

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)

**REPLY BRIEF OF APPELLANT/CROSS-APPELLEE
ROBERT EMERSON**

Howard Coker (Florida Bar #141540)
Chelsea Harris (Florida Bar #28368)
COKER LAW
136 East Bay Street
Jacksonville, Florida 32202
(904) 356-6071
hcc@cokerlaw.com
crh@cokerlaw.com

Derek T. Ho (pro hac vice # 93535)
Collin R. White (pro hac vice #1017302)
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
dho@kellogghansen.com
cwhite@kellogghansen.com

Counsel for Appellant/Cross-Appellee Robert Emerson

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PRELIMINARY STATEMENT

Appellees' effort to square state law with Article 11 impermissibly rewrites both. At bottom, Appellees contend that because § 212.055(1) would have authorized the Hillsborough County Commission to "deem[] appropriate" the spending regime that referendum voters imposed through Article 11, that statute does not conflict with Article 11. But Appellees cannot overcome the Legislature's clear answer to the prior question: Who decides?

As the circuit court correctly held, as Emerson has shown (at 3-5), and as both houses of the Legislature have reaffirmed (at 5-6), § 212.055(1) definitively structures power and accountability for spending transportation surtax proceeds: "Proceeds from the surtax shall be applied to as many or as few of the uses enumerated" in the statute "in whatever combination *the county commission* deems appropriate." § 212.055(1)(d), Fla. Stat. (emphasis added). Neither home-rule generalities (*see* Intervenor-Appellees' Br. at 31-32) nor a county charter's ability to limit a county commission's power in other ways (*see* Local Gov't Br. at 35-37) can override state law's explicit constraint on a county's spending authority. As the Legislature has explained (at 6), although § 212.055(1) gives county voters a "choice," that choice concerns only "whether to levy the surtax; they do not get to vote on how the proceeds will be spent."

Nor do county voters get to empower a new Independent Oversight Committee (“IOC”) to control the Commission’s exercise of its spending authority. As Intervenor-Appellees admit (at 35), that is precisely what Article 11 purports to do: the IOC may both “‘approve’ Project Plans submitted by each Agency” and “suspend the distribution of funds if an Agency has not complied with Article 11.” The Local Governments’ attempt to avoid this conflict by construing the IOC’s powers more narrowly (at 43) distorts Article 11’s text, and, in any event, does nothing to cure the IOC’s fatal flaw: a body professing to constrain a county commission’s surtax-spending decisions has arrogated to itself power that the Legislature delegated to the commission.

Appellees’ argument that these unconstitutional features can be severed from Article 11 caricatures its purpose. The notion that voters set out simply to improve transportation – regardless what projects would be funded, how much money what projects would receive, and who would control spending – is belied by the redline the circuit court substituted for the as-adopted text: to make Article 11 lawful, the circuit court had to alter its operation in fundamental respects. Further, Appellees’ argument is inconsistent with Article 11’s own severability clause, which makes clear that the unconstitutional features were integral to Article 11’s design. That textual evidence alone confirms that Article 11 is unlawful in its entirety – a

conclusion confirmed by the history that Appellees largely do not dispute, but (incorrectly) ask the Court to ignore.

CROSS-APPEAL STATEMENT OF THE CASE AND FACTS

Emerson relies on his statement of the case in his initial brief, and incorporates it here by reference.

SUMMARY OF THE ARGUMENT

Article 11 conflicts with state law because it divests the Hillsborough County Commission of spending discretion conclusively entrusted to it by state law. Section 212.055(1) grants the power to “deem[.]” the spending of transportation surtax proceeds “appropriate” to “the county commission.” Article 11 conflicts with that statute in two respects the circuit court identified: Article 11 both sets out a rigid allocation scheme governing what projects will receive what funding and empowers an Independent Oversight Commission to further superintend the Hillsborough County Commission’s exercise of spending discretion. Accordingly, Article 11 is unlawful.

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 ON CROSS-APPEAL

I. ARTICLE 11 CONFLICTS WITH STATE LAW

A. State Law Grants “The County Commission” the Power to “Deem[]” the Spending of Transportation Surtax Proceeds “Appropriate”

Appellees’ position that Article 11 does not conflict with § 212.055(1) rests on the premise that although state law constrains permissible uses for spending taxpayer money, it does not resolve who chooses among those uses. That is wrong: Section 212.055 expressly grants that power to county commissions, not referendum voters.

Appellees’ invocation of charter counties’ “powers of self-government,” Local Gov’t Br. at 32-33, 37; *see also* Intervenor-Appellees’ Br. at 31-32, frames the question upside-down, because it overlooks basic limits on those powers. As Emerson’s opening brief established (at 3-5), Florida’s default regime entirely precludes counties from imposing a tax like the one at issue. *See* Art. VII, § 1(a), Fla. Const. (“All other forms of taxation” – that is, other than those the state flatly bans – “shall be preempted to the state except as provided by general law.”).

Appellees’ rhetoric aside, counties enjoy the power to impose these taxes only at the Legislature’s grace. *Charlotte Cty. Bd. of Cty. Comm’rs v. Taylor*, 650 So. 2d 146, 148 (Fla. 2d DCA 1995) (“We realize, and appreciate, that as President Abraham Lincoln said in his address at Gettysburg that our government is one of

the people, by the people, and for the people. We also appreciate that a majority of the people who voted on this amendment in Charlotte County wanted the tax cap amendment. It must also be realized, however, that a majority of the electors of the state wanted the Florida Constitution and that those voting for home rule in Charlotte County adopted a charter which is subject to that constitution.”); *see also City of Tampa v. Birdsong Motors, Inc.*, 261 So. 2d 1, 3 (Fla. 1972) (statutes granting power to tax “are to be strictly construed”).

Section 212.055(1)’s text conditions its exception to the default rule on particularized accountability, providing that the proceeds “shall be applied to as many or as few of the uses enumerated” in the statute “in whatever combination the county commission deems appropriate.” § 212.055(1)(d), Fla. Stat. And no Appellee contests Emerson’s account of the eminent sense that makes: because the county commission holds authority over a wide spectrum of public business, it is uniquely positioned to decide what “combination” is most “appropriate” as a given county’s needs evolve – and to be held politically accountable for those decisions. Opening Br. at 4-5, 30. Neither the parties’ agreement that “the uses provided in Article 11 complied with” the statute (Local Gov’t Br. at 40) nor the fact that the statute “does not provide any particular form of action the county commission must take to deem the surtax uses appropriate” (*id.* at 34-37) answers the core point: the statute quite clearly does provide that the “commission” is the entity that

“deems” combinations of uses “appropriate,” and it so provides for good reason. *See* The Federalist No. 10 (James Madison) (explaining that representative democracy limits the manipulative influence of local factions).¹

The Local Governments’ attempt to qualify that power fails. They point to a provision explaining that one of the “uses” to which “the county commission” may put surtax proceeds is those proceeds’ remittance “to an expressway, transit, or transportation authority created by law to be used, at the discretion of such authority, for” various maintenance purposes. *See* Local Gov’t Br. at 38 (citing § 212.055(1)(d)(2), Fla. Stat.). But that language simply empowers a commission to yield some of its own power to another body; it in no way suggests that referendum voters can strip the commission of its power.

The history of the statute points the same direction. As the Local Governments ably explain (at 8-9, 39-40), in 1999, the Legislature revised § 212.055’s predecessor to give county commissions more discretion over spending. But that revision reinforces Emerson’s view and refutes theirs: it is that widened discretion that, as explained next, Article 11 purports to take away.

¹ Alexander Hamilton, to whom Emerson’s opening brief incorrectly attributed Federalist No. 10 (at 30), shared this view. *See* 1 Alexander Hamilton, *The Works of Alexander Hamilton* 431 (Henry Cabot Lodge ed., 1885) (“Experience has proved, that no position in politics is more false than” the view “that a pure democracy, if it were practicable, would be the most perfect government.”).

B. Article 11 Unlawfully Constrains the Commission’s Power to “Deem[]” the Spending of Transportation Surtax Proceeds “Appropriate”

The parties agree that if a “local enactment conflicts with a state statute,” it is unlawful. *Sarasota All. for Fair Elections Inc. v. Browning*, 28 So. 3d 880, 885-86 (Fla. 2010). As the circuit court held, Article 11 includes multiple provisions that “fly directly in the face” of § 212.055(1). Summ. J. Order (A9.683). That conflict arises in two respects.

1. Article 11’s Rigid Allocation Scheme Conflicts With State Law, Which Vests Spending Discretion in the Commission

Article 11 contains multiple provisions that “dictate the uses” that the Commission “may apply the proceeds to as well as how much of the proceeds” the Commission “may apply to each one.” (A9.684) (emphasis omitted). The circuit court’s explanation of the import of those sections’ merits reading in full:

Section 5 mandates how the proceeds will be distributed; section 6 requires IOC to approve all Agency project plans and amendments to said plans before the Agency may utilize the proceeds towards the project; section 7 mandates how each Agency must expend their allocated proceeds; section 8 specifies how HART must allocate their portion of proceeds to specific uses, and; section 9 states that if a two-thirds majority of IOC determines an Agency is not in compliance with Article 11 and if the Agency fails to correct the noncompliance, IOC may direct the Clerk to suspend distribution of proceeds to the Agency until such time as they come into compliance.

(A9.683). The circuit court correctly rejected this “usurpation of powers” as inconsistent with § 212.055. (A9.684) (emphasis omitted).

a. Appellees’ principal argument to the contrary – that Article 11 “merely supplement[s,] rather than contradict[s],” that statute, Local Gov’t Br. at 34-35 – finds no support in their cases, none of which held a comparable usurpation lawful. *State v. Sarasota County* found no conflict between state statutes that require counties to use gas tax revenues only for certain purposes and a charter provision that required a county to seek approval by referendum before issuing bonds of a certain size. 549 So. 2d 659, 660-61 (Fla. 1989). *Phantom of Brevard, Inc. v. Brevard County* found that a state statute providing that “a county must require at least a \$500 bond from” those who receive a license to display fireworks outdoors did not conflict with a county charter provision requiring those who sell fireworks to obtain liability insurance. 3 So. 3d 309, 314-15 (Fla. 2008). And *City of Kissimmee v. Florida Retail Federation, Inc.*, saw no conflict between a statute protecting the owners of shopping carts “found on public property” from paying certain costs and a local ordinance requiring retailers to develop a system keeping shopping carts on their property. 915 So. 2d 205, 209 (Fla. 5th DCA 2005). In none of these cases did a local government try to take decision-making discretion away from the governmental entity to which the Legislature had delegated it.

But that did occur in Intervenor-Appellees’ remaining conflict case, *Sarasota Alliance for Fair Election* – and the Court rejected the gambit for reasons that condemn Article 11, as well. The case generally concerned potential conflicts

between the Election Code and a county charter amendment. The Court first found no conflict between the Election Code’s “*minimum* statutory requirements” regulating voting machines and one provision of that amendment requiring voting machines to provide a voter verified paper ballot. 28 So. 3d at 888. But in a portion of the case Intervenor-Appellees ignore, the Court went on to find a conflict between the Election Code’s “specifi[cation] that the county canvassing board must certify the election results” and the amendment’s provision “for an independent auditing firm to complete the required audits before the election results may be certified.” *Id.* at 889-90. Article 11 conflicts with § 212.055(1) in much the same way: it purports to re-allocate the power over use of tax funds in a manner inconsistent with state statute.

b. Appellees’ view that Article 11 “simply cannot conflict with” § 212.055(1) in this respect because it includes language acknowledging § 212.055(1)’s supremacy (Intervenor-Appellees’ Br. at 33; *see also* Local Gov’t Br. at 39-40) gets things backward. The voters’ agreement that “in the event of any conflict between the provisions of this Article 11 and the laws of Florida, the laws of Florida shall prevail,” § 11.11(3), provides all the *more* reason that Article 11 should yield to state law given the existence of a clear conflict. The voters were not trying to override state law, nor could they have even if they had tried. *See*

Art. VIII, § 1(g), Fla. Const. (“The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law.”).

This Court has never endorsed Appellees’ view that such a clause – much less language incanting that various acts should be done “in compliance with,” “in accordance with,” or as “permitted by” state law – allows local law to proceed despite being in obvious conflict with state law. For that startling proposition the Local Governments cite no case at all (*see* at 39-40), and Intervenor-Appellees cite none (at 34; *but see id.* at 35 (retreating)) that support it. In *D’Agastino v. City of Miami*, the Court held that a municipal entity could not use its general subpoena power to compel the interrogation of a police officer in an investigation, because a state statute granted such an officer rights that that application of that power “would impermissibly countermand.” 220 So. 3d 410, 426 (Fla. 2017). Relying on the validity canon, the Court went on to explain that a different ordinance requiring the municipal entity to carry out its duties in accord with state law – including the conflict holding it had just issued – would be “an adequate means of ensuring the subpoena power, as it applies to non-officers, may continue to exist undisturbed.” *Id.* That modest holding follows from the peculiar relationship

between those particular ordinances; it does not support Appellees' view that counties may exempt charter provisions from conflict analysis using magic words.²

Intervenor-Appellees' contention (at 33) that Article 11's references to state law prevent any conflict because "if the County Commission were ever to deem appropriate another set of allocations, they would supersede those provided in Article 11 to the extent of any conflict," is beside the point. Intervenor-Appellees' concession that if some future Commission were to deem appropriate some allocation other than Article 11's, that allocation would trump Article 11's, does not cure the conflict: because the Commission did not set even Article 11's initial allocation, Article 11 conflicts with state law.

c. The Local Governments' position (at 37-38) that a different statute, § 125.86(8), Fla. Stat., authorizes referendum voters to take away the power § 212.055(1) delegated to county commissions misreads § 125.86(8). The latter explains that a county commission has (among other powers and duties) those "powers of local self-government not inconsistent with general law as recognized by the Constitution and laws of the state and which have not been limited by the county charter." § 125.86(8), Fla. Stat. The rule the Local Governments draw from that language – that it "specifically authorizes the voters of charter counties to

² Neither does *Miami-Dade County v. Dade County Police Benevolent Ass'n*, which did not rely on any similar supremacy clause. 154 So. 3d 373, 380 (Fla. 3d DCA 2014).

limit the county commission’s authority,” regardless what powers state law elsewhere grants county commissions (at 37) – appears nowhere in its text, and would be a radical proposition to bury in the last phrase of a residual clause. *Cf. Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 468 (2001) (Congress “does not, one might say, hide elephants in mouseholes.”) What is more, it proves far too much: if it were correct, Florida courts could never hold that a charter’s limitation on a county commission’s taxation authority is invalid because it conflicts with state law. *But see Ellis v. Burk*, 866 So. 2d 1236, 1237 (Fla. 5th DCA 2004) (Under Florida’s “state constitution and statutory scheme, the power to limit a county commission’s ability to raise revenue for the county’s operating needs by way of ad valorem taxation is effectively and exclusively lodged in the legislature.”); *Charlotte Cty. Bd. of Cty. Comm’rs*, 650 So. 2d at 148 (similar).

2. Article 11’s Creation of an Independent Oversight Committee To Control the Commission’s Exercise of Its Spending Discretion Likewise Conflicts With State Law

The circuit court correctly identified a second conflict between Article 11 and state law: its creation of an independent body, the IOC, empowered to police the County Commission’s exercise of its discretionary spending authority:

[S]ection 6 requires IOC to approve all Agency project plans and amendments to said plans before such Agency may utilize the proceeds towards the project[; and] section 9 states that if a two-thirds majority of IOC determines an Agency is not in compliance with Article 11 and if such Agency fails to correct the non-compliance, IOC may direct the Clerk to suspend distribution of proceeds to the

Agency until such time as they come into compliance. . . . Among IOC's responsibilities mandated in section 10 is the approval of Agency project plans.

(A9.685). The court went on to explain that these duties “are not supplementary and instead have the effect of depriving the county commission of its statutory authority and duties mandated in section 212.055(1).” (*Id.*; *see also* A9.685-86 (“[T]he stricken portions prescribe duties to IOC, which have the effect of relieving BOCC of the following duties: determining [to] which uses the proceeds will be applied; determining in which combination the proceeds may be applied, or [sic]; final approval and payment thereof.”) (emphasis omitted)).

Appellees fail to show otherwise. The Local Governments contend (at 41) that this “oversight function simply provides additional assurance that the surtax proceeds are spent on categories of transportation projects that are both consistent with section 212.055(1) and Article 11.” Intervenor-Appellees, for their part, similarly state that the IOC (at 35) “simply adds another layer of review to the process the statute contemplates.” Both characterizations embrace, rather than cure, Article 11’s basic flaw: it grants an independent entity the ability to control the Commission’s exercise of discretion the Legislature gave to it. However desirable Appellees may find that feature of Article 11, it conflicts with state law for the reasons already explained. *See supra* pp. 8-9 (citing *Sarasota All. for Fair Elections*, 28 So. 3d at 890).

The Local Governments attempt to reduce this conflict by offering an implausible limiting construction of the IOC’s powers. On their telling (at 43), although Article 11 grants the IOC the power “to approve project plans only based on a finding that they comply with Article 11 and Florida law[,] . . . the IOC does not have the authority to reject an otherwise compliant project plan merely because it dislikes it for some other reason.” As Intervenor-Appellees’ contrary position (at 35) suggests, however, that view conflicts with the language of Article 11, which grants the IOC the power to “[a]pprove Project Plans and approve and certify as to whether the projects therein comply with this article.” § 11.10(2). And even if the Local Governments’ reading were right, it would not salvage Article 11: because Article 11 still would empower the IOC to constrain the Commission’s spending discretion, it still would conflict with state law granting that discretion.

3. The Commission’s Putative Ratification of Article 11 Does Not Cure the Conflict

Appellees’ view (Intervenor-Appellees’ Br. at 32-33; Local Gov’t Br. at 44-46) that the Commission has validly ratified Article 11 is incorrect. It is true that the Commission has purported to “deem[] appropriate” “the provisions of Article 11” when it authorized the issuance of the bonds. (A11.75.) It is likewise true that the Commission and various other entities entered into an interlocal agreement purporting to “deem[] appropriate the allocation, distribution and uses of Surtax Proceeds as provided for in the Charter Amendment.” (A12.23.)

But charter amendments that are void from the start cannot be revived *nunc pro tunc*. Cf. *State ex rel. Ervin v. Mellick*, 68 So. 2d 824, 827 (Fla. 1953) (“[A]n invalid or illegal ordinance is wholly inoperative.”). Just as an after-the-fact “validation act cannot validate a lack of power in a city or county to act in the first instance,” *Broward Cty. v. Plantation Imports, Inc.*, 419 So. 2d 1145, 1148 (Fla. 4th DCA 1982), an after-the-fact Commission vote cannot validate a lack of power to act via referendum in the first place. That rule follows from black-letter agency law: although an act of ratification can “authorize that which was unauthorized,” it “cannot . . . give legal significance to an act which was a nullity from the start.” *Newman v. Schiff*, 778 F.2d 460, 467 (8th Cir. 1985).

Further, the Commission cannot ratify what it could not have lawfully authorized in the first place. See *City of Coral Gables v. Giblin*, 127 So. 2d 914, 919 (Fla. 3d DCA 1961); see also 2 Fla. Jur. 2d *Agency and Employment* § 84 (Sept. 2019 update). Although the Commission (again) could have authorized the uses to which Article 11 dedicates these funds, for the same reasons referendum voters could not strip the Commission of the duties § 212.055(1) assigns it, the Commission could not itself abdicate those duties in favor of a popular referendum. Cf. *P.C.B. P’ship v. City of Largo*, 549 So. 2d 738, 741 (Fla. 2d DCA

1989) (city lacked authority to “contract[] away the exercise of its police powers”).³

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

Appellees agree that whether the features of Article 11 gutting the Commission’s spending discretion can be severed largely turns on whether the as-severed version would accomplish Article 11’s purpose such that it would have become law in that form. *See Cramp v. Bd. of Pub. Instruction*, 137 So. 2d 828, 830-31 (Fla. 1962). But Appellees’ characterization of that purpose – as merely funding transportation projects in Hillsborough County – depends on a blinkered reading of Article 11’s text. As explained below, that text shows that Article 11’s unlawful spending-discretion restrictions were integral to its operation and fundamental to its purpose. Further, that conclusion – sufficient in its own right to require Article 11’s complete invalidation – is reinforced by all other available proof of Article 11’s purpose.

³ Notably, the interlocal agreement purports (*see* A12.23) to incorporate the incorrect limiting construction of the IOC’s powers that the Local Governments endorse, but Intervenor-Appellees reject, *see supra* p. 14 – a conclusion that hardly bolsters its validity.

A. Article 11’s Text Is Replete With Unconstitutional Features, Showing Their Centrality To Its Purpose

1. Appellees defend Article 11 primarily by attempting to extract a stand-alone purpose from a few provisions from which the circuit court did not strike language. Those provisions state the purpose of the surtax (§ 11.01), levy it (§ 11.02), explain that it will last for thirty years (§ 11.03), and detail the duties of the clerk (§ 11.04). From these four provisions Appellees contend that the voters’ intent can faithfully be reduced “to fund[ing] transportation projects in Hillsborough County.” Local Gov’t Br. at 25-29; *see also* Intervenor-Appellees’ Br. at 15-18 (similar).

But Appellees’ view that those provisions can be neatly separated from the six the circuit court altered – those that govern how the proceeds are to be distributed or how that distribution is to be overseen⁴ – overlooks those provisions’ interdependence. Section 11.01 states: “The proceeds of the surtax shall be distributed and disbursed . . . *in accordance with the provisions of this Article 11.*” Section 11.02 similarly provides: “Any other provision of this Charter to the contrary notwithstanding, all proceeds from the Transportation Surtax . . . *shall be*

⁴ 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).

expended only as permitted by this Article 11.” Section 11.03 states that “The Transportation Surtax *authorized by this Article 11 . . .* shall remain in effect for a period of thirty (30) years.” And § 11.04 states that the clerk must, among other things, arrange for an annual audit of “the Clerk’s and each Agency’s compliance with *the provisions of this Article relating to the distribution and expenditure of Surtax Proceeds.*”

Even these four facially unchanged provisions therefore draw meaning from the balance of Article 11. Put differently, by excising many of “the provisions of [Article 11] relating to the distribution and expenditure of Surtax Proceeds” – the restrictions subject to which Article 11 “authorized” this surtax – the circuit court necessarily changed what it means to say the proceeds must be spent “in accordance with” or “as permitted by” Article 11. It blinks reality to conjure an account of Article 11’s purpose from these four provisions alone while ignoring their dependence on the unlawful provisions. *See Larimore v. State*, 2 So. 3d 101, 106 (Fla. 2008), *as revised on denial of reh’g* (Jan. 29, 2009) (“Related statutory provisions must be read together to achieve a consistent whole, and where possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another.” (alterations omitted)).

A similar flaw afflicts Appellees’ reliance on § 11.01’s statement of purpose. *See Local Gov’t Br.* at 25; *Intervenor-Appellees’ Br.* at 16-17. To start, the

provision addresses the “Purpose of [the] *surtax*,” § 11.01 (emphasis added), rather than the relevant severability question – “the overall legislative intent of” Article 11 as a whole. *E. Air Lines, Inc. v. Dep’t of Rev.*, 455 So. 2d 311, 317 (Fla. 1984). In any event and again, the provision answers that question in a way that supports Emerson: it provides that the “proceeds of the surtax shall be distributed and disbursed . . . in accordance with the provisions of this Article 11.”

That Article 11’s text is so permeated by unlawful features confirms that it flunks this Court’s severability standards. *Lawnwood Medical Center, Inc. v. Seeger*, 990 So. 2d 503 (Fla. 2008), makes the point particularly clear. Again (*see* Opening Br. at 24-25), the Court there held that because the relevant “statutory scheme” was “replete with” unconstitutional features, the statute could not be said to “be an act complete in itself, once the invalid portions are severed, that would accomplish what the [voters] so clearly intended by the many different” unlawful “provisions.” *Lawnwood Med. Ctr.*, 990 So. 2d at 519. The same is true here, as the results that follow from the circuit court’s revisions vividly show. *See* Opening Br. at 24-26 (cataloging how “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”). Remarkably, Appellees do not address *Lawnwood Medical Center*’s severability analysis: the Local Governments do not so much as cite the case, and Intervenor-Appellees’ single-sentence encounter with it (at 24) recites

one element of its constitutionality reasoning while ignoring its severability holding. The first is irrelevant; the second is dispositive.

No case Appellees cite on this score (*see* Local Gov't Br. at 27; Intervenor-Appellees' Br. at 17-18, 20) undermines this conclusion. In *Florida Hospital Waterman, Inc. v. Buster*, the Court held that a medical-records statute explicitly designed to implement a medical-records constitutional provision furthered that purpose even without certain provisions that had narrowed rights granted by that constitutional provision. 984 So. 2d 478, 494 (Fla. 2008) (per curiam) (quoting statute's "Purpose" section). And in *Hall v. Recchi America Inc.*, the First District held that a single provision of a drug-free workplace statute establishing an unconstitutional evidentiary presumption could be severed without threatening the statute's goals of "discouraging drug abuse and maximizing industrial productivity by eliminating 'the costs, delays, and tragedies associated with work-related accidents resulting from drug abuse by employees.'" 671 So. 2d 197, 202-03 (Fla. 1st DCA 1996) (quoting statute's "Legislative intent" provision), *aff'd*, 692 So. 2d 153 (Fla. 1997)). In neither these cases nor the other two Intervenor-Appellees identify (at 20)⁵ was a constitutional flaw nearly as integral to the statute as the stripping of spending discretion is to Article 11.

⁵ *See Presbyterian Homes of Synod of Fla. v. Wood*, 297 So. 2d 556, 557 (Fla. 1974) (severing three interrelated provisions that together "mistakenly

And *Ray v. Mortham* (as relevant here) rejects a legal argument Emerson does not make – that if a proposed constitutional amendment complies with the single-subject requirement of the Florida Constitution, *see* Art. IX, § 3, it necessarily follows that no provision of that amendment can be severed from it. 742 So. 2d 1276, 1282 (Fla. 1999) (*per curiam*). The single-subject requirement is not the reason Article 11’s unconstitutional provisions are not severable. They are not severable because ordinary tools of textual interpretation compel that outcome.

B. Article 11’s Severability Clause Excludes Its Unconstitutional Features

Although Appellees are correct that “the voters here had clear notice of severability,” Intervenor-Appellees’ Br. at 9; *see also* Local Gov’t Br. at 29-31, they received that notice from a provision that excluded the language at issue. Article 11 specifically provided for the severance of “any mandated expenditure category set forth in section 11.07 or 11.08,” Petition Form, art. 11, § 11.11(2) (A10.802); it did not provide for the severance of other provisions. That omission necessarily implies that provisions other than those listed – including provisions now at issue – are too integral to the statute to be severed. *See Moonlit Waters*

exceeded” constitutional rule concerning tax exemption); *Tropical Park, Inc. v. Dep’t of Bus. Regulation, Div. of Pari-Mutuel Wagering*, 433 So. 2d 1329, 1332 (Fla. 3d DCA 1983) (single provision unlawfully delegating legislative power to executive branch was severable, particularly in light of applicable severability clause).

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.”).

Appellees offer the Court no contrary construction of this clause. They instead retreat (*see* Intervenor-Appellees’ Br. at 25; Local Gov’t Br. at 30) to the principle that “severability can occur whether or not the enactment contains a severability clause.” *Schmitt v. State*, 590 So. 2d 404, 415 n.12 (Fla. 1991) (*per curiam*). But that principle undermines their position: the fact that Article 11 explicitly *limits* the default breadth of severability doctrine does not show that voters intended “to save as much of Article 11 as possible in the event of a conflict” (Intervenor-Appellees’ Br. at 26), but the opposite.

Neither Article 11’s supremacy clause (*see* § 11.11(3)) nor the Hillsborough County Charter’s general severability clause shows otherwise. Again, *see supra* pp. 9-11, the supremacy clause merely restates that state law preempts conflicting local law – a truism that salvages nothing in Article 11. And (also again, *see* Opening Br. at 29 n.13) the ordinary rule that specific language controls over general language dictates that the County Charter’s general severability clause is controlled by Article 11’s specific severability clause. Intervenor-Appellees’ passing suggestion (at 27) that charter provisions are exempt from that black-letter rule of textual interpretation is simply not the law. *See Barry v. Garcia*, 573 So. 2d

932, 936 (Fla. 3d DCA 1991) (“The Miami City Charter specifically prescribes the several methods of subpoena power delegation and it is a general rule, that specific requirements of a special act or charter, will control to the exclusion of a general grant of authority.”).

C. All Other Evidence Reaffirms That Article 11’s Unconstitutional Features Are Integral To Its Purpose

All other evidence confirms the same outcome. *First*, Appellees’ view that the ballot summary characterizes Article 11’s purpose as merely “to pass a 30-year, one-cent surtax to fund transportation improvements in Hillsborough County” (Intervenor-Appellees’ Br. at 10; *see also* Local Gov’t Br. at 25) is belied by its text:

**No. 2 Hillsborough County Referendum
N.º 2 Referéndum del Condado de Hillsborough**

**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.

(A1.39.) That text confirms that the ballot initiative’s purpose was to fund specific projects; that the fund in which the proceeds would be held would be subject to “independent oversight”; that the revenues would be “shared” subject to a particular “population-based formula”; and that “the Charter Amendment” would “govern[]” expenditures. *Id.* Although the Local Governments are surely correct (at 26) that the summary does not detail all of Article 11’s unlawful features, that neither is a surprise (it is, after all, a summary) nor supports their view: fairly read,

the ballot text highlights exactly the unlawful limitations Article 11 put on the Commission's spending discretion.⁶

Second, Appellees do not meaningfully dispute Emerson's exhaustive account of how the unlawful features of Article 11 distinguished it from its unsuccessful predecessor. *See* Opening Br. at 21-23.⁷ Appellees instead contend (*see* Local Gov't Br. at 27-28 & n.6; Intervenor Appellees' Br. at 22-23) that the Court should ignore it.

But that position conflicts with this Court's severability jurisprudence. The Court has long looked outside the four corners of a statute in performing the

⁶ Intervenor-Appellees' quibble (at 18-19) with Emerson's colloquially describing the final two sentences as part of the ballot summary lacks merit: that is entirely sensible shorthand for language on a ballot that summarizes an initiative's financial impact – language that appears half an inch below the ballot question and is the final English-language text before the ovals with which voters were to mark their vote. (*See* A11.83.) And Intervenor-Appellees' suggestion that this text yields no evidence of purpose rests on the strange view that voters would have stopped reading at the question mark that closed the ballot question about whether to raise taxes – ignoring the very next two sentences explaining how the tax proceeds would be spent.

⁷ Appellees' complaint (at 23; *see also* Local Gov't Br. at 28-29 n.6) that public statements made by Intervenor All for Transportation ("AFT") are outside the record overlooks basic principles of judicial notice. § 90.202(12), Fla. Stat.; *Oken v. Williams*, 23 So. 3d 140, 148 n.2 (Fla. 1st DCA 2009), *quashed on other grounds*, 62 So. 3d 1129 (Fla. 2011) (per curiam) ("Many Florida appellate courts have taken judicial notice of internet materials that cannot be reasonably questioned to support their arguments and, thus, ... this court's reliance on the underlying materials does not violate binding precedent." (collecting cases, including from this Court). Notably, AFT does not deny that it made these statements.

inherently counter-factual exercise that severability doctrine entails – determining what the enacting body would have done without the offending language. *E.g.*, *Searcy, Denney, Scarola, Barnhart & Shipley, etc. v. State*, 209 So. 3d 1181, 1186, 1196-97 (Fla. 2017) (per curiam) (recounting context and lobbying background of claims bill addressing particular person’s injuries and, in addressing severability, explaining: “we are loathe to strike the entire claims bill, which is clearly intended to provide critical compensation for [a particular person’s] injuries in this case”); *Richardson v. Richardson*, 766 So. 2d 1036, 1041 (Fla. 2000) (relying in part on legislative history to reject severance). The evidence on that issue here is among the best likely to exist in any case about an initiative, rather than a statute.⁸ Any inexactitude in fit between that evidence and statutory severability precedent would not be a reason to reject the former; it would be a reason to reconsider whether the latter applies unmodified to initiatives to begin with, as Stacy White has encouraged the Court to do.

⁸ Contrary to the Local Governments’ view (at 28 n.6), *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000), does not hold that the Court must blind itself to political context in “determining an initiative’s chief purpose.” In relevant part, that case merely acknowledges that a ballot summary’s failure to explain an amendment’s chief purpose remains fatal even if that purpose had arguably been “disseminated via public hearings, pre-election publication, and other means.” *Id.* at 20 (citing *Wadhams v. Bd. of Cty. Comm’rs*, 567 So. 2d 414, 417 (Fla. 1990)).

In truth, the failure of Appellees’ rejoinder reflects the conceptual tension between severability doctrine’s quest for purpose and modern statutory-interpretation principles – that is, the view that legislation is “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) (alterations omitted). That tension has prompted thoughtful jurists to consider whether to abandon the doctrine,⁹ and White to question how a Court can coherently deploy it to salvage any partly-unlawful initiative.

But the Court need not go nearly so far here. The circuit court’s blue-penciled Article 11 puts Hillsborough County voters on the hook for billions of dollars in taxes to be raised over thirty years and spent without the comprehensive restrictions that the voters chose, unlawful though they are. It is work enough for this case to know that established severability law bars the judiciary from assuming that quintessentially legislative role.

⁹ See *Murphy v. NCAA*, 138 S. Ct. 1461, 1485 (2018) (Thomas, J., concurring) (explaining that the U.S. Supreme Court “should take another look at our severability precedents” for similar reasons); *Collins v. Mnuchin*, 938 F.3d 553, 610-11 (5th Cir. 2019) (en banc) (Oldham and Ho, JJ., concurring in part and dissenting in part) (A court “should not rewrite [a] statute while pretending such legislative activity is the most modest *judicial* remedy.”), *petitions for cert. pending*, Nos. 19-422 and 19-563 (U.S. docketed Sept. 30 and Oct. 29, 2019).

CONCLUSION

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

Respectfully submitted,

/s/ Derek T. Ho

Howard Coker (Florida Bar #141540)
Chelsea Harris (Florida Bar #28368)
COKER LAW
136 East Bay Street
Jacksonville, Florida 32202
(904) 356-6071
hcc@cokerlaw.com
chr@cokerlaw.com

Derek T. Ho (pro hac vice #93535)
Collin R. White (pro hac vice # 1017302)
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
dho@kellogghansen.com
cwhite@kellogghansen.com

Counsel for Appellant/Cross-Appellee Robert Emerson

November 12, 2019

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 12th day of November 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