a connection must exist between the condition applied to federal grants and the government interest to be achieved. The Dole Court stated that “conditions on federal grants might be illegitimate if they are unrelated ‘to the federal interest in particular national projects or programs.’” What has

134. See Dole, 483 U.S. at 207; Proposed Brief of Amici Curiae, supra note 102, at 1–2.
135. See Proposed Brief of Amici Curiae, supra note 102, at 8.
137. Id. (emphasis added); see also Exec. Order No. 13768, 82 Fed. Reg. at 8799, 8801 (Jan. 25, 2017).
141. Id. (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978)).
been recognized as the *nexus* requirement under the *Dole* test is only established when a reasonable relationship between the condition applied by Congress and the purpose of the federal program exists.\(^{142}\)

Thus, a connection must exist between the federal funds being conditioned by the Attorney General and the Secretary of State, and the ultimate goal of the Executive Order—compliance with § 1373 of Title 8 of the United States Code.\(^{143}\) The language of the Executive Order, in conjunction with the memorandum released by the Attorney General might, however, frustrate the Executive Order’s intentions.\(^{144}\) In fact, the Attorney General’s clarification on the identity of the federal grants that could potentially be affected in the process sheds some light on, but also clashes with, the express language of the Executive Order.\(^{145}\) The Executive Order alleges specifically the non-applicability of conditions on grants necessary for purposes of law enforcement.\(^{146}\) However, since all grants mentioned by the Attorney General as possible targets are, on different levels, designed for law enforcement purposes, it becomes unclear what other grants could be affected.\(^{147}\) The issue is of major relevance, because conditions on grants unrelated to immigration purposes—thus running afoul of the concept of *germaneness*—would be the exact type of federal activity the *Dole* Court intended to eliminate.\(^{148}\)

3. Coercion

While not an integral part of the four-prong test developed in *Dole*, the anti-coercion requirement is not any less important in establishing whether conditions on federal grants are constitutional.\(^{149}\) Nevertheless, although—as noted above—courts recognize that financial inducement

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1\(^{142}\). *See id.* at 213. “I agree that there are four separate types of limitations on the spending power: [T]he expenditure must be for the general welfare, . . . the conditions imposed must be unambiguous, . . . they must be reasonably related to the purpose of the expenditure, . . . and the legislation may not violate any independent constitutional prohibition . . . .” *Id.* (O’Connor, J., dissenting) (citations omitted).

1\(^{143}\). *See* 8 U.S.C. § 1373; *Dole*, 483 U.S. at 207; Letter from Annie Lai, Assistant Clinical Professor of Law, U.C. Irvine Sch. of Law et al., to Donald J. Trump, President of the United States of America 3 (Mar. 13, 2017) (on file with the Immigrant Legal Resource Center).

1\(^{144}\). *See Alvarez, supra* note 138; *Frankel, supra* note 99.

1\(^{145}\). *See Alvarez, supra* note 138; *Frankel, supra* note 99.


1\(^{148}\). *See Dole*, 483 U.S. at 207–08.

1\(^{149}\). *See id.* at 207–08, 211.
offered by Congress can be over-coercive, congressional threats to withhold money are upheld when they affect a limited amount of funds.\footnote{Id. at 211 (citing Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)); see also Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2604 (2012).}

In \textit{Dole}, the Supreme Court found the threat of losing 5\% of highway funds was not impermissibly coercive, and the financial inducement a “relatively mild encouragement to . . . [s]tates” to implement the language of the statute.\footnote{\textit{Dole}, 483 U.S. at 211.} In similar scenarios, states have the faculty to decide whether to accept the condition applied by Congress or deny acceptance of the grant.\footnote{Id. at 211–12.} As stated by the Supreme Court of the United States in \textit{National Federation of Independent Business v. Sebelius}, \footnote{Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2603 (2012).} courts “look to the [s]tates to defend [its] prerogatives by adopting ‘the simple expedient of not yielding’ to federal blandishments when they do not want to embrace the federal policies as their own.”\footnote{\textit{Id.} (quoting Massachusetts v. Mellon, 262 U.S. 447, 482 (1923)). Being separate and independent sovereigns, states need to act like it by demonstrating their will. \textit{Id.} at 2604–05.} When conditions attached to federal funds resemble a \textit{gun to the head}, congressional encouragement to state action is not considered a valid exercise of spending powers.\footnote{Id. at 2605; see also Chemerinsky, supra note 56, at 60; Hanson, supra note 114.} If States are not allowed to practically exercise a choice between acceptance or denial of conditions, but can only theoretically preserve such power, congressional actions appear as \textit{economic dragooning} and are therefore unconstitutional.\footnote{See Nat’l Fed’n of Indep. Bus., 132 S. Ct. at 2604. “When we consider . . . that all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5\% of the funds otherwise obtainable under specific[al] highway grant programs, the argument as to coercion is . . . more rhetoric than fact.” \textit{Dole}, 483 U.S. at 211.}

The threat of coercion varies based on the jurisdiction and their degree of reliance on federal funding for the daily management of duties and services to the resident population.\footnote{Complaint for Declaratory & Injunctive Relief, supra note 56, at 16; see \textit{City & Cty. of S.F., Mayor’s Office of Pub. Policy & Fin., Mayor’s 2017–2018 & 2018–2019 Proposed Budget} 11 (2017), http://www.sfmayor.org/sites/default/files/CSF_Budget_Book_2017_Final_CMYK_LowRes.pdf.} Among the jurisdictions directly involved in opposing the Executive Order, San Francisco’s yearly budget gravitates around $10 billion, with approximately $1.2 billion coming directly from the federal government.\footnote{\textit{Id.}} Santa Clara’s federal funding for the 2015 to 2016 fiscal year was approximately $1 billion, a staggering 15\%
of the county’s total budget. Further, Chicago received $1.08 billion in federal funding in 2015, with an estimated increase to $1.25 billion for 2016—roughly 13.5% of the yearly city’s budget.

The outcome of a coercion analysis regarding whether the Executive Order represents a coercive exercise of federal spending powers depends on the exact federal grants that would be withheld in case of non-compliance with the statute by a state or local jurisdiction. Therefore, a coercive effect would likely be an inevitable outcome if more than just federal funds for policing were affected. Contrarily, it is likely that Courts would rule in accordance with Dole and uphold the conditions on federal grants.

B. Tenth Amendment Umbrella

The Tenth Amendment to the Constitution affirms that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” In an effort to shape the relationship between the federal and state governments, the language of the Tenth Amendment helps define the concept of federalism. The basic principle established by the Tenth Amendment is that if powers are “delegated to Congress [by] the Constitution, [then] the Tenth Amendment . . . [refutes] any reservation of that [specific] power to the [s]tates.” Nevertheless, when a power is “not delegated to [Congress] by the Constitution,” it belongs to the [s]tates.

159. Complaint for Declaratory & Injunctive Relief, supra note 96, at 7.
161. See Cities Under Siege, Economist (London), May 6, 2017, at 36. For example, Chicago would only lose $2 million if “the order would affect only federal funds for policing” as argued by the Attorney General in his memorandum. Id. However, if more federal grants will be affected, Chicago would lose, according to some estimates, up to $3.6 billion for the current year. Id.
163. See id.
164. U.S. Const. amend. X.
165. See id.
167. United States v. Darby, 312 U.S. 100, 123–24 (1941) (emphasis added). “It is in this sense that the Tenth Amendment ‘states but a truism that all is retained which has not been surrendered.’” New York, 505 U.S. at 156 (quoting Darby, 312 U.S. at 124).
1. Anti-Commandeering

The Supreme Court of the United States’ understanding and interpretation of the Tenth Amendment has been that “[t]he States unquestionably do retain a significant measure of sovereign authority . . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the federal government.”\textsuperscript{168}

[The preservation of the [s]tates, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National [G]overnment. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible [s]tates.\textsuperscript{169}

\textit{New York v. United States},\textsuperscript{170} solidified the principle of anti-commandeering.\textsuperscript{171} The Supreme Court of the United States held that Congress does not have the power to “commandeer[r] the legislative processes of the [s]tates by directly compelling them to enact and enforce a federal regulatory program.”\textsuperscript{172} Upheld in Printz v. United States,\textsuperscript{173} the prohibition extends to federal directives requiring \textit{particular problems} to be addressed, and to orders given to states’ officers to administer and enforce any \textit{federal regulatory program}. Prohibition to compel states to enact and

\begin{itemize}
\item \textsuperscript{169} \textit{Texas v. White}, 74 U.S. 700, 725 (1868).
\item \textsuperscript{170} 505 U.S. 144 (1992).
\item \textsuperscript{171} \textit{Id.} at 145, 202 (White, J., concurring). The language of the Low-Level Radioactive Waste Policy Amendment Act of 1985 specified that a state or regional compact failing to provide disposal of internally generated waste by a particular date must take title and possession of the waste. \textit{Id.} at 153–54 (majority opinion). The provision also directed States to assume liability for internally generated waste if they failed to comply. \textit{Id.} Writing for the majority, Justice O’Connor found the provision impermissibly coercive, and thus, unconstitutional under the Tenth Amendment. \textit{Id.} at 176, 188.
\item \textsuperscript{172} \textit{New York}, 505 U.S. at 161 (quoting Hodel v. Va. Surface Mining & Reclamation Ass’n, 452 U.S. 264, 288 (1981) (affirming that the Surface Mining Control and Reclamation Act of 1977 was constitutional for the exact reason that it did not commandeer the States into regulating mining)).
\item \textsuperscript{173} 521 U.S. 898 (1997).
\item \textsuperscript{174} \textit{Id.} at 935. The Supreme Court held the Brady Handgun Violence Prevention Act of 1968, which required the Attorney General to establish a national system for instant background checking of prospective handgun purchasers and to command the chief law enforcement officers nationwide to conduct checks and related police tasks, unconstitutional. \textit{Id.} at 933–34.
\end{itemize}
administer federal programs applies regardless of whether congressional commands to regulate are pointed directly to states, or a state is coerced to implement a federal regulatory system.\(^ {175} \) Notwithstanding the principles enunciated in both *New York* and *Printz*, support of state governments and officials is possible when national security is at stake, therefore authorizing an exception to anti-commandeering for reasons beyond the general control of the federal government.\(^ {176} \)

The Executive Order arguably affects states and local jurisdictions in two ways: First, compelling jurisdictions to comply with federal detainer requests in order to avoid being labeled as a *sanctuary*, thus losing funding;\(^ {177} \) and second, preventing jurisdictions from exercising those police powers assigned to them under the Tenth Amendment.\(^ {178} \)

a. **ICE Detainers**

The language of section 9(b) of the Executive Order indicates that jurisdictions failing to comply with any ICE detainer request fall within the category of *sanctuary jurisdictions*.\(^ {179} \) An ICE civil detainer consists of local law enforcement agencies requesting local jurisdictions to keep inmates held for actual or suspected violations of state criminal laws for up to forty-eight hours after the inmate’s scheduled release—potentially extending detention up to five days when arrests and custody stretch over a holiday weekend.\(^ {180} \) The detainers serve the purpose of giving ICE agents enough time to verify the information within federal databases and determine whether the individual should be taken into federal custody.\(^ {181} \)

In its attempt to enforce ICE detainers, the language of the Executive Order—perceived as mandatory—runs afoul of constitutional principles established by judicial interpretation.\(^ {182} \) In 2014, the Third Circuit Court of

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176. See *Printz*, 521 U.S. at 940; Daniel Booth, Note, *Federalism on ICE: State and Local Enforcement of Federal Immigration Law*, 29 HARV. J.L. & PUB. POL’Y 1063, 1073 (2006). “Matters such as the enlistment of air raid wardens, the administration of a military draft . . . or perhaps the threat of an international terrorist, may require a national response before federal personnel can be made available to respond.” *Printz*, 521 U.S. at 940 (Stevens, J. dissenting).
177. See Letter from Annie Lai et al. to Donald J. Trump, supra note 143, at 1.
178. Id.
180. Stubblefield, supra note 51, at 546–47.
181. Id. at 545; see also U.S. IMMIGRATION & CUSTOMS ENF’T, 306-112-002B, ISSUANCE OF IMMIGRATION DETAINERS BY ICE IMMIGRATION OFFICERS 2, 4 (Mar. 24, 2017).
Appeals in *Galarza v. Szalczyk*,183 affirmed that local governments are not under any duty to comply with ICE civil detainer requests, which are strictly voluntary.184 In fact, “settled constitutional law clearly establishes that [immigration detainers] must be deemed requests” because, under the Tenth Amendment, any other interpretation would render them unconstitutional.185 Ordering imprisonment of suspected aliens subject to removal would, in fact, be inconsistent with the essential principles of anti-commandeering.186 The constitutional violations resulting from mandated imprisonment are not limited to the Tenth Amendment, but often extend to violations of the Fourth Amendment right against unreasonable seizures.187

In *Miranda-Olivares v. Clackamas County*,188 the court found Clackamas County in violation of Miranda-Olivares’s Fourth Amendment right against unreasonable seizures.189 Although the county argued that the seizure was a mere continuation of the original arrest, the court found otherwise.190 The “prolonged warrantless, post-arrest, pre-arraignment custody” by the county jail was not justified by the pending detainer request by ICE.191 A similar ruling was given by the Court of Appeals for the First Circuit in *Morales v. Chadbourne*,192 where the court found a twenty-four-hour imprisonment pursuant to an ICE detainer a violation of the arrestee’s Fourth Amendment rights.193 The court stated that, absent a warrant, immigration officers have the faculty to arrest an alien “only if they have ‘reason to believe’ that the alien so arrested is in the United States in violation

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183. 745 F.3d 634 (3d Cir. 2014).
184. See *id.* at 643, 645.
185. *Id.* at 643.
186. *Id.*
189. See *id.* at *11. “Miranda-Olivares was arrested for violating a . . . restraining order and booked into the [county] [j]ail.” *Id.* at *1. According to its policy to report arrests of foreign-born persons “on a warrant or probable cause charge[s],” the jail notified ICE, and a detainer request was issued to the jail the following day. *Id.* In furtherance of ICE objectives, the jail also honors detainers “even if the underlying state criminal charges are resolved or bail is posted.” *Id.* at *2. Arrested on March 14, 2012, “Miranda-Olivares remained in custody . . . on . . . state charges until March 29, 2012,” but due to the ICE detainer, remained in custody until the following day, when picked up by DHS agents. *Miranda-Olivares*, 2014 WL 1414305, at *2–3.
190. *Id.* at *9.
191. *Id.*
192. 793 F.3d 208 (1st Cir. 2015).
193. See *id.* at 211, 218, 223.
of any [immigration] law or regulation and is likely to escape before a warrant can be obtained for his arrest." Th e court further affirmed that reason to believe must be effectively considered equal to probable cause for the arrest, and that arrests made in its absence are in violation of Fourth Amendment principles. The plethora of lawsuits and consequential liability for Fourth Amendment violations are some of the reasons why cities and counties across the United States enact policies restricting compliance with ICE detainers.

Given the extensive jurisprudence on the unconstitutionality of detainer requests, which often lead to prolonged arrest periods for aliens absent probable cause, it becomes difficult to not justify the decision of local jurisdictions to refuse compliance to ICE detainers, which is likely a mere exercise of constitutional police powers.

b. Police Powers

The so-called police powers are the states’ reserved constitutional authority under the Tenth Amendment to promote health, safety, and welfare of their residents. In Sligh v. Kirkwood, the Supreme Court of the United States affirmed that:

The police power, in its broadest sense, includes all legislation and almost every function of civil government. It is not subject to definite limitations, but [it] is coextensive with the necessities of the case and the safeguards of public interest. It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health.

Sanctuary policies reflect determination by states and local jurisdiction to exercise their judgment and promote health and safety of their

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194. Id. at 216 (alteration in original) (emphasis in original) (quoting 8 U.S.C. § 1357(a)(2) (2012)).
195. Id. (citing Tejeda-Mata v. Immigration & Naturalization Serv., 626 F.2d 721, 725 (9th Cir. 1980)); see also 8 U.S.C. § 1357(a)(2).
199. 237 U.S. 52 (1915).
200. Id. at 59 (citations omitted).
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residents.\textsuperscript{201} It is undisputed that “[t]he promotion of safety of persons and property is . . . at the core of the [s]tate’s police power.”\textsuperscript{202} United States v. Morrison\textsuperscript{203} affirms the long recognized principle that states possess a unique domain of authority over many functions of government.\textsuperscript{204} In fact, the Founders “ensured that powers which ‘in the ordinary course of affairs, concern the lives, liberties, and properties of the people’ were held by governments more local and more accountable than a distant federal bureaucracy.”\textsuperscript{205} Moreover, the choice to limit direct involvement in the enforcement of federal immigration policies is dictated by practical issues of community management, and is strongly supported by those charged with patrolling the community to ensure its safety.\textsuperscript{206} The Executive Order arguably infringes upon the discretion of local law enforcement authorities to make the policy judgments deemed necessary, replacing them with federal preferences.\textsuperscript{207} Law enforcement agencies throughout the country have shown support for sanctuary policies.\textsuperscript{208} Police chiefs and sheriffs, together with the Major Cities Chiefs Association, sustain that using local law

\begin{thebibliography}{99}
\bibitem{201} Letter from Annie Lai et al. to Donald J. Trump, \textit{supra} note 143, at 1.
\bibitem{203} 529 U.S. 598 (2000).
\bibitem{204} \textit{Id.} at 618.
\bibitem{205} Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2578 (2012) (quoting The \textit{Federalist} No. 45, at 262 (James Madison) (American Bar Association ed., 2009)). The issue of accountability is a fundamental factor in the jurisprudence of the Supreme Court. \textit{Id.} at 2592, 2602. “Accountability is considered a particularly powerful argument against commandeering . . . .” Jessica Bulman-Pozen & Heather K. Gerken, \textit{Uncooperative Federalism}, 118 \textit{YALE L.J.} 1256, 1289 (2009); cf. New York v. United States, 505 U.S. 144, 169 (1992) (affirming that “where the federal government directs the [s]tates to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision[s].”).
\bibitem{206} Pham, \textit{supra} note 48, at 981.
\end{thebibliography}
enforcement agents to further federal immigration laws would be a detriment to the safety of local communities.\textsuperscript{209} Police apprehension towards local officers enforcing federal immigration laws is based upon multiple reasons.\textsuperscript{210} First, enforcement of immigration laws risks “[u]ndermin[ing] [t]rust and [c]ooperation of [i]mmigrant [c]ommunities.”\textsuperscript{211} Studies have shown that a majority of chiefs and sheriffs—from both red and blue states—consider maintaining high levels of trust with the immigrant communities towards police officers a priority.\textsuperscript{212} If any sort of trust is lacking, a reasonable consequence to the legitimate fear for deportation, the process of community policing is halted, hindering the community.\textsuperscript{213} Second, “budgets and resources of local police agencies” are limited when compared to the economic power of the federal government—making the use of local officers to implement federal immigration laws financially burdensome for local communities.\textsuperscript{214} Third, federal immigration laws present complicated policies, both on the civil and criminal side of the law, and local agents are not necessarily fit to enforce them.\textsuperscript{215} Fourth, local police lack the degree of authority that federal agents can exercise when enforcing immigration laws, thus increasing the level of difficulty for local agents to discern whether a particular violation results in criminal charges or mere civil violations.\textsuperscript{216} Finally, participation of local police officers in the enforcement of immigration laws would possibly expose local agencies to civil litigation and liability.\textsuperscript{217} “By upending the independent judgment of local officials responsible for ‘the suppression of...
violent crime and vindication of its victims,’ . . . the Executive Order intrudes upon a power reserved for the states and local governments, and threatens to undermine the mission of local law enforcement.”

Data analysis hints to a different reality than the one claimed by President Trump, and police departments across the country seem to agree with it. The data evidences that sanctuary jurisdictions present a lower average criminality level when compared to comparably sized non-sanctuary jurisdictions. Although numerically not impressive, researchers point out results that are statistically important, like lower crime and homicide rates. Generally, however, production of conflicting studies and interpretation of data render an objective analysis of the issue all but simple. Taking Phoenix, Arizona as an example, data shows that crime rates fell by impressive margins following the city renouncing its sanctuary status. A six-year study from the University of California, Riverside found levels of violent crimes to be “slightly higher in sanctuary cities.”

Independent from the crime rates analysis, it is important to highlight that one of the main fears of pro-sanctuary police departments across the country—decrease in crime reports resulting from the distrust towards law enforcement and immigration agents in non-sanctuary jurisdictions—is legitimate. Crime reports in Latino communities throughout the United States are decreasing, thus making police officers’ investigating jobs harder while simultaneously increasing the amount of silent victims. Therefore, although conflicting data exists, it is indisputably within the interest, right, and power of local

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218. Amicus Brief, supra note 213, at 8 (quoting United States v. Morrison, 529 U.S. 598, 618 (2000)).
220. See id.
221. See id.
222. See id.
224. See id.
225. See id.
jurisdictions to foster participation of all members of the community when it comes to crime reporting and cooperation.\textsuperscript{227}


As confirmed by the Attorney General, the intent of the Executive Order is to enforce 8 U.S.C. § 1373 against jurisdictions deemed to be in violation of the language of the statute.\textsuperscript{228} However, it is not clear whether by implementing their policies, sanctuary jurisdictions are in violation of the statute, thus triggering federal preemption.\textsuperscript{229} The relationship between federal and state law in case of a conflict is regulated by the preemption doctrine, which provides the superiority of federal law over state law.\textsuperscript{230} A classical analysis of preemption principles generally considers whether the language of the “federal law expressly precludes state and local governments from passing such a law.”\textsuperscript{231} \textit{De Canas v. Bica}\textsuperscript{232} developed a similar analysis to determine whether state or local policies are preempted.\textsuperscript{233} The three-prong analysis first considers “whether the law is attempting to regulate immigration;” second, whether it occupies “a field [generally] occupied by Congress;” and third, whether it is in \textit{conflict with} federal law.\textsuperscript{234} The first and second prongs are easily discernible because they “are unique to immigration law.”\textsuperscript{235} It is a widely recognized principle that the power to regulate immigration matters is retained by the federal government.\textsuperscript{236} The third prong is based upon the Supremacy Clause.\textsuperscript{237}

\textsuperscript{227} See Jawetz, \textit{supra} note 209.


\textsuperscript{229} See Letter from Annie Lai et al. to Donald J. Trump, \textit{supra} note 143, at 2, 2 n.7; Yee & Ruiz, \textit{supra} note 147.


\textsuperscript{232} 424 U.S. 351 (1976).

\textsuperscript{233} See id. at 356–63; Gulasekaram & Villazor, \textit{supra} note 231, at 1699.

\textsuperscript{234} Gulasekaram & Villazor, \textit{supra} note 231, at 1698–99; see also \textit{De Canas}, 424 U.S. at 354–63.

\textsuperscript{235} Gulasekaram & Villazor, \textit{supra} note 231, at 1699.

\textsuperscript{236} U.S. CONST. art. I, § 8, cl. 4. “The Congress shall have [the] [p]ower . . . [t]o establish an uniform Rule of Naturalization . . . .” \textit{Id}. 
The language of 8 U.S.C. § 1373 primarily targets only one of the three scholarly-developed categories of sanctuary policies namely the so-called don’t tell policies. Summing up the language of the statute analyzed in Part II of this Comment, the statute “prohibits government entities, agencies, officials, and persons from preventing the voluntary reporting of a person’s immigration status by any governmental entity, officials, or employees to federal immigration authority.” Sanctuary policies have been enacted by jurisdictions throughout the country, however, did not include, for the most part, any language prohibiting communications between local and federal authorities. For example, Santa Clara authorities prohibit employees from using County resources to transmit any information to federal agencies that was collected while providing services to the community. Santa Clara further prohibits employees from initiating inquiries or enforcement actions based upon the actual or suspected immigration status of the individual, national origin, race, ethnicity, or English-speaking ability. Another example of a don’t ask policy is given by the City of Philadelphia, where police officers are required “not [to] ask about the documentation status of people they encounter,” although cooperation with federal agencies in “anti-terrorism and drug trafficking task forces” is encouraged. New Orleans also has similar policies.

This Constitution, and the [l]aws of the United States which shall be made in [p]ursuance thereof; and all [t]reaties made, or which shall be made, under the [a]uthority of the United States shall be the supreme [l]aw of the [l]and; and the [j]udges in every state shall be bound thereby, any [t]hing in the Constitution or [l]aws of any [s]tate to the [c]ontrary notwithstanding.

Id.


239. Gulasekaram & Villazor, supra note 231, at 1700.


241. See Bd. of Supervisors of the Cty. of Santa Clara Res. 2010-316 (2010).

242. Id.; see also Morales v. Chadbourne, 793 F.3d 208, 215 (1st Cir. 2015). Reasonable suspicion is required for police officers to stop individuals and inquire about “them regarding their immigration status.” Morales, 793 F.3d at 215.

243. CITY OF PHILA., supra note 240; Kittrie, supra note 49, at 1455.

244. See NEW ORLEANS POLICE DEP’T, OPERATIONS MANUAL CH. 41.6.1, IMMIGRATION STATUS 1 (2016).
fitting the parameters of so-called don’t enforce policies. The NOPD also explicitly states that the activities of police officers must be in compliance with the statutory requirements, and that communications between federal and local law enforcement agents are welcomed. Jurisdictions implementing don’t ask policies also respect judicial doctrines against brief stops—absent reasonable suspicion—of alien individuals for inquiries on the alien’s immigration status. Detention to inquire about an individual’s immigration status has in fact been ruled a seizure implicating the Fourth Amendment. Further, “no exception to the Tenth Amendment” permits federal mandates to the states to disclose private information of residents gathered by the exercise of sovereign capacity. The principle is embedded in the Supreme Court’s ruling in Reno v. Condon, allowing federal requirements of information sharing only when not requiring states “to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.”

Nothing within the language of 8 U.S.C. § 1373 can be read to preempt jurisdictions from prohibiting the use of local funds to help federal agencies in enforcing immigration laws. Further, the statute does not proscribe the implementation of policies designed to prevent police officers from proactively searching for information that would not be promptly or inevitably available to them. In fact, although an argument could be presented that the language of the statute impliedly preempts proscriptions of information-gathering activities by police officers, it appears that the statute was designed to foster communication between agencies of already available information. It is well established that:

245. Id.; Kittrie, supra note 49, at 1455. Multiple jurisdictions across the country implemented policies presenting the same characteristics. Gulasekaram & Villazor, supra note 231, at 1694.
246. See NEW ORLEANS POLICE DEP’T, supra note 244, at 1, 3.
247. CITY OF PHILA., supra note 240; Kittrie, supra note 49, at 1455; Pham, supra note 48, at 982.
249. Letter from Annie Lai et al. to Donald J. Trump, supra note 143, at 5; see also U.S. CONST. amend. X.
251. Id. at 151; Letter from Annie Lai et al. to Donald J. Trump, supra note 143, at 5.
253. See id.
254. See id.; Gulasekaram & Villazor, supra note 231, at 1703. This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: Conflict; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none
Congress, in passing 8 U.S.C. § 1373, opted not to require state and local governments to ask for an individual’s immigration status or mandate them to report such status to immigration officials. Congress was well aware of the sanctuary movement when it passed this law yet it chose not to mandate the gathering or reporting of information.\(^{255}\)

Realistically, the statute only prohibits jurisdictions from imposing restrictions on the sharing of collected information.\(^{256}\) An argument under the Supremacy Clause would likely fail, because no inconsistency with the language of the statute is created by sanctuary policies.\(^{257}\) Courts may conclude, and many scholars have agreed, that “sanctuary policies [are] not [in] violat[ion] [of] 8 U.S.C. § 1373.”\(^{258}\)

Albeit this interpretation of the statute is probable, some jurisdictions opted to accept the request of the federal government and vowed to strictly implement the statute.\(^{259}\) Under the pressure of the DOJ, the Mayor of Miami-Dade County ordered jails to comply with detainer requests from federal officials—a decision later upheld by the county commission.\(^{260}\)

V. FLORIDA LOCALITIES

The State of Florida is no stranger to the debate around sanctuary jurisdictions and possible defunding from the federal government.\(^{261}\) As a final destination to many immigrants, both legal and illegal, Florida contains

\(^{255}\) Hines v. Davidowitz, 312 U.S. 52, 67 (1941).
\(^{256}\) See Gulasekaram & Villazor, supra note 231, at 1703 (emphasis in original).
\(^{257}\) See 8 U.S.C. § 1373(a)–(b).
\(^{259}\) Letter from Annie Lai et al. to Donald J. Trump, supra note 143, at 2 (emphasis in original); see also 8 U.S.C. § 1373.
\(^{261}\) Foley, supra note 259; Swisher, supra note 259.
one of the highest foreign-born populations in the country.\textsuperscript{262} In the twenty-five year span between 1990 and 2015, the percentage of foreign-born residents of Florida grew from 12.9\% in 1990 to 20.2\% in 2015.\textsuperscript{263} According to the 2015 census conducted by the U.S. Census Bureau’s American Community Survey, over four million Florida residents are foreign born.\textsuperscript{264} Among them, 75.1\% were born in Latin America.\textsuperscript{265} Online data sources show that Florida has, within its territory, about two dozen jurisdictions with sanctuary policies including Broward County, Palm Beach County, and Miami Beach.\textsuperscript{266} However, many jurisdictions disagree with the label of sanctuary that has been given to them.\textsuperscript{267} Both Broward County and Palm Beach County affirmed their compliance with federal immigration laws.\textsuperscript{268} Nevertheless, actions taken by the Sheriff’s Department in both counties may be considered otherwise.\textsuperscript{269} Broward County Sheriff’s Office stopped honoring ICE detainers after courts ruled them unconstitutional in 2014.\textsuperscript{270} Palm Beach County Sheriff’s Office also enforces similar detainer procedures.\textsuperscript{271} Moreover, in an attempt to appease their large immigrant communities, Broward County passed a resolution defining itself as “an inclusive county which welcomes, celebrates, and offers refuge to all residents and visitors irrespective of race, religion, ethnicity, or national

\begin{thebibliography}{9}
\bibitem{1263} State Immigration Data Profiles: Florida, supra note 262.
\bibitem{1264} Id.
\bibitem{1265} Id.
\bibitem{1267} See Swisher, supra note 259.
\bibitem{1268} See id.
\end{thebibliography}
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origin.” Parallel efforts were also made by the City of West Palm Beach, which declared itself “a welcoming city for immigrants.” Although non-compliance with ICE detainers is among the types of conduct that the Executive Order is trying to eliminate, it is not established whether friendly relationships with immigrant communities risk labeling Florida jurisdictions as sanctuaries. However, one thing is clear: Some degree of confusion exists regarding the conduct targeted by the Executive Order and the possible consequences for non-complying jurisdictions.

Florida State Legislators, however, are trying to solve some of the issues and to untie the Gordian Knot. The Florida House of Representatives approved a bill “prohibiting local law enforcement from resisting compliance with federal immigration laws and [detainer] requests” from ICE. Although the bill will unlikely become law—because no discussion has occurred yet on the floor of the Senate—legislators are showing anxiety regarding the possible consequences of the Executive Order. However, the Florida House of Representatives is not the first legislating body within state boundaries to adopt policies in compliance with federal requests.


275. See Barszewski, supra note 270; Sacchetti & Horwitz, supra note 228.


277. Id.

278. Id.; see also Daniel Ducassi, Bill Cracking Down on ‘Sanctuary Cities’ Clears First Committee Stop, POLITICO: FLA. (Mar. 13, 2017, 7:01 PM), http://www.politico.com/states/florida/story/2017/03/bill-cracking-down-on-sanctuary-cities-clears-first-committee-stop-110339. The bill, later affirmed by the Florida House, compels state and local governments to support enforcement of federal immigration law, barring the creation and implementation of any law or practice hindering the operations of federal officers. Ducassi, supra; see also Clark, supra note 276. The bill is a response to judicial injunctions of the Executive Order, and bypasses constitutional challenges to the Executive Order through state action. See Ducassi, supra.

A. Miami-Dade County

Miami-Dade is the only county in the United States where foreign-born residents constitute the majority. According to the latest census data from the United States Census Bureau, 51.7% of Miami-Dade County’s population is foreign-born, with a heavy majority being of Hispanic or Latino heritage. Yet, on January 26, 2017, the day after President Trump signed the Executive Order, Miami-Dade County Mayor Carlos Gimenez announced his agreement with the new policies. The Mayor released a memorandum to all county jails, directing them to observe federal detainer requests. The memorandum stated that, “[i]n light of the provisions of the Executive Order, I direct . . . to honor all immigration detainer requests received from the Department of Homeland Security. Miami-Dade County complies with federal law and intends to fully cooperate with the [F]ederal [G]overnment.”

In an effort to avoid the label of sanctuary city, thus risking sanctions in the form of cuts in federal funding, Miami-Dade County Commissioners voted in favor of the mayoral policy. The decision reversed a previous county policy, approved in 2013, opposing detention as a result of detainer requests from federal agencies.

The 2013 policy created a two-fold threshold to allow detainers. First, for the county to allow ICE detainers, the federal government had to agree to reimburse all costs associated with the detention—an agreement which had to be in writing. Second, once the reimbursement was agreed

283. Memorandum from Carlos A. Gimenez to Daniel Junior, supra note 279.
284. Id.
288. Id. at 4.
upon, detainers would be implemented only against individuals charged or convicted of certain enumerated offenses—principally felonies. Although the Board of County Commissioners passed a resolution upholding the anti-detainer policies in December of 2013, the tide changed quickly after President Trump signed the Executive Order, and a February vote by the same body reinstated full cooperation for detainers. The county’s decisions have already presented legal consequences.

1. Lacroix v. Junior

On March 3, 2017, Judge Milton Hirsch of the Eleventh Judicial Circuit in and for Miami-Dade County ruled the detention of James Lacroix, a Haitian national, unconstitutional. Judge Hirsch found the coercive conduct of ICE, pushing the Miami-Dade County jail to continue to incarcerate Lacroix, a violation of the Tenth Amendment. Questioning the constitutionality of the detainer, and denying the Miami-Dade County alleged sanctuary city status, Judge Hirsch affirmed that: “[T]he issue raised . . . has nothing to do with affording sanctuary to those unlawfully in this country. It has everything to do with the separation of powers between the state and federal governments as reflected in the Tenth Amendment to, and in the very structure of, the United States Constitution.”

The jail’s decision to comply with ICE’s demands to detain Lacroix is, in the words of Judge Hirsch, “a demand with which the local government is constitutionally prohibited from complying.” The beneficiaries of the

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289. Id.


293. See Order on Petition for Writ of Habeas Corpus, supra note 292, at 9–11.

294. Id. at 5 (emphasis in original).

295. Id. at 8. "It might well be deemed an unconstitutional exercise . . . to insist that the states are bound to provide means to carry into effect the duties of the national
constitutional structure are the people, whose rights and liberties are protected through a strong-willed local government in opposition to a heavy-handed federal government.296

Judge Hirsch’s ruling lends way to the fact that, regardless of whether or not a jurisdiction is a sanctuary—and regardless of the fact that local agencies and officials support President Trump’s crackdown on immigration—there are constitutional rights afforded to every person in this country, legal or illegal, which simply cannot be infringed upon.297

2. Creedle v. Gimenez

Tenth Amendment violations, however, are not the only claims that have been raised against Miami-Dade County as a result of the new policies.298 The American Civil Liberties Union (“ACLU”) of Florida, in conjunction with the University of Miami School of Law’s Immigration Clinic, filed a federal suit against the county for violation of the Fourth Amendment right against unreasonable seizures.299 In Creedle v. Gimenez,300 the action was filed on behalf of Garland Creedle, an American citizen voluntarily detained by Miami-Dade County in response to an ICE detainer.301 After being arrested on the evening of March 12, 2017, Creedle was fingerprinted by county correctional officials.302 After receiving an immigration detainer from ICE, correctional officers refused to release Creedle upon bond being posted.303 Although notified that Creedle was an American citizen by Creedle himself, county correctional officers did not release him until the next day.304

The Fourth Amendment violation, alleged by the ACLU, is a direct result of the nature of the ICE detainers implemented by Miami-Dade.305

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296. See id. at 8–9.
297. See id.
300. Complaint for Damages & Declaratory Relief at 12, 15, Creedle v. Gimenez, No. 1:17-cv-22477-KMW (S.D. Fla. filed July 5, 2017); Dickerson, supra note 298.
301. Id. at 9.
302. Id. at 11.
303. Id. at 10–11.
304. See Complaint for Damages & Declaratory Relief, supra note 299, at 11–12.
Since detainers are issued by immigration officers, the procedure lacks the necessary “probable cause determination by a detached and neutral” magistrate. It is indeed only logical that an immigration officer, due to the basic nature of his position, can hardly be a neutral and detached adjudicator. For the alleged violations perpetrated against him, Creedle is seeking compensatory damages, attorneys’ fees and costs, and any additional equitable relief deemed appropriate by the court. The absence of probable cause, added to the often nonexistent presence of an arrest warrant, exposes Miami-Dade County and its correctional agencies to hypothetically infinite legal liability, with the costs taken on by taxpayers.

B. What Does Federal Defunding Mean for Florida Jurisdictions?

Cities throughout the state risk losing “hundreds of millions of dollars” in federal funding if found not in compliance with the directives of the Executive Order. However, the exact amount will depend on the interpretation of the language of the Executive Order and the exact nature of the targeted grants. Summed together, the counties of Palm Beach, Broward, Miami-Dade, and Monroe received a total of $565 million in grants from the federal government in 2016 alone. The funds are used for programs in different areas, from education and public health, to transportation and housing. Mayor Gimenez’s choice to retract previous county policies regarding detainers is likely a response to the threat of losing hundreds of millions of dollars in federal funding. In fact, “Miami-Dade County is due to receive $355 million” in federal government money that the county cannot afford to lose. In an effort to explain the rationale behind the choice made, Gimenez affirmed that losing federal funding to keep implementing restrictions on detainer requests is not worth the risk. And although Mayor Gimenez’s choice to retract county policies is

306. Id. at 10, 12.
307. Id. at 10.
308. Id. at 14.
309. Id. at 5, 7–8.
310. Persaud, supra note 272.
311. See id.
312. Id.
313. Id.
315. See Gomez, supra note 314.
316. See Pazmino et al., supra note 60; Sanchez et al., supra note 17.
understandable under the circumstances, it is exactly the type of coerced reaction the Constitution protects against.317

VI. CONCLUSION

Judge William H. Orrick III of the United States District Court for the Northern District of California issued a court order granting a motion for nationwide injunction of section 9(a) of the Executive Order.318 After being requested to revisit the Order in light of the Attorney General’s memorandum clarifying the language of the Executive Order, Judge Orrick confirmed the injunction, leaving President Trump with a difficult task: Solve immigration problems and appease the electorate without infringing upon constitutional rights and principles.319 The power of states to implement and enforce their own laws is one of the cornerstones of American democracy.320 Compelling states, counties, municipalities, and other local jurisdictions into enforcing federal immigration laws threatens the system’s balance, and violates the Constitution so dear to most.321

The independence of state and local jurisdictions has been established by the Founding Fathers in hopes of a new, better world, distinguishing itself from the crooked, corrupted, oppressive Motherland.322 Centralization of power is a dangerous threat to democracy, and risks shifting constitutional balances to a direction of no return.323 The question that should be asked is whether we, as a democracy, prefer independent, empowered, knowledgeable, competent, engaged, and accountable local governments and representatives ruling over us, or a distant, centralized, controlling federal government.324 In promoting the ratification of the Constitution, James Madison affirmed that:

The powers delegated by the proposed Constitution to the [F]ederal [G]overnment are few and defined. Those which are to remain in the State [G]overnments are numerous and indefinite.

317. See Printz v. United States, 521 U.S. 898, 935 (1997); Sanchez et al., supra note 17.
318. Order Granting the County of Santa Clara’s & City & County of San Francisco’s Motions, supra note 97, at 1, 29–30.
319. Id. at 25, 30; see also Dan Levine, Judge Refuses to Remove Block on Trump Sanctuary City Order, REUTERS: POL. (July 20, 2017, 7:15 PM), http://www.reuters.com/article/us-usa-immigration-ruling-idUSKBN1A531K.
320. See Printz, 521 U.S. at 928.
321. See id. at 920–21.
323. See Printz, 521 U.S. at 928–29.
324. See id.
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The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce . . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.325

The right answer may have indeed been given by James Madison in his promotion of the Constitution, on January 26, 1788.326 Although an injunction is currently in place, there still exists a real possibility that the Attorney General, Secretary of State, and President Trump may enforce the stated intent of the Executive Order to the detriment of states and localities around the country, including within Florida.327 “[H]undreds of millions of dollars” in federal grants could be taken away, to the disadvantage of the people in communities that rely upon the funding.328 Clarification—by the courts or the President himself—of the federal funds involved and the sanctuary jurisdictions that will be impacted needs to be made clear, so that states can make rational and knowledgeable decisions as to whether to comply with the Executive Order.329

325. THE FEDERALIST NO. 45, supra note 205, at 262 (James Madison).
326. See id.; THE FEDERALIST NO. 45, at 293 (James Madison) (Project Gutenberg ed.).
327. See Complaint for Damages & Declaratory Relief, supra note 299, at 1; Order on Petition for Writ of Habeas Corpus, supra note 292, at 9; Levine, supra note 319.
328. See Persaud, supra note 272.
329. See Letter from Annie Lai et al. to Donald J. Trump, supra note 143, at 1, 3.
THE PRACTICAL AND PROCEDURAL REPERCUSSIONS OF SHORT-SIGHTED, UNDERFUNDED REFORMS AND THE PROHIBITION OF TELECONFERENCING IN BAKER ACT HEARINGS: WILL DOE v. STATE BE THE STRAW THAT BREAKS JUDGES’ BACKS?

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I. INTRODUCTION

On May 11, 2017, the Supreme Court of Florida held in Doe v. State\(^1\) that a judicial officer must be physically present at hearings that involuntarily commit individuals to mental health facilities pursuant to section 394.467 of the 2016 Florida Statutes,\(^2\) otherwise known as the Baker Act.\(^3\) Fifteen mental health patients brought this case through their public defenders in response to an email sent on behalf of a judge and magistrate from Lee County, Florida, announcing that Baker Act hearings would be held by teleconference from the courthouse, instead of in-person.\(^4\)

Patient advocates and patients argued that holding Baker Act hearings through teleconferences created a myriad of problems that violated

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1. 217 So. 3d 1020 (Fla. 2017).
2. Fla. Stat. § 394.467 (2016). Throughout this paper, this statute will be referred to as (“The Baker Act”) for uniformity.
3. Doe, 217 So. 3d at 1022, 1032.
4. Id. at 1023.
patients’ procedural and substantive due process rights.\(^5\) These violations would affect the fairness of these hearings and could create, or perpetuate, abuses sought to be remedied by costly reforms that had been implemented by the legislature since the late 1990s.\(^6\) Adversely, the respondents, judges, and court personnel in favor of holding Baker Acts via teleconferences argued that involuntary commitment is a civil process—as opposed to a criminal process—which means that “no rule, statute, or constitutional prohibition” exists banning the use of teleconferences in Baker Act hearings.\(^7\) Respondents also argued that trial court judges had the discretion to administer hearings, as they feel most appropriate and effective in the absence of an express legal right or constitutional prohibition.\(^8\) The respondents claimed—given the funding limitations of an already indebted system—only conducting in-person Baker Act hearings was excessively arduous, inefficient, and hindered patients’ treatment and reintroduction into society.\(^9\) The use of teleconferences in Baker Act proceedings provides a judge to work within a failing mental health reform system by limiting costs, lessening wait time, improving services to the community, and increasing efficiency in the rehabilitation and treatment of mental health patients.\(^10\)

This Comment will examine the public policy and historical development of the Baker Act,\(^11\) the debate over the Act’s constitutionality, practicability, and the cost-benefits of the Baker Act’s community-based treatment programs for the mentally ill.\(^12\) This Comment will also examine calls to reform the Baker Act and the effectiveness of those reforms.\(^13\) Part IV will analyze the practical and procedural repercussions of the holding in Doe v. State that prohibited the use of teleconferencing in Baker Act hearings.\(^14\) Finally, this Comment will conclude with recommendations that acknowledge the legitimacy of the judges’ concerns within an underfunded, short-sighted, reactionary—rather than proactive—mental health care system.\(^15\)

\(^5\). Id. at 1026.
\(^6\). See infra Parts IV–V.
\(^7\). Brief for the Chief Judge of the Fifteenth Judicial Circuit as Amicus Curiae Supporting Respondent at 2, 4, Doe v. State, 217 So. 3d 1020 (Fla. 2017) (No. SC16-1852).
\(^8\). Id. at 2.
\(^9\). See id. at 9, 20.
\(^10\). Id. at 9–10, 14–15.
\(^11\). See infra Part I.
\(^12\). See infra Parts I–II.
\(^13\). See infra Parts II–III.
\(^14\). See infra Part IV.
\(^15\). See infra Part V.
A. The Public Policy Behind the Baker Act

The Baker Act was named after State Representative Maxine Baker, who served as chairperson on the House Committee on Mental Health in the 1960s and into the early 1970s.16 The Florida Legislature passed the act into law as the Florida Mental Health Act in 1971.17 The Act was an overhaul revision of the standing mental health laws that had been in existence for ninety-seven years.18 The Baker Act came of age when government officials began to consider patients’ civil rights and protect patients’ rights, while also submitting to the necessity and authority of states’ parens patriae.19 The intent was to provide mental health patients with the choice to voluntarily seek treatment and to provide them with their constitutional rights to liberty and due process.20

Before the Baker Act passed, the statutes governing mental illness could place a patient into an institution for an undetermined amount of time.21 Patients could easily be institutionalized into a state hospital arbitrarily if “three people signed affidavits and secured the approval of a county judge.”22 Children could be placed with adults in these institutions, hospitals could request and require payments from the friends or families of the patients, and patients were limited to corresponding with only one person while institutionalized.23

18. Id.
19. See id.; Parens Patriae, BLACK’S LAW DICTIONARY (10th ed. 2014). Black’s Law Dictionary defines parens patriae as the “state in its capacity as provider of protection to those unable to care for themselves.” Parens Patriae, supra.
20. State of Fla. Dep’t of Children & Families Mental Health Program Office, supra note 16, at 1; see also Mental Health Program Office & Dep’t of Mental Health Law & Policy, supra note 16, at 22 (quoting Fla. Stat. § 394.459) (explaining that patients must be accorded individual dignity, and it provides that “[a] person who is receiving treatment for mental illness shall not be deprived of any constitutional rights.”).
22. Id.
23. Id.
Emblematic of the deprivations and abuses of the mental health system in Florida before the Baker Act, is the United States Supreme Court decision in *O’Connor v. Donaldson.* Respondent, Kenneth Donaldson, brought his original action against J.B. O’Connor, the superintendent of the Florida State Hospital at Chattahoochee in 1957. Donaldson was institutionalized by his father, who believed he was suffering from delusions. After a court proceeding in Pinellas County, Donaldson was confined for fifteen years for care, maintenance, and treatment against his will after he “was found to be suffering from paranoid schizophrenia.” Throughout the fifteen years, Donaldson repeatedly demanded his release without success. While the superintendent denied Donaldson’s demands and claimed it was because he was a danger to society, Donaldson stated that the hospital was not providing him treatment for his illness. Testimony at the trial court level provided no evidence that Donaldson posed a danger to others while he was confined. Donaldson never showed he was suicidal or thought of committing an injury against himself. Further, Donaldson’s demands for relief were supported by responsible individuals who were willing to care for him and help him after his release. Donaldson’s college classmate, John Lembcke, wrote the superintendent requesting Donaldson’s release, and stated he would take care of the patient, but was refused. Even a representative of the Helping Hands, a halfway house, wrote on behalf of Donaldson in 1963 and said they would take on his care upon release. The Supreme Court stated that, at the trial level, “[t]he evidence showed that Donaldson’s confinement was a simple regime of enforced custodial care, not a program designed to alleviate or cure his supposed illness.” “O’Connor described Donaldson’s treatment as milieu therapy,” which the

25. *Id.* at 564.
26. *Id.* at 565.
27. *Id.* at 565–66. The Mayo Clinic defines paranoid schizophrenia as “a severe mental disorder in which people interpret reality abnormally.” *Schizophrenia, MAYO CLINIC,* http://www.mayoclinic.org/diseases-conditions/schizophrenia/home/ovc-20253194?p=1 (last visited Dec. 31, 2017). “Schizophrenia may result in some combination of hallucinations, delusions, and extremely disordered thinking and behavior that impairs daily functioning, and can be disabling.” *Id.* “Schizophrenia is a chronic condition, requiring lifelong treatment.” *Id.*
29. *Id.* at 565.
30. *Id.* at 568.
31. *Id.*
32. *Id.* at 569.
33. *O’Connor,* 422 U.S. at 569.
34. *Id.* at 568.
35. *Id.* at 569.
hospital staff later described as a polite way of describing Donaldson’s unstructured confinement within the hospital.\textsuperscript{36} Hospital staff confirmed that his treatment consisted of being kept in a large room with sixty other patients, including many who were criminally committed.\textsuperscript{37}

B. \textit{The Historical and Systematic Overhaul of the Mental Health System: Deinstitutionalizing the Mentally Ill}

As previously mentioned, the Baker Act was a product of an evolving philosophy regarding the treatment of the mentally ill.\textsuperscript{38} Ninety-seven years came and went where mentally ill patients were locked up in hospitals and watched over, as described in Donaldson’s case.\textsuperscript{39} Patients who were perhaps arbitrarily institutionalized by friends, family, or doctors could be placed with other patients who were ostensibly ill and those who were criminally and homicidally insane.\textsuperscript{40} The mentally ill were not considered patients who could be rehabilitated.\textsuperscript{41} Individualized treatment with a goal of recovery was overlooked and, instead, public safety was prioritized.\textsuperscript{42}

Deinstitutionalization was introduced in the mid-1950s as a response to an outcry by mental health advocates and politicians; they argued that patients’ civil rights were being violated and that the system was both ineffective and a heavy cost burden on the federal and state governments.\textsuperscript{43} The primary goal of deinstitutionalization was to move treatment out of commitments in hospitals and provide treatment through community-based outpatient treatment centers.\textsuperscript{44} This movement gained steam because state mental hospitals were extremely underfunded, outdated, and excessively crowded.\textsuperscript{45} The Baker Act encourages patients to voluntarily admit

\begin{thebibliography}{9}
\bibitem{36} Id.
\bibitem{37} Id.
\bibitem{38} See State of Fla. Dep’t of Children & Families Mental Health Program Office, supra note 16, at 1, 3.
\bibitem{39} See id. at 1.
\bibitem{41} Cristina Bianchi, \textit{America’s Mental Health System: Closing the Revolving Door Between Hospitals, Correctional Facilities & the Streets}, 28 St. Thomas L. Rev. 99, 102 (2015).
\bibitem{42} See Gutterman, supra note 40, at 2402.
\bibitem{43} Steven Strang, Note, \textit{Assisted Outpatient Treatment in Ohio: Is Jason’s Law Life-Saving Legislation or a Rash Response?}, 19 Health Matrix: J.L. Med. 247, 250–51 (2009); see also Bianchi, supra note 41, at 102–03.
\bibitem{44} Gutterman, supra note 40, at 2406–07; Strang, supra note 43, at 250–51.
\bibitem{45} Gutterman, supra note 40, at 2407; Strang, supra note 43, at 251.
\end{thebibliography}
themselves into psychiatric care if they are competent, but also allows individuals to be involuntarily committed and examined if specific criteria are met. The revolution of new medications and newly created monetary incentives by the federal government also promoted this shift.

In 1955, Smith, Kline, and French Laboratories developed the first antipsychotic medication to land on the market, Thorazine. Before the introduction of Thorazine, the treatment of diseases, “such as schizophrenia, [was] long-term confinement” because no medication proved effective. Thorazine led to mentally ill patients being prone to less violent episodes because it relieved mental health symptoms, such as psychosis, delusion, paranoia, hallucinations, and irritability. Mentally ill patients were now considered capable of being reintroduced and integrated into society because there was a possibility they could function within their communities. In that year, an estimated 560,000 mentally ill patients from state-run hospitals were released with no follow-up care provided. These new medicines, coupled with the political environment of the 1960s and its specific focus on civil rights, provided patients a voice. Concerns grew throughout the mental health community that patients’ rights to seek and refuse treatment were being violated.

But the most effective and influential push away from institutionalization of mental health patients towards deinstitutionalization came in 1965. The federal government began Medicaid in 1965 and hospitals could receive payments from patients who had Medicaid. However, hospitals realized that discharging mentally ill patients had monetary benefits because patients institutionalized in state psychiatric

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47. See Bianchi, supra note 41, at 103–04; Gutterman, supra note 40, at 2406; Strang, supra note 43, at 251.
49. Id.
50. Id.
51. Id. at 250–51.
52. Bianchi, supra note 41, at 103.
53. See Gutterman, supra note 40, at 2406–07; Strang, supra note 43, at 251.
56. See Watnik, supra note 55, at 1184–85.
hospitals were excluded from the Medicaid payment system. This was not an accidental outcome of the changes made to mental health laws and its funding made by the legislature; excluding mentally ill patients from the Medicaid payment system was done to shift the burden and costs of individualized medical care for patients from the federal government to the individual states. By discharging patients out of state hospitals and into community-based treatment programs, the states were able to receive Medicaid reimbursements.

C. The Supreme Court’s Historical Declarations Regarding the Constitutionality of the Baker Act and the Current Law

Florida does not specifically prohibit the use of teleconferencing to conduct Baker Act hearings. However, the use of teleconferences during these proceedings arguably works in direct opposition to case law precedent that aims to ensure that the mentally ill are provided their constitutional right of liberty when not dangerous to themselves or others. In order to commit an individual under the Baker Act to a state mental health facility, the State must prove specific criteria. When met, this criteria shows that the

57. Id.
58. See id.
60. See Fla. Stat. § 394.467(6)(a)(2) (2016); Doe v. State, 210 So. 3d 154, 157 (Fla. 2d Dist. Ct. App. 2016), rev’d, 217 So. 3d 1020 (Fla. 2017); Brief for the Chief Judge of the Fifteenth Judicial Circuit as Amicus Curiae Supporting Respondent, supra note 7, at 5.
62. Fla. Stat. § 394.467(1). To commit a patient involuntarily into inpatient mental health facilities, the finding of the court must meet the following criteria by clear and convincing evidence:
(a) He or she has a mental illness and because of his or her mental illness:
1.a. He or she has refused voluntary inpatient placement for treatment after sufficient and conscientious explanation and disclosure of the purpose of inpatient placement for treatment; or
b. He or she is unable to determine for himself or herself whether inpatient placement is necessary; and
2.a. He or she is incapable of surviving alone or with the help of willing and responsible family or friends, including available alternative services, and, without treatment, is likely to suffer from neglect or refuse to care for himself or herself, and such neglect or refusal poses a real and present threat of substantial harm to his or her well-being; or
individual is incapable of surviving alone, or that there is significant cause to believe that the individual would inflict serious bodily harm upon himself, and all less restrictive means and treatment alternatives were judged inappropriate.\textsuperscript{63} This is because once the patient is involuntarily committed, he or she is deprived of his or her liberty as provided by the Due Process Clause of the Constitution.\textsuperscript{64}

D. The 1970s: Establishing a “Clear and Convincing Evidence” Standard to Involuntarily Commit Patients

In the 1970s, Florida courts were preoccupied with determining the burden of proof necessary to involuntarily commit a mentally ill patient and were also concerned with validating the constitutionality of depriving private citizens of their liberty while they were in such vulnerable health states.\textsuperscript{65} A patient can be involuntarily committed through a showing of clear and convincing evidence that they meet the requirements as set forth in the Baker Act.\textsuperscript{66} In 1977, in In re Beverly,\textsuperscript{67} the Supreme Court of Florida held that given that the standard of proof of civil commitment hearings was clear and convincing evidence, the Baker Act was not unconstitutionally overbroad or vague, as long as all the elements of the Baker Act were met by the burden of proof described by the court.\textsuperscript{68} Strict adherence to the rules was imperative given the serious nature of the deprivation of liberty.\textsuperscript{69} The balance between state interests and the individual’s interest\textsuperscript{70} must be constantly evaluated and

\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} U.S. CONST. amends. V, XIV, \S 1; see also FLA. STAT. \S 394.467(1); Brief for the Chief Judge of the Fifteenth Judicial Circuit as Amicus Curiae Supporting Respondent, supra note 7, at 4; MENTAL HEALTH PROGRAM OFFICE & DEP’T OF MENTAL HEALTH LAW & POLICY, supra note 16, at ix.
\textsuperscript{66} See In re Beverly, 342 So. 2d at 488–90 (Fla. 1977); STATE OF FLA. DEP’T OF CHILDREN & FAMILIES MENTAL HEALTH PROGRAM OFFICE, supra note 16, at 1.
\textsuperscript{67} FLA. STAT. \S 394.467(1)(a)–(b).
\textsuperscript{68} 342 So. 2d 481 (Fla. 1977).
\textsuperscript{69} See id. at 486, 490.
\textsuperscript{70} Id. at 489.

The state’s interest is to protect society from individuals who are dangerous either to themselves or to others, while protecting the individual interest pertains to providing individuals with their basic constitutional right of freedom without the undue imposition of a state’s governmental restraints. Id.
weighed. 71 Neff v. State 72 reiterated what the Donaldson case had already established and held that in Florida, if an individual is mentally ill and unable to recognize their illness, they still cannot be held against their will if they are considered non-dangerous, capable of caring for themselves, and ultimately able to survive despite their mental illness without help. 73

E. The 1980s and 1990s: Explicit Examinations to Determine, Case-by-Case, if Involuntary Commitment Is Necessary

By the 1980s and into the 1990s, Florida courts began to define case-by-case what clear and convincing evidence meant regarding the elements of the Baker Act. 74 They also began defining on a case-by-case basis whether involuntary commitment was the appropriate and least restrictive measure needed by the patient to meet his or her needs while ensuring the safety of the public. 75 Schexnayder v. State 76 held that, even if a person was severely mentally ill, the state would not meet the clear and convincing burden of proof if a person had a place to live, had financial resources, and had knowledge they needed medication but would periodically forget their medication, which often led to the patient’s hospitalization. 77 Despite the patient’s mood changes and hospitalizations, the court held that these instances did not show clear and convincing evidence that she was dangerous to herself or the public or that these events led to substantial harm to her well-being. 78

The Everett v. State 79 case, in 1988, demonstrated the incredible and detrimental impact an incorrectly imposed court order of involuntary commitment against an individual can have on the liberty rights of that patient within the Baker Act system. 80 The patient appealed the finding by the circuit court that held that she be involuntarily committed at a treatment facility to the First District Court of Appeal. 81 The First District Court of

71. In re Beverly, 342 So. 2d at 489–90.
73. O’Connor v. Donaldson, 422 U.S. 563, 576 (1975); Neff, 356 So. 2d at 903.
76. 495 So. 2d 850 (Fla. 1st Dist. Ct. App. 1986).
77. Id. at 851–52.
78. Id.
79. 524 So. 2d 1091 (Fla. 1st Dist. Ct. App. 1988).
80. See id. at 1092–93.
81. Id. at 1092.
Appeal reversed the decision of the circuit court because it found that the State did not provide evidence that showed involuntary placement was necessary and that she refused voluntary placement for mental health treatment. The devastating result in this case was that the appeal process endured beyond the original court order and, when the original court order expired, she had already been ordered to continue her involuntary placement. While the district court agreed that the State had not met its burden of proof in the original hearing, the order for continuing involuntary placement was not automatically considered null and void. Further, the patient’s liberty and time spent involuntarily committed while waiting for the appeal to be heard by the court could not be undone or recovered.

_Welk v. State_ established that if there is insufficient evidence to show that a person poses real and current harm to themselves or others, then involuntary commitment is not justified even if an expert testifies that without supervision problems with the mentally ill patient will continue to arise. The Fifth District Court of Appeal held in _Hedrick v. Florida Hospital Medical Center_ that even if the State can prove that the patient shows potential for poor judgment, without the evidence of a present and current threat to substantially harm himself or herself or someone else, the statutory test of clear and convincing evidence was not met. Conclusory statements that a patient had potential to cause substantial harm to himself and a potential for aggression did not meet the clear and convincing evidence standard to substantiate a court ordered continued involuntary placement under the Baker Act.

Even the testimony of a psychologist stating that a patient should be institutionalized through the Baker Act—because she was incapable of taking care of herself and surviving alone, and would cause her own suffering through neglect and a refusal to take care of herself—did not pass the clear and convincing evidence standard according to the First District Court of Appeal in the _Archer v. State_ case. The test was not met because the psychologist conceded that the patient had not threatened to hurt

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82. _Id._
83. _Id._
84. _Everett_, 524 So. 2d. at 1092–93.
85. _See id._
86. 542 So. 2d 1343 (Fla. 1st Dist. Ct. App. 1989).
87. _See id._ at 1344–45.
88. 633 So. 2d 1153 (Fla. 5th Dist. Ct. App. 1994).
89. _Id._ at 1153–54.
90. _See id._
92. _Id._ at 300–01.
herself or others, and the patient testified that she would take her medication. 93

To this end, the First District Court of Appeal in Lyon v. State, 94 held that a schizophrenic woman, who refused to care for herself and was “likely to suffer from neglect,” did not show signs of a “real [or] present threat of substantial harm” to herself or anyone else and did not meet the requirements of involuntary commitment under the Baker Act. 95 In this case, a doctor stated that the woman would become incoherent in her speech, would be unable to take care of herself, and would need supervision and structure when and if she did not take her medications. 96 Still, despite these statements in the trial court hearing, the appellate court reversed the involuntary commitment order and found that the trial court’s holding did not meet the clear and convincing evidence burden. 97 In Adams v. State, 98 a petition for the involuntary placement of a patient for treatment was not granted because it did not meet the clear and convincing evidence burden, since a witness mentioned in the original Baker Act petition was not present at the hearing. 99 This highlighted the ever-important issue of ensuring that the liberty of a patient is not deprived, without confirmation that all information and facts within the petition are confirmed by the judge, and rendered presently clear and convincing that the patient meets all the Baker Act requirements. 100

F. The Role of Teleconferences in Baker Act Hearings: State’s Interests Versus Mental Health Patients’ Constitutional Rights

Historically, there are court proceedings that occur by video, such as arraignments. 101 On November 12, 1998, video hearings were suggested as a means for involuntary commitment hearings to be held in a more convenient and cost-effective manner. 102 While some judges commented that the videoconferences would lessen the need for patients to be transported to the courthouse, other mental health professionals pointed out several issues regarding mental health patients being provided their court hearings through

93. Id. at 301.
94. 724 So. 2d 1241 (Fla. 1st Dist. Ct. App. 1999) (per curiam).
95. Id. at 1241–42; see also Fla. STAT. § 394.467 (2016).
96. Lyon, 724 So. 2d at 1242.
97. Id. at 1243.
98. 713 So. 2d 1063 (Fla. 1st Dist. Ct. App. 1998).
99. See id. at 1063–64.
100. See id.
101. FLA. DEP’T OF CHILDREN & FAMILIES, supra note 61, at 9.
102. Id.
videoconferences. Many mental health patients suffer from paranoia and will react negatively to video hearings. Mental health patients can be confused and unable to understand that the videoconference was a formal court hearing. Representatives from the Mental Health Program Office of the Department of Children and Families were concerned that the use of videos to conduct court hearings would deter mental health patients from participating in their involuntary placement proceedings. Judge Winifred Sharp, from the Fifth District Court of Appeal, admitted that it would be difficult to make a video proceeding feel like a formal court hearing, making it more difficult to ensure that a patient understands the proceeding was a formalized court proceeding which determines stakes as serious as their liberty and possible involuntary commitment. While the legislature never enacted the recommendations of the Supreme Court Commission, the Commission did recommend that to improve administrative justice during Baker Act hearings the use of videoconferences for involuntary placement hearings should not be used.

The Supreme Court of Florida cited to Ibur v. State, which stated, “because involuntary commitment is a substantial deprivation of liberty at which fundamental due process protections must attach, the patient cannot be denied the right to be present, to be represented by counsel, and to be heard.”

Part of the specified criteria in the Baker Act is that an evidentiary hearing must be conducted for involuntary inpatient treatment. The court must also conduct the hearing within five court-working-days, except for when a continuance is granted. And unless otherwise represented, the individual will be appointed a public defender by the court within one court-working-day. The Baker Act requires that, unless for good cause, the hearing would be held in the county or facility where the patient was located, as deemed appropriate. The hearing would need to be “convenient [for] the patient [and] consistent with orderly procedure,” and would need to be in

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103. See id.
104. See id.
105. See id.
106. FLA. DEP’T OF CHILDREN & FAMILIES, supra note 61, at 9.
107. Id.
108. Id.
111. FLA. STAT. § 394.467(2), (6) (2016).
112. Id. § 394.467(6)(a)1.
113. Id. § 394.467(4).
114. Id. § 394.467(6)(a)2.
a physical setting that is not dangerous to the patient's condition. Magistrates, along with judges, are allowed to preside over these hearings.

These procedural safeguards were established by the legislature to protect and recognize that individuals who fell under the auspices of the Baker Act were some of “the most vulnerable individuals of . . . society.” No doubt, the safeguard spelling out that hearings must be held by judges physically present was not in the statute.

II. RECIDIVISM AND THE PUSH FOR REFORM

Before twenty years had passed since the Baker Act’s initial implementation, calls for reform were prevalent throughout Florida. Reformers and civilians alike began to question the effectiveness of the Baker Act system at providing patients with treatment without depriving them of their constitutional rights. In many cases, mentally ill patients could not recognize they were ill and needed services. The Baker Act’s aim was to promote families and patients to voluntarily seek help at outpatient community centers, yet patients consistently lacked the insight to know they were ill. The Baker Act was originally drafted to authorize law enforcement officers and agents to provide emergency services through

115.  Id.
118.  Id.; see also Fla. Stat. § 394.467.
120.  See Killian, supra note 119 (explaining that in the 1990s, while the law required a Baker Act hearing to occur within four to five days after the initial seventy-two-hour involuntary commitment time had passed and a petition was filed, only 40–50% of Baker Act hearings would occur within that time frame). Thus, 50–60% of Baker Act hearings were not occurring within the statutory time frame, and individuals were being effectively held against their will without committing a crime and without recourse to combat their detainment. Id. Hence, these individuals were denied their constitutional right to due process during this time. See id.
121.  See South Florida Sun-Sentinel Editorial Board, supra note 119.
inpatient involuntary commitments to stabilize persons dangerous to themselves or others for only seventy-two hours. These two elements combined led to individuals being repeatedly involuntarily committed. From 1965 until 1995, involuntary commitments increased dramatically, and in 2002, over 900 Florida adult patients were admitted to hospitals through the Baker Act over four times. In one extreme case, a patient received forty-one examinations, and cost the State of Florida in excess of $81,000.

Reforms attempting to overhaul the Baker Act in 1996 and 1999 did not rid Florida’s Mental Health system of the constitutional abuses against patients. The overhaul, from as recently as 1996, attempted to lessen inappropriate commitments, such as vulnerable elderly individuals who were committed despite not needing psychiatric treatment. These abuses continued because patients became vulnerable once they were placed in the seventy-two hour hold and unable to voluntarily make any decisions until either released from the hospital or released by a judge. Further, while the law guarantees that involuntary commitment will be imposed upon an individual when all other methods are exhausted and the commitment is considered the least restrictive means for that patient to receive help, the definition of least restrictive is in itself up for interpretation. Receiving facilities and hospitals are allowed to hold a patient for seventy-two hours if the patient meets the involuntary commitment criteria. However, they may also ask a judge to allow them to hold a patient for longer periods if the facility feels that the person is a harm to themselves or others. In these

123. South Florida Sun-Sentinel Editorial Board, supra note 119.
124. See id.
125. See Torrey, supra note 59.
126. South Florida Sun-Sentinel Editorial Board, supra note 119.
127. Id.
129. Miller, supra note 128.
130. Id.; see also STATE OF FLA. DEP’T OF CHILDREN & FAMILIES MENTAL HEALTH PROGRAM OFFICE, supra note 46, at 3.
131. See Miller, supra note 128; South Florida Sun-Sentinel Editorial Board, supra note 119.
132. Id.; see also FLA. STAT. § 394.467(1)–(2) (2016) (referring to the criteria a patient must meet by clear and convincing evidence in order to be involuntarily committed under the Baker Act).
133. Miller, supra note 128.
instances, the facility receives Medicaid money to cover the cost of treatment—putting a price tag on each Baker Act patient’s head.\footnote{134}

A. Unfunded and Short-Sighted Reforms Lead to a Resurgence of Old Abuses and Re-Institutionalization via Criminalization and Incarceration

In 1997, the Supreme Court of Florida Commission on Fairness organized and evaluated whether the 1970s Baker Act was providing treatment, access, and opportunities to participate and receive services through the state court system in an equal manner.\footnote{135} The chair of the Commission was Eleventh Circuit Judge Gill S. Freeman, and she wrote that Florida “failed to develop . . . adequate . . . community programs [that met] the needs of its people.”\footnote{136} In 1997, the Commission reported that over half a million people in the State of Florida suffered from mental illness—more than 300,000 from Alzheimer’s; that “more than 70,000 [people] were involuntarily examined [by] the Baker Act;” and close to “20,000 petitions for involuntary civil commitment [were filed requesting] psychiatric treatment.”\footnote{137} The Commission focused on the idea that inadequate funding was the main problem in meeting the goals and purpose described by the 1970s Baker Act.\footnote{138} The system was slowed down and, as a result, detentions in involuntary civil commitments became lengthier, and abuses began to increase because monetary gains could be achieved by holding individuals for longer than necessary, especially with regard to the elderly.\footnote{139} “[T]he tension between fiscally driven policy and clinically desirable outcomes” has been named the key cause of these issues.\footnote{140} The switch from treating mentally ill patients with federally funded money to providing them treatment through state-funded programs has caused a major shift in how treatment is provided to patients and what patients qualify for state-funded help.\footnote{141}
Other major issues that the Commission cited as to why the Baker Act needed reform were: (1) time frames were not defined and up to interpretation—five days could mean “five working days or five consecutive days;” (2) no due process was afforded to a patient until the court hearing occurred; (3) “justice system participants [were] not always . . . trained on [the] mental health issues” they were either representing or making judgments; (4) almost exclusively, mental health patients were only represented by public defenders; (5) the quality of representation was not uniform, despite most being represented by their county’s public defender office; (6) resources to public defenders were not uniform; (7) communication about the priority which these cases were to take in public defender offices was not uniform; (8) compliance by state attorneys’ offices to represent and participate at every involuntary commitment hearing did not always occur, leading to the release of dangerous patients; (9) law enforcement officials and agencies lacked training on mental health as well; and (10) persons were, and could be, involuntarily committed because of the vindictiveness of an enraged spouse or neighbor given some officials were not trained properly. Beyond these issues cited by the Commission, the deinstitutionalized system depended on patients who lacked self-recognition and insight by mental health patients that they were sick and needed help.

Mental health advocates argued that as the system stood in 2004, a reform was needed because the system “deinstitutionaliz[ed] . . . persons with mental illness [away] from . . . mental health hospitals” and, ultimately, led them to “their re-institutionalization [within] the criminal justice system.” In 1992, a Public Citizen Survey found that sometimes individuals with no charges against them are incarcerated because they are waiting for a psychiatric evaluation, a hospital bed, or transportation to the hospital. One sheriff in Florida stated, “I have had mentally ill inmates in paper gowns in holding cells for close observation for up to six weeks before we could find a hospital bed for them.”

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142. Killian, supra note 119.
143. Id.; see also Stavis, supra note 122, at 21–22.
146. Id.
B. **The Disastrous Failures of Deinstitutionalization and the Move to Implement New Reforms in 2004**

In July 1998, forty-three year old Alan Singletary of Seminole County, Florida, killed Deputy Eugene Gregory after a thirteen-hour standoff ensued over a simple landlord-tenant dispute. Singletary had untreated schizophrenia, and his family had sought help for him for years without success. The landlord-tenant dispute quickly plummeted into a confusing and unsettling “standoff between Singletary, Seminole [Florida] Sheriff’s deputies, and SWAT team members.” Ultimately, Singletary died after killing Deputy Gregory and wounding two other law enforcement officers. Politicians and law enforcement agents would state that this incident was emblematic of a growing “law enforcement and humanitarian issue” regarding the treatment of mentally ill patients. While Florida was considered a pioneer in mental health law, heavy burdens induced upon law enforcement, the court system, and hospital crisis units made the practicalities of enforcing the 1971 Baker Act exceedingly difficult. Loopholes in implementing the law existed and continuing care was not provided. If an inpatient bed was not readily available, that patient was released, and the continued care they needed was not always provided.

By 2004, a call for Baker Act reform headed by Seminole County Sheriff Don Eslinger, made it to the State Legislature calling for sustained outpatient commitment orders combined with intensive mental health services. On the session’s last day, a major rewrite of the Baker Act was instituted. The reform was enacted into law by Governor Jeb Bush in 2004. The push was to begin to enact reforms; to create avenues which

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148. *Id.*

149. *Id.*

150. *Id.*


153. Lilac, *supra* note 152; *see also* *In Memoriam..., supra* note 147, at 9.


156. *Id.*

provide mental health patients with the resources they need—while keeping the public safe: to not create confusion in an underfunded mental health system; and to not overburden the court system. Mental health advocates believed that people with serious mental illness could avoid hospitalization if they received early interventions and treatments that were appropriate before their mental health deteriorated.

Mental health advocates began to look at other states’ mental health systems and eventually fixated on New York’s Kendra’s Law. The law in New York authorized court ordered assisted outpatient treatment to individuals with mental illness. Kendra’s Law, developed after a man with severe mental illness who was unable to comply with doctor’s orders and medical prescriptions, pushed thirty-two-year-old Kendra Webdale into a New York City subway train and killed her. Many Baker Act reforms were passed in 2004, intending to solve the problems that were discussed above. However, the amount allotted to institute these reforms was devastatingly under the estimated $150 million needed to institute Kendra’s Law in its first five years. Citing only to a 25% government match and one additional administrator at each mental health location to input additional data, the bill only loosely defined its financial terms and reforms.

Judges and other legal personnel in Florida’s criminal system argued that persons with mental illness often committed misdemeanors and would cycle in and out of county jails. This was attributed by judges and legal professionals in the criminal legal community as resulting from persons with mental illness not being diagnosed correctly; the lack of management of mental health patients outside inpatient facilities, and that for some individuals treatment only occurred when in jail, but was discontinued, along with their use of medications, once released from imprisonment. Some even argued that the newest rewrite of the Baker Act would save money by

158. See Pudlow, supra note 151.
160. See South Florida Sun-Sentinel Editorial Board, supra note 119.
161. Id.
162. Id.
163. Id.; see also Fla. H.R. Comm. on Mental Health, HB 463 (2004) Staff Analysis 1.
keeping patients out of a revolving door of expensive hospitals and jails.  
While others predicted oppositely and believed that the legislation that came with no funding would, in fact, overburden courts and create confusion; and the workload cost, while not determined, would undoubtedly be excessive.  
The legislation was deemed by many as a mandate without resources, both in physical and monetary support.  
Even the House of Representatives’ Staff Analysis Report stated that HB 463 would create a recurring fiscal impact, but only estimated the impact to be at $636,608 to $954,912.

Given that the laws put into place in 2004 were modeled after New York’s Kendra’s Law, the recurring estimated amount to fund SB 700/HB 463 was grossly underestimated over the actual cost of $150 million to institute Kendra’s Law in New York.  
The $150 million was only allotted to pay for the first five years of its implementation.  
Beyond the considerable discrepancy between the amount used to fund Kendra’s Law and the amount estimated to institute the 2004 reforms, the workload cost was described as the most detrimental in the 2000 Commission on Fairness Report, which stated that more training on mental health issues was needed and more thorough efforts by those representing and involuntarily committing patients needed to be provided to both protect the patient and the state’s interests.  
Judge Mel Grossman from the Seventeenth Circuit pointed to the fact that the legislation entitled patients to resources that the State did not currently have.  
“[T]he statute talks about entitlements to guardian advocates.  In most areas of the state, there are very few people.  [You are] talking about people committing to multi-year supervision, because mental illness is not something that is cured overnight.  I think there will be some difficulty there.”  
President of the Florida Public Defender Association, Nancy Daniels, stated that the new legislation would very likely “bring a lot of new cases into the system.”

A major problem that Kendra’s Law faced in New York, and persists as a major concern in Florida, is that the mentally ill will become incarcerated, homeless, and loiter in public spaces.  
Laws focused on
deinstitutionalizing mental health, such as *Kendra’s Law*, moved away from traditional notions of mental illness treatment that institutionalized patients in hospitals where they received structured, guided, and controlled care.\textsuperscript{179} *Kendra’s Law* was a move towards deinstitutionalization of mental health treatment for patients.\textsuperscript{180} The move to deinstitutionalize allowed patients to gain liberty in exchange for treatment.\textsuperscript{181} However, those who are imminently at danger often qualify for outpatient treatment until an actual danger, risk, or harm occurs.\textsuperscript{182} While patients gain their liberty and freedom through this process, the discharge of thousands of mentally ill patients from psychiatric hospitals, without providing a means to ensure that those same patients receive and take the medications they need to stay healthy, creates a crisis produced by deinstitutionalization.\textsuperscript{183}

One major contribution to the predicted workload increase was a new requirement that all Baker Act cases be reviewed *every six months*, making for heavy traffic within the court system without any resources or means to meet the excess demands on the court system.\textsuperscript{184} Predicting these difficulties, a prosecutor and chair for the House Appropriations Committee, Republican Bruce Kyle put in an amendment that funds would be provided to “state attorneys and public defenders” to assuage the predicted increase workload.\textsuperscript{185} However, the amendment was later taken off, before the bill was actually passed in the House by final vote 100 to 15.\textsuperscript{186} Ultimately, the bill was passed and predictions were that hearings would double or even triple, yet few resources were offered by politicians to alleviate implementing laws through practical procedures.\textsuperscript{187} Judge Grossman stated the frustration felt by many: “They gave us no money to go with this. They [did not] give us any new judges. It is an unfunded mandate.”\textsuperscript{188}
C. The Curious Case of Cindy Mertz: Abuses Recalling Back to Florida’s Mental Health System Pre-Baker Act Still Exist

A systematic upheaval, the deinstitutionalization of a system, and a revolving door of reforms have not rid Florida’s Mental Health System of the abuses and problems that the Baker Act promised and aimed to resolve since 1971. The case of Cindy Mertz is one case that typifies this abuse. Mertz was an intellectually disabled twenty-one-year-old who was held under the Baker Act in 2015. She was a child of abuse, placed into the foster system, and eventually adopted by a family in 2008. Against the wishes of her adopted family who became her legal guardians, Mertz was locked into North Tampa Behavioral Health Hospital instead of the state-funded group home where staff and her family had placed her originally. North Tampa Behavioral Health is owned by Acadia Healthcare—a conglomerate that runs 225 health facilities in thirty-seven states. North Tampa Behavior Health came into trouble, only a year earlier, when a woman admitted herself into the hospital voluntarily and was then refused release. The hospital was also criticized in 2014 for not ensuring that patients were competent to consent when admitting themselves pursuant to what the Baker Act laws in Florida require.

At the time the article was printed, August 18, 2015, Mertz had been locked up for three weeks in the North Tampa Behavioral Health Hospital, well beyond the seventy-two hour hold prescribed by the Baker Act. Nikki Drake, a board member of the National Association for Mental Illness, wrote an email to hospital staff on August 13, 2015, asking what needed to be done in order for Mertz to leave the hospital. She stated in the email, “[s]he can[not] live there. You [cannot] cure her developmental disability.” Two days after the original article was published in the Miami Herald, Mertz was sent back to her group

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190. See Miller, supra note 128.
191. Id.
192. Id.
193. Id.
194. Id.
195. Miller, supra note 128.
196. Id.
197. Id.
198. Id.
199. Id.
The original arguments for keeping her in the hospital no longer appeared to apply as reasons for keeping her in the facility.201 Mertz’s case is not unique, and it is possible under the Baker Act to be taken against one’s will legally.202 Richard Smith’s seven-year-old son was involuntarily committed into a mental institution by officers and school officials when he threw a temper-tantrum in his second-grade class.203 After reporting to the boy’s elementary school, seeing a classroom torn apart, hearing he stepped on a teacher’s foot, and battered another school official, the officers decided that the boy needed to be evaluated for his mental health.204 While school officials and officers believe that their decision to have the boy involuntarily committed under the Baker Act was valid, other legal officials, and the boy’s parents, believe that this was an abuse of the mental health system, given that the most harm caused was stepping on a teacher’s foot.205 In Pinellas County alone, in the school year of 2008 to 2009, between August and early February, the Pinellas School Police reported that it Baker Acted eighty-three children within its system alone.206

III. REFORM FAILURE WITHIN FLORIDA’S BAKER ACT SYSTEM AND THE CAUSES OF SYSTEMIC ABUSE

The numerous allegations of abuse and the general overbreadth of those alleged abuses have many causes.207 The 2004 reforms were instituted as a humane measure that would prevent the mentally ill from hurting

201. See id.; Miller, supra note 128.
202. See Fla. STAT. § 394.467 (2016); Abel, supra note 128.
203. Abel, supra note 128.
204. Id.
205. See id.
206. Id. (comparing this number to the fact that the figure of eighty-three children, in less than six months, excludes all other legal agencies in the area and is specific to the Pinellas School Police Force); see also Laura C. Morel, Numbers Show Surge in Baker Act Exams of Kids in Tampa Bay Area, TAMPA BAY TIMES: NEWS (Dec. 19, 2016, 10:55 AM), http://www.tampabay.com/news/publicsafety/numbers-show-surge-in-baker-act-exams-of-kids-in-tampa-bay-area/2306799 (referring to the fact that children are being committed involuntarily by the school system and parents because there is no oversight of the initial commitment by the court system and patient/minor child confidentiality prevents further investigation into the matter).
themselves or others. Yet, a Times-Union editorial declared—as recent as November 2015—the 2004 reforms had not solved the problems they set out to resolve.

A. Misuse and Abuse of the Baker Act System: Ever-Increasing Involuntary Commitments

From 2004 to 2015, involuntary commitments in Florida increased by 64%. The Times-Union reported that involuntary commitments were often misused and abused. The article referenced reported Baker Act hospitalizations by schools and parents who cannot or will not care for their difficult children. Meanwhile, the frail, elderly population—who suffer from dementia and act out as a symptom of the disease or other illnesses—are also often Baker Acted rather than placed where their needs would be better addressed. While mental health advocates applauded the Baker Act in the 1970s, they are now concerned with the Baker Act being a dumping ground used to commit and institutionalize individuals when the system has nowhere else to place them.

Continuous increases in involuntary commitments also reflect mental health advocates’ concerns regarding the validity of research used to promote the status-quo and subdue the call for more reforms of the current Baker Act system. While Baker Act patients are in contact with substance abuse services, mental health advocates question the validity of that research and state real concerns about a missing connection or coordination between those Baker Acted and substance abuse services. This problem becomes compounded in situations where the mentally ill are homeless or without resources and help once released. Once released, the revolving door

208. See Editorial, supra note 189.
209. See id.
210. Id.
211. Id.
212. Id.
213. Miller, supra note 128; see also Voices on Baker Act Reform, TREATMENT ADVOC.

CTR., http://www.treatmentadvocacycenter.org/storage/documents/voices_on_baker_act_reform.pdf (last visited Dec. 31, 2017). It is generally understood and accepted that if someone is Baker Acted, he or she has been involuntarily committed under the Baker Act. Voices on Baker Act Reform, supra.

214. See Editorial, supra note 189.
215. Id.
216. See id.
217. Id.
218. Id.
becomes almost inevitable as patients leave with only pills, a prescription, and no easy access to continued mental health care.\textsuperscript{219} The Baker Act Reporting Center reported that thirty-one mental health patients were Baker Acted sixteen or more times in one year alone.\textsuperscript{220} From 2004 to 2013, close to 350 patients were involuntarily committed over thirty-six times or more.\textsuperscript{221} This problem worsened when each institution and the bodies of professionals who were required to act in involuntary civil commitments acted independently and disjointedly.\textsuperscript{222} The Times-Union Editorial Board opined and warned that these issues were a product of a broken system and an obvious result of legislators passing reforms without providing the necessary funding to enact the reforms.\textsuperscript{223} Florida ranks forty-ninth out of fifty states regarding the amount of money it spends on mental health.\textsuperscript{224} Annette Christy, who was in charge of Florida’s Baker Act Reporting Center in 2015, stated that there was a need for funds and that, unfortunately, tragedy appears to be one of the few triggers that will stimulate the funds needed.\textsuperscript{225}

B. Competing Authorities and Interests: Who Prevails? How Can Information Be Communicated to Meet the Needs of the Patient and Competing Authorities?

\textit{W.M. v. State}\textsuperscript{226} established that multiple divisions and courts representing the State can have concurrent jurisdiction overseeing the involuntary inpatient placement hearings of patients involuntarily committed.\textsuperscript{227} This can result in what is seen in the \textit{W.M.} case: A patient can be committed for a short period of time and then be mandated by a facility administrator to stay a longer term than the circuit court’s initial determination.\textsuperscript{228} The facility administrator only needed to determine the patient was incompetent to act on his or her own behalf.\textsuperscript{229} Further, given the confidential nature of the patients and separate oaths of confidentiality between the patient, psychiatrists, lawyers, guardians, and mental health

\begin{tabular}{l}
\textbf{219.} Editorial, supra note 189. \\
\textbf{220.} Id. \\
\textbf{221.} Id. \\
\textbf{222.} See id. \\
\textbf{223.} Id. \\
\textbf{224.} Editorial, supra note 189. \\
\textbf{225.} Id. \\
\textbf{226.} 992 So. 2d 383 (Fla. 5th Dist. Ct. App. 2008). \\
\textbf{227.} Id. at 384, 388. \\
\textbf{228.} Id. at 384–86. \\
\textbf{229.} FLA. STAT. § 394.467(1)–(2) (2016); W.M., 992 So. 2d at 384; Miller, \\
\textit{supra} note 128.
\end{tabular}
advocates, necessary oversight over each patient, case, the facilities, and treatment becomes almost impossible without inherently violating a patient’s right to privacy.\textsuperscript{230}

Referring back to the case of the Cindy Mertz, a major cause of her alleged kidnapping resulted from competing authorities, interests, and an inability to communicate clearly.\textsuperscript{231} Communication between judges, mental health advocates, and the hospital was not handled in-person and primarily done through varying forms of technology—either email or the phone.\textsuperscript{232} These technological communications prevented immediate actions from being taken, and allowed for delays, as the allegations of Mertz’s advocates and guardian—based primarily on their communications over phone and email with hospital staff and Mertz—were weighed against the alleged observations of hospital staff and administrators.\textsuperscript{233} The Miami Herald reported, “[l]ong email threads among Drake, [Mertz’s advocate], Mertz’s guardian, her behavior analyst, and hospital staffers beg[a]n on Aug[ust] [third], and bec[a]me increasingly frantic.”\textsuperscript{234} J. Rob Phillips, the Director of Clinical Services at North Tampa Behavioral Health, validated the hospital’s decision to keep the developmentally impaired woman in the hospital by stating in an email that Mertz had shown “suicidal ideation[s] and suicidal gestures” and that it would be sending Mertz to court to keep her in its facility.\textsuperscript{235} Meanwhile, Drake wrote back that the woman was not psychotic and, when he spoke to her over the phone, she sounded over-medicated causing her speech to be severely slurred.\textsuperscript{236} Access to the patient was regulated by the hospital, and the patient’s access to the court was dependent upon the facility or hospital where they are admitted.\textsuperscript{237} This holds true until the patient is deemed by a judge to have met the criteria for release, and he or she is released by the judge from the facility’s control.\textsuperscript{238}

\begin{itemize}
  \item \textsuperscript{230} See Miller, supra note 128 (discussing how doctors referred to the patient’s confidentiality as a reason why they would not be able to provide more reasons as to why they were not releasing Mertz as requested).
  \item \textsuperscript{231} See id.
  \item \textsuperscript{232} See id.
  \item \textsuperscript{233} See id.
  \item \textsuperscript{234} Id.
  \item \textsuperscript{235} Miller, supra note 128.
  \item \textsuperscript{236} Id.
  \item \textsuperscript{237} Id.
  \item \textsuperscript{238} Fla. Stat. \textsection{} 394.467(7)(d) (2016); Miller, supra note 128.
\end{itemize}
IV. **DOE v. STATE: DOES TELECONFERENCING BAKER ACT HEARINGS PROVIDE A NECESSARY REMEDY OR VIOLATE AN INDIVIDUAL’S CONSTITUTIONAL RIGHTS?**

Video technology developed and advanced at the same time that Florida’s judiciary confronted many financial limitations.239 Budget cuts forced courts and the judiciary to create new and efficient ways to meet the rigorous demands of their judicial obligations, and ultimately led to an inquiry into how technology could be used for efficient and effective change.240 Statutory prohibitions and rule-based prohibitions do not exist regarding the use of videoconferencing during Baker Act proceedings.241 At the time that the Supreme Court of Florida considered this case, case law did not exist stating that Baker Act hearings by videoconferences were prohibited by the Constitution.242

On March 30, 2016, two seemingly innocuous email lines began a firestorm of legal debate, questioning the procedural validity, constitutionality, decision-making, and duties of judges with regard to using videoconferencing during Baker Act Hearings.243 As part of her daily routine, Judicial Assistant for the Honorable Judge Swett, Kate Hroncich, sent an email to Public Defender Kathleen Smith with the subject of *Baker Acts on Friday.*244 The email stated: “Per Judge Swett, he will be doing Baker Acts beginning this Friday via Polycom. Thank you.”245

These two lines began a legal battle between mental health officials, attorneys for the mentally ill, and trial judges who presided over Baker Act hearings.246 The debate would highlight the problematic procedural structure of the Baker Act, showcase how the mentally ill’s due process rights can be easily violated, re-emphasize the importance and need for reform, and underscore the continued lack of effective reform.247 Beyond whether the judge’s email violated an established legal procedure, petitioners questioned whether the patients’ constitutional and due process rights were violated as a result of this procedure.248

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240. Id.
241. Id. at 2.
242. Id.
244. Petitioners’ Initial Brief, *supra* note 243, at 5.
245. Doe, 217 So. 3d at 1023; Petitioners’ Initial Brief, *supra* note 243, at 5.
246. See Doe, 217 So. 3d at 1023.
247. See id. at 1022; *infra* Part IV (A)–(C).
A. The Practical and Procedural Costs of the 2004 Baker Act Reforms: Insufficient Resources and the Advent of Teleconferencing for Baker Act Hearings

In order to understand the significance of Doe, the historical and legal context of the judges’ plight must be understood and considered. Despite the legislature passing Baker Act reforms in 2004, the Florida Legislature had not added circuit or county judgeships in ten years to support the enactment of those reforms. Only in 2016, were twelve new judgeships recommended and announced by the Supreme Court of Florida. Yet, these recommendations came ten years behind schedule as reforms from 2004 increased judges’ workloads regarding Baker Act hearings. From 2010 until 2015 alone, some counties reported a 50% or more increase in Baker Act evidentiary hearings for minors alone. With no new judgeships added, judges were required to meet the needs of these patients and conduct the hearings at the courthouse or at patients’ facilities. When judges commuted to patient facilities, they would often have to wait as patients met with their attorneys. Wait time and time lost in travel backed up the hearing schedule in an already bogged down system. Costs accumulated as a result of the travel and wait time incurred by judges traveling from facility to facility. Yet, the travel and wait time was not limited to judges—all legal and medical authorities involved in the case were also required to attend the hearings, imparting more fees on the state through the presence and appearance of state, medical, and law enforcement officials.

249. See Florida Supreme Court Justices Ask for More Judges, supra note 207 (discussing how Florida lawmakers have not added judgeships in a decade and how judgeships have been impacted by heavy burdens on the state’s fiscal health because of crises such as the mortgage crisis).


251. Florida Supreme Court Justices Ask for More Judges, supra note 207.

252. See Brief for the Chief Judge of the Fifteenth Judicial Circuit as Amicus Curiae Supporting Respondent, supra note 7, at 13; Florida Supreme Court Justices Ask for More Judges, supra note 207; Morel, supra note 206.


255. Id. at 14 n.15.

256. See id. at 14.

257. Id. at 14–15.

258. See id.
Meanwhile, judges would argue that the courthouse did not provide patients with a proper and safe setting to hold Baker Act evidentiary hearings.\textsuperscript{259} Patients traveled to locations that were unfamiliar to them and followed strict protocols that were usually used to control “criminals or those accused of crime[s].”\textsuperscript{260} “The Baker Act [mandates] that the patients’ individual digniti[es] [be upheld and] respected at all times,” and these procedures were in direct opposition of that humane mandate.\textsuperscript{261} Holding cells were the only location where patients involuntarily committed could wait for their evidentiary hearings as \textit{no private or secure} holding areas existed for patients.\textsuperscript{262} Meanwhile, placing patients in open and public areas caused a new host of problems as the patient presumably was involuntarily committed because he or she posed a danger either to himself or herself or the public.\textsuperscript{263} By placing him or her in an open and public place, the respondent judges argued that this could cause the patient more harm and expose the public to unnecessary risks within the courthouse.\textsuperscript{264}

Further, medical facilities become responsible for relocating the patients to the courthouse, causing the state to incur more costs.\textsuperscript{265} “[T]ransport service employees [would] not [necessarily] be law enforcement” officers properly trained to handle the risks of transporting such vulnerable patients.\textsuperscript{266} Escapes, medical emergencies, risk to the transport service employees, and increased costs to the state would all be the basis of the judge’s reasoning that teleconferences were appropriate and applicable to Baker Act hearings and could substitute the statutory in-person hearings held at the courthouse.\textsuperscript{267}

B. \textit{Doe v. State: Petitioners Argue Baker Act Hearings Via Teleconferences Are a Violation of Patients’ Rights}

The issue at the heart of \textit{Doe} was whether a \textit{judicial officer} should be required to be \textit{physically present} with the petitioners when Baker Act hearings were held—either by law or legal duty.\textsuperscript{268} The case was initiated

\begin{footnotesize}
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\item \textsuperscript{259} Brief for the Chief Judge of the Fifteenth Judicial Circuit as Amicus Curiae Supporting Respondent, \textit{supra} note 7, at 15–16.
\item \textsuperscript{260} \textit{Id.} at 15 (quoting FLA. STAT. § 394.459(1) (2016)).
\item \textsuperscript{261} \textit{Id.}
\item \textsuperscript{262} \textit{See id.} at 15–16.
\item \textsuperscript{263} \textit{Id.} at 16.
\item \textsuperscript{264} \textit{See} Brief for the Chief Judge of the Fifteenth Judicial Circuit as Amicus Curiae Supporting Respondent, \textit{supra} note 7, at 16.
\item \textsuperscript{265} \textit{Id.} at 14–15.
\item \textsuperscript{266} \textit{Id.} at 16.
\item \textsuperscript{267} \textit{See id.} at 14–17, 20.
\item \textsuperscript{268} \textit{Doe v. State}, 217 So. 3d 1020, 1022–23 (Fla. 2017).
\end{itemize}
\end{footnotesize}
and filed with the Second District by fifteen petitioners, including John Doe, seeking relief from a seemingly off-the-cuff and without notice decision made by Judge Swett in Lee County that declared all involuntary commitment hearings would be held remotely. The Second District questioned the judgment of holding these hearings remotely, but held that conducting Baker Act hearings through teleconferences were “within the discretion of the court.”

The Baker Act did not establish that judicial officers had a ministerial or indisputable legal duty to be physically present when they “presid[ed] over involuntary inpatient placement hearings.”

The majority of the district court panel reviewing the briefs submitted by both parties concluded that there was no “express legal right to have the judicial officer be physically present with the petitioners” during Baker Act hearings, and that no legal duty was outright expressed. However, they did determine the law clearly established that necessary mandamus relief “can derive from a variety of legal sources, including . . . rules of court.”

Judge Wallace wrote a concurring opinion with the majority where he expressed concerns about the law as it stood. The Second District did state that despite there being no express legal right to have a judge physically preside over Baker Act hearings, two problems did exist in the proceedings of the trial court: (1) a court order supporting the judge’s arguments was not provided; and (2) the trial judge did not provide a reason for his decision to preside over involuntary placement hearings over teleconference.

Even still, Wallace wrote in this opinion that while the majority held correctly, “the manner in which the trial judges . . . exercised [their] authority” over these hearings was unwarranted, inappropriate, and ill-advised. Despite his concurring opinion, Judge Wallace stated three reasons why conducting Baker Act hearings through teleconferencing equipment was questionable: (1) potential difficulties such as equipment malfunctioning and counsel not being able to approach the bench to speak in private; (2) the Supreme Court of Florida appointed a subcommittee on this topic in 1997, and the circuit court was disregarding the opinion of the subcommittee by continuing to

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269. Id. at 1023.
270. Id.
271. Id.
273. Id. (quoting Nader v. Dep’t of Highway Safety & Motor Vehicles, 87 So. 3d 712, 723 (Fla. 2012)). Established law does not have to only be defined by the legislature, but can also be derived from rules of court, statutes, constitutional law, and controlling case law. Nader, 87 So. 3d at 723.
274. Doe, 210 So. 3d at 159.
275. Id. at 160–62.
276. Id. at 159.
hold such hearings; and (3) similar procedures for juvenile hearings were used before and ultimately failed.\footnote{277}

This begged the question of whether the silence by the legislature was an oversight or purposely excluded.\footnote{278} The question became whether the silence on this procedure provided judges with a choice in how to handle such hearings, or if it was an oversight and the legislature assumed that longstanding traditions—always compelling the personal attendance of judicial officers at the evidentiary hearings and trials of which they preside—would prevail.\footnote{279}

Judge Lucas of the Second District Court of Appeal offered in his dissent that while no law required the physical presence of a judge in express terms,\footnote{280} Bryant v. State\footnote{281} established that the physical presence of a judge was constitutionally mandated in a criminal trial, unless waived.\footnote{282} The case law held precedent that the physical presence of a judge was a bedrock principle and the reason it was not expressly stated in the law was because the physical presence of a judge or magistrate has always been a standard assumed as an elemental component to preside over trials and evidentiary hearings.\footnote{283} The Baker Act hearings constitute evidentiary hearings; and as

\footnote{277. Id. at 163–65 (discussing Florida’s videoconferencing experiment with juvenile detention hearings). The Second District summarized the difficulties of videoconferencing in juvenile proceedings by referring to the Amendment to Florida Rule of Juvenile Procedure 8.100(A), which states: Independent observations confirmed the fears expressed by all who have strongly and continuously opposed the adoption of the proposed robotic procedure. Specifically, many observed that there was no proper opportunity for meaningful, private communications between the child and the parents or guardians, between the parents or guardians and the public defender at the detention center, and between a public defender at the detention center and a public defender in the courtroom. The mechanical process produced a proceeding where, on many occasions, multiple parties would speak at once, adding to the confusion. At the conclusion of far too many hearings, the child had no comprehension as to what had occurred and was forced to ask the public defender whether he or she was being released or detained. It was also problematic that the public defender at the detention center often had no access to the child’s court file, and there was absolutely no opportunity to approach the bench to discuss private matters or anything that should not have been openly broadcast. Moreover, perhaps because it was difficult for the children to see, hear, and understand what was taking place, the youth did not behave as those participating in person in a courtroom; that is, the hearings totally lacked the dignity, decorum, and respect one would anticipate in a personal appearance before the court. Id. at 165; Amendment to Fla. Rules of Juvenile Procedure 8.100(A), 796 So. 2d 470, 473 (Fla. 2001).}

\footnote{278. See Doe, 210 So. 3d at 168.}

\footnote{279. See id.}

\footnote{280. Id. at 166–68.}

\footnote{281. 656 So. 2d 426 (Fla. 1995) (per curiam).}

\footnote{282. Id. at 428–29.}

\footnote{283. Doe, 217 So. 3d at 1024; see also Doe, 210 So. 3d at 168.}
such, Judge Lucas argued that these court proceedings must be followed pursuant to the rules of evidence.\textsuperscript{284} Lucas argued that the advent and expansion of teleconferencing does not authorize judges to violate their duties as would otherwise be assigned.\textsuperscript{285} This was something implicitly assumed by the judges and magistrates who chose to use the technology as a substitute for their physical presence during evidentiary hearings.\textsuperscript{286}

**C. Doe v. State: Judges Argue that Technology Is a Necessary Remedy for Failed Baker Act Reforms and Increasingly Insurmountable Workloads**

The respondents in the *Doe* case argued in their Amicus Brief before the Supreme Court of Florida\textsuperscript{287} that the Supreme Court of Florida’s Task Force on the Management of Cases Involving Complex Litigation Report and Recommendations, published in 2008, stated that the Supreme Court of Florida should promote all courts throughout Florida to use videoconferencing when possible.\textsuperscript{288} The respondents pointed out in the same report that attorneys and judges were encouraged by the Supreme Court Task Force to use videoconferencing to resolve their cases more quickly.\textsuperscript{289}

The respondents argued, referring back to Judge Lucas’s dissent, that the Florida Rules of Evidence provided statutory authority that video recordings could be used to provide substantial testimonial evidence and witness statements.\textsuperscript{290} Important court appearances, such as criminal arraignments and first appearances, are often made by employing the use of technology.\textsuperscript{291} Medical experts testify using videoconferencing technologies during trial proceedings, and children testify during trial proceedings through videoconference calls in order to avoid trauma pursuant to Florida Statute section 92.55.\textsuperscript{292} Much in the same way that children need protecting, the judges argue in their Amicus Brief that the Baker Act provided several protections for the mentally ill and none were impeded upon by the use of

\begin{thebibliography}{9}
\bibitem{284} *Doe*, 210 So. 3d at 168.
\bibitem{285} *Doe*, 217 So. 3d at 1027; \textit{see also} *Doe*, 210 So. 3d at 168–69.
\bibitem{286} *Doe*, 210 So. 3d at 168; \textit{see also} *Doe*, 217 So. 3d at 1027.
\bibitem{287} Answer Brief of Respondent at 10–11, Doe v. State, 217 So. 3d 1020 (Fla. 2017) (No. SC16-1852); \textit{see also} Brief for the Chief Judge of the Fifteenth Judicial Circuit as Amicus Curiae Supporting Respondent, \textit{supra} note 7, at 2.
\bibitem{288} \textit{See} Answer Brief of Respondent, \textit{supra} note 287, at 10–11.
\bibitem{289} \textit{See id.} at 10.
\bibitem{290} \textit{Id.} at 12 (citing *Kelley v. Webb*, 676 So. 2d 538, 539 (Fla. 5th Dist. Ct. App. 1996)); \textit{see also} Doe v. State, 210 So. 3d 154, 168 (Fla. 2d Dist. Ct. App. 2016) (Lucas J., dissenting), \textit{rev’d}, 217 So. 3d 1020 (Fla. 2017).
\bibitem{291} Answer Brief of Respondent, \textit{supra} note 287, at 12.
\bibitem{292} \textit{See Fla. Stat.} § 92.55 (2016); Answer Brief of Respondent, \textit{supra} note 287, at 12.
\end{thebibliography}
teleconferencing.\textsuperscript{293} While the petitioners argued that the use of videoconferencing technology during involuntary commitment procedures infringes upon the due process rights of the mentally ill, the respondents quoted the holding of \textit{M.W. v. Davis}.\textsuperscript{294} \textit{M.W.} held that while the purpose of due process in substantive due process claims was to protect the fair treatment of individuals by using proper administrative justice, the purpose and validity of due process claims in procedural due process depended on the nature of the court proceeding.\textsuperscript{295}

The Chief Judge Jeffrey Colbath of the Fifteenth District wrote an Amicus Brief citing that the Florida Legislature had not added or created new county or circuit judgeships in a decade but expected the reforms to be enacted.\textsuperscript{296} In his brief, he described the specific struggles of judges in Palm Beach County who comprised the Fifteenth Judicial Circuit.\textsuperscript{297} The struggles derived from the expanse of the county and the lack of judges and time needed to cover the area; the county is sixty-miles-long and forty-miles-wide, with seven mental health facilities all serviced by only four magistrates who would travel to attend the Baker Act hearings.\textsuperscript{298} The public defender, the state attorney, the sheriff deputy, and the judicial officer would all travel to each facility housing patients where they would preside over each of these hearings.\textsuperscript{299} The Chief Judge argued that time and resources lost were a waste as these hearings could be easily performed over teleconference.\textsuperscript{300} The Chief Judge also referred to cost concerns related to Baker Act proceedings.\textsuperscript{301} Travel-related costs would no longer be incurred by the judicial officer or the sheriff deputy’s office.\textsuperscript{302} The state attorney and the public defender’s offices would also save these travel costs.\textsuperscript{303} Furthermore, the facilities would also avoid the travel costs of transporting the patient between the facility and courthouse.\textsuperscript{304}

\begin{itemize}
\item \textsuperscript{293} See Fla. Stat. § 92.55; Brief for the Chief Judge of the Fifteenth Judicial Circuit as Amicus Curiae Supporting Respondent, \textit{supra} note 7, at 2–3, 20.
\item \textsuperscript{294} 756 So. 2d 90, 92 (Fla. 2000); \textit{see also} Answer Brief of Respondent, \textit{supra} note 287, at 14.
\item \textsuperscript{295} \textit{M.W.}, 756 So. 2d at 97.
\item \textsuperscript{296} \textit{See} Brief for the Chief Judge of the Fifteenth Judicial Circuit as Amicus Curiae Supporting Respondent, \textit{supra} note 7, at 13.
\item \textsuperscript{297} \textit{Id.} at 14.
\item \textsuperscript{298} \textit{Id.}
\item \textsuperscript{299} \textit{See} \textit{id.}
\item \textsuperscript{300} \textit{Id.}
\item \textsuperscript{301} Brief for the Chief Judge of the Fifteenth Judicial Circuit as Amicus Curiae Supporting Respondent, \textit{supra} note 7, at 14.
\item \textsuperscript{302} \textit{Id.}
\item \textsuperscript{303} \textit{See} \textit{id.} at 14–15.
\item \textsuperscript{304} \textit{Id.}
\end{itemize}
The security of the patient and the public is also cited in the Chief Justice’s Amicus Brief. 305 Specifically, the judge wrote that the courthouses were not well equipped to hold Baker Act hearings because patients could only be held in criminal holding cells. 306 He argued that the Baker Act states in plain language that holding cells should not be used and avoided for Baker Act hearings. 307 Holding a Baker Act patient in an open waiting area, who has been involuntarily committed because he or she is deemed either a danger to themselves or others, is an equally disconcerting idea as it would expose the public to a known and unnecessary risk. 308 Security protocols are not as easily controlled when a Baker Act hearing is held within the courthouse, given the environment cannot be completely controlled by the security provided by the facility. 309

D. The Supreme Court’s Final Decision on Doe v. State: Teleconferences are Unconstitutional

The Supreme Court of Florida in the Doe case ultimately held that the lack of resources and the struggles that the judges described did not outweigh the individuals’ constitutional rights to due process and liberty. 310 The expediency and problems with workload did not provide sufficient reason to validate holding Baker Act hearings by teleconference. 311 The Supreme Court of Florida stated that in Baker Act hearings, unlike in criminal proceedings, the use of teleconference technology is not expressly sanctioned against by the statute. 312 However, the Court did take issue with the way the judge incorrectly used his authority to determine that he would only preside over Baker Act hearings through teleconference technology. 313 The Supreme Court of Florida described Judge Swett’s actions as misguided wisdom and an overreach of authority. 314 His decision did not meet the standards intended by the legislature that allows judges to use their discretion as to where and how to hold Baker Act hearings. 315 Longstanding traditions require that judicial officers be present at trials and the advent of technology

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305. Id. at 15.
306. Brief for the Chief Judge of the Fifteenth Judicial Circuit as Amicus Curiae Supporting Respondent, supra note 7, at 15.
307. Id. at 15.
308. Id. at 16.
309. See id.
311. Id.
312. Id. at 1025, 1028.
313. Id. at 1031.
314. Id. at 1031–32.
315. See Doe, 217 So. 3d at 1023–25.
does not change this tradition, nor is it a reason to change this tradition, nor should it be assumed to change this tradition.\textsuperscript{316} The Supreme Court of Florida wrote that the legislature’s intent regarding how and where to hold Baker Act hearings was to benefit the patient only, and ultimately depended upon what was least injurious to the patient’s condition.\textsuperscript{317} With the patient’s conditions in mind, judges could use their discretion as to whether Baker Act hearings should be held in the courthouse or at the mental health facility.\textsuperscript{318}

The final conclusion regarding the respondents’ practical and logistical concerns was that judicial expediency never justifies the exercise of a judge’s discretion regarding Baker Act hearings.\textsuperscript{319}

V. RECOMMENDATIONS

The arguments made in the Amicus Brief of Chief Judge Jeff Colbath, while found to be insufficient to validate Baker Act hearings being teleconferenced, reflect a larger problem with the mental health system in Florida.\textsuperscript{320} Deinstitutionalization has created a mental health funding crisis with consistent decreases in funding provided to state-run treatment over the last three decades.\textsuperscript{321} In fact, after 2008, states were obligated to cut over $4 billion in mental health spending, equating to the greatest decrease in spending and funding for mental health since deinstitutionalization began.\textsuperscript{322}

In 2004, seemingly needed calls for reform took place and many were applied, but without the proper funding to support those reforms.\textsuperscript{323} The lack of funding allotted to implement these reforms and the decrease in federal funding that justified the move towards deinstitutionalization left mental health facilities to find means—sometimes described as abuses—to pay for the treatments they were meant to provide.\textsuperscript{324} As recent as 2015, Governor Rick Scott proposed an increase of $19 million for mental health treatment, which ultimately was passed as a split between mental health and drug

\begin{footnotes}
\item 316. \textit{Id.} at 1027.
\item 317. \textit{Id.} at 1025.
\item 318. \textit{Id.}
\item 319. \textit{Id.} at 1026.
\item 320. \textit{See} Brief for the Chief Judge of the Fifteenth Judicial Circuit as Amicus Curiae Supporting Respondent, \textit{supra} note 7, at 1–3, 20.
\item 321. \textit{See} Deanna Pan, \textit{Timeline: Deinstitutionalization and Its Consequences}, MOTHER JONES (Apr. 29, 2013, 10:00 AM), http://www.motherjones.com/politics/2013/04/timeline-mental-health-america/.
\item 322. \textit{Id.}
\item 323. \textit{See} Pudlow, \textit{supra} note 151.
\item 324. \textit{See} Editorial, \textit{supra} note 189; Miller, \textit{supra} note 128.
\end{footnotes}
treatment to be released over two years.\textsuperscript{325} This amount, while seemingly large, is dwarfed by the $150 million used by the New York Legislature to implement \textit{Kendra’s Law} for its first five years in the 1990s.\textsuperscript{326}

With the proper funding, more licensed professionals could provide care and services, and the services could be more effective.\textsuperscript{327} Without the proper funding, the mental health system in Florida, and those who must orchestrate and provide Baker Act services, will be consistently providing the same services to patients who consistently return to treatment, and will become overworked because they work in an inefficient and, possibly, dangerous system—due to patients not receiving treatment in time, or acting without medicine, or simply living in constant threats of lawsuits.\textsuperscript{328} Meanwhile, patients will continue to be misdiagnosed, mistreated, held against their will without due process, negated liberty, and held without treatment until the system can provide them with their court appearance.\textsuperscript{329} Patients may even be incarcerated—for acts they commit while being improperly treated or misdiagnosed—by an underfunded and ineffective system.\textsuperscript{330} In the past, reforms were consistently made without sufficient and proper funding provided, which has created our present mental health care crisis.\textsuperscript{331} When funds were allotted, they were minimal and token amounts, unable to achieve the lofty humanitarian notions the Baker Act and its reforms strived to achieve.\textsuperscript{332}

The Supreme Court of Florida questioned the wisdom of the judges’ use of technology and their justifications for its use in Baker Act hearings in \textit{Doe}.\textsuperscript{333} Yet, the Amicus Brief was not an attempt to abscond from the official duties of Baker Act hearings, but rather a diligent attempt to deal
with an overwhelming and ever-increasing problem given the documented surge in involuntary commitments and too few professionals and officials managing involuntary commitments under the Baker Act within Florida’s Mental Health System. Reform should be conceived and approved within the limits of the funding provided—rather than minimal funding being promised by legislature to provide token gifts of support to reforms that are not achievable—otherwise, the increased pattern of incarcerating the mentally ill will continue to cost the state more than if patients were to receive proper treatment from the beginning.

VI. CONCLUSION

Given the most recent holding of the Supreme Court of Florida in the Doe case, the Florida Legislature should begin to rethink their reactive and token-funding approach to mental health. Proactive action needs to take place regarding mental health, where feasible reforms are enacted and a sufficient and healthy amount of funding is provided to ensure the success of the reforms. Baker Act reforms have consistently been underfunded and a response to crisis. The clear and convincing standard of dangerousness, either to one’s self or to others, is another pitfall that must be overcome because help is too often provided too little and too late. New legal definitions and grounds need to be created that better distinguish individuals who need involuntary commitments and those who solely just need mental health treatment and support. The definition of dangerousness needs to be expanded to include concerns about patients’ welfare, their ability to manage themselves healthily regarding self-care and neglect, as well as ensure that they are living in suitable living environments that promote mental health and self-care. A system responding to repeated crises without funding has created a system riddled with issues that make Florida’s Mental Health System a complex knot that must be untied; concurrent jurisdictions, disjointed action by competing authorities, a broken communication system, a concern for patient privacy, and a concern for funding underfunded hospitals all create a perfect storm where abuse threatens the patient’s liberty.

334. See Brief for the Chief Judge of the Fifteenth Judicial Circuit as Amicus Curiae Supporting Respondent, supra note 7, at 1–2.
335. See Gilliam, supra note 141; Pudlow, supra note 151.
336. See Doe, 217 So. 3d at 1032.
337. See Gilliam, supra note 141; Editorial, supra note 189.
338. See Gilliam, supra note 141.
339. See Editorial, supra note 189.
341. Id.
at every turn and the fight between all competing and interested parties ultimately affect the patient whose interest they all allegedly aim to protect. These abuses do not begin in hospitals or courtrooms, but rather have been created on Florida’s Senate floor. The State of Florida needs to stop reacting to crisis and, instead, act to prevent crisis by putting real money into these reforms.

342. See W.M. v. State, 992 So. 2d 383, 386–87 (Fla. 5th Dist. Ct. App. 2008); Stavis, supra note 340, at 198; STATE OF FLA. DEP’T OF CHILDREN & FAMILIES MENTAL HEALTH PROGRAM OFFICE, supra note 16, at 3; Killian, supra note 119. Miller illustrates how competing interests and an inability to communicate clearly and effectively between parties interested in the treatment and status of Mertz ultimately led to a chaotic scene that kept Mertz in treatment or kidnap[ed] depending on which party was addressing the status and topic of Mertz’s inpatient commitment. Miller, supra note 128.

343. See Pudlow, supra note 151; Editorial, supra note 189.

344. See Pudlow, supra note 151; Editorial, supra note 189.
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