IN THE SUPREME COURT OF FLORIDA

Case Nos. SC19-1250, SC19-1343

ROBERT EMERSON, ET AL.,
Appellants,

v.

HILLSBOROUGH COUNTY, ET AL.,
Appellees.

STACY WHITE,
Appellant,
v.

HILLSBOROUGH COUNTY, ET AL.,
Appellees.

BRIEF OF *AMICUS CURIAE* ASSOCIATED INDUSTRIES OF FLORIDA IN SUPPORT OF APPELLANT WHITE

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Known as "The Voice of Florida Business" in the Sunshine State, Associated Industries of Florida (AIF) has represented the principles of prosperity and free enterprise before the three branches of state government since 1920. A voluntary association of diversified businesses, AIF was created to foster an economic climate in Florida conducive to the growth, development, and welfare of industry and business and the people of the state. Every project undertaken by AIF is guided by one simple idea: The good fortune of our state hinges on the prosperity of our state's employers. AIF works to lessen the burdens government would place on employers, while seeking solutions to conditions that threaten their success. AIF's members are often impacted by changes to counties' charters through citizens' initiatives and can offer a unique perspective on the legal test this Court should use when addressing the issue of severability.

SUMMARY OF ARGUMENT

The Trial Court held the voter approved citizens' initiative provisions mandating the allocation of the $15 billion transportation sales tax levy, and Independent Oversight Committee (IOC) authority to approve projects unconstitutional, but then allowed the tax levy to survive. The entire initiative should have been struck. The Trial Court also erred in not striking all the initiative language

its ruling covered, before determining severability.

The severability analysis that should apply when a portion of a municipal citizens' initiative is unconstitutional, should take into account the requirement of the ballot title and summary to explain the main purpose of the initiative and not be misleading. If the voter approved ballot title and summary would have to be materially modified to not be misleading, in light of the struck language, the entire initiative should be struck.

Even under the traditional legislative severability standards, the entire initiative should have been struck. It is unreasonable to have a $15 billion levy with mandatory restrictions, to strike all the major restrictions as unconstitutional, and then assume the voters would still have voted the same way. This is no more reasonable than a legislature voting for a claims bill explicitly limiting the attorney fees and assuming that if the limitations were struck as unconstitutional, the legislature would still have passed the bill giving the injured child $3.65 million less.

ARGUMENT[1]

I. The Trial Court erred by not striking the entire citizens' initiative, but severing the tax levy, after holding that the initiatives' allocation of funds, and

[1] The main record this case is in a multi-volume appendix. It will be cited as (A*:**) for the main appendix. The appendix provided with Mr. White's brief will be citied (W.A.*).

creation of a separate entity to approve projects unconstitutionally conflicted with state law.

At issue in this case is the viability of a citizens' initiative levying a 30-year 1% Hillsborough County transportation sales surtax. Key to determining the viability of the tax levy is that the voter approved citizens' initiative included not only this tax, but also required mandatory allocations for tax levy funds, and specified who (IOC) would be approving projects, instead of the County Commission. (A. 9:260-64)

This tax was predicted to raise $15 billion.[2] Assuming $15 billion, the allocations (based on percentages and rounded) were $8.1 billion for *General Purposes*, $6.750 billion for *Transit Restricted Purposes*, and $150 million for the Metropolitan Planning Organization (MPO). Within *General Purposes*, $1.620 billion was to repair existing roads and reduce congestion; $2.106 billion was to reduce rush hour bottlenecks; $2.187 billion was to improve transportation safety on existing roads; $972 million was for improving bicycle and pedestrian safety; Within *Transit Restricted*, $3.037 billion was for enhancing bus services and $2.362 billion was for expanding public transit options. (A. 9:261-62).[3]

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[2] See *Hillsborough Commissioners Vote to Restore Percentages for Transportation Tax*, https://www.baynews9.com/fl/tampa/news/2019/07/17/hillsborough-transportation-sales-tax-up-for-discussion-once-again (last visited (9/6/2019).

[3] The totals are not exact, there were some small catch-all allocations.

Ruling on a constitutional challenge[4] to the initiative's mandated tax levy allocations and the authority of the IOC to approve projects, , the Trial Court appropriately held as unconstitutional allocations of funds and delegation of authority to the IOC, instead of the County Commission, to approve allocations. (A9:683-85) In essence, the Trial Court ruling was that the initiatives' mandated allocation of funds and authorization of the IOC to approve funded projects were unconstitutional, conflicting with the controlling state statute (*Id*.)

In furtherance of that ruling, the Trial Court struck some of the initiative text. (A9:750-54) However, it appears the language struck was significantly underinclusive compared to the breadth of its ruling. (A9:683-85) Based on the Trial Court's holding, all that should have remained of the language is the levy of the tax, and some reporting requirements for the IOC. The below initiative section, (A9:750) with the Trial Court strikes marked, illustrates this point:

> **Section 11.05. Distribution of Surtax Proceeds**. The Surtax Proceeds shall be deposited in a dedicated trust fund (the "Trust Fund") maintained by the Clerk and distributed in accordance with the following formula:
> **(1) General Purpose Portion.** ~~Fifty four percent (54%) of~~ the Surtax Proceeds (the "General Purpose Portion") shall be distributed to the County and to each Municipality ~~in accordance with their relative populations as calculated utilizing the statutory formula provided in F.S. § 218.82 (the "Distribution Formula")~~ and be expended by the County and each Municipality in accordance with Section 11.07. The

[4] There was also a challenge to the ballot title and summary and a single subject challenge to the citizens' initiative. The Trial Court denied those challenges, and those rulings are not on appeal.

> County and each Municipality may elect to bond or otherwise encumber their respective distribution of the Surtax Proceeds allocated pursuant to this Section 11.05(1) and shall provide notice of such election to the other recipients of the General Purpose Portion at least ninety (90) days prior to issuing bonds.
> **(2) Transit Restricted Portion.** ~~Forty five percent (45%)~~ of the Surtax Proceeds (the "Transit Restricted Portion") shall be distributed to HART and be expended by HART in accordance ~~with Section 11.08.~~ Subject to compliance with applicable law and the charter of HART, HART may elect to directly, or through the County, bond or otherwise encumber the Transit Restricted Portion.
> **(3) Planning and Development Portion.** ~~One percent (1%) of~~ the Surtax Proceeds (the "Planning and Development Portion") shall be distributed to the metropolitan planning organization described in F. S. §339.175 whose jurisdiction includes Hillsborough County (the "MPO"). The Planning and Development Portion shall be expended by the MPO on planning and development purposes, including data collection, analysis, planning, and grant funding to assist the Agencies and the Independent Oversight Committee in carrying out the purpose set forth in Section 11.01.

This entire section should have been struck, with possibly the exception of "The Surtax Proceeds shall be deposited in a dedicated trust fund (the "Trust Fund") maintained by the Clerk." As one more example, the Trial Court did not strike any of the language in section 11.01, which provides:

> **Section 11.01. Purpose of Surtax.** The purpose of the surtax levied in accordance with Section 11.02 below is to fund transportation Improvements throughout Hillsborough County, including road and bridge improvements: the expansion of public transit options; fixing potholes; enhancing bus service; relieving rush hour bottlenecks; Improving intersections; and making walking and biking safer. The proceeds of the surtax shall be distributed and disbursed in compliance with F.S. § 212.055(1) and in accordance with the provisions of this Article 11. [***underlining added***].

To give effect to the Trial Court holding, all of the underlined language should have been struck, and much more of the initiative language than is examined here. The initiative legally could require no funding of any specific categories of transportation improvements, or what the level of funding would be: those decisions statutorily were given to the County Commission. Section 212.055(1)(d). Florida Statutes required the surtax proceeds to be dedicated to local uses selected by the "county commission" as it "deems appropriate."

AIF maintains that with the language properly stricken, there should have been no severability. The entire citizens' initiative should have been struck, whether utilizing a standard that took into account the unique circumstances of a municipal citizens' initiative proposing a transportation surtax or under the legislative test of severability that has been applied to municipal and state level citizens' initiatives.

A. Certain unique considerations present when evaluating the severability of a transportation tax levy established by a municipal citizens' initiative, support a severability analysis modified from the traditional legislative severability analysis.

The general test for statutory severability has been set out in *Cramp v. Board of Public Instruction of Orange County*, 137 So. 2d 828, 830 (Fla. 1962):

The rule is well established that the unconstitutionality of a portion of

> a statute will not necessarily condemn the entire act. When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided:
>
> (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.

Historically this doctrine applied only to statutes, an exercise of judicial deference to separation of powers and the coequal legislative branch. *See* e.g. *Schmitt v. State*, 590 So. 2d 404, 415 (Fla. 1991); *State v. Calhoun County*, 170 So. 883, 886 (Fla. 1936). This doctrine was applied to one citizens' initiative that amended the Florida Constitution.[5] *See Ray v. Mortham,* 742 So. 2d 1276, 1280 (Fla. 1999). And, it has since been applied to local citizens' initiatives. *See Demings v. Orange County Citizens Review Bd.,* 15 So. 3d 604, 611 (Fla. 5th DCA 2009).

AIF proposes that, when evaluating a citizens' initiative to amend a municipal charter, the severability analysis should reflect the differences between

[5] While *Ray* addressed the citizen initiative that established term limits for both state elected officials and members of congress that passed 1992, when the Court was addressing this 7 years later, it was really addressing a portion of the constitution, however it had been passed. One can wonder if this case was mores deference to a state constitutional provision, however adopted, than an application to citizens' initiatives.

the citizens' initiative, and a legislatively adopted statute. Even in the context of the legislative analysis, it can be difficult to determine if a portion of a statute should be severable. *See e.g. Searcy, Denney, Scarola, Barnhart & Shipley, etc. v. State*, 209 So. 3d 1181 (Fla. 2017). (Holding the portion of a claims bill limiting the amount of an award for attorneys' fees was unconstitutional and severable, thereby decreasing the amount that the injured child would receive by $3.65 million - with Canady, J., Polston, J., and Labarga, C. J., dissenting on severability.)

How much more may this be a concern for a citizens' initiative, where the language is not drafted by a legislative body, or a significant portion of voters, and where it is likely that most voters see just the ballot title and summary. In a citizens' initiative there may be more of a divide between the intent of the drafters and voters, and definitely a numerosity issue: Instead of trying to determine if two chambers with a legislative record and a finite number of members would have passed the legislation if the unconstitutional language were struck, one is now analyzing hundreds of thousands of individuals, most of whom have probably not read the language of the initiative. And, unlike a proposed constitutional amendment, there is no pre-vote review of the ballot title and summary. All of these factors would seem to make it more difficult to answer part (3) of the analysis, without much speculation, the "would voters have adopted it anyway" query.

Which leads to AIF's proposal that the ballot title and summary should play a greater role in evaluating the severability of a portion of a citizens' initiative. Pursuant to §101.161 Fla. Stat., the ballot summary is supposed to be an explanatory statement of the "chief purpose" of the measure, and caselaw has held that the ballot title and summary should not mislead the public. *See e.g., Florida Dept. of State v. Slough*, 992 So. 2d 142, 147 (Fla. 2008). In the instant case, the ballot title and summary stated:

> BALLOT TITLE: Funding for Countywide Transportation and Road Improvements by County Charter Amendment
> BALLOT SUMMARY:
> Should transportation improvements be funded throughout Hillsborough County, including Tampa, Plant City, Temple Terrace, Brandon, Town 'n' Country, and Sun City, <u>including projects that:</u>
> <u>Improve roads and bridges,</u>
> <u>Expand public transit options,</u>
> <u>Fix potholes,</u>
> <u>Enhance bus services, Relieve rush hour bottlenecks,</u>
> <u>Improve intersections, and</u>
> <u>Make walking and biking safer,</u>
> By amending the County Charter to enact a one-cent sales surtax levied for 30 years and deposited in an audited trust fund <u>with independent oversight</u>? [underlines added] (A9:750)

The Trial Court held that this language met the requirements for a ballot title and summary. AIF is skeptical it would have passed this Court's review,[6] but it can't

[6] Unlike the failed attempt in 2010 to pass a transportation surtax, "tax" is not to be found in the title, but is buried the last sentence of the summary; light rail is never referred to in the summary or initiative, one has to dig into "transit" and "guideways;" the mandatory allocations are not mentioned in the summary; nor was including no funds for new roads, etc.

really be disputed that the original ballot title and summary would now be misleading with the unconstitutional language struck from the initiative.

AIF suggests that with the mandatory allocations struck, and the IOC neutered, the underlined language would have to have been deleted or changed for the ballot title and summary not to be misleading. Without mandatory allocations, the initiative does not ensure that any one, or all of the purposes would ever be funded. It could even be argued that the inclusion of the specific cities is in error, since there is no requirement that funds be spent on projects in any specific city.

So, if the ballot title and summary, assuming it meets the legal requirement to express the primary purpose of the initiative, would require modification after the unconstitutional provisions were struck, to not be misleading, this should strongly weigh in favor of striking the entire initiative. This analysis would seem to be more supportive of the intent of the voters, than presuming severability. It gets close to pure speculation, if the primary purpose of the initiative has to be modified in the ballot summary and title, to not be misleading, about how a voter faced with the modified ballot title and summary would have voted. The presumption should be that there is a reason the legislature requires a ballot title and summary, to explain the primary purpose and not to be misleading for voters. If severing a portion of the initiative would require a material change to the ballot title and summary, the

presumption should be that the entire initiative should be struck, for it is not possible to reasonably know how the voters would have voted.

If the ballot title and summary "hid the ball' or were misleading in the first instance, the entire initiative would have been struck. *See e.g. Volusia Citizens' All. v. Volusia Home Builders Ass'n, Inc.*, 887 So. 2d 430, 431 (Fla. 5th DCA 2004). In *Wadhams v. Bd. of County Com'rs of Sarasota County*, 567 So. 2d 414, 417 (Fla. 1990) the Court struck a proposed municipal amendment

> No one can say with any certainty what the vote of the electorate would have been if the voting public had been given the whole truth, as mandated by the statute, and had been told "the chief purpose of the measure." As this Court has previously stated: "[T]he voter should not be misled and ... [should] have an opportunity to know and be on notice as to the proposition on which he is to cast his vote.... What the law requires is that the *ballot* be fair and advise the voter sufficiently to enable him *intelligently* to cast his ballot." *Hill v. Milander*, 72 So.2d 796, 798 (Fla.1954) (emphasis added).

Applying the above analysis to the instant case supports striking the entire initiative.

B. Even if this citizens' initiative is analyzed under the traditional legislative severability review, the entire initiative should still be struck.

AIF maintains that the modified evaluation of severability, focused on the ballot title and summary, is more appropriate for evaluating municipal citizens' initiatives. However, even if evaluated under the legislative severability test, this

initiative should be struck in its entirety.

It is unreasonable to assume that when there is a voter approved $15 billion levy with mandatory restrictions and independent oversight, if all but the levy was struck as unconstitutional, the same voters would have voted in support. And, it is difficult to make the case that a tax levy specifically allocated for certain purposes and specifically not allocated for other purposes, with an independent entity having veto authority, would accomplish substantially the same purpose if the allocated amounts or purposes are invalid and the IOC is gone.

There is a history in Hillsborough of prior attempts to pass a transportation surtax. In 2010 the County Commission put a proposal on the ballot that would have passed a one cent transportation surtax, with approximately 75% of the proceeds committed to light rail, but this proposal failed to pass. (A7:403) The County's evaluation suggested that voters were not happy with the percentage that would be dedicated to light rail and did not trust the County Commission to make the right choices. (A7:405) How surprising then that the current citizens' initiative attempted to address two of the things thought to be key in the rejection of the prior proposal. This time the allocation for light rail was less than 16%, although a bit of subterfuge was used such that light rail is never actually referred to anywhere within the ballot title summary or ballot initiative. And, the initiative attempted to give an entity other

than the County Commissioners veto power over projects, attempting to address the citizens distrust of the County Commission. (A9:750-54) If the proponents did not think those factors were important, why not just propose a 1% percent sales tax for transportation projects and leave it at that? It would be unreasonable to assume that these provisions found unconstitutional were not intended to appeal to voters, and in fact, did so appeal.

It is also not unreasonable to believe that some voters who might have voted for the initiative believing that $800 million would go to bicycle and pedestrian projects, would be less likely to support it if there was no guarantee those funds would go to bicycle and pedestrian projects, and so on, for every allocation category. Individuals may even have voted for this because of an understanding that none of these funds could be used to develop new roads, yet that restriction is now gone.

AIF would suggest that the *Searcy* case on the severability of a claims bill was wrongly decided; the dissents had the better arguments on severability; and the logic of the dissents would support not finding severability in this case as well. As Canady, J., wrote in dissent in *Searcy. v. State*, 209 So. 3d at 1198 (Fla. 2017).

> I strongly disagree with the conclusion of the majority concerning severability. In deciding that legislative intent can be respected and given effect by requiring the expenditure of appropriated funds for a purpose that is expressly prohibited by the Legislature, the majority has turned our severability jurisprudence topsy-turvy. . . . .

> Here, there is no basis for concluding that the Legislature would have anticipated that appropriated funds would be used for a purpose that was expressly prohibited. And there is no basis for the view that the specific allocations of funds for distinct purposes mandated by the Legislature are "not inseparable." The result of severance here is that the Legislature's purpose is thwarted in two ways: less funds than appropriated are provided to the special needs trust and more funds than appropriated are provided for attorneys' fees. Severance thus wreaks havoc on the legislative scheme.

Although the instant case has voters and not legislators, just as it was hard to believe that the Legislature's purpose would not have been thwarted with a claims bill in which the child got $3.65 million less than was appropriated and the attorneys received that much more, it is hard to comprehend that voters who voted for a comprehensive allocation of $15 billion, with the IOC to make sure it was allocated as set out and not just a paper tiger, would not be dissatisfied with the tax levy, yet no mandatory allocations and no independent oversight.

It would seem to be a general principle that, when an appropriation is made, with specific conditions, or as in the instant case, a levy passed with mandated allocations, that the action least likely to preserve legislative or voter intent would be to strip all of the intended restrictions, and deliver the intended funds with none of the restrictions. Even a Massachusetts court balked at that. *See Mayor of Boston v. Treasurer & Receiver Gen*., 384 Mass. 718, 720, 429 N.E.2d 691, 692 (1981)

> We agree that the limitation exclusively imposed on Boston was

> adopted in violation of the Home Rule Amendment and is invalid. We do not agree, however, that the proviso can properly be severed from the grant to Boston and Boston's funds then distributed to it free of the limitation. Moreover, we agree with the Attorney General, arguing on behalf of the defendant Treasurer and Receiver General, that, if the limitation on Boston is unconstitutional, the entire allocation of $348,000,000 in additional local aid must be struck down.

CONCLUSION

The Court should reverse the Trial Court's decision to sever the invalid initiative parts and remand with instructions for the Trial Court to strike the initiative in its entirety.

Respectfully submitted,

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I HEREBY CERTIFY that on this tenth day of September, 2019, a true copy of the foregoing amicus brief was furnished to the Clerk of the Court through the Florida Courts eFiling Portal, which shall serve a copy via e-mail to the counsel service list below, constituting compliance with the service requirements of Florida Rule of Judicial Administration 2.516(b) and Florida Rule of Appellate Procedure 9.420(c).

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