IN THE SUPREME COURT OF FLORIDA

ROBERT EMERSON, et al.

Appellants, **Case No.: SC19-1250**

v.

HILLSBOROUGH COUNTY, et al.

Appellees.

_____/

STACY WHITE,

Appellant, **Case No.: SC19-1343**

v.

HILLSBOROUGH COUNTY, et al.

Appellees.

_____/

CROSS-ANSWER and REPLY BRIEF of STACY WHITE

On Appeal from the Thirteenth Judicial Circuit
Hillsborough County, Florida
Case Nos.: 18-CA-11749 and
19-CA-1382

CHRIS W. ALTENBERND (*FBN 197394*)
caltenbernd@bankerlopez.com
BANKER LOPEZ GASSLER P.A.
501 East Kennedy Blvd., Ste. 1700
Tampa, Florida 33602
Telephone (813) 221-1500
Facsimile (813) 222-3066

Attorney for Stacy White

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

PRELIMINARY STATEMENT

The answer/cross-appeal brief filed by All For Transportation, Keep Hillsborough Moving, Inc., and Tyler Hudson will be cited as "(AFT p.*)," and those parties will be referred to collectively as "AFT." The answer/cross-appeal brief of Hillsborough County, Hillsborough County Metropolitan Planning Organization, and the City of Tampa, which has been adopted by HART, the City of Plant City, The Clerk of Court, and the State Attorney's Office for the State, will be cited as "(LG p. *), and referred to collectively as "Local Government."

In the circuit court, the Property Appraiser, the Tax Collector, and the City of Temple Terrace were all originally parties to Mr. White's action for declaratory relief, but they were voluntarily dismissed before entry of the final judgment. They have not filed briefing in this appellate proceeding. The Florida Department of Revenue is a party, but it has taken no position throughout the litigation.

The record will be cited as in Mr. White's initial brief.

All emphasis is counsel's unless otherwise noted.

CROSS-ANSWER STATEMENT OF THE CASE AND FACTS

Mr. White will rely upon his original statement of the case and facts in this cross-answer brief. But two factual matters warrant a fuller explanation in light of the arguments by AFT and Local Government in the cross-appeal.

A. Article 11's restrictions on the County Commission expressed in dollar amounts.

The Local Government brief claims that Mr. White wants the County Commission to have total control of every dollar spent on transportation over the next 30 years from this $9 billion tax. (LG p.15). As explained later in the argument, that is not true. But it is helpful to understand factually the size of the monetary restrictions placed on the County Commission by the unconstitutional restrictions in Article 11.

Factually, $5.4 billion of the $9 billion conservatively expected to be generated in surtax proceeds must go to the other governmental "Agencies" without any vote of the County Commission under the provisions in Article 11 that were held unconstitutional by the circuit court.[1]

---

[1] 45% goes to HART; 1% goes to the MPO; and under current census numbers 26.18% of the 54% of the funds allocated to the General Fund or 14.14% of the overall surtax proceeds goes to the three municipalities. (A. 4:112). This totals 60.14%.

Of the remaining $3.6 billion that is received by Hillsborough County, 100% of this entire amount is received without any vote of the County Commission determining that this application of tax proceeds is appropriate.

Of this amount, 85% of these surtax proceeds are subject to the restrictions, conditions, and limitations in section 11.07. Thus, only $729 million or $24.3 million per year is available to the County Commission for projects it actually deems appropriate independent of the constraints of Article 11.

Because section 11.07(8) prevents the County Commission from spending 73% of the allocation of General Revenue funds on projects that build new roads or widen existing roads, only a total of $1.31 billion or $43.74 million per year can be spent by the County Commission on building new roads or widening existing roads.

45% of the surtax proceeds, or $4.05 billion, must go to HART to be spent as directed in section 11.08. Not only does the County Commission have no discretion to apply these funds to uses it deems more appropriate, but HART is denied the discretion given to it in section 212.055(1) to apply surtax proceeds to transit uses that it deems more appropriate. Thus, HART must spend 45% of the funds it receives on "enhancing bus services." This amount is $1.82 billion. An additional 35% or $1.42 billion must be spent on "expanding public transit options." Thus, under the stricken provisions, HART would be allowed to use its discretion to spend only $810 million or $27 million per year during the 30-year period. The County

Commission– today and throughout the entire 30-year term of the tax–would have no authority whatsoever to deem any of this compulsory spending "appropriate."

B. The References to Section 212.055(1) in Article 11.

AFT is correct that it inserted a reference to section 212.055(1) eleven times in Article 11. Given that the Legislature decided the County Commission "shall" be required select the uses under section 212.055(1), it is also noteworthy that AFT used the word "shall" 56 times in Article 11 to mandate the outcomes it desires.

It is also noteworthy that there is no reference to compliance with section 212.055(1) in section 11.05, which is the core provision that mandates all distributions to the "Agencies" and to the MPO without any decision by the County Commission.

Specifically, references to section 212.055(1) occur in Sections 11.01, 11.02, 11.07, 11.08, and 11.11. On 7 of these occasions, a reference to the statute is in a phrase where it is joined by the conjunction "and" to a reference to Article 11. On 3 occasions Article 11 requires the selection of a project by an "Agency" "to the extent permitted by" the statute. On a final occasion, the reference to the statute is in a phrase joining it to a reference to Article 11 by the conjunction "or."

1. 11.01:

Section 11.01 states the purpose of the surtax. Section 11.01 references section 212.055(1) one time. It 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 this Article 11**." Thus, 11.01 states that the disbursement of proceeds from the surtax shall comply with both section 212.055(1) and Article 11, which was impossible until the circuit court removed 14 sections from Article 11.

2. 11.02:

Section 11.02 is the provision providing for the levying of a one percent sales tax. Section 11.02 references section 212.055(1) two times. On the second occasion, it states that "[a]ny other provision of this Charter to the contrary notwithstanding, all proceeds from the Transportation Surtax, including any interest earnings and bond proceeds generated therefrom, **shall be expended only as permitted by this Article 11**, **F.S. § 212.055(1), and in accordance with the purpose set forth in Section 11.01** . . . ." Thus, this provision requires mandatory compliance with both Article 11 and section 212.055(1), and it requires compliance with section 11.01, which also requires compliance with both. Again, this was impossible until the circuit court removed 14 sections from Article 11.

3. 11.07:

Section 11.07 establishes restrictions on the uses the General Purpose Fund. Section 11.07 references section 212.055(1) five times. All five occasions are in sentences in which the framers mandated an expenditure by an Agency when the Legislature in section 212.055(1) had left the decision to the County Commission.

4. 11.08:

Section 11.08 establishes mandatory percentages of the Transit Restricted Portion of the Surtax that HART must spend on particular uses. Section 11.08 references section 212.055(1) twice. Section 11.08 provides, "[t]he Transit Restricted Portion, and any Agency Distribution received by HART, **shall be spent by HART** for the planning, development, construction, operation, and maintenance of **public transportation projects** located solely in Hillsborough County, which are consistent with the HART Transit Development Plan . . . **to the extent permitted by F.S. § 212.055(1), and include expenditures in the following categories:**" The "following categories" compel HART to spend 80% of the funds for 30 years on projects without either the County Commission or HART deeming them appropriate.

5. 11.11:

Section 11.11(2) contains the narrow severability clause. It provides, "[t]o 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.**" Thus, even these funds are not returned to the County Commission for it to apply as it deems appropriate.

SUMMARY OF MR. WHITE'S CROSS-APPELLEE ARGUMENT

The Legislature, to whom the field of sales tax is preempted by the Constitution, has decided that a charter county can have a transportation surtax so long as the tax is used for uses described in section 212.055(1)(d), Florida Statutes, and so long as the surtax proceeds are applied to authorized uses that are deemed appropriate by the county commission, as a charter county's governing body.

Article 11, as drafted by AFT, determined that the municipalities in Hillsborough County must receive a specific allocation of the surtax proceeds to use as each municipality deems appropriate, subject to the veto power of the Independent Oversight Committee. It determined that HART must receive 45% of the surtax proceeds to be used largely for uses specified by AFT, including the replacement of the downtown streetcar as an "expansion of transit options." Any discretionary use selected by HART need not be approved by the County Commission, but can be disapproved by the IOC. Article 11 determined that the MPO, which is an entity mandated by federal law, must receive 1% of the local funds. And it mandated that 100% of the surtax proceeds must be allocated in this manner for every year of the 30-year tax. All of these determinations were made without any action by the County Commission to select the uses it deemed appropriate.

45% of the written content of Article 11 creates conditions, restrictions, and limitations directly overruling the Legislature's clear requirement in section

212.055(1), that the County Commission shall apply the surtax proceeds as it deems appropriate. The application of these surtax funds involves complex, public-policy decisions concerning the best uses of the proceeds—in conjunction with other scarce tax resources available for transportation uses. These decisions will require both vision today and the common sense to allow future governing bodies the flexibility to select and adjust appropriate uses based on changing circumstances over a 30-year period. The Legislature wisely decided the elected governing body of a charter county "shall" make these difficult decisions and be accountable for them to the people they represent.

This is not a case where a definition, or a phrase, or even a sentence or a subsection was in direct conflict with the sales tax law enacted by the Legislature. It is hard to imagine a more flagrant and intentional violation of general law in a proposed charter amendment, short of one in which the entire amendment was unconstitutional. The circuit court correctly struck 14 parts of Article 11 as violations of supremacy, and it should have stricken more.

But AFT and Local Government claim that all of this language is constitutional. They claim it is constitutional because the people voted for requirements that were unconstitutional on their face when AFT first filed this amendment with the Supervisor of Elections. They claim that this supremacy violation is constitutional due to after-the-fact actions by Local Government to pass

inferior laws—a resolution, an inter-governmental agreement, and a recent ordinance—all designed to cede the County Commission's duty to the Legislature to make the tough decisions. What is worse, if AFT's complex plan does not pan out over time, these after-the-fact inferior laws give elected officials the ability to place future responsibility for these decisions on "the people," who clearly did not know they were voting for an unconstitutional transportation plan.

The Court should affirm the circuit court's decision to strike major portions of Article 11 and should strike the additional offending language. It should strike the remaining language levying a tax that was inextricably intertwined with the unconstitutional plan. The voters should be given a fair opportunity to vote for a transportation tax that is actually authorized by the Legislature.

CROSS-APPELLEE ARGUMENT

I. The sections of Article 11 declared unconstitutional by the circuit court are in irreconcilable, direct conflict with Florida general law.

This brief follows the outline of the brief submitted by Local Government, using different wording in the headings.

A. The Standard of review.

There is no dispute that the constitutionality of Article 11 of the Hillsborough County Charter is an issue reviewed de novo by this Court. This local law is presumed to be constitutional. However, when there is doubt about whether a local

law will affect the operation of a state statute, the doubt must be resolved in favor of the statute and against the local law. *See Metropolitan Dade County v. Chase Federal Housing Corp.* 737 So. 2d 494, 504 (Fla. 1999).

B. The people exercised their inherent political power to declare that general law is superior to local law, and that sales tax issues are preempted to the state.

Mr. White has acknowledged from the inception of this litigation that it is his burden of persuasion to overcome the well-recognized presumption of constitutionality that applies in this context. He met that burden in the circuit court and he will do so here.

But AFT and Local Government seem to believe there is some super presumption that arises from the political power of the people of Hillsborough County. Hillsborough County relies on *Citizens for Responsible Growth v. City of St. Pete Beach*, 940 So. 2d 1144, 1149 (Fla. 2d DCA 2006), which merely held that a citizens' initiative could be placed on the ballot because it was not entirely unconstitutional on its face.

Mr. White does not dispute that the Florida Constitution begins with the declaration of the following right:

> **All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.**

Art. I, § 1, Fla. Const.

But the people of Florida have exercised their inherent political power to establish a constitution that prudently requires local governments, including charter counties like Hillsborough County, to obey Florida general laws. It is the people who declared that charter counties can create no law that is "inconsistent with general law." Art. VIII, §1(g), Fla. Const.

Likewise, it is the people of Florida who declared that the subject of sales tax is "preempted to the state except as provided by general law." Art. VII, §1(a), Fla. Const. It is the people who gave the Legislature the power to decide that a local transportation tax can exist only if the "uses" of those tax proceeds are selected by the county commission. *See* §212.055(1)(d), Fla. Stat.

And it is the people who decided that the governing body of a charter county would be the duly elected, representative board of county commissioners, politically accountable to the people for its decisions, unless the people expressly provided otherwise in their county charter. *See* Art. VIII, §1(e), Fla. Const. Although Local Government argued below that the Independent Oversight Committee or the people, as a pure democracy, had replaced the County Commission as the governing body of Hillsborough County for the application of these tax proceeds, they are no longer making that dubious argument here. (A. 1:565-66; 3:264; 7;164-67).

Simply put, "power to the people" is not a presumption that warrants keeping provisions in a county charter that flagrantly violate general state law. It is not a

presumption that justifies salvaging a tax that was sold to the people based on a private plan that the county commission can only obey if it abandons its duty, and that of future commissioners, to make complex, fact-intensive, policy-based judgments for the appropriate use of $9 billion of the taxpayers' money.

C. The detailed funding plan in Article 11 conflicts with 212.055(1).

Mr. White, in his initial brief, has already discussed and explained the provisions of Article 11 that, in the words of the circuit court, "fly directly in the face of general law as enunciated in section 212.055." (W. IB p. 30-35). He continues to maintain that the circuit court should have removed all of the content of section 11.05, 11.07 and 11.08 because the remaining content is still a restriction upon the judgment and the decisions of the County Commission. To avoid repetition, Mr. White will not discuss those arguments again. He will also rely upon Mr. Emerson's arguments in his cross-answer brief on this issue.

All this Court needs to do is read Article 11 to appreciate that the County Commission cannot obey both Article 11 and the mandate of section 212.055(1)(d) that it apply the surtax proceeds to as many or as few of the uses enumerated in the statute, in whatever combination, as it deems appropriate. Indeed, AFT and Local Government cannot deny that under sections 11.04, 11.05, 11.07 and 11.08 of Article 11, **all** of the tax proceeds are distributed automatically by the Clerk to the

"Agencies" for the entire 30-year term of the tax, largely to be spent on uses determined without any role whatsoever for the County Commission.

1. Mr. White does not argue that the statute requires the County Commission to directly allocate "every surtax dollar itself."

Mr. White maintains that the Legislature has wisely concluded that each county commission representing a charter county with a transportation tax must be responsible for making the difficult decisions about the uses of these tax proceeds. Subsection 212.055(1)(d) contains four sub-subsections in which the Legislature delineates a wide range of uses for the tax proceeds. Some of those uses can be undertaken directly by the County for projects that are budgeted and managed by the County. *See* §212.055(1)(d)(1), Fla. Stat. Some are uses that can be undertaken by a transit authority. *See* §212.055(1)(d)(2), Fla. Stat. And some are uses that contemplate improving transportation problems in municipalities that may exist within a county. *See* §212.055(1)(d)(4), Fla. Stat.

As a result of the many optional uses of these tax proceeds, county commissioners are faced with hard issues, where demand for resources is great and the supply of tax proceeds is limited. In deciding to apply these surtax proceeds and other tax proceeds available for application to transportation uses, the scarcity of these economic resources should lead to many hard questions over a thirty-year period. For example, in a county where only a small percentage of the population now rides buses, before committing $1.8 billion to a bus system, a county commission

might need to know whether the transit authority had a valid strategy with an acceptable likelihood of success to increase ridership to 20% of the population in 10 or 15 years. Or are we simply buying more buses that will continue to be operated without many passengers?

If we spend $1.4 billion on enhancing public transit options that must begin by replacing the downtown streetcar, will this help solve commuter problems for workers who live in Brandon, Town 'n' Country, or Sun City, or are there other options to address the needs of beleaguered commuters that would warrant applying these scarce resources to other uses? In the short-term, should we spend a higher percentage of this money on new and expanded roads that might be a long-term solution if self-driving electric cars evolve as predicted? Good questions for a county commission to ponder–but matters that Article 11 removed from the table for discussion by the Hillsborough County Commission.

The county commission of such a county can allocate tax proceeds to municipalities within the county. But the transportation needs of each municipality will likely be different. The competence of each city council to budget a project and perform successfully will vary. Their needs are unlikely to be the same every year, and the need for a significant degree of flexibility over a thirty-year period might seem very important to a county commissioner today, or ten years from now. Before deciding upon a population-based, thirty-year automatic distribution plan, the county

commission might want to consider whether a less arbitrary allocation was more appropriate. But Article 11 gave the Hillsborough County Commission no power whatsoever to reflect upon this allocation of scarce resources.

The brief of the Amici who support AFT and Local Government primarily presents material that is totally outside the record, but it demonstrates the type of information that the Legislature contemplated citizens would present to the County Commission when it decided to apply available tax proceeds. It is not information that justifies the imposition of a complex, 30-year fixed plan in accord with the undisclosed core political strategy of AFT, divorced from the statutory role and responsibility of the County Commission.

A county's future depends on wise growth management. And that includes, but only in part, the management of traffic. Commissioners who study problems deeply, who have vision, and who spend scarce resources well, will be re-elected and remembered in history. Those who do not, will not. The Legislature understood this human dynamic when it wisely mandated these decisions be made by an elected, representative county commission.

With its preemptive authority over taxation, the Legislature clearly did not intend the unambiguous language of section 212.05(1) to compel billions of dollars to be spent on projects mandated by the undisclosed authors of a charter amendment

designed to remove authority from the County Commission and to give some of that authority to an unelected, unbonded Independent Oversight Committee.

Mr. White would hope that every dollar of tax money is spent as carefully as possible. But he is not claiming that the County Commission must authorize every check written from these surtax proceeds. Article 11 is in irreconcilable conflict with the general law announced in section 212.055(1), not because of the power to sign checks, but because it eliminates the County Commission's responsibility to make basic, policy decisions about the appropriate uses of these scarce public resources.

2. Article 11 is not constitutional because it is "more stringent." When a general law requires a governing body to make discretionary decisions, "more stringent" local requirements create conflict.

Local Government argues that an amendment is not unconstitutional if it is "more stringent than a statute," citing *City of Kissimmee v. Fla. Retail Federation, Inc*., 915 So. 2d 205, 209 (Fla. 5th DCA 2005) (LG p.33). As in *Kissimmee,* that typically occurs where an ordinance regulating the conduct of people or businesses has requirements in addition to those in a general statute. In that context, usually the additional local regulation can "coexist" with the general law. *See Phantom of Brevard, Inc. v. Brevard County,* 3 So. 3d 309, 314 (Fla. 2008); *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011, 1020 (Fla. 2d DCA 2005).

But section 212.055(1), Florida Statutes, requires that the County Commission have full discretion to choose the "appropriate" uses for the tax

proceeds. Full discretion cannot coexist with more stringent local requirements that eliminate discretion and compel uses of surtax proceeds without the deliberation of a county commission. It cannot coexist with local laws that give power to an unelected Independent Oversight Commission to override the County Commission's discretionary decisions.

AFT and Local Government do not argue that the phrase "deem appropriate" is ambiguous, but they minimize the mandatory role of the County Commission in applying surtax proceeds "to as many or as few of the uses enumerated below in whatever combination the county commission deems appropriate."

It is worth considering that hundreds of statutes, rules, and judicial opinions give judges and governmental bodies the power to make decisions they "deem appropriate." For example, Section 255.515, Florida Statutes, gives the Division of Bond Finance the authority to "use such method of financing or combination of methods of financing as it deems appropriate to result in cost-effective financing."

In deciding the need to adjust judicial circuits, this Court has imposed upon itself the obligation to "consider the assessment committee's recommendations within a timeframe it deems appropriate." Fla. R. Jud. Admin. 2.241(b)(7).

In awarding restitution, a trial court considers "such other factors which it deems appropriate." *State v. Hawthorne*, 573 So. 2d 330, 332–33 (Fla. 1991). And in making the difficult decisions involved in releasing autopsy photographs, a circuit

court "upon a showing of good cause, may issue an order authorizing any person to view or copy a photograph or video recording of an autopsy or to listen to or copy an audio recording of an autopsy and may prescribe any restrictions or stipulations that the court deems appropriate." §406.135(4)(a), Florida Statutes.

When there is a fact-based, complex decision that depends on "all the circumstances," the Legislature and the courts often use this phrase in designating a decision-maker to whom discretion is given to judge the circumstances and to select the best decision that appears reasonable to the decision-maker under them.

Simply stated, the unconstitutional provisions in Article 11 override the Legislature's decision as to **who** would be the decision-maker and **how** that discretionary decision would be made. They prevent the County Commission from evaluating all of the circumstances, and they supplant that open-ended decision-making process with the detailed plan drafted by the unknown authors of Article 11.

3. Article 11 does not merely "supplement, rather than contradict" the provisions of section 212.055(1).

Local Government argues that Article 11 "supplements" the requirements of section 212.055(1). It avoids quoting those requirements: "*Proceeds from the surtax shall be applied to as many or as few of the uses enumerated below in whatever combination the county commission deems appropriate.*"

As demonstrated above, the sections of Article 11 that are unconstitutional plainly blocked the County Commission from performing this task for all but a small percentage of the tax proceeds. No one explains how these provisions are a supplementary help to the County Commission in performing the difficult discretionary, policy-based task of selecting the appropriate uses for a $9 billion tax.

Remarkably, again without quoting the language in section 212.055(1)(d), Local Government declares that nothing in the statute "preclude[s] the voters from placing parameters on the distribution and expenditure of transportation sales tax revenues." (LG p.36). It also argues that, while section 212.055 requires the Legislature itself to state the purpose for a surtax in the statute creating the tax, "the statute says nothing about the process by which those uses are determined." (LG p.36). But that "process" is unambiguously explained in section 212.055(1)(d) and it clearly requires the County Commission to be the decision-maker, and to make its decision based on its assessment of the uses "appropriate" for these scarce resources.

Local Government argues that other surtaxes permitted by the Legislature in section 212.055 provide "other requirements" beyond what is required in section 212.055(1). (LG p. 36, including footnote 8). The relevance of this circumstance is unclear. However, it is noteworthy that the other enumerated surtaxes must be initiated by the "governing body" of the county or by a school board.

The Legislature has authorized the transportation tax to be created by charter amendment. And the Hillsborough County Charter, in turn, authorizes amendment by citizens' initiative. After the Legislature amended section 212.055(1) to provide the extensive list of potential uses, it was completely logical for the Legislature to conclude that it must add the language giving mandatory control of the application of the surtax proceeds to a county commission. That was necessary so the allocation of these scarce resources, in conjunction with other available tax proceeds, over the life of the surtax could be decided by elected, accountable representatives evaluating all the local circumstances. It was needed to prevent the type of manipulation of the tax proceeds by citizens' initiative that occurred in this case.

Nothing in the other sections of section 212.055–each being a different surtax added at a different time–would cause anyone to believe that the unambiguous mandatory language of section 212.055(1)(d) means anything other than what it says: The county commission, as the governing body of the county, must make the decisions as to the application of the surtax proceeds to the optional uses.

4. Section 125.86, Florida Statutes, does not support Hillsborough County's argument.

Local Government argues that the "electorate was empowered by general law to limit its County Commission's authority." (LG p. 37). This is a scaled-down version of the argument made to the circuit court that Article 11 had actually changed

the governing body of the county for purposes of this tax from the county commission to either the people or the Independent Oversight Commission. (A. 1:565-66, 3:264, 7:164-67). It is based primarily on section 125.86, Florida Statutes.

Section 125.86 enumerates the legislative powers of a county commission in a charter county. It empowers the county commission, for example, to "approve the annual operating and capital budgets and any long-term capital or financial program" of the county. *See* §125.86(4), Fla. Stat. This statute ends with a provision that gives the county commission:

> *All other 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.*

This statute, of course, is based on the Florida Constitution, which states:

> (g) CHARTER GOVERNMENT. Counties operating under county charters shall have all powers of local self-government **not inconsistent with general law**, or with special law approved by vote of the electors. The governing body of a county operating under a charter may enact county ordinances **not inconsistent with general law**. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances.

Article VIII, §1(g), Fla. Const.

Simply put, nothing in this statute or in the Florida Constitution gives "the people" the power to override the unambiguous requirement of a general law.

Nothing in this statute gave AFT a good-faith legal basis to draft Article 11 with any of its unconstitutional provisions.

5. The many references to 212.055(1) in Article 11 probably demonstrate that its author knew it had constitutional problems, but they do not insulate Article 11 from those problems.

AFT and Local Government argue that Article 11 is constitutional in its entirety because it repeatedly referred to a need to comply with general law, and specifically with section 212.055(1). This is a curious argument.

Imagine if the citizen's initiative had said in 1970: "It shall be lawful for the citizens of Hillsborough County, as a charter county, to organize and operate Bolita games in accordance with section 849.09, Florida Statutes." Or perhaps more recently: "The County Commission, in compliance with Article I, section 3 of the Florida Constitution, shall prohibit the free exercise of the Muslim faith in Hillsborough County." No one would suggest that adding a reference to a supreme law in clear conflict with a charter amendment somehow made the amendment okay.

Although it is common to have at least one reference to a supreme law in an inferior ordinance or charter provision, it is totally unnecessary. The supreme law has supremacy whether the inferior law mentions it or not.

As demonstrated in the statement of the facts, many of the references to section 212.055(1) are in sentences where the statute is paired with a reference to Article 11 under circumstances in which obedience to both is impossible. It almost

seems as though the unknown author had a guilty conscience about the fact that he or she was writing an amendment that did not comply with the supreme general statute. The references to the statute simply make it more obvious that the conflict exists, and that the County Commission cannot obey section 212.055(1)(d) in the context of the many "shall" requirements in the charter amendment that eliminate the County Commission's role under section 212.055(1)(d).

The charter's "supremacy clause" in section 11.11(3) likewise fails to preserve anything in the sections that were found unconstitutional by the circuit court. That clause states:

> *Supremacy. This Article 11 shall at all times be interpreted in a manner consistent with the laws of Florida, and in the event of any conflict between the provisions of this Article 11 and the laws of Florida, the laws of Florida shall prevail.*

Again, such a clause is common in a county charter, but it is totally unnecessary. The interpretation called for in the clause will occur because of Article VII, section 1(g) of the Florida Constitution, not because that supreme law was acknowledged in Article 11 itself.

But the eleven references to the controlling general law by the framers at AFT tell us something else. Article 11 was drafted with the intent to save the tax after all of the attractive window dressing was removed by the circuit court as unconstitutional fabric. The framers were not so obtuse that they could not see the

open and obvious conflict between Article 11 and section 212.055(1). They were preparing for the argument that has developed. They knew that, if all of the provisions in section 11.05, 11.07, 11.08, and the provisions giving superpowers to the IOC were removed by the circuit court, they could still argue that a valid tax remained due to their many references to the general statute.

What AFT and Local Government are arguing is that the ballot summary and section 11.01 could promise the voters that certain uses were guaranteed and that a plan with something in it for everyone would be fulfilled, and then when all of these unconstitutional promises to the people were stripped from the charter amendment by the circuit court, they were still legally entitled to collect the taxpayers' money for thirty years. It would be a mockery of the doctrines of supremacy and severance if this Court were to permit this legal argument and this election strategy to work.

D. The circuit court properly removed the powers of the Independent Oversight Committee that made it far more than an advisory board.

To be clear, Mr. White is not opposed to an advisory board. He believes that any board providing advice for a transportation surtax should be created by the county commission, and that its members should thereby qualify as "volunteers" under section 125.9501- 125.9506, Florida Statutes. But the inclusion of an ordinary advisory board in Article 11 would not have been sufficient by itself to warrant a ruling that all of Article 11 was unconstitutional.

That said, the three parts of Article 11 removed by the circuit court relating to the IOC were clearly unconstitutional. Section 11.10 is the primary section in Article 11 creating the IOC. As provided for in that section, the IOC members are selected by the municipalities, HART, the Clerk, the Property Appraiser, the Tax Collector, as well as by the County Commission. Once selected, the IOC is truly independent. It "*may make and adopt such by-laws, rules and regulations for its own guidance and for the oversight of the Transportation Surtax as it may deem expedient and not inconsistent with this Chapter*."

Section 11.10 states that the IOC "*shall have only those powers and duties specifically vested in it by this Section 11.10*. The powers stricken by the circuit court include one power stated in section 11.10, and two that are not.

First, section 11.10(2) gave the IOC the power to "Approve Project Plans and approve and certify as to whether the projects therein comply with this Article." Section 11.06 further explains this power:

> ***Each Project Plan must be approved by the governing body of the applicable Agency and by a majority vote of the Independent Oversight Committee at a public meeting***.

"Project Plan" is defined earlier in section 11.06 as:

> ***a plan setting forth the projects, including reasonable detail for each, on which such Agency will expend their distribution of the Surtax***

Proceeds for the following calendar year in accordance with the uses mandated by Sections 11.07 and 11.08 below.

Local Government takes the position that these two provisions in Article 11 give the IOC the power merely to ensure consistency with the allocations mandated in Article 11. (LG. p.42). But it still maintains that the IOC has the power to suspend distribution of the tax proceeds for plans approved by the Agencies–including plans approved by the County Commission. AFT, on the other hand, seems to maintain that the IOC was actually given the same power to "approve" a project plan as the "Agencies," including the County Commission. (AFT p. 35).

The language in section 11.06 in the above-quoted sentence uses the word "approved" once to describe the function of the governing body of the applicable Agency **and** the function of the IOC. Textually, it is hard to believe that this one word has two different meanings in this short sentence. If the IOC were a mere advisory board, the county commission would "approve" plans and then the IOC would decline to "certify" them as a matter of political pressure.

Because of the text of this one short sentence, it was clear to the circuit court that Article 11 gave the IOC the power to disapprove project plans after the County Commission, as the governing body of the county, had voted to apply the surtax proceeds to the project plan. Thus, the IOC could override the County Commission's vote by disapproving the project. It could do the same to HART. And AFT told the

voters as much before the election in its political advertisements that claimed the IOC would keep the commissioners out of the "cookie jar." (W.A. p.44, A. 8:64).

In short, until the circuit court struck these unconstitutional provisions, the County Commission was only given the power to approve the projects within the limited portion of the General Fund that was automatically allocated to the county—and the IOC could override that approval. The IOC, on the other hand, was given the power to override the approval of all Agencies. Only the MPO received allocations that were unreviewed by the IOC. Thus, Article 11, when it was submitted to the Supervisor of Elections by AFT, gave far more power to the unelected IOC to deem uses appropriate than it gave to the County Commission.

Second, section 11.07(9) gave the power to reallocate expenditure categories to the IOC. Thus, if the County Commission wanted to reallocate funds from any one of the first three mandated categories in section 11.07, it had no power to do so. The County Commission could only reallocate funds with a 75% vote of the IOC. Not only does this conflict with section 212.055(1), but it does not appear to be a power enumerated in section 11.10. The circuit court properly struck this language.

Finally, section 11.08 was stricken by the circuit court in its entirety. It frankly is unconstitutional or illegal for several reasons. We can start with the fact that it is not a power specifically vested in the IOC by section 11.10, so it is invalid on the face of Article 11 itself.

But section 11.08 gives the IOC the power to "determine" by a two-thirds vote that an Agency, including the County Commission, "has failed to comply with any term or condition of this Article 11. . . ." If it makes this factual determination and, if the Agency is still in "non-compliance" after ninety days, the IOC is given the power to order the Clerk to "suspend" the payment of surtax proceeds to the Agency.

This is a judicial or quasi-judicial power granted to an unelected, unsworn group of people, who may not even qualify as "volunteers" under Chapter 125. The IOC can effectively issue a cease and desist order to the Clerk. Hopefully, that order would be reviewable by common law certiorari to the circuit court, but nothing in Article 11 states this, and the independently IOC makes its own rules.

Not only does this directly conflict with the power of the County Commission to apply these tax proceeds to the uses it deems appropriate, but it extends judicial or quasi-judicial powers to a body that is not governed by Article V of the Florida Constitution or by Chapter 120 of the Florida Statutes.

That Local Government can claim that the circuit court erred in striking section 11.09 as unconstitutional is amazing. That AFT's undisclosed framers of Article 11 could insert this into a charter amendment with any good-faith belief that it was constitutional is equally amazing.

E. The actions of the County Commission and the other "Agencies" in "deeming appropriate" AFT's plan during this litigation are no solution to a charter amendment that violates the supremacy of Florida general law.

1. The Actions during the Litigation in the Circuit Court.

Both AFT and Local Government argue that it is important for this Court to consider the votes of the County Commission when it passed the Bond Resolution in February 2019 and when it agreed to an Interlocal Agreement later in 2019. It may be useful for this Court to consider the circumstances of those votes, but they hardly solve the constitutional problem for several reasons.

First, the conflict with general law that creates a violation of the doctrine of supremacy and, thereby, an unconstitutional local law exists in this case between a statute enacted by the Legislature and an amendment to a county charter. In the pecking order of supremacy, a bond resolution, an ordinance, and an interlocal agreement are each inferior to the charter, as well as to the general laws of Florida and the Florida Constitution. A county commission or a municipality cannot eliminate supremacy conflicts that existed in a charter amendment on election day by passing inferior laws or signing local agreements after the fact.

Second, both the Bond Validation and the Interlocal Agreement were voted on prior to the circuit court's order declaring 14 parts of Article 11 unconstitutional. At the time the commissioners voted, counsel for Hillsborough County was advising

the County Commission that everything in Article 11 was constitutional. Counsel for Hillsborough County is still making that argument today.

The commissioners who followed the advice of their counsel were compelled to deem appropriate the contents of Article 11 because Article 11 left them no choice. They were bound by the county charter, and according to their lawyers that charter required that the tax proceeds be applied as specified in section 11.05, subject to the conditions, restrictions and limitations in section 11.07 and 11.08.

Local Government cannot argue that these commissioners were exercising the policy-based discretion to "deem appropriate" uses, as expected by the Legislature, when they deemed appropriate a plan that was based on the undisclosed core political strategy of AFT—a plan that had not even been properly studied in the statutorily required "performance audit" available to the commissioners on the County's website.

Third, the "deem appropriate" language was placed in the Bond Resolution and in the Interlocal Agreement as surplus language purely for use in this litigation. This Court regularly reviews orders approving bond validations. This Court will find no other bond resolution with this language. Hillsborough County did not need $10 million in bonds to supplement the other tax proceeds being used to rework the East 131st Avenue Improvement Project; a project selected in April 2019 to avoid the ambiguous language in the earlier bond resolution describing only a "2019

Project" as the use for the funds. (A. 9:199, 10:22-23). That project was selected at the end of this process because the County needed a test case to determine the constitutionality of Article 11.

Mr. White is not suggesting that the test case was inappropriate. But the bond resolution could have been issued without a finding "deeming appropriate" – **not the application of tax proceeds to a particular use**–but the entire thirty-year plan allocating funds to other "Agencies." This includes funds distributed to other "Agencies" that may or may not be the source of revenue for any local bonds. The County Commission had the audacity to attempt to bind all future commissions for the entire thirty years to the "appropriateness" of this overall plan in the context of seeking $10 million in bonds. It did this when even Article 11 gave future county commissions to right to approve "project plans" annually. *See* Art. 11, §11.06.

Finally, it is noteworthy that Hillsborough County wants to rely solely on the few pages of records created and maintained by the Clerk to explain this action. (A. 12:78-84). While it would seem that the Clerk, as the trustee of the funds, would need to take a neutral position in this litigation, the Clerk was an active opponent of Mr. White in the circuit court. The Clerk remains an active opponent in this Court. Indeed, the Clerk argued that Article 11 had replaced the County Commission as the governing body of Hillsborough County for purposes of applying these tax proceeds and had given these powers to the people or the IOC. (A. 1:565-66).

In the trial court, Mr. White submitted transcripts of the two relevant county commission meetings that had been transcribed by a court reporter from the videotaped county commission meetings that are available to the world at the County's website. (A. 8:75). He requested that either the video or the transcripts be considered by the circuit court. (A. 9:630). But the proponents of Article 11 claimed the actual discussions of the commissioners were not under oath, inadmissible hearsay, and that only the Clerk's minutes could be considered by the circuit court. (A. 9:829-841). **They further argued that the "deemed appropriate" portions of these documents were not being presented to the circuit court as "resolving some type of conflict."** (A. 9:839-40). The circuit court accepted this reasoning. (A. 9:841).

But now Local Government does want to use its after-the-fact activities as evidence that there is no conflict. Mr. White submits that the transcripts or the County's own online video of those meetings are the best evidence of the County Commission's actions in this context. This is not evidence equivalent to testimony under oath. This is the County's own public "surveillance video" of the meeting that was subject to sunshine. *Cf. McKeehan v. State*, 838 So. 2d 1257, 1259 (Fla. 5th DCA 2003)(a surveillance video is the best evidence of a collateral crime because, as codified by statute, if the original evidence is available, no evidence should be received which is merely "substitutionary in nature.") The severely edited minutes

prepared by an adverse party do not reflect the limited discussion at the meetings where the County Commission deemed everything appropriate for thirty years.

2. The Actions of the County Commission while this case is pending on appeal.

AFT, but not the Local Government, wants this Court to hold that the circuit court erred in ruling that parts of Article 11 were unconstitutional as violations of the supremacy of section 212.055(1), Florida Statutes, because, *while this appeal was pending,* the County Commission passed an *ordinance*. (AFT p. 5, 33). Suffice it to say, there is no precedent to support such a holding.

Mr. White admits that, outside the record, the County Commission on September 18, 2019 enacted an ordinance that takes **all** of the unconstitutional conditions, limitations, and restrictions of Article 11, except for the superpowers of the IOC, and reinstates them as an ordinance. Obviously, the constitutionality of that ordinance has not yet been challenged.

But, knowing: (1) that AFT was unwilling to explain why there were specific percentages in the unconstitutional provisions; (2) that the performance audit on its own webpage did not study whether the unconstitutional provisions could achieve any of the goals that had been promised the voters over a thirty-year period, and (3) that "expanding public transit options" on "guideways" covertly required funding a replacement of the downtown streetcar, which had never been disclosed to the voters, the County Commission nevertheless chose to adopt whole-cloth AFT's very

restrictive plan to control future uses and bar future commissioners from exercising their discretion unless those future commissioners repeal the ordinance.

Like the earlier Bond Resolution and the Inter-Local Agreement, this ordinance is inferior to the county charter, which is inferior to section 212.055(1). Its adoption is not a legal reason for the Court to reinstate provisions to the county charter that conflict with the general law of Florida.

Like the earlier Bond Resolution and the Inter-Local Agreement, this ordinance was adopted while the County Commission's lawyers are telling them the circuit court was wrong.

Like the earlier Bond Resolution and the Inter-Local Agreement, this is a litigation tactic trying to convince this Court to salvage an unconstitutional tax. AFT argues that the recent adoption of this ordinance demonstrates that the unconstitutional provisions in Article 11 do not conflict with the general law because "they require compliance with it." (AFT p. 32-33). It maintains this recent vote by the County Commission should cause this Court to reinsert the provisions that deprive the County Commission of the power and obligation to make the hard discretionary choices the Legislature intends for it to make.

Only in a George Orwell novel would a vote on such an ordinance create a justification to reinsert language into a county charter when that language irreconcilably conflicts with general law. Those provisions require compliance with

the undisclosed political strategy of the framers of Article 11 at AFT, not with the Legislature's clear and unambiguous requirement in section 212.055(1) that commissioners make decisions for which they will bear ultimate responsibility.

The circuit court's order striking fourteen parts of Article 11 should be affirmed, and this Court should strike the remainder of the offending language.

REPLY ARGUMENT

I. After striking an unconstitutional transportation improvement plan from the County Charter, the circuit court erred by severing a 30-year tax intended by its framers to provide the revenue to fulfill that plan.

A. The standards of review and the decision-making process in this case.

All parties agree that this issue is reviewed de novo.

B. The circuit court erred in its application of the doctrine of severance.

Neither AFT nor Local Government directly responds to this part of Mr. White's argument. AFT begins its argument with the proposition that an initiative petition containing a severability clause demonstrates that its framers intended severability. (AFT p. 13). Local Government makes a similar argument in section I. D of its brief. (LG p. 29-30).

But Mr. White's point is that the severability clause in section 11.11(2) addressed only the problem of a "mandated expenditure category" in section 11.07 or 11.08 being impermissible under section 212.055(1). It did not address what

happens when sections 11.07 and 11.08 (and section 11.05) are held unconstitutional. Contrary to the argument of Local Government, Mr. White did not suggest that the severability clause in section 11.11(2) applied to a minority of the stricken provisions. (LG p. 30). Section 11.11(2) simply has no relevance to the issue at hand. It did not even hint to the voters that the tax would be levied after all of these sections of Article 11 were declared unconstitutional.

Thus, it cannot be denied that the circuit court's reasoning for severing the tax is incorrect. This issue comes to this Court with no presumption of correctness. It must be analyzed correctly by this Court for the first time using either the *Cramp* tests or a newly stated test better suited for such local citizens' initiatives.

C. The circuit court facilitated its decision to save a tax by striking only the percentages used in the "formula" while keeping the text that created mandatory uses and restrictions.

Again, neither AFT nor Local Government directly responds to this part of Mr. White's argument. Local Government appears to mention this argument in only one sentence at the bottom of page 26 of its brief, where it questions whether the "number of words" stricken is relevant to the issue on appeal. AFT, in contrast, argues that only 500 of 3,050 words were stricken. (AFT. 16). It then addresses this issue in a little more detail later in its brief. (AFT p. 23-25).

AFT argues that none of the remaining words "poses any challenge to the County Commission's authority." (AFT p. 24). But if one examines all of the

highlighted text in Article 11 on pages 39-41 of Mr. White's appendix to his initial brief, that text mandates funding to "each Municipality," which means the County Commission must create an interlocal agreement. It mandates local funding of the MPO for thirty years whether such funding is needed or not. It mandates funding HART. It places many restrictions on the County Commission albeit ones that can be obeyed by the expenditure of less money. No party has argued to this Court that an unconstitutional provision that involves less money can be retained in Article 11 under some rule of law that overlooks small constitutional violations.

AFT next argues that just because the circuit court's edit may create an ambiguous document with numerous grammatical errors does not warrant removing the full text of these restrictions, conditions, and limitations. It cites *Schmitt v. State,* 590 So. 2d 404, 415 (Fla. 1991). That case was not deciding how much to strike from an unconstitutional law. It applied the *Cramp* tests to a criminal statute after the Court removed only a phrase within the definition of "sexual conduct" because it was unconstitutionally overbroad. Thus, it was not addressing how much to remove, but whether the overall statute could survive following the removal of a phrase in one definition. The mandatory requirements left by the circuit court are both unconstitutional and grammatically incorrect. They would require the inclusion of additional words to make sense.

And if the full text of sections 11.05, 11.07, and 11.08 is properly removed by this Court, then approximately 1400 of the 3,050 words of Article 11 are removed. Mr. White agrees this is not a Scrabble game, but unlike the cases cited by AFT and Local Government, we are not evaluating a case where a phrase or a sentence or even a subsection is removed. 45% of the words in this lengthy amendment are in the paragraphs that create unconstitutional content. Even with the circuit court's minimalist approach, most of the operative effect of 45% of this amendment has been removed. When such a substantial part of the text that was submitted to the voters is stricken, it ought to raise serious questions about whether the voters would have voted for the tax that remains. AFT now claims that the basic provisions creating a tax were the "heart of Article 11," (AFT p.16). But it was the promises in the plan on which AFT expended the bulk of the words in its ballot summary. The unconstitutional plan was the heart of both Article 11 and the ballot language.

D. Using the text of Article 11 to determine the framers' intent and to address the two *Cramp* tests

Local Government, and especially AFT, have confused the "chief purpose" test used in determining the adequacy of ballot language with the two *Cramp* tests at issue in this case. AFT claims that Mr. White must demonstrate "that the Amendment 'in its entirety' violates general law," citing to *Dade County v. Dade Cty. League of Municipalities,* 104 So. 2d 512, 515 (Fla. 1958). (AFT p. 14). That

pre-*Cramp* case discussed whether a proposed charter amendment could be placed on the ballot when its opponents claimed it was unconstitutional. The Court allowed the matter to be placed on the ballot because it was not entirely unconstitutional, expressly pointing out that the constitutionality of the challenged portions of the amendment could be determined later if it was enacted. *Id.* at 518. AFT and Local Government cited *Wright v. Frankel*, 965 So. 2d 365, 373 (Fla. 4th DCA 2007), for this same proposition in the circuit court, and Mr. White explained this error in reasoning in the circuit court as well. (A. 8:357, 371). The many ballot cases cited in their briefs are simply addressing a different issue. Likewise, the cases on statutory construction do not resolve this issue; they merely confirm that section 212.055(1) is clear and unambiguous.

The *Cramp* issue is not whether the ballot language adequately described the proposed Article 11–including all of its unconstitutional provisions. Instead, the issue under the third *Cramp* test is whether the tax that remains after the detailed transportation plan is eliminated is "not so inseparable in substance" from the detailed plan that the voters would have passed the tax without the plan. Mr. White maintains that the text of Article 11 demonstrates the framers created an amendment in which the stricken plan and the tax were inextricably intertwined. *See Allen v. Butterworth*, 756 So. 2d 52, 65 (Fla. 2000)("the remaining sections cannot be

logically separated from the unconstitutional sections, as these sections are inextricably intertwined").

Today both Local Government and AFT maintain that the voters really just wanted the tax for any transportation improvement that the County Commission might deem appropriate and that the detailed plan with all of its percentages and restrictions was unimportant. One has to wonder why AFT placed all of the extensive unconstitutional planning restrictions in Article 11 if they just thought the voters wanted a transportation tax for the County Commission to spend prudently.

Although as discussed in the initial brief, this Court has made clear that the issue is more a matter of legislative intent than legislative purpose, Local Government's brief is much closer to the mark when it argues that the question is whether the "overall purpose" of Article 11 as presented to the voters can be achieved without sections 11.05, 11.07, 11.08, and the superpowers of the IOC. (LG p. 24). Local Government describes these sections as "ancillary details." (LG p. 26). In *Ray v. Mortham*, 742 So. 2d 1276, 1283 (Fla. 1999), when addressing the removal of the handful of federally elected officials from the long list of term-limited state officials, the Court explained:

> Likewise, we find that the portions of this amendment are functionally independent. The unconstitutional provisions of this amendment can be stricken **without disrupting the integrity of the remaining provisions.** Further, the overall purpose of limiting political terms can still be accomplished after the unconstitutional portion is stricken.

Likewise, in *Florida Hospital Waterman, Inc. v. Buster*, 984 So. 2d 478, 494 (Fla. 2008) the Court explained the offending subsections could be separated "**without any adverse effect on its remaining portions."**

But the overall purpose of Article 11 was clearly explained in section 11.01:

> 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.

Simply put, AFT cannot deny that, if the County Commission, now and in the future is free to use its own judgment to select any use from section 212.055(1) it deems appropriate, then the overall guaranteed purpose promised to the voters in the underlined portion of Article 11 above is not achieved. The removal of even that part of Article 11 removed by the circuit court "disrupts" the "integrity" of the amendment submitted to the voters. It has a major "adverse effect" upon achieving what AFT promised the remaining portions would achieve. Using only the text of Article 11, the *Cramp* tests do not permit the tax to be severed.

E. Using the text of the ballot title and summary to determine intent and the two *Cramp* tests

Both AFT and Local Government appear to recognize that the ballot title and summary may be relevant in resolving the two *Cramp* tests, but they do not directly

respond to this argument, including the excellent discussion in the amicus brief filed by Associated Industries.

In the circuit court, Mr. White challenged the ballot language because he believed it was inadequate to explain the entirety of proposed Article 11 on the ballot. This included the portions that he also believed to be unconstitutional. But once the circuit court removed the unconstitutional provisions, there was little reason to challenge in this Court the circuit court's determination that the language had been adequate to describe the entire proposed amendment.

When considering ballot language for a *Cramp* analysis, the question should be two-fold: 1) Did the original ballot summary describe an overall purpose that is not achieved by what remains, and 2) would a different ballot summary be necessary to provide a fair description of the overall purpose of the remainder if the voters were voting only on that part? The answer to both questions in this case is clearly yes.

Just as the purpose in section 11.01 is not achieved by what remains, the list of guaranteed uses of the tax proceeds in the ballot summary is no longer guaranteed by the text of Article 11. It is now a tax to be applied as the County Commission deems appropriate. It is not a tax for projects in Town 'n' Country, Brandon, and Sun City nor for the attractive list of projects promised in the ballot summary.

AFT relies on a brief quote from a case that warrants quotation in full:

> **The citizen initiative constitutional amendment process relies on an accurate, objective ballot summary for its legitimacy. Voters deciding whether to approve a proposed amendment to our constitution never see the actual text of the proposed amendment. See § 101.161(1), Fla. Stat. They vote based only on the ballot title and the summary. Therefore, an accurate, objective, and neutral summary of the proposed amendment is the sine qua non of the citizen-driven process of amending our constitution. Without it, the constitution becomes not a safe harbor for protecting all the residents of Florida, but the den of special interest groups seeking to impose their own narrow agendas.**

In re Advisory Opinion to the Atty. Gen. re Additional Homestead Tax Exemption, 880 So. 2d 646, 653–54 (Fla. 2004).

The ballot summary drafted by AFT was not sufficient to legitimize the vote on the tax that remains. Using the ballot title and summary of Article 11, the *Cramp* tests do not permit the tax to be severed because the legislative purpose contained in the ballot summary is not achieved by the tax that remains.

F. Considering the Political Campaign.

No party seems to believe that a fact-based trial to determine the impact of these changes on the voters is a good idea. Mr. White is not certain, however, that the campaign material identified by Mr. Hudson in his deposition is entirely irrelevant to the *Cramp* determination by this Court. This Court does not appear to have so held.

AFT cites to *Williams v. Smith*, 360 So. 2d 417, 420 n.5 (Fla. 1978) for the proposition that intent in this context should focus on voters more than framers. (AFT p. 23). That footnote states:

> In analyzing a constitutional amendment adopted by initiative rather than by legislative or constitution revision commission vote, the intent of the framers should be accorded less significance than **the intent of the voters as evidenced by materials they had available as a predicate for their collective decision.** An absence of debate and recorded discussion marks the development of an initiative proposal. **To accord the same weight to evidences of the intent of an amendment's framer as is given to debates and dialogue leading a proposal adopted from diverse sources would allow one person's private documents to shape constitutional policy as persuasively as the public's perception of the proposal. This we cannot permit.**

Mr. White fully agrees with the Court on this point. In this case, the "private documents" have not been disclosed by AFT. The voters, for example, undoubtedly did not understand the intent of AFT in the provision "expanding public transit options." But the question remains: What materials are included in the "materials [the voters] had available as a predicate for their collective decision?"

Clearly the ballot title and summary were available to them. The text of Article 11 could be located by a determined voter, but it would be an exaggeration to say it was readily available. The campaign mailers by AFT, on the other hand, were delivered to homes of voters and were quite available.

The mailers identified by Mr. Hudson that are in Mr. White's appendix never once use the word "tax" or "surtax" or "1%" or "30 years." They make promises about plans. They assure the voters that the IOC can keep the commissioners out of the "cookie jar." (W.A. p. 43-46).

AFT does not want this information considered because it only hurts its argument. It demonstrates that the tax was not "the heart of Article 11." Mr. White does not think it should be the end-all of this case, but it is not unreasonable for it to play some role in the Court's legal resolution of the *Cramp* issues.

II. When substantial portions of a citizen's initiative amending a county charter are declared unconstitutional, this Court should determine the issue of severability using a test that better assesses this local political process than the "legislative" tests in *Cramp.*

Mr. White is not asking this court to "discard" the *Cramp* test for its proper use in testing statutes enacted by the Legislature. Indeed, it would seem appropriate for ordinances passed by county commissions. But it is a misfit for a local citizen's initiative that is substantially unconstitutional at the time its framers first submit it to the Supervisor of Elections to begin the process of obtaining voter signatures.

AFT and Local Government argue that Mr. White's proposal is anti-democratic, that it disregards the political power given to the people under our constitution, and that it is "unworkable." It is none of these.

Local Government argues that Mr. White is forgetting that the "sponsors" are "the people." (LG p.21). But the real "sponsors" of article 11 are the people of AFT who framed this proposed amendment, and who moved to intervene in the circuit court to defend their proposal. (A. 1:60). If there had been a procedure for a pre-election review in this Court, they would have defended their proposal in that advisory proceeding.

Article 11 was not written by the people at a New England town meeting. If it had been written by the people at such a meeting, certainly at least a few of the people in attendance would have read section 212.055(1). They would have pointed out that the Legislature had given them the power to tax themselves, but not to control the particular uses to which the tax proceeds would ultimately be applied.

But AFT, sponsored by a handful of major donors, wrote a proposed amendment to the Hillsborough County Charter that repeatedly creates restrictions and mandatory funding decisions that are in blatant conflict with the applicable general statute. The undisclosed authors of Article 11 have refused to disclose the "core political strategy" that caused them to place the many conditions, restrictions, and limitations upon the County Commission. They have refused to disclose why they allocated more than $1.4 billion to "expanding public transit options," when the generic words are carefully designed to require rebuilding a downtown streetcar system that will greatly benefit the landowners and businesses adjacent to that

discrete route, but will have little impact upon the transportation woes of "the people" of Hillsborough County in places like Brandon and Town 'n' Country.

AFT knew full well that it was free to incorporate all of these unconstitutional conditions, restrictions and limitations into Article 11, and that so long as some portions of the charter amendment were constitutional, the unconstitutional provisions could only be challenged after the election. *See Dade County v. Dade Cty. League of Municipalities,* 104 So. 2d 512, 515 (Fla. 1958). As its brief demonstrates, even though it did not need to state that the charter amendment must be in compliance with section 212.055, it included this phrase 11 times. It hopes that it can salvage the tax because it repeatedly told the voters that this plan would be implemented in accordance with the terms of Article 11 and in accordance with the terms of section 212.055, when AFT had to know from the beginning that this was a legal impossibility.

It is not Mr. White's position that any minor defect in a citizen initiative petition should cause an entire amendment to fail. It is Mr. White' position that when a citizen's initiative contains "substantial constitutional violations when submitted to the voters," it should be assumed (or presumed) that the unconstitutional provisions did affect the outcome of the election. The amendment should be declared unconstitutional in its entirety unless those who placed it on the ballot can demonstrate that the unconstitutional parts did not affect the election.

There is nothing undemocratic about placing a burden of persuasion on the issue of severability upon the framers of a citizens' initiative when it included provisions—attractive to the voters—that were facially unconstitutional when those framers submitted the proposal to the Supervisor to begin collecting signatures.

The power of self-governance that is given to the people under a county charter is an awesome freedom. But that power needs to be protected from the corrupting potential of small groups with undisclosed self-interests that can manipulate the process by presenting petitions containing attractive unconstitutional provisions that are not examined by the judiciary prior to an election.

In this case, there really can be no question that the ballot language selected by AFT for its unconstitutional version of Article 11 would be misleading ballot language for the portion that remains. Clearly, a constitutional defect in a citizens' initiative is "substantial" when it would require a different ballot summary to present the remainder to the voters fairly.

Once the "bad" mandatory transportation plan" is removed from Article 11, given that it was this plan that AFT marketed to the voters, it should not be Mr. White's burden to *disprove* that the voters would have adopted the "good" tax anyway. The burden to prove that the voters would have adopted the tax alone should fall on those who drafted and promoted the constitutionally defective

citizens' initiative. That is not undemocratic; it is an appropriate burden to protect the democratic process.

Respectfully Submitted,

/s/ Chris W. Altenbernd
Chris W. Altenbernd, Esq.
Florida Bar No: 197394
BANKER LOPEZ GASSLER P.A.
501 East Kennedy Blvd., Suite 1700
Tampa, FL 33602
Telephone: (813) 221-1500
Fax No: (813) 222-3066
Email: caltenbernd@bankerlopez.com
Service: service-caltenbernd@bankerlopez.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the above and foregoing was filed and served on this 13th day of November, 2019, using the Florida Courts e-Filing Portal upon:

Alan S. Zimmet, B.C.S.
Nikki C. Day, B.C.S.
Elizabeth W. Neiberger, Esq.
BRYANT MILLER OLIVE, P.A.
One Tampa City Center, Suite 2700
Tampa, FL 33602
Email: azimmet@bmolaw.com
nday@bmolaw.com
eneiberger@bmolaw.com
nakins@bmolaw.com
cmiller@bmolaw.com
agarner@bmolaw.com
Attorneys for Hillsborough County

Kenneth Buchman, Esq.
City Attorney for Plant City
302 W. Reynolds St.
Plant City, FL 33566
kbuchman@plantcitygov.com
kenbuchman@gmail.com
lyoung@plantcitygov.com
Attorney for Plant City

William D. Shepherd, Esq.
Hillsborough County Property Appraiser
601 E. Kennedy Blvd., 15th Floor
Tampa, FL 33602
Email: shepherw@hcpafl.org
Attorney for Hillsborough County Property Appraiser

Harry Cohen, Esq.
601 E. Kennedy Blvd., 13th Floor
P.O. Box 1110
Tampa, FL 33601
Email: harry.cohen@hillsclerk.com
Attorney for Pat Frank

Robert E. Brazel, Esq.
Chief Assistant County Attorney
P.O. Box 1110
Tampa, FL 33601
Email:
brazelr@hillsboroughcounty.org
matthewsl@hillsboroughcounty.org
johnsonni@hillsboroughcounty.org

David L. Smith, Esq.
Kristie Hatcher-Bolin, Esq.
GrayRobinson, P.A.
401 E. Jackson St., Suite 2700
Tampa, FL 33602
Email: david.smith@gray-robinson.com
Kristie.hatcher-bolin@gray-robinson.com
jane.larose@gray-robinson.com
linda.august@gray-robinson.com

Attorney for Doug Belden, Hillsborough County Tax Collector

Attorneys for HART

Cameron Clark, Esq.
Hillsborough County Attorney's Office
P.O. Box 1110
Tampa, FL 33601
Email:
clarkc@hillsboroughcounty.org
Attorney for Hillsborough MPO

David E. Harvey, Esq.
City Attorney's Office
315 E. Kennedy Blvd., 5th Floor
Tampa, FL 33602
Email: david.harvey@tampagov.net
Angela.armstrong@tampagov.net
Attorneys for City of Tampa

William H. Stafford, III
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399
Email:
William.stafford@myfloridalegal.com
Attorney for Florida Dep't of Revenue

Ada Carmona, Esq.
State Attorney's Office
419 N. Pierce St.
Tampa, FL 33602
Email: mailprocessingstaff@sao13th.com
Attorney for State of Florida

Ben H. Hill, III, Esq.
Robert A. Shimberg, Esq.
J. Logan Murphy, Esq.
Hill Ward Henderson, P.A.
101 E. Kennedy Blvd., Suite 3700
Tampa, FL 33602
Email: ben.hill@hwhlaw.com
robert.shimberg@hwhlaw.com
logan.murphy@hwhlaw.com
debra.whitworth@hwhlaw.com
regina.bigness@hwhlaw.com
tina.mcdonald@hwhlaw.com
Attorneys for Keep Hillsborough Moving and All for Transportation

Raoul G. Cantero, Esq.
David P. Draigh, Esq.
W. Dylan Fay, Esq.
White & Case LLP
200 S. Biscayne Blvd., Suite 4900
Miami, FL 33131
rcantero@whitecase.com
ddraigh@whitecase.com
wfay@whitecase.com
ldominguez@whitecase.com
miamilitigationfileroom@whitecase.com
Attorneys for Keep Hillsborough Moving and All for Transportation and Tyler Hudson

Derek T. Ho, Esq.
Collin R. White, Esq.
Kellogg, Hansen, Todd, Figel & Frederick, PLLC
1615 M St., N.W., Suite 400

Howard C. Coker, Esq.
Chelsea R. Harris, Esq.
Coker Law
136 East Bay St.
Jacksonville, FL 32202

Washington, D.C. 20036
Email:
dho@kellogghansen.com
cwhite@kellogghansen.com
Attorneys for Robert Emerson

Email: hcc@cokerlaw.com
crh@cokerlaw.com
Attorneys for Robert Emerson

W. Jordan Jones, Esq.
Florida House of Representatives
402 S. Monroe St.
Tallahassee, FL 32399
Jordan.jones@myfloridahouse.gov
Counsel for Fl. House of Rep.

Jeremiah Hawkes, Esq.
Ashley Istler, Esq.
The Florida Senate
404 S. Monroe St.
Tallahassee, FL 32399
Hawkes.jeremiah@flsenate.gov
Istler.ashley@flsenate.gov
Counsel for Florida Senate

Diane G. Dewolf, Esq.
Marilyn Mullen Healy, Esq.
Akerman LLP
106 E. College Ave., Suite 1200
Tallahassee, FL 32301
Diane.dewolf@akerman.com
Marilyn.healy@akerman.com
Elisa.miller@akerman.com
Michele.rowe@akerman.com
Michelle.hacek@akerman.com
Judy.barton@akerman.com
Counsel for Greater Tampa Chamber of Commerce

George S. Lemieux, Esq.
Kenneth B. Bell, Esq.
Lauren V. Purdy, Esq.
Gunster, Yoakley & Stewart, P.A.
450 E. Las Olas Blvd., Suite 1400
Ft. Lauderdale, FL 33301
glemieux@gunster.com
kbell@gunster.com
lpurdy@gunster.com
awinsor@gunster.com
cjames@gunster.com
Counsel for Hillsborough County

Daniel J. Woodring, Esq.
Woodring Law Firm
111 N. Calhoun St., Suite 9
Tallahassee, FL 32301
daniel@woodringlawfirm.com
Counsel for Associated Industries of Florida

/s/ *Chris W. Altenbernd*
Chris W. Altenbernd, Esq.

CERTIFICATE OF TYPE SIZE & STYLE

I certify that the type, size, and style utilized in this Brief is 14-point Times New Roman.

/s/ *Chris W. Altenbernd*
Chris W. Altenbernd, Esq.