

Case No. SC19-1250

SUPREME COURT OF FLORIDA

Robert Emerson, Et Al.,

Appellants/Cross-Appellees,

v.

Hillsborough County, Florida, Etc., Et Al.,

Appellees/Cross-Appellants.

On Appeal from the Circuit Court, Thirteenth Judicial Circuit,
in and for Hillsborough County, Florida
(Lower Tribunal Case No. 2019-CA-001382)

**INITIAL BRIEF OF APPELLANT/CROSS-APPELLEE
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NOTE ON APPENDIX

An appendix is provided here in lieu of a record. *See Fla. R. App. P.*

9.110(i). The appendix contains twelve volumes. Each is cited as “A1. __,”
“A2. __,” etc.

PRELIMINARY STATEMENT

Multiple provisions in a transportation surtax amendment to Hillsborough County’s Charter “fly directly in the face of” Florida law. Summ. J. Order (A9. 683). The state legislature has vested discretion about how the proceeds from such surtaxes are to be spent in “the county commission.” *See* § 212.055(1)(d), Fla. Stat.¹ The amendment at issue, known as Article 11, sought to scramble the legislature’s allocation of political accountability through a ballot initiative backed by local interests: it created a formula devoting specific percentages of the collected funds to specific sorts of projects, and empowered a new independent committee to decide if particular projects would be funded. The court below correctly held that this “usurpation of powers” belonging to the county commission is unconstitutional. Summ. J. Order (A9. 684).

But the court went on to hold that “the amendment” nonetheless “survives” only because of a “severability analysis” unlike one this Court has ever permitted. *Id.* (A9. 687). Taking as its lodestar voters’ putative “desire to improve transportation needs,” *id.*, the court took a blue pencil to Article 11 – selectively striking 21 lines of language appearing across 15 of the Article’s 32 provisions. The rewritten amendment, embodied in a markup appended to the final judgment,

¹ All references to the Florida Statutes are to the 2019 version.

replaced the formulas with one undifferentiated trust fund, and eliminated the independent committee's core powers.

That outcome conflicts with decades of precedent. This Court's severability cases explain that an unconstitutional provision condemns the surrounding statute if its unconstitutional features are inextricably intertwined with the rest of its text and its purpose; only if a court can excise the offending language and leave behind an intelligible statute that yields results consonant with the act's purpose can the remainder be enforced. As Article 11's text, structure, history, and context all show, nothing was more integral to voters' approval of Article 11 than its scheme stripping the county commission of its authority to decide where money would be spent, what kinds of projects would be eligible to receive money, and how much money particular projects would receive. The circuit court's effort to write the voters' answers to those questions out of Article 11 imposes a tax scheme that bears no resemblance to what the voters actually approved; in fact, the rewritten surtax better resembles a prior proposal that voters rejected in 2010.

This Court has never blessed so brazen a judicial rewriting of an invalid law – let alone an invalid tax – under the banner of severability. It should not start now. To the contrary, the separation-of-powers premises that animate this Court's severability cases require that the judgment be reversed in relevant part, and Article 11 be held unconstitutional in its entirety.

FACTS AND STATEMENT OF THE CASE

This appeal arises from a proceeding initiated by the Board of County Commissioners of Hillsborough County to validate a series of bonds secured by a newly instituted sales surtax. As part of that proceeding, the County sought confirmation that the surtax itself was legal. The circuit court found that several aspects of the law authorizing the tax violated the Florida Constitution, but ruled that those portions could be severed and the tax could survive. The question presented is whether the circuit court erred in that severability analysis and should have invalidated the tax in full.

I. CONSTITUTIONAL AND STATUTORY BACKGROUND

The Florida Constitution guarantees that “[n]o tax shall be levied except in pursuance of law.” Art. VII, § 1(a), Fla. Const. In addition to flatly banning certain kinds of state-levied ad valorem taxes (i.e., real property taxes), it also provides that “[a]ll other forms of taxation shall be preempted to the state except as provided by general law.” *Id.* The state legislature has, in turn, surrendered its exclusive power of taxation to local entities only in certain defined circumstances. This case concerns one example: counties may impose a “charter county and

regional transportation system surtax” to fund transportation projects.

§ 212.055(1), Fla. Stat. (capitalization altered).²

But the Legislature conditioned that authority on accountability. Although the proceeds can be applied to several statutorily-enumerated ends – for example, the development of a countywide bus system or the construction of roads – it is for “the county commission” to decide which of those uses merits the public’s money in a particular county. *Id.* § 212.055(1)(d). The county commission, in turn, exercises that discretion in conjunction with its broader oversight of public business³ – setting the budget⁴; buying⁵ and selling⁶ property; and allocating resources among “fire protection,” “hospitals” and public health programs, “parks,

² Section 212.055 is the sole authority for county sales taxes under the general laws of Florida. *See* § 212.054(1), Fla. Stat. (“No general excise tax on sales shall be levied by the governing body of any county unless specifically authorized in s. 212.055.”). A transportation surtax must be approved by a majority of the electorate of the county (either through a majority vote or by a charter amendment). *See id.* § 212.055(1)(a).

³ Art. VIII, § 1(e), Fla. Const. (“Except when otherwise provided by county charter, the governing body of each county shall be a board of county commissioners composed of five or seven members serving staggered terms of four years. After each decennial census the board of county commissioners shall divide the county into districts of contiguous territory as nearly equal in population as practicable. One commissioner residing in each district shall be elected as provided by law.”).

⁴ § 129.01(1), Fla. Stat.; *id.* § 125.86(4).

⁵ *Id.* § 125.355(1)(a).

⁶ *Id.* § 125.35(1)(a).

preserves, playgrounds, recreation areas, libraries, museums, historical commissions,” and other public expenditures.⁷

II. FACTUAL BACKGROUND

A. In 2010, voters rejected a proposed transportation surtax

1. In 2010, the Hillsborough County Commission passed an ordinance proposing the adoption of a local transportation surtax under § 212.055(1) and submitted the proposal to voters. *See* Cty.’s Ex. 17 (“Ordinance No. 10-7”) (A12. 226-32). Four of its provisions are particularly important here.

Distribution. Funds were to “be deposited in a trust fund within the accounts of the County and distributed” among various local-government entities “in accordance with” a contemplated future interlocal agreement. *Id.* § 3 (A12. 229).

Use. Seventy-five percent of the proceeds were to be “spent on transit, including local rail and an expanded bus system for express, local and neighborhood service,” with the remaining twenty-five percent to be “spent on improving roads and other transportation projects, in order to improve transportation and transit infrastructure and service throughout Hillsborough County’s incorporated and unincorporated areas.” *Id.* § 4 (A12. 229).

⁷ *Id.* § 125.01(1)(d)-(f).

Oversight Committee. A “citizen oversight committee” of a particular composition was granted “the responsibility to review the expenditures of the proceeds of the Transportation Surtax.” *Id.* § 5 (A12. 229-30).

Severability. A severability clause “declared . . . the intent of the Board that if any section, subsection, sentence, clause or provision of this Ordinance be held invalid by a court of competent jurisdiction, it shall in no way affect the validity of the remaining portions of this Ordinance.” *Id.* § 7 (A12. 230).

2. Voters rejected that proposal.

In the wake of this setback, the Hillsborough Metropolitan Planning Organization (MPO) carried out a multiyear “Post Referendum Analysis” and summarized the findings in its *Imagine 2040* plan. Cty.’s Ex. 18, *Imagine 2040: Hillsborough Long Range Transportation Summary Report* (A12. 374). In the first phase of this study, the MPO found that voters harbored a “mistrust in government spending,” felt that “the projects to be funded [by the referendum] were not clearly defined,” and perceived the referendum “as a ‘rail’ referendum with nothing for roads.” *Id.* (A12. 376). In the third phase, voters were specifically asked about their high-priority projects, and clear preferences emerged. Voters particularly favored spending on “Road/Bridge Maintenance” (96%), “Intersection Improvements” (86%), and “Local Bus ‘Service Expansion” (84%); much less popular were “Water Ferry Service” (44%) and “Express Toll Lanes” (47%). *Id.*

B. In mid-2018, a local interest group launched a campaign supporting Article 11, which departed from the rejected 2010 proposal in several novel ways

In June 2018, local interests revived the matter. A political committee called All for Transportation petitioned for a local transportation surtax to be adopted via an amendment to the Hillsborough County Charter. *See* Stipulation of Undisputed Facts (“SUF”) (A10. 734). All for Transportation was backed in substantial part by local development interests, including the owner of a sports team; a prominent former car dealer-turned-philanthropist; and a Miami-based construction services firm aiming to expand its foothold in the Tampa market. *See* Dep. of Tyler Hudson, Chair of All for Transportation (A7. 545-51); *id.*, Ex. 16 (Supervisor of Elections Report) (A8. 67-69).

This proposed “Surtax for Transportation Improvements” came to be known as Article 11. As explained below, its aim was to cabin the spending power of Hillsborough County’s Board of County Commissioners.

1. Article 11 restricted the entities entitled to receive funds

Article 11 required the proceeds of the tax to be automatically allocated by the Clerk of the Circuit Court of Hillsborough County according to a distribution formula: 54% was to be distributed to the County and the municipalities within it; 45% to the Hillsborough Area Regional Transit Authority (HART), and 1% to the MPO. *See* SUF, Ex. C, Cty. Charter Amendment Pet. Form (“Petition Form”), art.

11, § 11.05 (A10. 799). The 54% portion was yet further divided among the County and the municipalities according to a population-based formula codified elsewhere in Florida law. *See id.* (cross-referencing § 218.62, Fla. Stat.).

2. Article 11 restricted the amount of money the receiving entities could use to fund particular categories of projects

Article 11 also restricted how the County, municipalities, and HART could use their funds, largely through percentages mandating that certain portions of revenue be spent on certain kinds of projects. *See id.* §§ 11.07, 11.08 (A10. 800-01). Additionally, even though § 212.055(1)(d) specifically allows surtax revenues to be “[u]sed by the county for the development, construction, operation, and maintenance of roads and bridges in the county,” § 212.055(1)(d)(3), Fla. Stat., Article 11 restricted a portion of its proceeds – the majority of funds allocated to the County and municipalities – from being used to (1) construct new roads or (2) add additional lanes to existing roads, unless those lanes were for the narrow purpose of “intersection capacity improvement.” Petition Form, art. 11, § 11.07(8) (A10. 800).

3. Article 11 created an Independent Oversight Committee to control which particular projects would receive funding

Article 11 created a new governance structure. In particular, it created an “Independent Oversight Committee” (or “IOC”) and gave it veto power over the use of surtax proceeds. *See id.* §§ 11.06, 11.10 (A10. 799-800, 801). The IOC was

authorized to suspend the distribution of funds to a particular recipient agency – such as HART or the County itself – if it determined that the recipient has failed to comply with any term or condition of Article 11. *See id.* § 11.09 (A10. 801). The county commission did not have authority to overturn a decision of the IOC or otherwise pursue a surtax-funded project without IOC approval. *See id.* § 11.06 (A10. 799-800).

4. Article 11’s severability clause narrowed the 2010 proposal’s severability clause and implicitly excluded the foregoing provisions

Article 11 includes a severability provision providing in its entirety:

To the extent that any mandated expenditure category set forth in Section 11.07 or 11.08 is deemed by a court of competent jurisdiction to be an impermissible use of Surtax Proceeds, the funds allocated to such impermissible use shall be expended by the applicable Agency on any project to improve public transportation permitted by F.S. § 212.055(1) and this Article.


Id. § 11.11(2) (A10. 802). That section does *not* provide for severability in the case §§ 11.05, 11.06, or 11.10 are declared invalid.

5. Article 11’s backers extensively promoted the amendment’s restructuring of county spending authority

Article 11’s promoters relied on the foregoing features of the statutes. For example, below is a mailer promoting the initiative by All for Transportation:




- Independent Oversight
- Annual Audits
- Open and Fair Decision-Making
- Every Part of the County Benefits



The All for Transportation plan generates \$280 million annually for road and transit projects, overseen by an independent 13-member board, to ensure dollars are spent properly. The plan also requires annual audits of those funds.

As a result, Hillsborough County can avoid unnecessary political pet projects, while funding important infrastructure that reduces traffic, provides safer roads, and expands bus service and transit options.



vote **YES**for **TRANSPORTATION**

TEXT TRAFFIC TO 474747
(12g text restriction in use only)

Hillsborough County Referendum 2 | Vote Early or Tuesday, November 6

www.AllForTransportation.com | [@AllForTrans](https://twitter.com/AllForTrans)

EXHIBIT 13

Depoent: HUDSON

Depo Date: 4/1/19

Reporter: Niki Nigam

▲ Antism Reporting, LLC

Dep. of Tyler Hudson, Ex. 13 (A8. 64). Other mailers likewise explicitly relied on the Article’s implicit and explicit constraints on the commission’s spending authority. *E.g., id.*, Ex. 12 (A8. 63) (“A \$280 Million Plan to Help Reduce Congestion Along Dale Mabry, Hillsborough Avenue, Gunn Highway – and more!”); *id.*, Ex. 15 (A8. 66) (promoting many specific projects, including

“[c]omputerized traffic lights to improve rush hour congestion,” “[f]ixing potholes and resurfacing streets,” and “[i]nstall[ing] 600 miles of streetlights,” subject to “INDEPENDENT OVERSIGHT” concerning spending).

C. In the November 2018 election, Article 11 was adopted by referendum

The proposed amendment was submitted to voters via a referendum held as part of the general election on November 6, 2018. *See* SUF (A10. 736). The ballot title and summary presented to voters read:

Funding for Countywide Transportation and Road Improvements by County Charter Amendment

Should transportation improvements be funded throughout Hillsborough County, including Tampa, Plant City, Temple Terrace, Brandon, Town ‘n’ Country, and Sun City, including projects that:

Improve roads and bridges,
Expand public transit options,
Fix potholes,
Enhance bus services,
Relieve rush hour bottlenecks,
Improve intersections, and
Make walking and biking safer,

By amending the County Charter to enact a one-cent sales surtax levied for 30 years and deposited in an audited trust fund with independent oversight?

A new 1% sales surtax is in addition to the current 7% sales tax and is estimated to raise \$276 million annually and \$552 million the first two calendar years. Revenues will be shared by Hillsborough Area Regional Transit Authority (HART); Metropolitan Planning Organization; and, using a population-

based formula, by Hillsborough County Board of County Commissioners, City of Tampa, Plant City, and City of Temple Terrace. Expenditures will be governed by the Charter Amendment.

SUF, Ex. H, Hillsborough Cty. Referendum (A11. 83).

Voters approved the amendment. *See* SUF (A10. 736). It was adopted under the authority of § 212.055(1), as discussed above. *See* Petition Form, art. 11, § 11.02 (A10. 799).

III. PROCEDURAL BACKGROUND

A. Multiple cases concerning the constitutionality of Article 11 were consolidated

1. Shortly after the election, Hillsborough County Commissioner Stacy White filed a lawsuit in his official capacity, seeking a declaratory judgment that Article 11 was invalid. (Case No.: 18-CA-11749). *See* SUF (A10. 738-39). He later filed a similar amended complaint in his individual capacity, specifically alleging that (1) Article 11 interfered with the Board of Commissioners' statutorily guaranteed discretion to apply the proceeds as it "[d]eems [a]ppropriate," (2) Article 11 violated the Hillsborough County Charter's single-subject rule for popular amendments, and (3) the ballot summary for Article 11 was defective. *See* Am. Compl. for Declaratory J. (A1. 480).

Thereafter, the Hillsborough County Commission adopted a resolution authorizing the issuance of certain revenue bonds, secured by a pledge of the

transportation surtax revenues received by the County under Article 11. *See* SUF (A10. 737). The next day, February 7, 2019, the County filed a Complaint for Validation (Case No.: 19-CA-1382). *See* Compl. (A10. 13). The complaint was filed pursuant to § 75 of the Florida Statutes, which allows a county to conclusively establish the legality of a tax pledged to support proposed bonds. *See* § 75.08, Fla. Stat.

The bond validation proceeding was consolidated with Commissioner White's lawsuit for the purposes of discovery and hearing, with the circuit court clarifying that, to the extent possible, common issues would be resolved in the bond validation case. *See* Order on Hillsborough Cty.'s Mot to Consolidate (A10. 90-91). Commissioner White separately intervened in the bond validation proceeding, raising the same objections as he made in his earlier complaint. *See* Answer, Defenses, & Objs. (A10. 92).

2. Robert Emerson, a citizen and taxpayer of Hillsborough County and the appellant here, also intervened in the bond validation proceeding and objected to the County's request for validation.⁸ *See* Objs. to Compl. for Validation (A11. 214). Mr. Emerson also objected to Article 11's restrictions on the discretion of

⁸ Mr. Emerson is challenging the surtax on the same constitutional grounds as a named plaintiff in a separate class proceeding. *See Emerson v. Hillsborough Cty.*, Case No. 19-CA-2483.

the Hillsborough County Commission. Unlike Commissioner White, Mr. Emerson did not raise the ballot summary or the single-subject issues.

B. The circuit court concluded that although several features of Article 11 are unconstitutional, those features can be severed and the remainder enforced

1. After a two-day hearing, the court resolved the issues through a combined order on summary judgment. *See* Summ. J. Order (A9. 673). The court agreed with Commissioner White and Mr. Emerson that significant portions of Article 11 violated § 212.055 and were therefore unconstitutional.⁹ The court found that the language of § 212.055(1)(d) reflected the “legislature’s intention that the county commission be exclusively responsible for determining which uses the surtax proceeds should be allocated to as well as the amount to be distributed to each use.” *Id.* (A9. 683). As a result, then, “[b]ecause Article 11 Sections 5 - 9 were established by the voters rather than by the county commission, this Court finds they fly directly in the face of general law as enunciated in section 212.055(1)(d)(1)-(4).” *Id.*

The court proceeded to identify the specific unconstitutional text by providing a marked-up version of Article 11 as an attachment to the order. *See id.* (A9. 689-93). As the exhibit shows, the court removed:

⁹ The court rejected Commissioner White’s ballot summary and single-subject objections. *See* Summ. J. Order (A9. 678-81).

- References to the specific percentages (54%, 45%, and 1%) in the overall mandatory distribution formula. However, the court let stand language stating that “the Surtax Proceeds shall . . . be distributed” to “the County and to each Municipality,” “HART,” and “metropolitan planning organization.” *See id.*, art. 11, § 11.05(1)-(3) (A9. 690).
- Language requiring that funded projects receive approval by the IOC. *See id.* § 11.06 (A9. 690-91).
- References to the specific use percentages indicating how the County, municipalities, and HART must spend their funding. Again, however, the court retained language stating that such revenue “shall . . . include expenditures in the following categories” and retained language describing the categories themselves. *See id.* §§ 11.07, 11.08 (A9. 691-92).
- Language restricting the amount of funds that could be spent by the County and municipalities on additional lanes for automobile traffic and new roads and streets. *See id.* § 11.07(8) (A9. 691).
- Language authorizing the IOC to suspend distributions to the County, municipalities, and HART in the event they fail to comply with Article 11. *See id.* § 11.09 (A9. 692).

- Additional language giving the IOC power to approve project plans. *See id.* § 11.10 (A9. 692).
- Language forbidding that revenues be used for (1) expansion of the interstate highway systems or (2) construction of a sports facility or any other facility not related to transportation. *See id.* § 11.11 (A9. 693).

The court proceeded to “determine whether the unconstitutional portions of Article 11 Sections 5 - 10 require the entire amendment be struck down or whether the unconstitutional portions of the aforementioned sections may be severed from the amendment.” Summ. J. Order (A9. 686). The court recited this Court’s test for severability from *Cramp v. Board of Public Instruction of Orange County*, 137 So. 2d 828, 830 (Fla. 1962) and *Ray v. Mortham*, 742 So. 2d 1276, 1280-81 (Fla. 1999), then stated without explanation that the offending provisions could be severed under that test. *See* Summ. J. Order (A9. 686-87). It further stated that “[v]oters were provided with a clear notice of severability,” relying on both the text of Article 11 itself and associated political advertising and news coverage. *Id.* (A9. 687). The Court did not address the language of the amendment’s severability provision.

2. Commissioner White moved in both cases for (1) entry of final judgment and (2) for reconsideration. *See* Mot. for Recons. & for Entry of Final J. (A9.

694). With respect to the latter, he argued that the court had overlooked language that was unconstitutional under the court's own reasoning: text in § 11.05 that further subdivided the funding allocated to the County and the municipalities according to a population-based formula. *See id.* (A9. 697).

The court entered amended final judgments in both cases. *See* Final Summ. J. Granting Dec. Relief in Case No. 18-CA-11749 (A9. 747); Am. Final J. in Case No. 2019-CA-001382 (A12. 807). Those judgments included a newly marked-up copy of Article 11 – this time striking the formula language, as well. Although the judgment in the bond validation proceeding referenced the court's earlier order severing some of the unconstitutional language, it validated the bond issuance and the tax. *See* Am. Final J. in Case No. 2019-CA-001382 (A12. 816).

Mr. Emerson timely appealed the amended final judgment in the bond validation, placing jurisdiction in this Court. *See* § 75.08, Fla. Stat.; Fla. R. App. P. 9.030(a)(1)(B)(i).

SUMMARY OF ARGUMENT

The circuit court's effort to salvage Article 11 conflicts with this Court's severability precedents. Severability law's core question is: would a version of the text without the unlawful language accomplish the law's purpose such that the altered text, too, would have been enacted? That question's answer here is clear, because Article 11's effort to remove the county commission's power of the purse

was no bug in the design – it was the point of the design. Indeed, nearly half of the Article’s subsections include language that, in one way or the next, purports to divest the county commission of authority to decide how surtax proceeds will be spent. It is those features of Article 11 that distinguished it from its unsuccessful predecessor, and it is those features that Article 11’s defenders highlighted in the public arena. Without them, Article 11 is not Article 11.

Indeed, one need look no further than § 11.11(2). The plain text of that section makes clear that the voters approved severance *only* in the scenario where § 11.07 or § 11.08 were invalidated. They did *not* authorize severance if § 11.05 was invalidated. And for good reason: that section establishes the fundamental distribution formula at the heart of the referendum. So, too, with §§ 11.06, 11.09, and 11.10, which set forth the responsibilities of the IOC. Severance of these sections simply cannot be squared with the law’s plain language.

The circuit court’s revisions jettison multiple features that were integral to the amendment as it was written, debated, and approved. By doing so, those revisions put the public on the hook for a judicially-crafted tax that looks nothing like the one voters had approved, and instead looks far more like one voters had rejected. Nothing in this Court’s cases supports that result. The judgment should therefore be reversed, and Article 11 held unconstitutional in its entirety.

STANDARD OF REVIEW

This Court reviews questions of the interpretation and constitutionality of a statute and questions of severability de novo. *See Searcy, Denney, Scarola, Barnhart & Shipley, Etc. v. State*, 209 So. 3d 1181, 1188-89, 1196-97 (Fla. 2017).

ARGUMENT

I. THE UNCONSTITUTIONAL FEATURES OF ARTICLE 11 CANNOT BE SEVERED FROM THE CONSTITUTIONAL PROVISIONS

A. The Unconstitutional Features of Article 11 Were Integral to the Article's Text, Structure, and Public Promotion

1. The great majority of the amendment's text and structure is devoted to detailing the various illegal restrictions. *See* Am. Final J. in Case No. 2019-CA-001382, Ex. A ("Final As-Severed Version"), art. 11, §§ 11.05 ("Distribution of Surtax Proceeds"); 11.06 ("Agency Project Plans"); 11.07 ("Uses of General Purpose Portion"); 11.08 ("Uses of Transit Restricted Portion"); 11.09 ("Suspension of Distribution"); 11.10 ("Independent Oversight Committee") (A12.820-23). Indeed, that the circuit court could address these features only with a markup striking 21 lines of text (and only after initially missing some of the offending language) highlights the point: viewed as a whole, Article 11 represents a highly detailed scheme establishing (1) which entities would receive the resulting revenues, (2) how much each entity would receive, (3) how each entity could spend that money, (4) how individual project plans would be approved, (5) what

consequences (including suspension of funds) there would be if any entity deviated from Article 11's mandates.

Further, Article 11's own description of the "Purpose of [the] Surtax" confirms that voters understood these features were part and parcel of the Article. *Id.* § 11.01 (A12. 819). In part, that section states that "[t]he proceeds of the surtax shall be distributed and disbursed in compliance with F.S. § 212.055(1) and in accordance with the provisions of Article 11." *Id.* (emphases added). That Article 11 so described its purpose makes clear that voters intended it to function only as an integrated whole.

The ballot summary that introduced this language confirms the same insight. That summary advised voters that the amendment would impose "a one-cent sales surtax levied for 30 years and deposited in an audited trust fund *with independent oversight[.]*" SUF, Ex. H, Hillsborough County Referendum (A11. 83) (emphasis added). The summary also informed voters that that "[r]evenues will be shared by Hillsborough Area Regional Transit Authority (HART); Metropolitan Planning Organization; and, using a population-based formula, by Hillsborough County Board of County Commissioners, City of Tampa, Plant City, and City of Temple Terrace." *Id.* And the summary promised voters that "[e]xpenditures will be governed by the Charter Amendment." *Id.* Accordingly, even those voters who

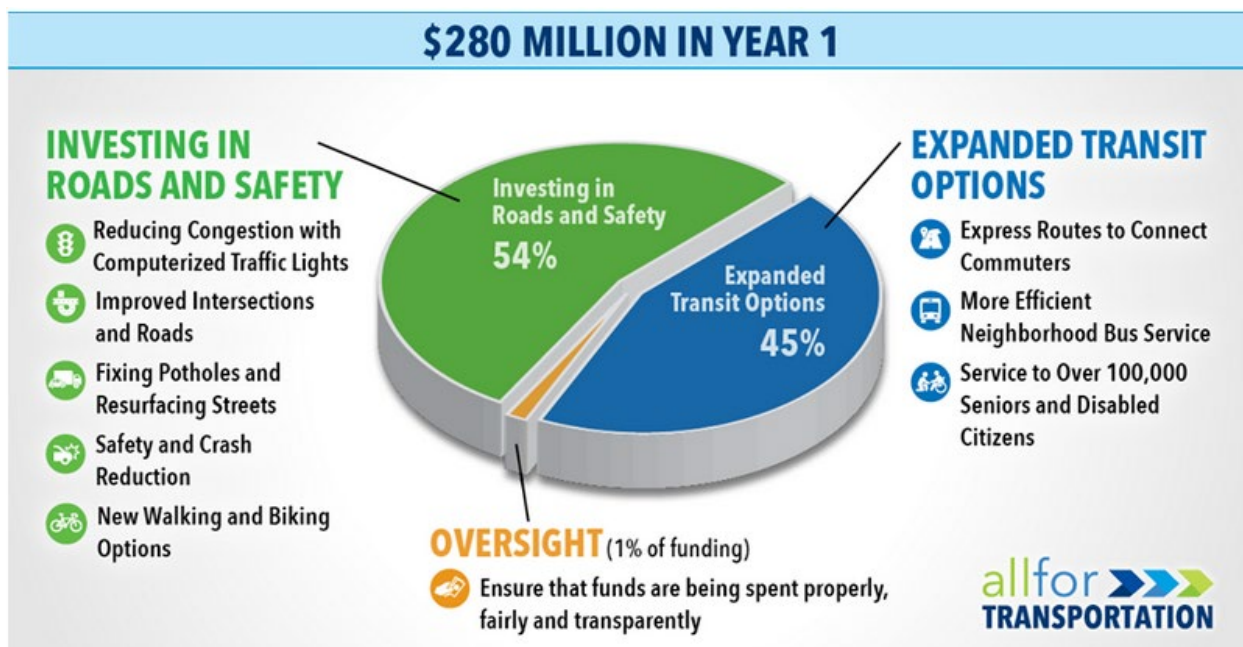
read only the summary understood that the spending restrictions in Article 11 were fundamental to its purpose.

2. History shows that these features also secured Article 11's political success, because they departed from the rejected 2010 proposal in four critical respects. *First*, where the 2010 proposal had left the distribution of the proceeds among the various local government entities to be resolved by interlocal agreement, Article 11 set specific percentages for how funds were to be distributed among various local government entities. *Compare* Ordinance No. 10-7 § 3 (A12. 229) *with* Petition Form, art. 11, § 11.05 (A10. 799). *Second*, Article 11 imposed a far more detailed scheme requiring the use of the funds on particular kinds of projects. *Compare* Ordinance No. 10-7 § 4 (A12. 229) *with* Petition Form, art. 11, §§ 11.07, 11.08 (A10. 800-01). *Third*, although the 2010 proposal included an independent committee, that committee would have been empowered only to review the results of an audit. *See* Ordinance No. 10-7 § 5 (A12 229-30). Article 11, in contrast, created a new, parallel spending authority – giving the IOC veto power over the use of surtax proceeds on particular projects, and the power to entirely suspend the distribution of funds to a particular agency in certain circumstances. *See* Petition Form, art. 11, §§11.06, 11.09, 11.10. (A10. 799-800, 801). *Fourth*, Article 11 narrowed the 2010 proposal's severability clause: Article 11 provided for severability only with respect to two provisions defining the

projects on which surtax proceeds may be spent, *see id.* § 11.11(2) (A10. 802), rather than “any section, subsection, sentence, clause or provision of this Ordinance,” Ordinance No. 10-7 § 7 (A12. 230). The first three of those changes exacerbated the amendment’s departure from the Constitution relative to its unsuccessful predecessor – depriving the county commission of yet more of its statutorily delegated spending power – and the fourth makes clear that those features could not be removed from the article.

Other evidence confirms this conclusion. The MPO’s study of the 2010 proposal’s failure found that voters who rejected the 2010 referendum had done so in part because certain types of projects were much more popular than others, and in part due to a “mistrust in government spending.” Article 11 addressed those concerns by cabining the types of projects on which money could be spent; transferring authority to choose particular projects from the Board to the IOC; and giving the IOC real enforcement authority. It is therefore no surprise that Article 11’s backers emphasized those features in public-relations efforts. *See supra* pp. 9-11.

They still do. This image remains on All for Transportation’s website now:



All for Transportation, *Learn More*, <https://www.allfortransportation.com/learn-more/> (last visited Aug. 14, 2019). And All for Transportation’s public response to Commissioner White’s lawsuit could not more clearly make the point: it claimed that the electorate “voted in favor of safer roads, expanded transit options AND independent oversight.” See All for Transportation (@AllforTransport), Twitter (Dec. 4, 2018 7:30 AM), <https://twitter.com/AllforTransport/status/1069977156707647488>. Just so.

B. The Unconstitutional Features of Article 11 Cannot Be Severed

Severance of these unconstitutional provisions is improper. This Court has identified four factors that a law must satisfy in order to survive despite an unconstitutional provision:

- (1) the unconstitutional provisions can be separated from the remaining valid provisions,
- (2) the legislative purpose expressed in

the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

Cramp, 137 So. 2d at 830.¹⁰

The application of that test in *Lawnwood Medical Center, Inc. v. Seeger*, 990 So. 2d 503 (Fla. 2008) is instructive. There, the Court concluded that certain provisions of a hospital statute granted impermissible “privilege[s] to a private corporation” in violation of the Florida Constitution. *Id.* at 506 (quoting Art. III, § 11(a)(12), Fla. Const.). Applying *Cramp*, the Court went on to hold that those features could not be severed, because “the statutory scheme set forth in the” statute was “replete with special benefits and advantages granted to” that corporation. *Id.* at 518. For that reason, the Court explained, the statute could not be said to “be an act complete in itself, once the invalid portions are severed, that would accomplish what the Legislature so clearly intended by the many different provisions granting the corporation privileges.” *Id.* “Accordingly,” the Court rejected “the contention that any of the unconstitutional provisions can be severed and the remainder preserved.” *Id.*

¹⁰ Although *Cramp* speaks only of laws enacted by a legislature, this Court has applied the *Cramp* severability test to a state constitutional amendment passed by a citizens’ initiative. *See Ray*, 742 So. 2d at 1281.

That reasoning compels the same outcome here. Article 11 is shot through with unconstitutional features precisely because there is no independent purpose to be preserved: removing those features transforms a reticulated scheme for the raising and spending of money under specific (unconstitutional) restrictions into an open-ended tax-and-spend scheme. Indeed, the circuit court’s revisions granted the Hillsborough County Commission power voters denied it – free rein to use surtax monies in any otherwise legal way.¹¹ For example, even though the law passed by voters strictly limited the amount of funding that could be used for new roads or lane capacity, the court’s revisions free the County from that restriction. *See* Final As-Severed Version, art. 11, § 11.07(8) (A12. 821). Likewise, even though voters expected that HART and the municipalities would be guaranteed significant amounts of funding, they may ultimately receive nothing under the as-

¹¹ In striking the mandated distribution percentages, the court below let stand language indicating that “[T]he Surtax proceeds . . . shall be distributed . . . to each Municipality,” “to HART,” and “to the metropolitan planning organization.” *See, e.g.,* Final As-Severed Version, art. 11, § 11.05 (“~~Fifty-four (54%)~~ of the Surtax Proceeds . . . shall be distributed to the County and to each Municipality”) (A12. 820). Under § 212.055(1) and the court’s own reasoning, this language should have also been found illegal, as it similarly restricts the county commission’s discretion to use the funding as it deems appropriate. But with the mandated percentages removed, the practical impact of the language is trivial; the county commission could presumably comply with the language by distributing one cent to each recipient.

severed amendment.¹² And if municipalities do receive funding, they can spend it in ways unanticipated by voters: HART, for instance, is no longer required to spend nearly half of its allocation on bus services, *see id.* § 11.08(1) (A12. 821-22). Finally, the formerly powerful Independent Oversight Committee lacks any material enforcement powers: it can no longer disapprove project plans or order the immediate suspension of funds, *see id.* §§ 11.06, 11.09 (A12. 820-21, 822).

The principles that underlie the severability doctrine bar so extensive a judicial revision. Severability doctrine “is designed to show great deference to the legislative prerogative to enact laws.” *Schmitt v. State*, 590 So. 2d 404, 415 (Fla. 1991) (per curiam). But when, as in this case, severance would generate “results” that were “unanticipated” (even rejected) by the voters, that same commitment to judicial restraint dictates that severance is inappropriate; “the entire law must be declared unconstitutional.” *See Eastern Air Lines, Inc. v. Department of Revenue*, 455 So. 2d 311, 317 (Fla. 1984); *cf. State v. Catalano*, 104 So. 3d 1069, 1081 (Fla. 2012) (“[I]n striving to show great deference to the Legislature, this Court will not legislate and sever provisions that would effectively expand the scope of the statute’s intended breadth.”).

¹² Except potentially for a *de minimis* amount, *see supra* note 11.

Indeed, that concern is most acutely implicated here because the taxing power is at issue. “[T]he power to tax [being] the power to destroy,” it may be exercised only by legislative bodies; the judiciary, in turn, generally must “strictly construe[.]” tax laws in favor of the taxpayer. *City of Miami v. Kayfetz*, 30 So. 2d 521, 524 (Fla. 1947) (en banc). The circuit court’s decision instead to recraft Article 11 and subject voters to a tax that undoes the political compromise at its core enjoys no support in this Court’s precedent.

2. The circuit court rested its contrary conclusion on two flawed inferences. *First*, it pointed to the initiative petition’s severability clause, and found that to be evidence “that the framers intended severability to save the amendment in case portions of it were declared invalid.” Summ. J. Order (A9. 687). But the text of Article 11’s specific severability clause points in the opposite direction. Again, the clause reads:

To the extent that any mandated expenditure category set forth in Section 11.07 or 11.08 is deemed by a court of competent jurisdiction to be an impermissible use of Surtax Proceeds, the funds allocated to such impermissible use shall be expended by the applicable Agency on any project to improve public transportation permitted by F.S § 212.055(1) and this Article.

Petition Form, art. 11, § 11.11(2) (A10. 802). By negative implication, voters did not intend or expect that the statute should survive severance of provisions other than § 11.07 or § 11.08 – certainly not § 11.05, which establishes the fundamental 54%-45%-1% distribution formula, or §§ 11.06, 11.09, and 11.10, which relate to

the responsibilities of the IOC. Severing these provisions contravenes the plain terms of the severability clause, which is limited to the expenditure categories in § 11.07 or § 11.08. *See Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 198 (Fla. 2007) (“[L]egislative intent is determined primarily from the statute’s text.”); *Moonlit Waters Apartments, Inc. v. Cauley*, 666 So. 2d 898, 900 (Fla. 1996) (“Under the principle of statutory construction, *expressio unius est exclusio alterius*, the mention of one thing implies the exclusion of another.”).

That conclusion is reinforced by the distinction between the failed 2010 proposal’s severability clause and Article 11. Again, the 2010 proposal’s severability clause extended to each and every “section, subsection, sentence, clause or provision.” Ordinance No. 10-7 § 7 (A12. 230). That voters rejected that provision and, in Article 11, endorsed only a narrower severability clause makes clear that voters believed the remainder of the Article must stand or fall together.

In all events, this Court has explained that if a law cannot survive under the traditional test, the presence of a severability clause will not preserve it. *See Schmitt*, 590 So. 2d at 415 n.12 (“[T]he inclusion of a severability clause will not save a statute if the unconstitutional portions clearly cannot be severed.”). That principle makes Article 11’s severability clause at best beside the point: for the

reasons already explained, the unconstitutional provisions quite clearly cannot be severed from the balance of Article 11.¹³

Second, the circuit court attempted to reduce Article 11’s purpose to only a “desire to improve transportation needs.” Summ. J. Order (A9. 687). As should by now be clear, that account of the amendment’s purpose is profoundly incomplete. “Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage, and no statute yet known pursues its stated purpose” – indeed, any single purpose – “at all costs.” *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (brackets and internal quotation marks omitted). That the voters were willing to pay for transportation improvements is true, but far too general an articulation of the Article’s purpose: the text, structure, history, and context of Article 11 make clear that voters’ willingness to subject Hillsborough County taxpayers to this surtax depended on

¹³ The circuit court’s passing reliance (A9. 687) on Article 11’s supremacy clause does not change the outcome: that clause’s restatement of the principle that state law displaces contrary local law gives no insight into how voters would have viewed the circuit court’s revised version of Article 11. And the fact that the Hillsborough County Charter contains a general severability clause, *see* SUF, Ex. A, Hillsborough Cty. Charter § 9.05 (A10. 760), is irrelevant, because the specific language in Article 11, rather than the general language in the Charter’s clause, controls. *See Gretz v. Florida Unemployment Appeals Comm’n*, 572 So. 2d 1384, 1386 (Fla. 1991). Moreover and again, under *Schmitt*, the Charter’s general severability clause cannot save Article 11, because it clearly fails *Cramp*’s severability test.

Article 11's unconstitutional alteration of the statutorily-prescribed structure of political accountability for the resulting spending.

As this case illustrates well, however, that structure exists for good reason. State law trusts county commissioners to oversee the work of their counties comprehensively, allocating the public's money among a great number of worthy causes that compete for it. *See supra* pp. 4-5. It is a primary purpose of that structure to dilute the influence of local factions by subjecting their demands to deliberation by officials charged with protecting the public's broader interests. *Cf.* The Federalist No. 10 (Alexander Hamilton) ("The effect of" representative, rather than direct, democracy is "to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."). Although curbing excessive spending is a laudable goal, it may not be accomplished by sacrificing that structure: as the circuit court explained, "[i]f the voters are not satisfied with the commissioners' actions in this regard," their "remedy" is "through the ballot box at the next popular election." Summ. J. Order (A9. 683). Because Article 11 would not have become law without the features that conflict with that principle, it must fall.

CONCLUSION

The judgment should be reversed in relevant part and Article 11 should be held unconstitutional in full.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been filed and served to all counsel of record via the State of Florida's electronic filing portal this 21st day of August 2019.

/s/ Derek T. Ho

CERTIFICATE OF COMPLIANCE

I certify that the font used in this brief is Times New Roman 14 point and in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Derek T. Ho