IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY FLORIDA

FLORIDA LEAGUE OF CITIES, INC.; CITY OF FORT WALTON BEACH, FLORIDA; CITY OF NAPLES, FLORIDA; AND CITY OF PORT ORANGE, FLORIDA,

Plaintiffs,

v.

THE HONORABLE ASHLEY MOODY, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF FLORIDA; AND THE HONORABLE LAUREL M. LEE, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE OF THE STATE OF FLORIDA,

Defendants.
_____/

CASE NO. 2019 CA 001071

CIVIL DIVISION

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs sue Defendants and allege:

PRELIMINARY STATEMENT

1. This Complaint alleges that a Florida statute that, in part, preempts municipalities' ability to control the use of their own property, namely utility poles installed, owned and maintained by municipalities for lighting, traffic control and signage, in public rights-of-way, to allow for the collocation of certain wireless communications infrastructure by private wireless providers violates the Florida Constitution. Plaintiffs seek declaratory and injunctive relief to declare these provisions of the statute unconstitutional and to prevent their enforcement.

2. In 2017, the Florida Legislature passed and the Governor signed CS/CS/HB 687,[1] amending Section 337.401, Florida Statutes, by adding subsection 337.401(7), known as the "Advanced Wireless Infrastructure Deployment Act" (the "Small Cell Statute").

[1] Compiled at Chapter 2017-136, Laws of Florida.

3. Among other things, the Small Cell Statute (i) caps the fees municipalities may charge wireless providers for use of utility poles owned by municipalities in public rights-of-way at artificial and unreasonable below-market rates; (ii) establishes arbitrary and restrictive requirements for municipalities to process applications for the use of utility poles owned by municipalities; and (3) frustrates municipalities' ability to manage effectively the use of their utility poles to protect the health, safety, and welfare of their residents and visitors.

4. The Small Cell Statute grants the wireless communications industry, comprised of for-profit corporations, broad access to taxpayer funded public rights-of-way (typically sidewalks and streets) and publicly funded utility poles (including traffic signal, lighting, and signage poles) to place wireless antennas and large equipment boxes. The Small Cell Statute further provides that these for-profit corporations may be charged a maximum of $150 per year for each pole to which they attach their facilities, an amount significantly below fair market value for such attachments to poles. The effect of these provisions is to provide wireless for-profit corporations with a significant financial windfall at taxpayer expense.

5. Plaintiffs seek a declaration that certain provisions of the Small Cell Statute are unconstitutional, unlawful, and invalid, and injunctive relief enjoining enforcement of the unconstitutional provisions.

6. Plaintiffs in this case are the Florida League of Cities, Inc. ("FLC"), and the cities of Fort Walton Beach, Naples, and Port Orange, Florida (collectively, the cities are referred to as the "Plaintiff Municipalities").

7. Plaintiffs are suing appropriate State officials in their official capacities to challenge specific provisions of the Small Cell Statute.

JURISDICTION AND VENUE

8. This action seeks declaratory and injunctive relief and is brought pursuant to Chapter 86, Florida Statutes. This Court has jurisdiction over this action pursuant to Fla. Stat. §§ 86.011, 86.021, 86.101.

9. Venue appropriately lies in this Judicial Circuit pursuant to Fla. Stat. §47.011, because Plaintiff FLC and Defendants are all located in, or have their principal headquarters in, Leon County, Florida.

THE PARTIES

10. FLC is a Florida not-for-profit corporation with its principal place of business in Tallahassee, Leon County, Florida. FLC is the united voice for Florida's municipal governments and has associational standing. FLC's stated goals and objectives are to serve the needs of Florida's cities and to promote local self-government. FLC's membership consists of more than 400 municipalities in the State of Florida ("FLC's Members"), including each of the Plaintiff Municipalities.

> An association… has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Sierra Club v. Johnson, 436 F.3d 1269, 1276 (11th Cir. 2006)(citation omitted). *See also Florida Association of Counties, Inc. and Florida League of Cities, Inc. v. Dept. of Admin., Div. of Retirement*, 580 So.2d 641 (Fla. 1st DCA 1991), *aff'd*, 595 So.2d 42 (Fla. 1992). FLC's Members control public rights-of-way and many of FLC's Members own utility poles, including poles used for lighting, traffic control and signage, in the public rights-of-way that are subject to provisions of the Small Cell Statute, including Plaintiff Municipalities.

11. Each of the Plaintiff Municipalities is a duly incorporated municipal corporation

organized and established pursuant to Article VIII, Section 2(a) of the Florida Constitution, and is authorized to exercise home rule powers pursuant to Article VIII, Section 2(b) of the Florida Constitution. The elected officials of the Plaintiff Municipalities have taken an oath to uphold the Florida Constitution.

12. Defendant, the Honorable Ashley Moody, sued in her official capacity, is the Attorney General of Florida. As Attorney General, she is the chief state legal officer. Art. IV, §4(b), Fla. Const. The Attorney General advocates on behalf of the State of Florida in enforcing its laws and is responsible for defending the constitutionality of Florida statutes, including the provisions of the Small Cell Statute challenged herein.

13. Defendant, the Honorable Laurel Lee, sued in her official capacity, is the Florida Secretary of State. Secretary Lee is a proper defendant in this action because, as Secretary, she is charged with performing specific action under the Small Cell Statute. Subsection 337.401(3)(d), Florida Statutes, provides:

> After January 1, 2001, in addition to any other notice requirements, a municipality must provide to the Secretary of State, at least 10 days prior to consideration on first reading, notice of a proposed ordinance governing a telecommunications company placing or maintaining telecommunications facilities in its roads or rights-of-way. (The notice requirement for a county is at least 15 days prior to consideration.) The notice required by this paragraph must be published by the Secretary of State on a designated Internet website. The failure of a municipality or county to provide such notice does not render the ordinance invalid.

The Secretary of State charges municipalities a fee to publish notices of hearings of proposed ordinances pursuant to Section 337.401(3)(d), Florida Statutes. Accordingly, Defendant Lee participates in the implementation of the Small Cell Statute.

14. Defendants each have an actual, cognizable interest in this action, for among things, the reasons stated above.

FACTUAL BACKGROUND

The Growth of Wireless Technology's Use of Public Rights-of-Way

15. Municipalities in Florida enjoy home rule powers pursuant to the Florida Constitution. Municipalities exercises their home rule authority in the interests of the health, safety and welfare of their residents and those who visit and conduct business within their jurisdictions.

16. Municipal public rights-of-way are used for a substantial variety of often conflicting purposes. Various uses of municipal rights-of-way include the travelling public, numerous businesses and providers of a variety of services (waste collection, delivery services, U.S. mail, government employees), first responders, drainage, landscaping, economic development and community beautification, street furniture and infrastructure, lighting, traffic and pedestrian signalization and signage, public safety notices and warnings, emergency storm preparations, evacuations and recovery, and by utilities and franchised services including water, sewer, natural gas, communications, cable television and electric.

17. As a utility, wireline communications providers, such as telephone and franchised cable television providers (wireline communications providers and franchise cable providers are collectively referred to as "wireline providers"), enjoy access to public rights-of-way for their infrastructure pursuant to Section 337.401, Florida Statutes ("F.S."), and ordinances adopted by municipalities consistent with Section 337.401, F.S.

18. Wireline providers may seek to install their cable and wireline infrastructure on poles owned by municipalities, such as light poles and traffic signal poles, in public rights-of-way. However, municipalities may, in the exercise of their home rule and proprietary authority, refuse to allow wireline providers to attach facilities to poles they own and control in their proprietary capacity.

19. Because of technical, building code and public safety issues, wireline providers rarely seek to attach their fiber and wireline infrastructure to light poles and other similar poles owned by municipalities. Rather, wireline providers typically install their own utility poles, or enter into pole attachment agreements with other utilities to attach their facilities to third parties' utility poles, such as poles owned by electric utilities. In Florida, wireline providers' attachment of facilities to utility poles owned by private utilities is regulated by federal law, while wireline attachment to municipal utility poles remains unregulated at the state and federal levels.

20. Wireless services providers often construct wireless communications facilities in Florida pursuant to local land use codes and consistent with applicable federal and state law that regulates municipal processing of applications for siting wireless towers and antennas, while preserving local zoning and land use authority.

21. Neither federal law, including the Telecommunications Act of 1996, nor Florida law, including the Florida cell tower statute[2], regulate municipalities with respect to requests to site towers and antennas on property owned by municipalities. Municipalities may refuse to allow towers and antennas on their property, or may negotiate leases for use of their property.

22. Because of land use and public safety issues, as well as building code and technical limitations, wireless towers have been constructed traditionally on private or public property, not within public rights-of-way. These towers are generally maintained pursuant to land leases with the property owners, and approved pursuant to applicable municipal land use processes.

23. Notwithstanding public safety, land use, technical and other concerns, municipalities occasionally have issued permits pursuant to local ordinances, allowing the

[2] Telecommunications Act of 1996, 47 U.S.C. §§253(a) and 332(c)(7)(B)(i)(II) ("96 Act"); Section 365.172, Florida Statutes ("FL Cell Tower Statute").

construction of communications towers and antennas in public rights-of-way.

24. For a variety of reasons, including technical limitations with height, land use and public safety concerns, and the inability of such poles to accommodate such antennas and still function as required, wireless antennas were historically not attached to municipal light, traffic signalization and signage poles.

25. The use of wireless communications services by consumers has expanded exponentially over the past few years. As a result, the wireless communications industry has developed and continues to develop new technologies to expand and to improve the coverage and capacity of their wireless networks. In the simplest terms, the coverage of a wireless network refers to the geographic area that the wireless network's signal will reach. Wireless capacity refers to the number of users who can use the wireless network simultaneously in one location, and how, and at what rate, network users are utilizing bandwidth.

26. The wireless communications industry has announced recently plans to launch a new generation of wireless service, known as fifth generation or 5G service, that promises to allow the use of new applications or apps, more data, and other services that could not be used on existing generations of wireless service. Existing wireless services include 4G, 3G which launched in the U.S. in 2003 and is used primarily for voice service, and earlier wireless services that are used for analog cell phones. First Generation through Fourth Generation is available in much of the country, although there are many areas of the country that do not have access to wireless service, including 4G service needed for wireless data applications.

27. Fifth Generation wireless service will require consumers to use the newest technology wireless phones and devices, and is expected to be a costly service to consumers. Upon information and belief, no wireless services provider has launched 5G service in Florida.

Upon information and belief, some wireless providers are marketing existing 4G services as 5G.

28. The wireless communications industry maintains that the launch of 5G requires many more sites for wireless facilities ("wireless communications industry" or "industry" as used in this Complaint, refers to both wireless service providers and infrastructure companies that do not provide wireless service, but rather construct and manage infrastructure for use by service providers for a fee).

29. The wireless communications industry asserts that new technology, which the industry terms "small cell" facilities, is essential for 5G. The industry maintains that it plans to install hundreds of thousands of small cell facilities throughout the country in the coming years.

30. Small cell technology would allow wireless providers to improve wireless service capacity over relatively small areas where there exists significant demand. Such demand involves primarily greater need for wireless data service in certain locations for texting, downloading and uploading images and video and similar data or information services. The density of such facilities will correlate with the intensity of use for a given area. Small cell technology is generally not expected to improve voice services or to increase the coverage of wireless services in areas that do not now have wireless service.

31. Initially the term "small cell" referred to the limited or small range from an engineering standpoint of the signal from such facilities. However, the term evolved to reference the size of such facilities, compared to "macro" tower facilities generally installed on private property.

32. The designs of various small cell facilities differ based on the technology goals of the wireless service provider, whether acting alone or in partnership with an infrastructure provider. However, currently most small cell facilities share similar components.

33. A small cell facility consists typically of an antenna or antennas that would be installed on a pole, either on the top or mid-pole. Most small cell facilities require either one omnidirectional antenna with a 360° radius, or three panel antennas to achieve the same 360° radius. A wireless services provider may need less than three panel antennas where the area to be covered requires a 240° or 120° radius. The panel antennas are often incorporated into a cylindrical enclosure that is installed on the top of the pole.

34. The poles to which the antennas are attached, vary in height from approximately twenty to well over fifty feet, vary in diameter, and are envisioned to be installed within the public rights-of-way. In addition, the facility would often include an electrical cabinet or other support equipment that can range from four to five feet in height and approximately two to three feet in width and depth. Depending on the design and provider, the equipment can be integrated into the pole base, attached to the middle or top of the pole, installed as a standalone cabinet near the pole, located underground in a vault or located on private or public property adjacent to the public rights-of-way. Finally, a small cell facility needs to be connected to the core network, which is accomplished with backhaul facilities, which are typically wireline or fiber installed either underground or overhead in public rights-of-way, or in some instances via wireless backhaul through an additional antenna attached to the pole.

35. As an alternative to installing a new pole for a small wireless facility, the antennas and equipment for small cell facilities could be attached to existing public or private poles and structures in the public rights-of-way.

36. As small cell technology was beginning to be deployed, industry members sought to install poles as tall as 120’ within various commercial and residential areas in municipal public rights-of-way, on occasion without obtaining required municipal permits. The Federal

Communications Commission ("FCC") and local governments imposed sanctions on industry members for engaging in such illegal installations, yet illegal installations remain and continue to be installed in some locations.

37. The technology and design of such small cell wireless facilities has and continues to evolve, particularly as the industry develops new technologies and attempts to deploy facilities that are less intrusive and impactful to communities.

38. While small cell facilities could technically be sited on private or governmental property, the wireless communications industry prefers to install these facilities in public rights-of-way. Throughout the United States, wireless providers have installed their own poles in municipal rights-of-way, or attached small cell facilities to municipally-owned poles, pursuant to contractual agreements with municipalities or in compliance with municipal codes.

39. The wireless communications industry also installed its own poles in State-controlled public rights-of-way or entered into agreements to attach small cell facilities on State-owned poles.

40. Over the past several years, the wireless communications industry has made it a priority to support the adoption of laws in certain States to allow for the installation of small cell facilities in public rights-of-way, and the use of municipally-owned poles, without having to comply with local land use procedures or to negotiate agreements with municipalities. The industry also supported the issuance of an order by the FCC to address the siting of small wireless facilities in public rights-of-way and attachment of small wireless facilities on publicly owned poles.

41. Prior to the adoption of the Small Cell Statute, wireless service providers often pursued, and occasionally entered into agreements with municipalities in Florida to attach small

cell facilities to municipally-owned poles and structures in the public rights-of-way.

The Florida Small Cell Statute

42. During the 2017 Florida legislative session, passage of the Florida Small Cell Statute was a priority of the wireless communications industry, which has indicated its intention to install thousands of small cell facilities in Florida.

43. The Florida Small Cell Statute, which became effective July 1, 2017, defines the various components of a small cell facility that are covered by the Statute. Section 337.401(7)(b)10., F.S., provides:

> "Small wireless facility" means a wireless facility that meets the following qualifications:
>
> a. Each antenna associated with the facility is located inside an enclosure of no more than 6 cubic feet in volume or, in the case of antennas that have exposed elements, each antenna and all of its exposed elements could fit within an enclosure of no more than 6 cubic feet in volume; and
>
> b. All other wireless equipment associated with the facility is cumulatively no more than 28 cubic feet in volume. The following types of associated ancillary equipment are not included in the calculation of equipment volume: electric meters, concealment elements, telecommunications demarcation boxes, ground-based enclosures, grounding equipment, power transfer switches, cutoff switches, vertical cable runs for the connection of power and other services, and utility poles or other support structures.

44. The Small Cell Statute thus, includes antennas up to 6 cu. ft., and associated equipment up to 28 cu. ft., or roughly the size of a refrigerator, within the meaning of small wireless facilities.

45. The Small Cell Statute defines a "wireless service provider" as a person who provides wireless service. The Small Cell Statute defines a "wireless infrastructure provider" as a person who has been certificated to provide telecommunications service in the state and who builds or installs wireless communication transmission equipment, wireless facilities, or wireless

support structures but is not a wireless services provider. Under the Small Cell Statute, "wireless provider" refers to both service and infrastructure providers.

46. The Small Cell Statute provides for a wireless service provider or a wireless infrastructure provider to install a pole in the public rights-of-way to accommodate a small wireless facility.

47. The Small Cell Statute also authorizes a wireless provider to use a utility pole owned or controlled by an "authority" without having to negotiate an agreement with that authority. Section 337.401(7)(b)5., F.S., of the Small Cell Statutes defines "Authority" as "a county or municipality having jurisdiction and control of rights-of-way of any public road." Section 337.401(7)(f)5., F.S., provides, in pertinent part:

> A person owning or controlling an authority utility pole shall offer rates, fees, and other terms that comply with this subsection. By the later of January 1, 2018, or 3 months after receiving a request to collocate its first small wireless facility on a utility pole owned or controlled by an authority, the person owning or controlling the authority utility pole shall make available, through ordinance or otherwise, rates, fees, and terms for the collocation of small wireless facilities on the authority utility pole which comply with this subsection.

48. Section 337.401(7)(b)11., F.S., of the Small Cell Statute, provides:

> "Utility pole" means a pole or similar structure that is used in whole or in part to provide communications services or for electric distribution, **lighting, traffic control, signage, or a similar function**. The term includes the vertical support structure for traffic lights but does not include a horizontal structure to which signal lights or other traffic control devices are attached and does not include a pole or similar structure 15 feet in height or less unless an authority grants a waiver for such pole. (emphasis added).

49. Pursuant to this provision of the Small Cell Statute, light poles, poles used to support traffic signalization devices, poles to support signage, and other similar poles and structures owned or controlled by a municipality in the public rights-of-way over 15-feet in height, constitute "utility poles" that a wireless provider could use to collocate its small wireless

facilities.

50. FLC's Members, including the Plaintiff Municipalities, purchase, install and maintain poles in their public rights-of-way for lighting, traffic control, signage, and similar functions. Such poles are used for a variety of municipal purposes, including, but not limited to, public safety, efficient use of public rights-of-way, economic development and aesthetics.

51. Unlike counties, which are considered political subdivisions, municipalities are not political subdivisions of the State. Municipalities' placement and maintenance of such poles in the rights-of-way are corporate functions, rather than governmental.

52. Wireless providers may apply to municipalities to install antennas or antenna enclosures of up to six cubic feet on utility poles owned or controlled by municipalities within the public rights-of-way. They could also apply to install equipment facilities up to 28 cubic feet, or roughly the size of refrigerators, on municipally-owned or controlled utility poles in municipal public rights-of-way.

53. Since passage of the Small Cell Statute, some of FLC's Members, including the Plaintiff Municipalities, have been approached to have small wireless facilities collocated on utility poles that they own. Many of FLC's Members have processed applications to install small wireless facilities in public rights-of-way pursuant to the Small Cell Statute.

54. Section 337.401(7)(d)12., F.S., of the Small Cell Statute provides that municipalities may require registrations and may adopt ordinances that provide for "insurance coverage, indemnification, performance bonds, security funds, force majeure, abandonment, authority liability, or authority warranties," provided "[s]uch provisions…are reasonable and nondiscriminatory."

55. The Small Cell Statute purports to preempt municipal home rule authority by

imposing very exacting procedures for how municipalities as "authorities" must process applications to install small wireless facilities in their public rights-of-way or to collocate small wireless facilities on municipally-owned utilities poles. "Collocate" or "collocation" means "to install, mount, maintain, modify, operate, or replace one or more wireless facilities on, under, within, or adjacent to a wireless support structure or utility pole. The term does not include the installation of a new utility pole or wireless support structure in the public rights-of-way."

56. Florida municipalities' public rights-of-way and utility poles owned or controlled by municipalities, including FLC's Members and Plaintiff Municipalities, are subject to the Small Cell Statute.

57. However, the Small Cell Statute expressly exempts the public rights-of-way controlled by the Florida Department of Transportation's ("FDOT") and utility poles owned or controlled by FDOT, providing in pertinent part, that the term "authority" does not include the Department of Transportation. "Rights-of-way under the jurisdiction and control of the department [of transportation] are excluded from this subsection."

58. The Small Cell Statute purports to preempt municipalities' existing permit review and approval procedures, by imposing arbitrary time limits for municipalities to review and to process applications for small wireless facilities.

59. Pursuant to Section 337.401(7)(d)7., F.S., municipalities are compelled to comply with the following when processing applications for small wireless facilities:

> Within 14 days after receiving an application, an authority must determine and notify the applicant by electronic mail as to whether the application is complete. If an application is deemed incomplete, the authority must specifically identify the missing information. An application is deemed complete if the authority fails to provide notification to the applicant within 14 days.

60. Section 337.401(7)(d)8., F.S., further purports to preempt municipal home rule

authority by imposing deadlines for municipalities to approve or to deny applications:

> An application must be processed on a nondiscriminatory basis. A complete application is deemed approved if an authority fails to approve or deny the application within 60 days after receipt of the application. If an authority does not use the 30-day negotiation period provided in subparagraph 4., the parties may mutually agree to extend the 60-day application review period. The authority shall grant or deny the application at the end of the extended period. A permit issued pursuant to an approved application shall remain effective for 1 year unless extended by the authority.

61. Section 337.401(7)(d)9., F.S., of the Small Cell Statute infringes on municipal authority by dictating the form, timing and substance of application decisions by municipalities, providing:

> An authority must notify the applicant of approval or denial by electronic mail. An authority shall approve a complete application unless it does not meet the authority's applicable codes. If the application is denied, the authority must specify in writing the basis for denial, including the specific code provisions on which the denial was based, and send the documentation to the applicant by electronic mail on the day the authority denies the application. The applicant may cure the deficiencies identified by the authority and resubmit the application within 30 days after notice of the denial is sent to the applicant. The authority shall approve or deny the revised application within 30 days after receipt or the application is deemed approved. Any subsequent review shall be limited to the deficiencies cited in the denial.

62. These arbitrary and unduly burdensome requirements are further compounded by the Small Cell Statute allowing a wireless provider to apply to collocate up to 30 small wireless facilities within a single jurisdiction in one application, yet the same time frames to review, and to grant or to deny such application apply. Specifically, Section 337.401(7)(d)10., F.S., provides:

> An applicant seeking to collocate small wireless facilities within the jurisdiction of a single authority may, at the applicant's discretion, file a consolidated application and receive a single permit for the collocation of up to 30 small wireless facilities. If the application includes multiple small wireless facilities, an authority may separately address small wireless facility collocations for which incomplete information has been received or which are denied.

63. Pursuant to Sections 337.401(7)(d)8. and 9., F.S., quoted above, if the municipality does not act to deny a complete application for a small wireless facility or utility pole within the statutory time frame, the application is "deemed approved."

64. The Small Cell Statute does not identify any public purpose or public goal to justify imposing these arbitrary time frames. Moreover, the Small Cell Statute does not set forth an important state interest to be served by affording wireless providers the ability to collocate small wireless facilities on municipally-owned utility poles.

65. The Small Cell Statute's arbitrary requirements imposed on municipalities to process applications to collocate small wireless facilities on utility poles owned by municipalities conflict with many municipalities' staffing limitations and procedures, and impose a substantial burden on efficient municipal operations. Municipal staff must stop working on various pending applications and other projects, to make applications for small wireless facilities the priority. Many of FLC's Members will need to hire additional staff or contractors to process registrations and applications by wireless providers to satisfy the procedural requirements of the Small Cell Statute.

66. The Small Cell Statute further purports to preempt municipal home rule authority by limiting what a municipality may charge a wireless provider to collocate a small wireless facility on a municipally-owned utility pole. Section 337.401(7)(f)3., F.S., provides: "The rate to collocate small wireless facilities on an authority utility pole may not exceed $150 per pole annually."

67. Wireless providers that collocate a small wireless facility on a municipally-owned utility pole intend to use such poles on a long-term basis, for several years. They are not seeking to collocate small wireless facilities on municipally-owned poles for only a brief, temporary

period of time.

68. As with the arbitrary time frames imposed for reviewing and processing applications, the $150 cap imposed by the Small Cell Statute is wholly arbitrary. The Small Cell Statute fails to identify any basis for such fee cap, nor any public policy or public goal to support such a low fee.

69. The Small Cell Statute's $150 fee cap per pole per year is substantially below the market rate or value for the collocation of small wireless facilities on utility poles in Florida, and well below contractual rates agreed to by wireless service providers in existing contracts with municipalities.

70. Since municipally-owned lighting, traffic support and signage poles were not constructed to accommodate small wireless facilities, particularly antennas up to 6 cu. ft. and associated equipment up to 28 cu. ft., the Small Cell Statute addresses construction or "make-ready work," or pole replacement that will be necessary to accommodate the collocation of such facilities. Section 337.401(7)(f)5.c. gives a municipality the option of providing a "good faith estimate" for any make-ready work or pole replacement to support the collocation, within 60 days after receipt of a complete application, and to complete such work or replacement within 60 days of an applicant's acceptance of the estimate, or alternatively, requiring the applicant to provide the make-ready or pole replacement estimate at its expense, and to perform such work. Such altered or replaced poles remain the property of the municipality. Accordingly, FLC's Members will need to confirm that altered or replaced poles meet not only building codes for wind, electrical and other safety requirements, but also their own requirements to satisfy the original purposes of the poles to accommodate municipal facilities.

71. FLC's Members will incur thousands of dollars in expenses to prepare such good

faith estimates for make-ready work or pole replacement, or to review an applicant's estimate for make-ready work or pole replacement and to inspect its construction. Since each application can involve collocation on up to 30 municipally-owned poles, a municipality can easily incur expenses in excess of hundreds of thousands of dollars in processing just a few applications, to comply with these provisions of the Small Cell Statute.

72. Moreover, many of FLC's Members, including Plaintiff Municipalities, do not employ engineers and similar professionals to have the expertise in-house to perform good faith estimates for make-ready work or pole replacement, to perform the construction to accommodate small wireless facilities, to review estimates provided by applicants, or to inspect their construction. They will need to hire outside consultants, including engineers and similar professionals, to conduct these services, at substantial expense to their taxpayers. In addition, the procedures required under Florida's procurement laws to obtain such outside consultants will likely make it impossible to meet the deadlines under the Small Cell Statute.

73. Notwithstanding these onerous and expensive obligations placed on FLC's Members, including Plaintiff Municipalities, to perform these functions, the Small Cell Statute prohibits municipalities from charging appropriate fees to wireless providers. Section 337.401(7)(f)5.d., F.S., provides that a municipality may not charge fees for make-ready work that include costs related to preexisting damage or prior noncompliance. Fees for make-ready work, including any pole replacement, may not exceed actual costs. Significantly, municipalities cannot charge any consultant fees or expenses.

74. Based on this provision, if a municipally-owned light pole has been damaged, which occurs often, it may be the municipality's obligation to bear the cost to repair the pole to accommodate a small wireless facility. Moreover, the significant costs to hire contractors to

prepare and to review estimates for make-ready work or pole replacement, to perform construction, or to inspect construction performed by applicants are the responsibility of the municipality.

75. Pursuant to these make-ready and pole replacement provisions to accommodate a small wireless facility, FLC's Members, including Plaintiff Municipalities, will perform considerable work in a very short amount of time, and will incur substantial expense to accommodate a wireless provider's collocation of its facilities on their poles, while such provider gets nearly free use of such municipally-owned poles.

76. In addition, collocation of small wireless facilities interferes with FLC's Members' including the Plaintiff Municipalities, use of their own light, traffic support, and signage poles. While the Small Cell Statute provides that municipalities may reserve space on their utility poles for "future public safety uses," such reservation may not preclude wireless providers' collocation of small wireless facilities on such poles, which may be altered or replaced to accommodate the small wireless facilities and future uses. When a wireless provider applies to collocate antennas up to 6 cubic feet and equipment facilities up to 28 cubic feet, or the size of refrigerators, on a municipality's utility poles, the municipality will likely not know what its "future public safety uses" will be in five or ten years. Further, "public safety uses" are not defined. It is therefore questionable whether a municipality could reserve space on its poles for additional or new lighting fixtures, signage, smart city technology, or holiday and event banners that are often placed on municipal poles. Municipalities will likely have to alter or replace poles at considerable expense to accommodate collocated small wireless facilities and their future uses, or install new poles at considerable expense when existing poles cannot accommodate municipal needs.

77. All conditions precedent to this action have occurred, have been waived, or have otherwise been satisfied.

COUNT I

DECLARATORY JUDGMENT THAT THE SMALL CELL STATUTE'S TAKING OF MUNICIPAL PROPERTY WITHOUT COMPLYING WITH EMINENT DOMAIN REQUIREMENTS VIOLATES ARTICLE X, SECTION 6(a) OF THE FLORIDA CONSTITUTION

78. Plaintiffs repeat, re-allege, and incorporate by reference each of the allegations of paragraphs 1-77 as though fully set forth herein.

79. This is a count for declaratory and injunctive relief, pursuant to Chapter 86, F.S., requesting that the Court hold unconstitutional those provisions of the Small Cell Statute that: (i) impose a maximum amount of $150 per pole per year on what municipalities may charge for collocation of a small wireless facility on a municipally-owned utility pole, set forth in Section 337.401(7)(f)3., F.S., (referenced herein as the "Challenged $150 Cap Provision"), and (ii) provide for an application to collocate a small wireless facility on a municipally-owned utility pole to be "deemed granted" if the municipality does not deny such application within 60 days, as set forth in Section 337.401(7)(d)8., F.S. (referenced herein as the "Deemed Granted Remedy"), and enjoin the enforcement of such provisions.

80. FLC's Members, including the Plaintiff Municipalities, own utility poles and are or will be directly impacted by the challenged provisions of the Small Cell Statute.

81. FLC's Members, including the Plaintiff Municipalities, are protected property owners under the Florida Constitution, and are entitled as property owners to constitutional property protections from unjustified government takings.

82. A taking of municipal property, owned in its corporate capacity, requires compliance with the same constitutional prerequisites as a taking of any other citizen's property.

83. Any property owner, including a municipality, forced to allow a third party to enter upon or to occupy its property under color of the State's powers has suffered a taking.

84. FLC's Members, including the Plaintiff Municipalities, are entitled to a jury trial to determine the value of the taking resulting from third parties' physical invasion of their municipally-owned utility poles pursuant to the authority granted under the Small Cell Statute.

85. Article X Section 6(a) of the Florida Constitution prohibits "private property [from] be[ing] taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner."

86. Notwithstanding the requirements of the Florida Constitution, pursuant to the Small Cell Statute, upon receipt of an application by a wireless provider to collocate small wireless facilities, which may include antennas and associated equipment up to 28 cu. ft., on a municipally-owned utility pole, the municipality would have 14 days to review the application for completeness, and 60 days to grant or to deny the application, or it would be deemed granted, and the maximum the municipality could charge would be $150 per pole per year for the occupation of its pole.

87. The Small Cell Statute does not provide for a jury trial, or any process, to determine if a wireless provider's collocation of small wireless facilities on a municipality's poles would serve a public purpose, or to determine the compensation that should be paid to the municipality for the placement and maintenance of such facilities on its property.

88. By authorizing private wireless providers to place and to maintain small wireless facilities on municipally-owned utility poles, without an appropriate process to determine the public purpose for such taking or the full compensation owed to municipalities, the Small Cell Statute deprives FLC's Members, including Plaintiff Municipalities, of their rights under the

Florida Constitution.

89. By providing that applications by wireless service providers to collocate small wireless facilities on municipally-owned utility poles shall be "deemed granted" if a municipality fails to deny a complete application within 60 days, the Small Cell Statute deprives FLC's Members, including Plaintiff Municipalities, of their rights under the Florida Constitution.

90. Moreover, collocation of small wireless facilities on municipally-owned utility poles, the maximum $150 rate, and the Deemed Granted Remedy do not serve a valid public purpose, required for the exercise of taking property.

91. The constitutional validity of a statute is a proper subject for declaratory relief.

92. There is a bona fide, actual, present practical need for the requested declaration, as FLC's Members, including the Plaintiff Municipalities, are in doubt as to their rights and obligations under the Small Cell Statute and Florida Constitution.

93. FLC's Members, including the Plaintiff Municipalities, and Defendants have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law.

94. The antagonistic and adverse interest are all before the Court by proper process or class representation, particularly since FLC is a representative party representing the interests of virtually all Florida municipalities subject to the Small Cell Statute.

95. The rights and obligations of Defendants, FLC's Members, Plaintiff Municipalities, and many others would be affected if the Challenged $150 Cap Provision and the Deemed Granted Remedy are invalid.

96. Any wireless provider that collocates small wireless facilities on municipally-owned utility poles under color of the Small Cell Statute physically invades municipal property without full compensation or compliance with required procedures under the Florida

Constitution.

97. Sections 337.401(7)(f)3. and 337.401(7)(d)8., F.S., of the Small Cell Statute are unconstitutional under the Florida Constitution, and therefore the Attorney General will be or has been served with a copy of the Complaint and is entitled to be heard.

WHEREFORE Plaintiffs request that this honorable Court:

a) takes jurisdiction of the parties and this cause,

b) declares unconstitutional under the Florida Constitution those provisions of the Small Cell Statute, in particular Sections 337.401(7)(f)3. and (d)8, F.S., which authorize wireless providers to invade municipally-owned property without compliance with procedures required under the Florida Constitution for the taking of property,

c) enjoins the enforcement of Sections 337.401(7)(f)3. and (d)8., F.S., and

d) grants any other relief the Court deems equitable.

COUNT II

DECLARATORY JUDGMENT THAT SECTION 337.401(7)(f)3. OF THE SMALL CELL STATUTE CONSTITUTES A TAKING OF THE DIFFERENCE BETWEEN $150 AND THE ACTUAL VALUE OF PROPERTY TAKEN FROM MUNICIPALITIES IN VIOLATION OF ARTICLE X, SECTION 6(a) OF THE FLORIDA CONSTITUTION.

98. Plaintiffs repeat, re-allege, and incorporate by reference each of the allegations of paragraphs 1-77 as though fully set forth herein.

99. This is a count for declaratory and injunctive relief pursuant to Chapter 86, F.S., requesting that the Court hold unconstitutional that portion of the Small Cell Statute which imposes a $150 cap per pole per year on the fee a municipality may charge for use of its utility poles.

100. The Small Cell Statute authorizes wireless providers to place small wireless facilities, consisting of antennas up to 6 cu. ft. and associated equipment up to 28 cu. ft., on utility poles owned or controlled by municipalities. The Small Cell Statute also imposes a $150

per pole, per year cap on the fee municipalities may charge wireless providers for the use and occupation of their utility poles.

101. FLC's Members, including the Plaintiff Municipalities, are protected property owners under the Florida Constitution.

102. A taking of municipal property owned in its corporate capacity requires satisfaction of the same constitutional prerequisites as a taking of any private property.

103. Municipalities are equally entitled as private property owners to constitutional property protections from unjustified government takings.

104. Article X Section 6(a) of the Florida Constitution prohibits "private property [from] be[ing] taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner."

105. Full compensation means, at a minimum, the market value of the property rights taken.

106. As with all property, the permanent occupation of utility poles owned by municipalities by third parties has a market value.

107. The market rate, and therefore compensation owed, for collocating small wireless facilities on municipally-owned poles substantially exceeds the statutory maximum of $150 per pole per year.

108. By authorizing wireless providers to place on a permanent basis, small wireless facilities, which may include antennas and electronic equipment the size of refrigerators, on municipalities' property for an arbitrary and unreasonably low amount, the Small Cell Statute unconstitutionally deprives FLC's Members, including Plaintiff Municipalities, of a valuable property right, represented by the difference in value between the market value and the

maximum amount imposed by the Small Cell Statute.

109. By capping the maximum compensation that can be paid at $150, instead of allowing municipalities to charge market value, the Small Cell Statute unconstitutionally deprives FLC's Members, including Plaintiff Municipalities, of full compensation guaranteed by the Florida Constitution.

110. By providing that an application to collocate a small wireless facility on a municipally-owned utility pole is "deemed granted" if the municipality does not deny a complete application within 60 days after receipt, the Small Cell Statute further authorizes the use of a municipality's property without affording any opportunity for consideration of full compensation to the municipality.

111. Moreover, the Small Cell Statute's compensation cap does not serve a valid public purpose, and is not reasonably necessary to serve a valid public purpose, as is required for the exercise of eminent domain powers.

112. The constitutional validity of a statute is a proper subject for declaratory relief.

113. There is a bona fide, actual, present practical need for declaratory and injunctive relief. FLC's Members, including the Plaintiff Municipalities, will be harmed by having their property taken without full compensation.

114. FLC's Members, including the Plaintiff Municipalities, have the right to prevent the placement and maintenance of small wireless facilities on their utility poles without full compensation.

115. Plaintiffs and Defendants have an actual, present, adverse and antagonistic interest in the subject matter.

116. The relief sought is not merely the giving of legal advice by the courts or the

answer to questions propounded from curiosity.

117. The rights and obligations of Defendants, FLC's Members, Plaintiff Municipalities, and many others would be affected if the challenged provisions of the Small Cell Statute are invalid.

118. There exists a real threat of immediate injury, rather than a general, speculative fear of harm that may possibly occur at some time in the indefinite future. Any wireless provider that places and maintains small wireless facilities on municipally-owned utility poles under color of the Small Cell Statute is taking municipal property without full compensation required by the Florida Constitution. FLC Members, including the Plaintiff Municipalities, are in doubt as to their rights and obligations under the Small Cell Statute and the Florida Constitution.

119. Section 337.401(7)(f)3., F.S., is alleged to be unconstitutional, and therefore the Attorney General will be or has been served with a copy of the complaint and is entitled to be heard.

WHEREFORE Plaintiffs request that this honorable Court:

a) takes jurisdiction of the parties and this cause,

b) declares unconstitutional that provision of the Small Cell Statute, Section 337.401(7)(f)3., F.S., which takes from municipalities the difference between the maximum compensation amount of $150 per pole per year and the market value of the property rights taken,

c) enjoins the enforcement of Sections 337.401(7)(f)3., F.S., and

d) grants any other relief the Court deems equitable.

COUNT III

DECLARATORY JUDGMENT THAT THE SMALL CELL STATUTE'S PROVISIONS THAT PURPORT TO PREEMPT MUNICIPALITIES' EXERCISE OF THEIR

PROPRIETARY AUTHORITY OVER PROPERTY THEY OWN ARE INVALID BECAUSE THEY VIOLATE THE FLC'S MEMBERS, INCLUDING THE PLAINTIFF MUNICIPALITIES, HOME RULE RIGHTS UNDER THE FLORIDA CONSTITUTION AND ARE UNENFORCEABLE

120. Plaintiffs repeat, re-allege, and incorporate by reference each of the allegations of paragraphs 1-77 as though fully set forth herein.

121. This is a count for declaratory and injunctive relief pursuant to Chapter 86, F.S., requesting that the Court hold unconstitutional those provisions of the Small Cell Statute that are inconsistent with municipalities' home rule rights under the Florida Constitution.

122. FLC's Members, including the Plaintiff Municipalities, own and control their utility poles, as defined in the Small Cell Statute, in their proprietary capacity as owners of personal property.

123. The Florida Constitution grants municipalities the right of home rule. Specifically, Article VIII, Section 2(b) of the Florida Constitution, provides:

> Municipalities shall have governmental, corporate and **proprietary powers** to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. Each municipal legislative body shall be elective. (emphasis added).

124. It is inappropriate for Defendants to purport to preempt municipalities' exercise of their proprietary authority as owners of personal property without a public purpose.

125. Several provisions of the Small Cell Statute referenced above purport to dictate how FLC's Members, including the Plaintiff Municipalities, exercise their proprietary authority as owners of utility poles. These provisions include, but are not limited to, providing that municipalities: (i) must allow wireless providers to use their poles pursuant to rates, terms and conditions that they are required to establish consistent with the Small Cell Statute, (ii) must process applications to use their poles pursuant to certain procedures and time frames or that

such applications will be deemed granted, (iii) cannot charge more than $150 per pole per year for the occupation of their poles, (iv) must allow third parties to perform make-ready work or to replace poles owned by municipalities to accommodate small wireless facilities, and (v) must establish design requirements for facilities that are collocated on their poles by ordinance and must provide notice of such proposed ordinance to Defendant, the Florida Secretary of State, for publication sufficiently in advance of the hearing on such ordinance.

126. More specifically, the Small Cell Statute provides that FLC's Members, including the Plaintiff Municipalities, shall offer rates, terms and conditions consistent with the Statute to allow wireless providers to collocate their small wireless facilities, which includes antennas or antenna enclosures up to 6 cubic feet and equipment facilities up to 28 cubic feet, or the size of refrigerators, on municipally-owned utility poles.

127. While generally an owner of property may refuse to allow third parties to use their property, pursuant to the Small Cell Statute, FLC's Members, including the Plaintiff Municipalities, may not merely refuse requests by wireless providers to collocate small wireless facilities on municipally-owned utility poles. The Small Cell Statute sets forth very limited bases for which a municipality may reject an application to collocate a small wireless facility on its utility poles. In addition, municipalities may not require agreements or set forth rates, fees, and other terms for collocation of small wireless facilities on their poles that are not authorized by the Small Cell Statute.

128. Collocating small wireless facilities on municipally-owned lighting, traffic control and signage poles will interfere with and impair municipalities' use and maintenance of their poles.

129. The provisions of the Small Cell Statute that impair municipalities' ownership,

control and use of their property violate the Florida Constitution and established law regarding municipalities' exercise of their proprietary authority.

WHEREFORE Plaintiffs request that this honorable Court:

a) takes jurisdiction of the parties and this cause,

b) declares unconstitutional the provisions of the Small Cell Statute that purport to preempt municipalities' exercise of their proprietary authority over their personal property, namely their utility poles,

c) enjoins the enforcement of provisions of the Small Cell Statute that impair Plaintiffs' exercise of their proprietary authority over their utility poles, and

d) grants any other relief the Court deems equitable.

COUNT IV

DECLARATORY JUDGMENT THAT THE SMALL CELL STATUTE'S PROVISIONS THAT CLASSIFY UTILITY POLES OWNED OR CONTROLLED BY MUNICIPALITIES DIFFERENTLY THAN UTILITY POLES OWNED OR CONTROLLED BY FDOT IN MUNICIPAL PUBLIC RIGHTS-OF-WAY FOR COLLOCATION OF SMALL WIRELESS FACILITIES VIOLATE ARTICLE III, SECTION 11 OF THE FLORIDA CONSTITUTION AND ARE UNENFORCEABLE

130. Plaintiffs repeat, re-allege, and incorporate by reference each of the allegations of paragraphs 1-77 as though fully set forth herein.

131. This is a count for declaratory and injunctive relief pursuant to Chapter 86, F.S., requesting that the Court hold unconstitutional those provisions of the Small Cell Statute that classify utility poles owned or controlled by municipalities differently than utility poles owned and controlled by the Florida Department of Transportation ("FDOT").

132. The Small Cell Statute imposes very specific requirements on municipalities to process applications by wireless providers to collocate small wireless facilities on municipality-owned or controlled utility poles within municipal public rights-of-way.

133. As noted above, the Small Cell Statute imposes these requirements on an

"Authority" which "means a county or **municipality**…." However, Section 337.401(7)(b)5., F.S., provides that an "Authority" does not include FDOT. Utility poles under the jurisdiction and control of FDOT are therefore excluded from the Small Cell Statute's provisions addressing collocation on utility poles.

134. FDOT owns and controls utility poles as defined in the Small Cell Statute, including light poles, poles for traffic control, and signage, in municipal public rights-of-way throughout Florida. In many jurisdictions, FDOT actually owns and controls substantially more utility poles in municipal public rights-of-way than the municipality.

135. The Florida Constitution addresses the classification of political subdivisions and governmental entities. Specifically, Article III, Section 11 of the Florida Constitution provides, in pertinent part:

> (a) There shall be no special law or general law of local application pertaining to:
> (1) – (21) (omitted list of specific topics)
> (b) In the enactment of general laws on other subjects, political subdivisions or other governmental entities may be classified only on a basis reasonably related to the subject of the law.

136. The Small Cell Statute is a general law.

137. Those provisions of the Small Cell Statute that apply to the collocation of small wireless facilities on utility poles owned or controlled by municipalities, but exempt expressly utility poles owned or controlled by FDOT, violate the Florida Constitution unless there is a basis for such classification reasonably related to the subject of the Small Cell Statute. The different classification of municipally-owned utility poles versus FDOT-owned utility poles does not have a basis reasonably related to the purpose of the Small Cell Statute.

138. FLC's Members, including the Plaintiff Municipalities, must process an application to collocate a small wireless facility consistent with the requirements of the Small

Cell Statute. However, if the same wireless provider applies to collocate a small wireless facility on an adjacent FDOT-owned utility pole in the same municipal public rights-of-way, FDOT is not subject to the provisions of the Small Cell Statute.

139. The Small Cell Statute does not set forth any basis why the collocation of small wireless facilities on FDOT-owned utility poles should be classified or treated differently than the collocation of such facilities on municipally-owned utility poles.

140. The provisions of the Small Cell Statute that subject FLC's Members, including the Plaintiff Municipalities, to requirements for collocation of small wireless facilities on municipality-owned utility poles that do not apply to utility poles owned by FDOT violate Article III, Section 11 of the Florida Constitution.

WHEREFORE Plaintiffs request that this honorable Court:

a) takes jurisdiction of the parties and this cause,

b) declares unconstitutional those provisions of the Small Cell Statute that impose requirements applicable to municipally-owned or controlled utility poles, while exempting expressly similarly situated FDOT-owned or controlled utility poles,

c) enjoins enforcement of these unconstitutional provisions, and

d) grants such other and further relief the Court deems appropriate.

COUNT V

DECLARATORY JUDGMENT THAT THE SMALL CELL STATUTE'S PROVISIONS THAT ALLOW PRIVATE CORPORATIONS TO USE UTILITY POLES PURCHASED, INSTALLED AND MAINTAINED BY MUNICIPALITIES WITH PUBLIC FUNDS WITHOUT REQUIRING THE PAYMENT OF APPROPRIATE FEES, VIOLATE ARTICLE VII, SECTION 10 OF THE FLORIDA CONSTITUTION AND ARE NOT ENFORCEABLE

141. Plaintiffs repeat, re-allege, and incorporate by reference each of the allegations of paragraphs 1-77 as though fully set forth herein.

142. This is a count for declaratory and injunctive relief pursuant to Chapter 86, F.S.,

requesting that the Court hold unconstitutional those provisions of the Small Cell Statute that authorize municipalities to give, lend or use their taxing power to aid private corporations, namely wireless providers, in violation of the Florida Constitution.

143. As set forth herein, the Small Cell Statute requires municipalities, including FLC's Members and Plaintiff Municipalities, to commit substantial public funds and property of value to aid private for-profit corporations. The Small Cell Statute does not set forth a corresponding public purpose or benefit for the commitment of public funds and property of value to such private entities, in violation of the Florida Constitution.

144. Specifically, Article VII, Section 10 of the Florida Constitution provides in pertinent part:

> Neither the state nor any county, school district, municipality, special district, or agency of any of them, shall become a joint owner with, or stockholder of, or give, lend or use its taxing power or credit to aid any corporation, association, partnership or person.

145. As set forth above, numerous provisions of the Small Cell Statute call for municipalities to expend substantial amounts of public funds, and authorize the use of municipally-owned property, for the benefit of private wireless providers. Complying with the procedures to process applications for collocation of wireless providers' small wireless facilities, and to address alteration or replacement of municipally-owned utility poles, will require that municipalities spend substantial taxpayer and public funds, and give taxpayer and publicly funded property to wireless provides, without a public purpose or full compensation. In addition to the financial and property benefits afforded wireless providers discussed previously, Section 337.401(7)(e)1. of the Small Cell Statute provides that a municipality cannot charge wireless providers that collocate small wireless facilities on municipally-owned utility poles a fee for routine maintenance.

146. Wireless providers as defined under the Small Cell Statute are private corporations, associations, partnerships or persons. Wireless providers benefiting from the Small Cell Statute are not governmental entities.

147. FLC's Members, including Plaintiff Municipalities, through the use of taxpayer and other public funds, bear substantial costs to purchase, to install, and to maintain utility poles, which the Small Cell Statute provides may be used, altered and replaced, by for-profit wireless providers for the purpose of collocating small wireless facilities. Under the Small Cell Statute, the maximum amount a municipality can charge for collocation of a small wireless facility on a utility pole owned by the municipality is $150 per year, which is a mere fraction of the taxpayer and other public funds incurred to purchase, to install, and to maintain a utility pole.

148. A municipality's purchase and installation of a single light pole in the public rights-of-way typically costs tens of thousands of dollars. Maintenance of a light pole in the public rights-of-way typically costs a municipality tens of thousands of dollars in public funds over the useful life of such pole.

149. By requiring municipalities to commit substantial taxpayer and public funds to accommodate wireless providers' collocation of facilities on municipally-owned utility poles, while prohibiting municipalities from charging appropriate fees to wireless providers for that privilege, the Small Cell Statute effectively requires that municipalities use taxpayer and public funds and property to subsidize private corporations.

150. The collocation of small wireless facilities on utility poles owned by municipalities does not provide a benefit to the general public or to the municipality. The Small Cell Statute's provisions for the collocation of small wireless facilities on municipally-owned utility poles are predominantly for the benefit of for-profit, wireless providers that do not need

such subsidies.

151. While there are a variety of sites and technologies available to provide wireless services, wireless providers incur substantially less costs and avoid having to comply with land use and zoning regulations by collocating small wireless facilities on utility poles owned by municipalities, as opposed to entering leases to install wireless facilities on public or private property or installing new structures or poles to accommodate antennas. By capping the amount municipalities can charge for-profit wireless providers for the use of utility poles owned by municipalities, the Small Cell Statute effectively requires municipalities to commit taxpayer and other public funds and public property to provide a benefit to private corporations; a benefit that is worth millions of dollars over the useful life of such poles.

152. The Small Cell Statute does not afford municipalities, or any government entity, oversight of wireless providers' services to ensure that municipalities or the general public receive a benefit as a result of the use of public funds and property to benefit wireless providers.

153. FLC's Members, including Plaintiff Municipalities, have expressed interest in expanding wireless coverage to residents without adequate wireless service. However, there is no requirement in the Small Cell Statute that wireless providers offer services in any particular areas, including in underserved or unserved areas. The Small Cell Statute expressly prohibits municipalities from imposing any service requirement.

154. The main reason wireless providers collocate small wireless facilities on utility poles owned by municipalities is to densify the most profitable services already available generally in urban locations in a manner that minimizes the costs to such providers. The Small Cell Statute thus requires that municipalities expend taxpayer and other public funds and dedicate public property to subsidize the expansion of wireless services by corporations to

maximize profits, not to benefit the general public or the municipalities. Wireless providers in the United States, including those in Florida benefiting from the Small Cell Statute, have earned billions of dollars in annual profits through providing services, including through collocation of their facilities on municipally-owned utility poles.

155. By providing for the collocation of small wireless facilities by private corporations on utility poles owned and maintained by municipalities with taxpayer and public funds, without paying appropriate fees for such use and maintenance, and without a corresponding public purpose, such provisions of the Small Cell Statute violate Article VII, Section 10 of the Florida Constitution.

WHEREFORE Plaintiffs request that this honorable Court:

a) takes jurisdiction of the parties and this cause;

b) declares unconstitutional the provisions of the Small Cell Statute that provide for the collocation of small wireless facilities on utility poles owned and maintained by municipalities;

c) enjoins the enforcement of provisions of the Small Cell Statute that provide for the collocation of small wireless facilities on utility poles owned by and maintained by municipalities; and

d) grants any other relief the Court deems equitable.

COUNT VI

DECLARATORY JUDGMENT THAT THE SMALL CELL STATUTE'S PROVISIONS THAT PROVIDE FOR THE COLLOCATION OF SMALL WIRELESS FACILITIES ON MUNICIPALLY-OWNED UTILITY POLES CONSTITUTE AN UNFUNDED MANDATE IN VIOLATION OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION AND ARE UNENFORCEABLE

156. Plaintiffs repeat, re-allege, and incorporate by reference each of the allegations of paragraphs 1-77 as though fully set forth herein.

157. This is a count for declaratory and injunctive relief, pursuant to Chapter 86, F.S.,

requesting that the Court hold unconstitutional those provisions of the Small Cell Statute that require FLC's Members, including Plaintiff Municipalities, to incur substantial expenses, easily in excess of millions of dollars, to process applications and to accommodate wireless providers' collocation of small wireless facilities on municipally-owned utility poles, in violation of the unfunded mandate provisions contained in Article VII, Section 18, of the Florida Constitution.

158. Section 18, Article VII of the Florida Constitution provides:

> Section 18. Laws requiring counties or municipalities to spend funds or limiting their ability to raise revenue or receive state tax revenue**.**
>
> (a) No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds unless the legislature has determined that such law fulfills an important state interest and unless: funds have been appropriated that have been estimated at the time of enactment to be sufficient to fund such expenditure; the legislature authorizes or has authorized a county or municipality to enact a funding source not available for such county or municipality on February 1, 1989, that can be used to generate the amount of funds estimated to be sufficient to fund such expenditure by a simple majority vote of the governing body of such county or municipality; the law requiring such expenditure is approved by two-thirds of the membership in each house of the legislature; the expenditure is required to comply with a law that applies to all persons similarly situated, including the state and local governments; or the law is either required to comply with a federal requirement or required for eligibility for a federal entitlement, which federal requirement specifically contemplates actions by counties or municipalities for compliance.
>
> (b) Except upon approval of each house of the legislature by two-thirds of the membership, the legislature may not enact, amend, or repeal any general law if the anticipated effect of doing so would be to reduce the authority that municipalities or counties have to raise revenues in the aggregate, as such authority exists on February 1, 1989.

159. The Small Cell Statute's restriction that municipalities may only charge up to the maximum arbitrary rate of $150 per pole per year for the collocation of small wireless facilities, will significantly reduce FLC's Members' including the Plaintiff Municipalities, ability to raise revenues. If FLC's Members were allowed to charge market rates for collocating small wireless facilities on their utility poles, over the useful lives of those poles, they would easily realize

revenue in excess of hundreds of millions of dollars more than what they will realize under the Small Cell Statute's maximum rate.

160. In addition and more significantly, the Small Cell Statute mandates that FLC's Members, including the Plaintiff Municipalities, spend substantial funds, easily in excess of tens of millions of dollars, over the years that the Small Cell Statute is in effect.

161. The Small Cell Statute effectively prohibits municipalities from requiring application fees, taxes, cost reimbursement, in-kind payments, permit fees, or other fees and impositions when processing requests by wireless providers to collocate small wireless facilities on municipally-owned poles. Municipalities are only allowed to charge up to the maximum rate of $150 per pole per year for the collocation of small wireless facilities on their utility poles.

162. The Florida House of Representatives Staff Analysis recognized the serious fiscal impact of the Small Cell Statute's provisions for collocation on municipally-owned poles, providing, in pertinent part:

> II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT
>
> ***
>
> B. FISCAL IMPACT ON LOCAL GOVERNMENTS:
>
> 1. Revenues:
>
> The bill will have a negative fiscal impact on local government revenues if the collocation rate set forth in the bill is lower than the rates that could otherwise be established by ordinance or negotiated under local governments' existing authority. Based on information provided to staff concerning previously established or agreed rates, this appears likely.
>
> 2. Expenditures:
> The bill may have an indeterminate fiscal impact on local government expenditures.
>
> ***
>
> III. COMMENTS
>
> A. CONSTITUTIONAL ISSUES

1. Applicability of Municipality/County Mandates Provision:

> The mandates provision appears to apply because the bill reduces the authority that… municipalities have to raise revenues in the aggregate. The bill establishes a cap on the rates that … municipalities may impose for collocation of small wireless facilities within public rights-of-way under their authority.
>
> The bill does not appear to qualify for an exemption or exception. Therefore, the bill may require a 2/3 vote of the membership of each house.

163. While the Small Cell Statute passed each house by more than a 2/3 vote of the membership, the Small Cell Statute does not articulate an important state interest, which is also required to support the extraordinary expenses to municipalities. Quite the contrary, the Small Cell Statute does not satisfy an important state interest.

164. As discussed *supra*, the benefits from the siting of small wireless facilities are far from certain, as fifth generation wireless may never come to Florida and certainly will not come to most areas of the State. Rather, wireless providers will offer such services in areas of the country that will be the most profitable. It is also far from certain that fifth generation wireless will provide significant benefits over current technology, even in areas where it is offered. With discussion of competing technologies offering better communications services than 5G, at the rate technology changes, small wireless facilities may become an archaic technology in a few short years, removed from or left abandoned in public rights-of-way and on municipally-owned poles throughout Florida and the country. Initial technology installations of small wireless facilities pursued just one or two years ago have already been abandoned to make way for new technology.

165. Further, the Small Cell Statute's provisions for collocation on municipally-owned polls are entirely unnecessary to deploy such facilities. Wireless providers have numerous

options to deploy small wireless facilities, other than to collocate on municipally-owned poles.

166. Moreover, wireless providers negotiated agreements and complied with requirements of municipalities around the country to collocate small wireless facilities on municipally-owned poles, just as they continue to do on private utility poles in Florida and around the country, and are still required to do under the Small Cell Statute on FDOT's utility poles. It is entirely unnecessary, let alone an important state interest, that municipalities be forced to incur millions in taxpayer and public funds to subsidize an incredibly profitable industry's use of municipal property. In actuality, the predominant purpose of the provisions of the Small Cell Statute for collocating small wireless facilities on municipally-owned utility poles is to reduce costs incurred by wireless providers to deploy such facilities, by forcing municipalities to accommodate collocations by spending taxpayer and public funds. That can hardly serve as an important state interest.

WHEREFORE Plaintiffs requests that this honorable Court:

a) takes jurisdiction of the parties and this cause;

b) declares unconstitutional the provisions of the Small Cell Statute that provide for the collocation of small wireless facilities on utility poles owned and maintained by municipalities;

c) enjoins the enforcement of provisions of the Small Cell Statute that provide for the collocation of small wireless facilities on utility poles owned by and maintained by municipalities; and

d) grants any other relief the Court deems equitable.

COUNT VII

DECLARATORY JUDGMENT THAT MUNICIPALITIES HAVE THE AUTHORITY TO REQUIRE A SECURITY FUND AS PART OF A REGISTRATION BY COMMUNICATIONS PROVIDERS THAT PLACE AND MAINTAIN COMMUNICATIONS FACILITIES IN MUNICIPAL PUBLIC RIGHTS-OF-WAY

167. Plaintiffs repeat, re-allege, and incorporate by reference each of the allegations of

paragraphs 1-77 as though fully set forth herein.

168. Pursuant to Section 337.401(1)(a), F.S., FLC's Members, including Plaintiff Municipalities:

> [H]ave the jurisdiction and control of public roads … are authorized to prescribe and enforce reasonable rules or regulations with reference to the placing and maintaining across, on, or within the right-of-way limits of any road … under their respective jurisdictions any electric transmission, voice, telegraph, data, or other communications services lines or wireless facilities . . . referred to in this section . . . as the "utility."

169. In addition to the general right to impose "reasonable rules and regulations" relating to the placement and maintenance of utilities within their respective roads or rights-of-way, FLC's Members, including Plaintiff Municipalities, also are authorized expressly by Section 337.401(3)(a), F.S., to require that providers of communications services that place or seek to place facilities in their public rights-of- way register with the municipality.

170. Section 337.401(3)(b), F.S., expressly provides that the "[r]egistration described in paragraph (a) does not establish a right to place or maintain, or priority for the placement or maintenance of, a communications facility in roads or rights-of-way of a municipality," and recognizes that "[e]ach municipality and county retains the authority to regulate and manage municipal and county roads or rights-of-way in exercising its police power."

171. Section 337.401(3)(b), F.S., further instructs that:

> Any rules or regulations adopted by a municipality or county which govern the occupation of its roads or rights-of-way by providers of communications services must be related to the placement or maintenance of facilities in such roads or rights-of-way, must be reasonable and nondiscriminatory, and may include only those matters necessary to manage the roads or rights-of-way of the municipality or county.

172. In furtherance of the authority granted to municipalities in Sections 337.401(3)(a) and (b) to require providers of communications services that place or seek to place facilities in its

roads or rights-of-way to register with the municipality, and the power of municipalities to manage their public rights-of-way, Section 337.401(7)(d)12., of the Small Cell Statute authorizes municipalities to adopt by ordinance provisions for **security funds**, provided such provisions must be reasonable and nondiscriminatory.

173. Pursuant to the foregoing provision, municipalities are authorized expressly, in the exercise of their police powers, to require communications providers to provide adequate security for the proper and timely performance of their obligations relative to the placement and maintenance of communications facilities within municipal public rights-of-way and the collocation of small wireless facilities on utility poles owned or controlled by municipalities.

174. The provision of Section 337.401 with respect to security funds is consistent with Florida law's long recognition that municipalities may adopt measures to enforce their police powers.

175. In or about March 2018, the Florida Legislature adopted House Bill No. 7087 ("HB 7087"), designed to provide for a wide range of tax reductions for individuals and businesses.

176. Among the existing statutory provisions affected by the adoption of HB 7087 was Section 202.24, Florida Statutes, entitled "Limitations on local taxes and fees imposed on dealers of communications services."

177. Specifically, Section 202.24(2)(b)1., F.S., was amended to add the term "security fund" to the list of other taxes, fees and charges municipalities could not impose on dealers of communications services that were subject to the communications services tax, as follows:

> (2)(a) Except as provided in paragraph (c), each public body is prohibited from:
>
> 1. Levying on or collecting from dealers or purchasers of communications services any tax, charge, fee, or other imposition on or with respect to the

provision or purchase of communications services.

2. Requiring any dealer of communications services to enter into or extend the term of a franchise or other agreement that requires the payment of a tax, charge, fee, or other imposition.

3. Adopting or enforcing any provision of any ordinance or agreement to the extent that such provision obligates a dealer of communications services to charge, collect, or pay to the public body a tax, charge, fee, or other imposition.

Municipalities and counties may not negotiate those terms and conditions related to franchise fees or the definition of gross revenues or other definitions or methodologies related to the payment or assessment of franchise fees on providers of video services.

(b) For purposes of this subsection, a tax, charge, fee, or other imposition includes any amount or in-kind payment of property or services which is required by ordinance or agreement to be paid or furnished to a public body by or through a dealer of communications services in its capacity as a dealer of communications services, regardless of whether such amount or in-kind payment of property or services is:

1. Designated as a sales tax, excise tax, subscriber charge, franchise fee, user fee, privilege fee, occupancy fee, rental fee, license fee, pole fee, tower fee, base-station fee, security fund, or other tax or fee;

2. Measured by the amounts charged or received for services, regardless of whether such amount is permitted or required to be separately stated on the customer's bill, by the type or amount of equipment or facilities deployed, or by other means; or

3. Intended as compensation for the use of public roads or rights-of-way, for the right to conduct business, or for other purposes.

178. The term "security fund" is not defined in Section 202.24, or anywhere in Chapter 202, F.S., known as the Communications Services Tax Simplification Law (the "CST Law").

179. Section 202.105, F.S., sets forth the legislative intent and purpose of the CST Law, providing in pertinent part:

It is declared to be a specific legislative finding that the creation of this chapter fulfills important state interests by reforming the tax laws to provide a fair, efficient, and uniform method for taxing communications services sold in this state. This chapter is essential to the continued economic vitality of this

> increasingly important industry because it restructures state and local taxes and fees to account for the impact of federal legislation, industry deregulation, and the multitude of providers offering functionally equivalent communications services in today's marketplace.

180. By its plain and clear language, the purpose of Chapter 202 is limited to issues related to the taxation of communications services sold in the State. Chapter 202 does not purport to regulate the placement or maintenance of communication facilities in roads or rights-of-way, which authority is expressed reserved to municipalities in Section 337.401.

181. Many municipalities in Florida, including FLC's Members, adopted ordinances to implement the Small Cell Statute that provide for submitting a security fund or permanent performance bond upon registration to guarantee compliance with the ordinances and to manage the public rights-of-way.

182. Security funds and performance bonds that municipalities currently require and may continue to require for communications providers to place and to maintain communications facilities in municipal public rights-of-way are reasonable regulations directly related to the management of the rights-of-way, and therefore authorized by Section 337.401(3)(b).

183. Plaintiffs maintain that the inclusion of the term "security fund" in Section 202.24, in the list of taxes, fees and charges that cannot be imposed in addition to the communications services tax, does not preempt or otherwise nullify municipalities' police powers, authority under Section 337.401(3)(b), or express authority under Section 337.401(7)(d)12., F.S., to require adequate security, including a security fund or performance bond, to ensure that communications service providers that place communications facilities in municipal public rights-of-way or collocate small wireless facilities on municipally-owned poles comply with ordinances and applicable codes related to management of the public rights-of-way.

184. Plaintiffs maintain that the security funds or performance bonds Florida

municipalities have imposed or may seek to impose when a communications provider registers to place or maintain facilities in public rights-of-way are not to be paid or furnished "in its capacity as a dealer of communications services," "[m]easured by the amounts charged or received for services, regardless of whether such amount is permitted or required to be separately stated on the customer's bill, by the type or amount of equipment or facilities deployed, or by other means," or "[i]ntended as compensation for the use of public roads or rights-of-way, for the right to conduct business, or for other purposes."

185. Rather, the purpose of such security fund or performance bond is to ensure a communications provider complies with a municipality's ordinances including, but not limited to, paying for damage to municipal or other facilities as a result of installation and maintenance of facilities, and removing abandoned or illegally installed facilities. A security fund, in this regard, is akin to a construction bond to ensure compliance with applicable permits and construction requirements.

186. Such security funds apply not only to providers of communications services, but also to wireless infrastructure providers that are authorized pursuant to the Small Cell Statute to place and to maintain infrastructure in the public rights-of-way.

187. The placement and maintenance of communications infrastructure in municipal public rights-of-way has in the past, and will in the future, cause significant damage to public rights-of-way and to persons and property within and outside of public rights-of-way. The installation of fiber and backhaul facilities often involves excavation, which has and will damage municipal rights-of-way, water and sewer lines, and other facilities owned by municipalities, and may often be performed without local permits. In addition, both wireline and wireless providers have and will continue to abandon infrastructure installed in municipal public rights-of-way. On

occasion, wireline and wireless providers have installed infrastructure in municipal public rights-of-way illegally, without obtaining appropriate permits.

188. Municipalities have and will continue to incur significant costs to address damage to their rights-of-way and facilities, and to remove abandoned and illegally installed facilities in the public rights-of-way. Security funds and performance bonds imposed by municipalities are far below actual costs municipalities have incurred in the past and easily may incur in the future and are a small fraction of the costs incurred and revenue realized by communications providers that place and maintain communications facilities in public rights-of-way. The security funds and performance bonds municipalities impose as part of a registration to place and to maintain communications infrastructure in public rights-of-way are reasonable.

189. Upon information and belief, the Defendants maintain that inclusion of the term "security fund" in Section 202.24(2)(b)1., F.S., as amended by HB 7097, does prohibit, limit or otherwise impair Plaintiffs' right or authority to exercise their statutorily-granted rights under Section 337.401, F.S., and police powers under Florida law to demand adequate security from communication services providers as part of the registration process to comply with municipal codes and regulations.

190. Plaintiffs are in doubt as to their rights and obligations under Section 337.401 and Section 202.24, F.S., and their police powers with respect to the ability to require security funds or performance bonds.

191. There is a bona fide, actual, justiciable controversy existing between the parties herein.

192. There is an actual, practical and present need for declaratory relief, because the parties have an irreconcilable disagreement as to the parties' respective rights under Florida law.

193. Plaintiffs have no remedy at law to protect and enforce their rights as set forth in greater detail above.

WHEREFORE, Plaintiffs requests that this honorable Court:

a) takes jurisdiction of the parties and this cause,

b) declares that the recent amendment of Section 202.24(2)(b)1., F.S., to include the term "security fund" does not preempt or otherwise nullify municipalities' authority under Section 337.401(7)(d)12., and Section 337.401(3)(b), F.S., and Florida law, to require providers of communications services that place or maintain communications facilities in municipal public rights-of-way to provide adequate security, including security funds or permanent performance bonds, to manage the public rights-of-way and to ensure compliance with municipal codes, as part of the statutorily-authorized registration process, and

c) grants such other relief as the Court deems equitable.

Dated this 13th of May, 2019.

Respectfully Submitted,

GRAYROBINSON, P.A.
Attorneys for Plaintiff Florida League of Cities, Inc.
401 E. Las Olas Boulevard, Ste. 1000
Fort Lauderdale, FL 33301
Telephone: 954-761-8111
Fax : 954-761-8112

By: */s/Gary I. Resnick*
Gary I. Resnick
Florida Bar No. 54119
Email: Gary.Resnick@gray-robinson.com

William McCormick
Florida Bar No. 119377
Email:William.McCormick@gray-robinson.com

Allison Goodson
Florida Bar No. 44030
Email: Allison.Goodson@gray-robinson.com

Kraig Conn
General Counsel
Florida League of Cities, Inc.
301 S. Bronough Street, Ste. 300
Tallahassee, Florida 32301
Florida Bar No. 0793264

Roetzel & Andress, A Legal Professional Association
Attorneys for Plaintiff City of Naples, FL
850 Park Shore Drive
Trianon Center – 3rd Floor
Naples, FL 34103
Telephone: 239.649.6200
Fax No.: 239.261.3659

By: */s/Robert D. Pritt*
Senior Attorney
Florida Bar No. 0196571
Email: rpritt@ralaw.com

James D. Fox
City Attorney
Florida Bar No. 689289
Email: jfox@ralaw.com

HAND, ARENDALL, HARRISON, SALE, LLC
Attorneys for Plaintiff City of Fort Walton Beach, FL
35008 Emerald Coast Parkway, Suite 500
Destin, FL 32541
Telephone: 850-650-0010
Fax: 850-424-5093

By: */s/Hayward Dykes, Jr.*
Hayward Dykes, Jr.
City Attorney
Florida Bar No. 0560162
Email: hdykes@hsmclaw.com

Margaret Roberts, City Attorney
Matthew Jones, Deputy City Attorney
Attorneys for Plaintiff City of Port Orange, FL
City of Port Orange
1000 City Center Circle
Port Orange, FL 32129
Tel: 386-506-5537
Fax: 386-506-5530

By: */s/Margaret Roberts*
Margaret Roberts
City Attorney
Florida Bar No. 277381
Email: mroberts@port-orange.org