APPENDIX A **US District Court of Appeals Order**

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12680
Non-Argument Calendar

D.C. Docket No. 8:18-cv-02642-WFJ-AEP

ROBERT KELVIN LINDBLOOM,

Plaintiff–Appellant,

versus

MANATEE COUNTY,
a political Subdivision of the State
of Florida, TANYA SHAW, et al.,

Defendants–Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(March 31, 2020)

Before WILLIAM PRYOR, JILL PRYOR, and ANDERSON, Circuit Judges.

PER CURIAM:

Robert Lindbloom, proceeding *pro se* on appeal, appeals the district court's dismissal of his *pro se* complaint under 42 U.S.C. § 1983, which challenged the constitutionality of Florida's Local Government Code Enforcement Boards Act, Fla. Stat. §§ 162.01–.13, and alleged that his due process and civil rights were violated at a Manatee County, Florida, Code Enforcement Division hearing. Lindbloom argues that the district court erred in dismissing his complaint for failure to state a claim because the code enforcement hearing violated his due process rights and the individual defendants were not entitled to qualified immunity. Lindbloom also argues that the district court erred in dismissing his complaint for failure to state a claim because he successfully challenged the constitutionality of Florida's Local Government Code Enforcement Boards Act. We address each in turn and affirm the district court's dismissal of Lindbloom's complaint.

I. BACKGROUND

Because we solely write for the benefit of the parties, we provide only as much detail as is necessary for us to reach our decision. Lindbloom, a property owner in Manatee County, Florida, received two notices of violation on July 31, 2018, from the county government for having large amounts of trash and debris in his yard and for having an unsound roof. The notices, which were sent to Lindbloom by certified mail, made clear that Lindbloom needed to clean the entire

property to remove the trash and debris and make his roof weatherproof and free from defects by August 10, 2018. Subsequent re-inspections revealed that the violations remained uncorrected after the deadline and the county issued notices of hearing to Lindbloom by certified mail and email.

The hearing took place on September 26, 2018, with Lindbloom in attendance, and was transcribed. Tanya Shaw, an officer with the county's Code Enforcement Division, outlined the alleged violations and presented photographs of Lindbloom's house. Lindbloom had an opportunity to respond, and requested a "VGA cable" to plug his computer into. Katharine Zamboni, an Assistant Manatee County Attorney, informed Lindbloom that he needed to provide them with a copy of anything he wished to present. She asked if that would be a problem, and Lindbloom said that it would not be. He then said that he wanted to "make a fourth request for a hearing aid," which he said he assumed would be provided by the Americans with Disabilities Act, and said that he could not hear any of the hearing.

Lindbloom argued that none of the photographs "represent current conditions." When Shaw disagreed, he replied that he would "bring her back on perjury charges because there's been a lot of stuff done here." He then advised the magistrate judge that he had "major surgery" and was "here against doctor's orders." He was advised that, even if the photographs presented by Shaw did not

represent current conditions, he would have about a month to make the necessary changes, and that fines would only start accruing at that point. Lindbloom conceded that debris remained on his lawn and that he was "in the middle of trying to fix some storm damage." He further objected to the photographs on the ground that they were "taken with a zoom, which means she entered through my property electronically and took these pictures." He questioned what a structure was, and whether his roof was a part of his house's structure, which the magistrate advised him it was.

The magistrate informed Lindbloom that he found that the house was not in compliance and that Shaw, or another code enforcement officer, would conduct re-inspections to verify compliance. He gave Lindbloom until October 19, 2018, to correct the noncompliance; if it was not corrected by that point, a fine of $50 per day would be assessed for each violation, with a $20,000 cap. Lindbloom indicated that he would appeal the decision and that he "could not understand the first part of" the hearing. Zamboni advised him that he said that he "wished to go forward" with the hearing, and the magistrate told him that while he may not have been able to hear, the order adequately set out the violation. Lindbloom did not bring his property into compliance by the deadline and was assessed daily fees until February 19, 2019, at which point a $4,778.50 fee, along with $28.50 in recording fees, was imposed as a lien against his property.

Lindbloom did not appeal the magistrate's order, instead filing a *pro se* complaint in the instant case on October 29, 2018. He filed a second amended complaint on April 25, 2019, which serves as the operative complaint in this case. He alleged that his First and Fourth Amendment rights, his due process rights, and the Americans with Disabilities Act were violated, and that Manatee County Ordinance 15-10, adopted pursuant to Florida Statutes §§ 162.01–.13, were unconstitutional. In support of these claims, Lindbloom asserted a litany of arguments, which we do not endeavor to voluminously or exclusively recount.

Manatee County moved to dismiss the second amended complaint for failure to state a claim. Specifically, it argued that his procedural due process claim was unavailable because there was an adequate remedy under state law—namely, he could appeal the determination to the state circuit court. As to the substantive due process claim, it argued that Lindbloom's constitutional rights were not violated. It also argued that the individual defendants were entitled to qualified immunity and that Lindbloom's claims under the Florida Constitution—excessive fines and a violation of his right to privacy—were not sufficiently alleged because he made no showing that the fine was disproportionate or that he had a legitimate expectation of privacy in the description of the debris around his property. The district court granted the motion to dismiss with prejudice. Lindbloom timely appealed to us.

II. DISCUSSION

A. Due Process Claims

We review *de novo* a district court's dismissal of a complaint for failure to state a claim. *Bishop v. Ross Earle & Bonan, P.A.*, 817 F.3d 1268, 1270 (11th Cir. 2016). Federal Rule of Civil Procedure 8(a)(2) requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The complaint is viewed in the light most favorable to the plaintiff, and all the plaintiff's well pleaded facts are accepted as true. *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1057 (11th Cir. 2007). Further, *pro se* pleadings are held to a less strict standard than counseled pleadings and are liberally construed. *Alba v. Montford*, 517 F.3d 1249, 1252 (11th Cir. 2008). However, in order to survive a motion to dismiss, the plaintiff's complaint must contain facts sufficient to support a plausible claim to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). The district court must accept the plaintiff's allegations as true but is not required to accept his legal conclusions. *Id.* at 678. A threadbare recital of the elements of a cause of action, supported by conclusory statements, does not suffice. *Id.*

We note that we do not usually consider issues not raised in the district court and raised for the first time in an appeal. *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004). And where a legal claim or argument that has

not been briefed on appeal is deemed abandoned, and its merits will not be addressed. *Id.* at 1330. While we construe briefs filed by *pro se* litigants liberally, a litigant's decision to represent themselves *pro se* does not excuse noncompliance with procedural requirements. To that end, issues not briefed on appeal by a *pro se* litigant are deemed abandoned. *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008). Further, issues must be raised plainly and prominently on appeal. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680–81 (11th Cir. 2014). Generally, issues raised in a conclusory manner, without citation to authorities and the record, are deemed waived. *See* Fed. R. App. P. 28(a)(8); *NLRB v. McClain of Ga., Inc.*, 138 F.3d 1418, 1422 (11th Cir. 1998). Finally, we do not consider arguments raised for the first time in a reply brief. *Sappupo*, 739 F.3d at 683.

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that a person acting under color of state law committed an act that deprived him of some right protected by the Constitution or laws of the United States. Qualified immunity protects government officials from individual liability for discretionary actions taken in the course of their duties. *Alcocer v. Mills*, 906 F.3d 944, 950–51 (11th Cir. 2018). All except the plainly incompetent or an official who knowingly violates federal law are protected from litigation under qualified immunity. *Id.* at 951. To show entitlement to qualified immunity, the official must first establish that they acted within the scope of their discretionary authority. *Id.* Then the

burden shifts to the plaintiff to show that qualified immunity is inappropriate. *Id.* The plaintiff must show that the officer's conduct violated a constitutionally protected right and that the right was clearly established. *Id.* Each defendant is entitled to an independent qualified-immunity analysis. *Id.*

The Fourteenth Amendment protects against deprivation by state action of a constitutionally protected interest in "life, liberty, or property" without due process of law. *Maddox v. Stephens*, 727 F.3d 1109, 1118 (11th Cir. 2013). "The Due Process Clause provides two different kinds of constitutional protections: procedural due process and substantive due process." *Id.* A violation of either can form the basis for a suit under section 1983. *Id.*

To prove his section 1983 substantive due process claim, a plaintiff must establish that he has been deprived of a federal constitutionally protected interest and that the deprivation was the result of an abuse of governmental power. *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1577 (11th Cir. 1989). Deprivation of a property interest is unconstitutional if it is undertaken for an improper motive and by means that are pretextual, arbitrary and capricious, and without any rational basis. *Id.* To succeed on a section 1983 claim challenging the denial of procedural due process, a plaintiff must demonstrate: (1) the deprivation of a constitutionally protected liberty or property interest, (2) state action, and (3) a

constitutionally inadequate process. *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003).

As a general rule, state-created property rights enjoy no substantive due process protection because they are not fundamental rights protected by the Due Process Clause. *Hillcrest Prop., LLP v. Pasco County*, 915 F.3d 1292, 1297–98 (11th Cir. 2019); *Kentner v. City of Sanibel*, 750 F.3d 1274, 1279 (11th Cir. 2014). We have recognized an exception to this general rule when rights are infringed by a *legislative*, rather than an *executive*, act. *Id.* at 1279–80. Executive acts characteristically apply to a limited number of people, often only one person, while legislative acts apply to a larger portion, if not all, of society. *Id.* at 1280. There is a strong presumption that a fine is not unconstitutionally excessive if it is within the range of fines prescribed by the legislature. *See United States v. Bajakajian*, 524 U.S. 321, 336 (1998).

A violation of procedural due process does not become complete unless and until the state refuses to provide adequate due process. *Club Madonna, Inc. v. City of Miami Beach*, 924 F.3d 1370, 1378 (11th Cir. 2019). Generally, due process requires notice and the opportunity to be heard. *See Grayden*, 345 F.3d at 1236. An appeal of a final administrative order to the Florida State Circuit Court satisfies due process because the circuit court has the power to remedy any procedural

defects and cure due process violations. *Club Madonna*, 924 F.3d at 1379 (citing *McKinney v. Pate*, 20 F.3d 1550, 1564 (11th Cir. 1994)).

Lindbloom's specific argument is that Manatee County violated his due process rights in two separate ways. First, it violated his substantive due process rights by putting a lien on his property. Second, it violated his procedural due process rights by providing him with an inadequate remedy. These arguments are without merit. With respect to Lindbloom's procedural due process claim, a procedural due process claim does not accrue unless and until the state refuses adequate due process. *Club Madonna*, *id.* at *1378.* Lindbloom could have appealed the final administrative order to the Florida State Circuit Court which has the power to remedy any procedural defects and cure procedural due process violations. Lindbloom failed to pursue that state court remedy, and therefore has no procedural due process claim.

With respect to his substantive due process claim—even if we assume arguendo that he is challenging a legislative act, not an executive act, with respect to which under some circumstances "the substantive component of the Due Process Clause . . . protects . . . from arbitrary and irrational governmental action," *Kentner*, 750 F.3d at 1278–80—Lindbloom has not pointed to irrational or arbitrary governmental action.

B. Constitutionality of the Local Government Code Enforcement Boards Act

We review the constitutionality of a challenged statute *de novo*. *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1308 (11th Cir. 2009). A facial challenge asserts that a law always operates unconstitutionally and an as-applied challenge asserts that a law is unconstitutional on the facts of the particular case or to a particular party. *Id.* Due process is violated where a law forbids or requires an act in terms so vague that a person of common intelligence must necessarily guess at its meaning and differ in its application. *Id.* at 1310. Separation of powers principles recognize boundaries between the three branches of government and that one branch must not encroach on the central prerogatives of another. *See Miller v. French*, 530 U.S. 327, 341 (2000).

Florida's Local Government Code Enforcement Boards Act was created to promote the health and safety of state citizens by creating administrative boards to impose administrative fines and other noncriminal penalties to provide an effective and inexpensive method of enforcing county and municipal codes and ordinances where a pending or repeated violation persists. Fla. Stat. § 162.02. A special magistrate has the same status as an enforcement board. *Id.* § 162.03(2). Enforcement is initiated by a code inspector who notifies the violator and gives him a reasonable time to comply, and if the violation continues, the code inspector notifies the special magistrate and requests a hearing. *Id.* § 162.06(2). At the

hearing, the special magistrate must take testimony from the code inspector and the alleged violator, and formal rules of evidence do not apply. *Id.* § 162.07(3). The special magistrate must issue findings of fact, conclusions of law, and an order affording the proper relief. *Id.* § 162.07(4).

Upon notification by the code inspector that a previous order has not been complied with, the special magistrate can assess fines up to $250 per day that the violation continues. *Id.* § 162.09(1), (2)(a). A certified copy of the order filed with the public records constitutes a lien upon the property involved, and the county attorney may foreclose on the lien unless it involves real property that is a homestead under the Florida Constitution. *Id.* § 162.09(3). An appeal of the final administrative order may be taken within 30 days to the state circuit court, which must be limited to appellate review of the record created before the special magistrate. *Id.* § 162.11.

Manatee County adopted this code enforcement system as it pertains to property maintenance and structural standards through local ordinance. Manatee County Ordinance 15-10. The ordinance provides that all property in the county must be maintained in a sanitary condition and the "storage of trash, rubbish, and garbage is prohibited on any property." *Id.* § 2-9-105(c). Further, the ordinance provides that all structures must be structurally sound and all roofs must be sound and not have defects that admit rain. *Id.* § 2-9-106(b)(3). We have recognized the

authority under Florida law for special magistrates to adjudicate code violations pursuant to Fla Stat. §§ 162.01–.13. *See Club Madonna*, 924 F.3d at 1379.

Here, Lindbloom argues that (1) the Act is a bypass of due process and gives unlimited power to the county with no appeal; (2) the code-enforcement scheme transforms an administrative order into a court judgment in violation of separation of powers principles; (3) that the County Ordinance targets old, poor citizens; and (4) that the definition of "trash and debris" is vague. We note at the outset that Lindbloom has inadequately developed his third argument, *see Sapuppo*, 739 F.3d at 680–81, and that he has waived his fourth argument by not raising it before the district court, *see Access Now*, 385 F.3d at 1331.

As to Lindbloom's first two arguments, we conclude that they are without merit. As a practical matter, the Act *does* allow for an appeal—that Lindbloom felt that it was an *inadequate* avenue of appeal and opted against exercising does not transform an otherwise-available appeal into an unavailable one.

With respect to his separation-of-powers argument, we find persuasive a decision by Florida's Fifth District Court of Appeal that rejected an identical argument. The Fifth DCA reasoned that (1) the power given to the special magistrate did not cross the line between "quasi-judicial" and "judicial"; (2) the special magistrate cannot impose criminal penalties; (3) presentment of a defense is permitted before enforcement of any lien; and (4) the statutory scheme provides

for fundamental due process requirements, including notice and a hearing, creation of a record, and an appeal. *Michael D. Jones, P.A. v. Seminole Cty.*, 670 So.2d 95, 96 (Fla. 5th DCA 1996). While obviously not binding, we agree with the *Jones* court that the Act does not violate separation of powers principles.

And in any event, Lindbloom has not persuasively demonstrated how the boundaries of the branches of government have been encroached by the Act. *See Miller*, 530 U.S. at 341. His freewheeling argument that the Act "bestows upon the county" the power to "detain, arrest, and incarcerate citizens[] for code violations," and therefore violates separation of powers principles finds no support in the law. It is true that the Act allows code enforcement boards to "[i]ssue orders having the force of law to command whatever steps are necessary to bring a violation into code compliance," Fla. Stat. § 162.08(5), and that its enforcement methods include "the issuance of a citation, a summons, or a notice to appear in county court or arrest for violation of municipal ordinances," *id.* § 162.22, these powers are narrow, *see* Op. Att'y Gen. Fla. 2009-37, and the punishments are minimal. Accordingly, we affirm the district court's order in this regard.

III. CONCLUSION

For the foregoing reasons, we conclude that the district court properly dismissed Lindbloom's complaint with prejudice for failure to state a claim. The arguments he raises on appeal are without merit. The district court's order is

AFFIRMED.

APPENDIX B **US District Court Order**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ROBERT KELVIN LINDBLOOM,

Plaintiff,

v. Case No. 8:18-cv-02642-T-02AEP

MANATEE COUNTY, DONALD COURTNEY, TANYA SHAW, TOM WOOTEN, KATHARINE ZAMBONI,

Defendants.
_____/

ORDER

This action concerns a special magistrate's enforcement hearing on local code violations. The matter comes to the Court on a motion to dismiss Plaintiff Robert Lindbloom's Second Amended Complaint, Dkt. 26, from Defendants Manatee County and Donald Courtney, Tanya Shaw, Tom Wooten, and Katharine Zamboni in their individual capacities, Dkt. 27. Plaintiff, pro se, has responded in opposition. Dkt. 29. The Court GRANTS the motion.

BACKGROUND

Taking Plaintiff's factual allegations as true, Plaintiff has lived in the same home in Manatee County for more than 35 years. Dkt. 26 at 14. The individual Defendants work for Manatee County: Defendant Shaw is a code enforcement

officer; Defendant Wooten is a code enforcement field supervisor; Defendant Zamboni is an assistant county attorney; and Defendant Courtney is a special magistrate. *Id.*

According to Shaw's testimony at the eventual enforcement hearing, she made initial inspections of Plaintiff's residence on July 17, 2018. Dkt. 26-3 at 20. These inspections led to notices of violations (NOVs) for trash and debris (Section 2-9-105, case number 2018070212) and an unsound roof (Section 2-9-106, case number 2018070184). *Id.* The NOVs were dated July 31, 2018 and posted on the property the same day. *Id.* Reinspections were made on July 31, August 14 and 30, and September 21 of 2018. *Id.* There was "drop service," and the cases were posted on the first floor of the county administration building. *Id.*

On September 26, 2018, Magistrate Courtney held a hearing on the NOVs in which Shaw testified and presented photographic evidence of Plaintiff's noncompliance. Dkt. 26-3 at 20-26. Plaintiff testified that the photographs did not represent the then-current condition of his residence, objected to their "enhanced" nature, and questioned the allegation that the condition of the roof was structurally unsound. *Id.* at 21.

During the hearing, Plaintiff also asked for a connector cable with which to make a computer presentation. *Id.* at 21. Plaintiff was informed that he would need to provide a copy of any materials presented, so he would also need to use email or

a printer. *Id.* Plaintiff then made a request for a hearing aid but quickly turned to his case "so we don't have to come back here again." *Id.* Though he once more complained about the absence of a hearing aid, Plaintiff seemed able to communicate with and answer questions from the Magistrate. *Id.* at 21-22.

During the hearing the Magistrate issued his decision finding noncompliance and charging Plaintiff fines of $50.00 per day for each of the violations for a maximum of $20,000. *Id*; *see also* Dkt. 26 ¶ 65. Defendant Courtney and other individuals in attendance repeatedly informed Plaintiff that the fines would only assess on the compliance date on October 19, 2018. Dkt. 26-3 at 21-22. The fines started on November 17, 2018 and stopped on February 19, 2019. Dkt. 26 ¶¶ 66-67. A lien in the amount of $4,778.50 (apparently only for the trash and debris violation) was entered upon the property. Dkt. 26-2. In his original complaint, Plaintiff alleged that the Magistrate's decision is "being appealed." Dkt. 1 at 5.

In his Second Amended Complaint, Plaintiff broadly challenges the constitutionality and validity of Chapter 162, Florida Statutes and Manatee County Ordinance 15-10. Dkt. 26 ¶¶ 14-15. He also brings eighteen claims against Defendants, including claims in individual capacity. The causes of action include, against Manatee County: (1) excessive fines, (2) a due process claim under 42

U.S.C. § 1983[1] for retroactive regulation, namely Ordinance 15-10 which required homestead property owners to comply with its provisions; and (3) a due process claim for entering a lien on a homestead property.

Plaintiff brings against Defendant Shaw: (4)-(9) a series of due process claims for submitting false NOVs and altered photographs, not providing evidence to Plaintiff prior to the hearing, and not specifying additional actions necessary to bring the residence into conformity, a Fourth Amendment "privacy" claim, and a First Amendment "free speech" claim.

Plaintiff complains against Magistrate Courtney: (10) an Americans with Disabilities Act violation for failing to provide a hearing aid at the hearing; and a series of due process claims for (11) mistakenly finding the noncompliance of Plaintiff's roof; (12) not providing a connector cord to present evidence; (13) relying on evidence not provided to Plaintiff prior to the hearing and for ignoring testimony; (14) not allowing Plaintiff to question Shaw about the NOVs; (15) allowing Shaw's presentation with photographs; (16) failing to serve as an impartial tribunal as evidenced by the comment, "Here's the order in writing, sir, so you maybe can't hear but you can read this."

[1] Plaintiff's many due process claims are, in the alternative, brought under article I, section 9 of the Florida Constitution, though he does not specify how the analysis may differ.

Plaintiff also brings (17) a due process claim against Defendant Wooten for interrupting his questioning of Defendant Shaw. The last claim, (18), is against Defendant Zamboni for not allowing Plaintiff to present evidence that he did not provide prior to the hearing.

Plaintiff seeks a variety of relief, including injunctive relief to remove the lien, a stay of the Magistrate's decision, and punitive damages.[2] Defendants move to dismiss under Rule 10(b) of the Federal Rules of Civil Procedure for the defective form of Plaintiff's Second Amended Complaint, under Rule 8(a)(2) for lack of notice of the grounds supporting his claims, and under Rule 12(b)(6) for failure to state a claim.

LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead sufficient facts to state a claim that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). In considering the motion, the court accepts all factual allegations of the complaint as true and construes them in the light most favorable to the plaintiff. *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008) (citation omitted).

[2] Plaintiff also complains about injuries related to heart surgery weeks prior to the hearing. He alleges that the hearing might have "contributed to the subsequent collapse of the graft requiring stents as well as extremely painful drains that were placed in the pericardium." Dkt. 26 ¶¶ 195-96. It is unclear whether he seeks damages related to these injuries. Any such claim would be unavailing. The matter is also irrelevant to his procedural due process claim, especially because there is no indication that he sought a continuance or that the condition affected presentment of his defense.

Courts should limit their "consideration to the well-pleaded factual allegations, documents central to or referenced in the complaint, and matters judicially noticed." *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004) (citations omitted). Courts may also consider documents attached to a motion to dismiss if they are (1) central to the plaintiff's claim; and (2) undisputed or, in other words, the "authenticity of the document is not challenged." *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002) (citations omitted).

DISCUSSION

Rather than proceed one-by-one through Plaintiff's eighteen claims, the Court first observes that Plaintiff fails to successfully challenge the constitutionality and validity of Chapter 162, Florida Statutes and Ordinance 15-10. Secondly, the procedures for the Magistrate's hearing do not offend due process and, in any event, Plaintiff's remedy lies in state court. Additionally, Plaintiff does not raise a cognizable substantive due process or excessive fines claim as it relates to the lien. He cannot establish his remaining claims for violations of his First and Fourth Amendment rights, his privacy, and under the Americans with Disabilities Act. Lastly, qualified immunity shields the individual Defendants from suit.

I. Chapter 162, Florida Statutes and Ordinance 15-10

More than once in his Complaint, Plaintiff asserts that Chapter 162, Florida Statutes, and Ordinance 15-10 are unconstitutional. Dkt. 26 ¶¶14-15, 29. His chief argument is that Chapter 162 provided the legal basis for the County to pass Ordinance 15-10, which "forc[es] citizens to abide by current regulations, no matter how expensive the repairs are and/or how long they have lived in the same house," or in other words, is a "retroactive regulation." *Id.* ¶¶ 7-9, 14.

Chapter 162 concerns county and municipal code enforcement, including authorizing enforcement boards and special magistrates. *See, e.g.*, Fla. Stat. § 162.03. As a Florida appellate court summarized, Chapter 162:

> authorizes counties and municipalities to create a code enforcement board to enforce local codes and ordinances which have no criminal penalties, where a pending or repeated violation continues to exist. Section 162.02. Enforcement is initiated by a code inspector who notifies the violator and gives him a reasonable time to correct the violation, and if the violation continues beyond the time specified for correction the code inspector must notify the board and request a hearing. Section 162.06. Under the procedures set forth in section 162.07, the board must issue findings of fact, conclusions of law and an order affording the proper relief consistent with the statute.
>
> Section 162.09 authorizes the board, upon notification by the code inspector that a previous order of the board has not been complied with by the set time or, upon finding that the same violation has been repeated by the same violator, to assess fines up to $250/day for each day that a violation continues past the date set for compliance. Once a certified copy of the order imposing a fine is filed with the public records, it constitutes a

> lien upon either the land involved or other property owned by the violator, and within six months the board may authorize the city attorney to foreclose on the lien except if it involves real property which is a homestead under the Florida Constitution.

City of Gainesville Code Enf't Bd. v. Lewis, 536 So. 2d 1148, 1150 (Fla. 1st DCA 1988). In addition to setting forth various standards for the maintenance of property and structures, Ordinance 15-10 provides for enforcement of code violations "as provided in Chapter 162, Florida Statutes." Manatee County, Fla., Ordinance 15-10, Sec. 2-37-8.

Chapter 162's constitutionality has been addressed before. For example, in *Michael D. Jones, P.A. v. Seminole Cty.*, 670 So. 2d 95 (Fla. 5th DCA 1996), the Florida appellate court rejected an argument that the chapter violated the Florida Constitution by establishing a "rogue" judicial system. 670 So. 2d at 96. In upholding the chapter, the court observed:

> The powers given by the Legislature to code enforcement boards by Chapter 162 do not appear to us as having crossed the line between "quasi-judicial" and "judicial." Such boards may impose fines for code violations but they cannot impose criminal penalties. Although boards can assert a lien against real or personal property, presumably section 162.09 would be interpreted to permit the presentment of defenses prior to enforcement of any lien. Further, the statute provides for the fundamental due process requirements of notice and a hearing, making of a record, and appeal, although such an appeal is not *de novo.*

Id. Additionally, the Eleventh Circuit has noted the authorization under Florida law for special magistrates to adjudicate code violations. *E.g.*, *Bey v. City of Tampa*

Code Enf't, 607 F. App'x 892, 897 (11th Cir. 2015) (citing Fla. Const. art. VIII, § 2(b); Fla. Stat. § 166.021(1) & (4); Fla. Stat. §§ 162.01-162.13; City of Tampa Code § 9-1).

Alternatively, Plaintiff's argument that the statute and ordinance provide for "retroactive regulation" is unpersuasive. In support, he points to *Winston Towers 200 Ass'n, Inc. v. Saverio*, 360 So. 2d 470 (Fla. 3d DCA 1978), a short opinion that invalidated an amendment to a condominium by-law because it "was an attempt to impose a retroactive regulation." 360 So. 2d at 470-71.

There are a few problems with this. First, the court in *Winston Towers* did not specify the authority which proscribed the retroactive regulation, so it is unclear whether that authority would also implicate a statute or county ordinance. Secondly, Plaintiff provides no cases for the proposition that new or amended code provisions cannot apply to buildings that exist at the time of an ordinance's promulgation. This seems especially anomalous here because Ordinance 15-10 apparently became operative in 2015, yet the inspections and NOVs of Plaintiff's residence were not until 2018. This could suggest the defective condition was not present when Ordinance 15-10 took effect. In fact, Plaintiff does not concretely allege that the condition of his residence would have complied with code as unamended by the ordinance.

Plaintiff has not set forth a claim that is plausible on its face to challenge the constitutionality of Chapter 162, Florida Statutes or Ordinance 15-10.

II. Procedural Due Process

Most of Plaintiff's claims are for procedural due process violations under § 1983, which requires him to prove (1) a deprivation of a constitutionally-protected liberty or property interest, (2) state action, and (3) constitutionally-inadequate process. *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003) (citation omitted). Yet as Defendants point out, "only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise." *Cotton v. Jackson*, 216 F.3d 1328, 1330-31 (11th Cir. 2000) (citations omitted). "It is the state's failure to provide adequate procedures to remedy the otherwise procedurally flawed deprivation of a protected interest that gives rise to a federal procedural due process claim." *Id.* at 1331 (citations omitted). This rule provides the State an "opportunity to remedy the procedural failings of its subdivisions and agencies in the appropriate fora—agencies, review boards, and state courts before being subjected to a claim alleging a procedural due process violation." *Id.* (citations and internal quotation marks omitted).

The Court must "look to whether the available state procedures were adequate to correct the alleged procedural deficiencies." *Id.* (citations omitted). "If

adequate state remedies were available but the plaintiff failed to take advantage of them, the plaintiff cannot rely on that failure to claim that the state deprived him of procedural due process." *Id.* (citations omitted). To be "adequate," the state remedial procedure "need not provide all the relief available under section 1983"; rather, it "must be able to correct whatever deficiencies exist and to provide plaintiff with whatever process is due." *Id.* (citations omitted).

Here, the Magistrate's order was appealable under section 162.11, Florida Statutes. *See also* Fla. Stat. § 26.012(1) ("Circuit courts shall have jurisdiction of appeals from final administrative orders of local government code enforcement boards."). Though Plaintiff admitted the order was "being appealed," the disposition of any appeal is unclear. In any event, Plaintiff does not clearly allege in what ways such an appeal would be inadequate to remedy his claimed procedural due process violations. Though Plaintiff would not be afforded a de novo hearing, he could nonetheless obtain "appellate review of the record created before the enforcement board." Fla. Stat. § 162.11. Based on that review, the circuit court could address the lien and the Magistrate's decision, which is relief Plaintiff seeks here.[3]

[3] To the extent that Plaintiff could not challenge the constitutionality of Chapter 162 or Ordinance 15-10 in an administrative hearing or on appeal, *see, e.g.*, *Wilson v. Cty. of Orange*, 881 So. 2d 625, 631 (Fla. 5th DCA 2004), the Court nonetheless considered these claims above.

Though the Court need not address Plaintiff's underlying claim, it does note its skepticism. To be sure, due process "requires notice and the opportunity to be heard incident to the deprivation of life, liberty or property at the hands of the government," and, generally, "requisite notice and opportunity for a hearing at a meaningful time and in a meaningful manner." *Grayden*, 345 F.3d at 1232 (citations and internal quotation marks omitted). To determine due process requirements in a particular situation, courts generally apply the three-factor *Mathews*[4] test to assess:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 1232-33.

Other courts, in applying the *Mathews* test to Chapter 162 enforcement proceedings, have found procedural due process violations where a magistrate relied solely upon an officer's affidavit and the aggrieved party was not given an opportunity to protest or contest the factual findings. *E.g.*, *Massey v. Charlotte Cty.*, 842 So. 2d 142, 145-47 (Fla. 2d DCA 2003); *Michael D. Jones, P.A.*, 670 So. 2d at 96 ("Although [code enforcement] boards can assert a lien against real or

[4] *Mathews v. Eldridge*, 424 U.S. 319 (1976).

personal property, presumably section 162.09 would be interpreted to permit the presentment of defenses prior to enforcement of any lien."). The *Massey* court noted the importance of an opportunity to present a defense because the findings there involved "moderately complex issues, including whether the alleged violation continued, how long it continued, and whether there was any reason to reduce the per diem fine imposed in light of attempts by the [aggrieved party] to comply." *Id.* at 147.

The Court agrees that Plaintiff has an interest against accrued fines—which can constitute a lien on property—but a close look at the hearing transcript reveals that Plaintiff was afforded an opportunity to be heard. Indeed, he was duly noticed of the hearing and was allowed to present after Defendant Shaw testified. *See* Fla. Stat. § 162.07(3) ("The enforcement board shall take testimony from the code inspector and alleged violator. Formal rules of evidence shall not apply, but fundamental due process shall be observed and shall govern the proceedings.").

Plaintiff requested a VGA cable for his computer but did not raise the issue again after he was informed he would need to provide a copy of any presented evidence. And though Plaintiff requested a hearing aid, he decided to "just try . . . so we don't have to come back here again." The record shows he was able to respond to questions from the Magistrate, and officials obliged him whenever he asked for confirmation of what other individuals had said. It was Plaintiff's choice

to proceed, and there is no indication he made any prior request or notice for hearing assistance.

As for his defense, Plaintiff argued that Defendant Shaw "accused me of having beer cans in my yard. I don't drink beer at all." Plaintiff later clarified that the cans were Pepsi cans without explaining why this distinction affected compliance with the code. When asked about black plastic over the roof, Plaintiff responded, "The black plastic is -- it's protecting the structure that's there now. It doesn't have any -- it does not have any -- a permanent over-structure. But that -- that is not structure. Structure is what's underneath." Dkt. 26-3 at 21-22. The Magistrate took this as an admission that there was no proper roof. There was also a dispute about the currency of the photographs presented by Shaw, but the Magistrate assured Plaintiff that "Ms. Shaw will go out there, or somebody else will go out there, and you can show them around your property, and if everything is great, it goes away."[5] *Id.* at 22.

[5] Plaintiff complains that "[w]hen the fine ends, how much the fine is, when the property is compliant, are determined sometime after the hearing, by a person who is NOT a magistrate." Dkt. 29 at 8. But it is worth noting that the fines eventually assessed were significantly less than as allowed by the Magistrate's order—and did not begin for nearly a month after the set compliance date. Plaintiff's suggestion that he is entitled to a special magistrate hearing each day the fines accumulate is untenable and unnecessary under both section 162.09, Florida Statutes and due process. In any event, as section 162.11 makes clear, it is the enforcement board or special magistrate's order that is appealed, not the ultimate assessment of the fines. Also unpersuasive is Plaintiff's argument that Defendant Shaw imposed additional requirements for compliance not addressed at the hearing. The Magistrate's order required Plaintiff to clear *all* trash or debris from his property. Dkt. 26-2 at 8.

Lastly, the Magistrate's comment about Plaintiff's hearing does not constitute a procedural due process violation. Though due process does afford the right to an impartial tribunal, *see Dirt, Inc. v. Mobile Cty. Comm'n*, 739 F.2d 1562, 1566 (11th Cir. 1984), the arguably insensitive comment came at the end of the hearing after the Magistrate had entered his findings. The comment does not rise to such a level that it singlehandedly impugns the impartiality of the hearing, and there are no other facts that support discrimination against Plaintiff on the basis of a hearing disability.

In sum, while the hearing appears to have been brief, the issues were simple and Plaintiff was nonetheless allowed to speak and present evidence on his behalf. *See City of Fort Lauderdale v. Scott*, 551 F. App'x 972, 975 (11th Cir. 2014) ("Here, before any lien attached, the City issued a Notice of Violation to the property owner that specified the purported violation and set a time and place for a hearing before a special master. A hearing, had it been requested, would have afforded the property owner a right to be heard in full—to contest the violation. And judicial review would have been available. This is a paradigm of due process."). In any event, the proper avenue for redress of his many claims is the State appeal process as contemplated by Chapter 162.

III. Substantive Due Process & Excessive Fines

Plaintiff also raises a substantive due process and an excessive fines claim related to the lien on his property. Due process "protects individuals against arbitrary exercises of government power." *T.W. ex rel. Wilson v. Sch. Bd. of Seminole Cty.*, 610 F.3d 588, 598 (11th Cir. 2010). To make out a substantive due process claim, Plaintiff must show he was deprived of a constitutionally protected interest through "an abuse of government power." *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1577 (11th Cir. 1989) (citation omitted). Because "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense,'" the government's actions must "shock[] the conscience." *Cty of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (citation omitted).

"[T]here is generally no substantive due process protection for state-created property rights." *Kentner v. City of Sanibel*, 750 F.3d 1274, 1279-80 (11th Cir. 2014). There is an exception where such rights are infringed by a "legislative" as opposed to an "executive" act. *Id.* (citations omitted). Executive acts "typically arise from the ministerial or administrative activities of the executive branch and characteristically apply to a limited number of people, often to only one," while legislative acts "generally apply to a larger segment of—if not all of—society." *Id.* (citations omitted); *see also Eisenberg v. City of Miami Beach*, 54 F. Supp. 3d

1312, 1327 (S.D. Fla. 2014) (citing *DeKalb Stone, Inc. v. County of DeKalb, Ga.*, 106 F.3d 956, 960 (11th Cir. 1997).

The plaintiffs in *Eisenberg*, for example, challenged a city's enforcement as applied to an apartment hotel, including "eligibility for a discretionary exemption to the Fire Code given [the hotel's] historic status." *Id.* at 1327. The court held that because the decision was specific to the plaintiffs and did not affect the general population—and was therefore non-legislative—the substantive due process claim failed. *Id.*

Here, the decision to enforce the code provisions against Plaintiff was clearly specific to Plaintiff and did not affect the general population. Plaintiff cannot circumvent this fact by alleging that Ordinance 15-10 retroactively applies to all members of the public whose property existed at the time the ordinance took effect. *See, e.g.*, Dkt. 26 ¶¶ 13, 16. Additionally, Plaintiff can point to no abuse of government power or any action by the County that "shocks the conscience."

Turning to the statutory language, section 162.09, Florida Statutes provides:

> (1) An enforcement board, upon notification by the code inspector that an order of the enforcement board has not been complied with by the set time . . . may order the violator to pay a fine in an amount specified in this section for each day the violation continues past the date set by the enforcement board for compliance[.]
>
> . . .
>
> (3) A certified copy of an order imposing a fine . . . may be recorded in the public records and thereafter shall constitute a lien against the land on which the violation exists and upon any

> other real or personal property owned by the violator. Upon petition to the circuit court, such order shall be enforceable in the same manner as a court judgment by the sheriffs of this state. . . . No lien created pursuant to the provisions of this part may be foreclosed on real property which is a homestead under s. 4, Art. X of the State Constitution. The money judgment provisions of this section shall not apply to real property or personal property which is covered under s. 4(a), Art. X of the State Constitution.

Meanwhile, article X, section 4 of the Florida Constitution states that homestead properties are "exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon."

According to Plaintiff, "[w]hile there are many [court] opinions about the Florida Constitution's authorizing the recording of a 'super-lien' that is based on an order, not a judgment[, t]here have been *no* opinions about the last sentence in 162.09(3)." Dkt. 26 ¶¶ 20-21 (citation omitted). But the Court finds that such an issue is unnecessary to resolve the case. Indeed, courts have refused to invalidate liens on homestead properties, notwithstanding the Florida Constitution. As one state appellate court reasoned:

> [T]he instant lien was created pursuant to a code enforcement board *order* rather than pursuant to a "judgment, decree or execution" which are prohibited by the constitution. More importantly, . . . the prohibition of the constitutional provision is a prohibition against the use of process to force sale of homestead property and does not invalidate the debt or lien. Thus, the constitutional prohibition takes priority over the debt or lien and renders the same unenforceable. The legislature

> recognized this fact in determining that an enforcement board order should not be considered a judgment except for enforcement proceedings. Accordingly, the mere recording of the order in the instant case does not constitute a cloud upon [the owner's] homestead property. However, if [the] property somehow lost its homestead status, the City would be able to enforce the order as a lien against the property.
>
> Accordingly, the trial court correctly determined that the Florida Constitution did not invalidate the lien created in the instant case but merely rendered the same unenforceable. As such, the summary judgment granted in favor of the City is affirmed.

Miskin v. City of Fort Lauderdale, 661 So. 2d 415, 416 (Fla. 4th DCA 1995) (citations omitted); *see also Demura v. Cty. of Volusia*, 618 So. 2d 754, 756-57 (Fla. 5th DCA 1993) ("It is arguable that the action which the [property owner] should have filed (assuming, *arguendo,* that any action at all was necessary) was a declaratory judgment action seeking a determination that the property at issue is, in fact, homestead property at this time.").

Nor does Plaintiff state a plausible excessive fines claim. The Eleventh Circuit has upheld much greater fines under both the U.S. and Florida Constitutions. *E.g.*, *Moustakis v. City of Fort Lauderdale*, 338 F. App'x 820 (11th Cir. 2009). The fine in *Moustakis*, for example, was $150 per day to total $700,000. *Id.* at 821. The court first observed that "[t]here is a strong presumption that the amount of a fine is not unconstitutionally excessive if it lies within the range of fines prescribed by the legislature." *Id.* at 821 (citations omitted). After

noting that Chapter 162 did not impose a cap on the fines, the court found that the fine "was created by the [owners'] failure to bring the house into compliance with the Code each day for 14 years. Rather than being grossly disproportionate to the offense, the $700,000 fine is, literally, directly proportionate to the offense." *Id.* at 822.

The same is true here. A fine of $50 per day to total less than $5,000—which is within the bounds set by the legislature—is not excessive.

IV. Remaining Claims

Plaintiff's remaining claims do not survive the motion to dismiss stage. For the First Amendment claim, Plaintiff alleges that Defendant Shaw misidentified Pepsi cans in his yard as beer cans. Dkt. 26 ¶ 121. He told her in an email that the cans "were to be used to construct an informational outdoor display." *Id.* ¶ 123. He removed the cans because of the NOV and the threat of fines. *Id.* ¶ 124.

First of all, Plaintiff provides no support for the proposition that misidentifying trash on a yard constitutes a First Amendment violation. This is true even if Defendant Shaw knew there were no beer cans on the yard. Secondly, Plaintiff cites no case finding that storing trash—or, as claimed by Plaintiff, materials for a future project—on one's yard is a constitutionally protected activity. Plaintiff further provides no details about the nature of the "informational

outdoor display," including any concrete plans for its construction.[6] *Cf. First Vagabonds Church of God v. City of Orlando, Fla.*, 638 F.3d 756, 763 (11th Cir. 2011) (en banc) (upholding neutral ordinance that promotes substantial government interest notwithstanding incidental effect on speech).

The constitutional and tort privacy claims similarly fall. The argument is again that the misidentification of the Pepsi cans in the NOV invaded Plaintiff's privacy because a "yard full of beer cans presents a more negative mental picture, than does a yard full of Pepsi cans." Dkt. 26 ¶ 117. But Plaintiff does not cite any authority that an NOV that misidentifies trash on a yard—even if knowingly—violates the Fourth Amendment or an individual's privacy interests. There was simply no intrusion as understood by the Fourth Amendment or article 1, section 23 of the Florida Constitution.

As for tort, Florida courts recognize three strains of invasion of privacy claims: "(1) appropriation—the unauthorized use of a person's name or likeness to obtain some benefit; (2) intrusion—physically or electronically intruding into one's private quarters; [and] (3) public disclosure of private facts—the dissemination of truthful private information which a reasonable person would find objectionable." *Oppenheim v. I.C. Sys., Inc.*, 695 F. Supp. 2d 1303, 1308 (M.D. Fla.), *aff'd*, 627

[6] It is worth noting that there is nothing inherent in the NOV or compliance order that would prohibit Plaintiff from erecting the "informational display" on his yard once it is completed. Yet the question of whether any such display would violate the county's code—and whether Plaintiff would thereafter have a First Amendment claim—is not before the Court.

F.3d 833 (11th Cir. 2010) (quoting *Allstate Ins. Co. v. Ginsberg*, 863 So. 2d 156, 162 (Fla. 2003). Plaintiff is unable to establish any of the above.

Plaintiff's allegations sound in defamation, yet such a claim is also unavailable. The cause of action requires that: (1) the defendant published a false statement, (2) about the plaintiff, (3) to a third party, and (4) the falsity of the statement caused injury to the plaintiff. *In re Nofziger*, 361 B.R. 236, 245 (Bankr. M.D. Fla. 2006) (citations omitted). Malice is also an essential element. *Id.* (citation omitted). "Actual malice is established by showing that the publication was made with knowledge that it was false or with reckless disregard of whether it was false or not," though no showing is required where the statement is considered actionable *per se*. *Id.* (citations omitted). A "communication is actionable *per se*—that is, without a showing of special damage—if it imputes to another . . . a criminal offense amounting to a felony . . . or conduct, characteristics or a condition incompatible with the proper exercise of his lawful business, trade, profession or office[.]" *Id.* (citation omitted).

Apart from conclusory language, Plaintiff does not set forth specific allegations that the falsity of Defendant Shaw's statement caused him injury. Indeed, the statement contested here is not that Plaintiff had cans in his yard—only that they were beer cans. Similarly, Plaintiff does not dispute that the cans, or any other trash, would have been observable to any member of the public. Furthermore,

again excluding conclusory language, there are no allegations supporting the claim that Defendant Shaw knew the cans were not beer cans when she made the statement. Lastly, though the Court need not resolve the point, an absolute privilege attaches to statements made by public officials so long as publication is made "in connection with the performance of the duties and responsibilities" of their office. *Stewart v. Sun Sentinel Co.*, 695 So. 2d 360, 362 (Fla. 4th DCA 1997).

The last of Plaintiff's remaining claims is under the Americans with Disabilities Act for the Magistrate's alleged refusal to provide Plaintiff with a hearing aid during the enforcement hearing. Under Title II of the ADA, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Plaintiff must establish: (1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) that the exclusion, denial of benefit, or discrimination was by reason of Plaintiff's disability. *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1083 (11th Cir. 2007).

This claim has numerous defects. First of all, the allegations do not make clear that Plaintiff is a qualified individual. Nor is there any indication that Plaintiff

requested an accommodation in advance of the hearing. Additionally, the transcript reveals Plaintiff was not excluded from participation in the hearing; rather, he elected to proceed "so we don't have to come back here again." He was, moreover, able to communicate with the Magistrate and present evidence on his behalf. Even more fundamentally, Title II does not require public entities to provide disabled individuals with individually prescribed devices, such as hearing aids. 28 C.F.R. § 35.135; *see also Butts v. Georgia State Patrol Div.*, No. 4:11-CV-60 CDL, 2011 WL 5597258, at *6 (M.D. Ga. Nov. 17, 2011) (denying Title II claim for failure to provide a hearing aid).

V. Qualified Immunity

In response to Plaintiff's various § 1983 claims, the individual Defendants also invoke qualified immunity, which protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citation omitted). Qualified immunity allows government officials to "carry out their discretionary duties without the fear of personal liability or harassing litigation." *Oliver v. Fiorino*, 586 F.3d 898, 904 (11th Cir. 2009) (citation omitted). The Eleventh Circuit teaches that qualified immunity should be addressed "as early in the lawsuit

as possible" because it is a defense not only from liability, but from suit. *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002) (citation omitted).

A government official "asserting this defense bears the initial burden of showing that he was acting within his discretionary authority." *Moore v. Sheriff of Seminole Cty.*, No. 17-14779, 2018 WL 4182120, at *2 (11th Cir. Aug. 30, 2018) (citation and quotation marks omitted). Then, to overcome the qualified immunity, Plaintiff has the burden to show that (1) the official's conduct violated a constitutional right, and (2) the right was clearly established at the time of the official's alleged misconduct. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *see also Pearson*, 555 U.S. at 236 (courts free to address inquiry in most appropriate order).

A constitutional violation can be clearly established by showing (1) a "materially similar case"; (2) pointing to a "broader clearly established principle" that controls "the novel facts of the situation"; (3) or demonstrating that the conduct involved in the case "so obviously violates 'the constitution that prior case law is unnecessary." *Terrell v. Smith*, 668 F.3d 1244, 1255-56 (11th Cir. 2012) (citations and alterations omitted). As evidenced by the above analysis, Plaintiff has failed to demonstrate a violation of a clearly established right. Qualified immunity thus shields Defendants from suit in their individual capacity.

CONCLUSION

The Court **GRANTS** Defendants' Motion to Dismiss. Dkt. 27. This is Plaintiff's third complaint, and a fourth attempt would be futile. As such, the Court dismisses with prejudice Plaintiff's Second Amended Complaint. Dkt. 26. The Clerk is directed to terminate all pending motions and close the case.

DONE AND ORDERED at Tampa, Florida, on June 17, 2019.

/s/ William F. Jung
WILLIAM F. JUNG
UNITED STATES DISTRICT JUDGE

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Pro se parties

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