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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.

________________________________/

INITIAL BRIEF of STACY WHITE

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

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT v

NATURE OF THE TWO CASES ON APPEAL 1

STATEMENT OF THE CASE AND FACTS 3

SUMMARY OF THE ARGUMENT 17

ARGUMENT 21

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 21

- A. The standards of review and the decision-making process in this case. 21
- B. The circuit court erred in its application of the doctrine of severance. 27
- 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. 30
- D. Using the text of Article 11 to determine the framers' intent and to address the two *Cramp* tests 35
- E. Using the text of the ballot title and summary to determine intent and the two *Cramp* tests 39
- F. Considering the Political Campaign 41

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*. 42

CONCLUSION 48

CERTIFICATE OF SERVICE 49

CERTIFICATE OF TYPE SIZE & STYLE 51

TABLE OF AUTHORITIES

CASES

Advisory Opinion to Attorney General--Limited Political Terms in Certain Elective Offices,
592 So. 2d 225 (Fla. 1991) 43

Allen v. Butterworth,
756 So. 2d 52 (Fla. 2000) 20

Charlotte County Bd. of County Com'rs v. Taylor,
650 So. 2d 146 (Fla. 2d DCA 1995)..15

City of Tampa v. Birdsong Motors, Inc.,
261 So. 2d 1 (Fla. 1972) 23

Cramp v. Board of Public Instruction of Orange County,
137 So. 2d 828 (Fla. 1962) .... passim

Dade County v. Dade County League of Municipalities,
104 So. 2d 512 (Fla. 1958) 22, 47

Demings v. Orange County Citizens Review Bd.,
15 So. 3d 604 (Fla. 5th DCA 2009)... 22, 23, 24

Eastern Air Lines, Inc. v. Department of Revenue,
455 So. 2d 311 (Fla. 1984) 18, 36

Lawnwood Medical Center, Inc. v. Seeger,
990 So. 2d 503 (Fla. 2008) 26, 33

Martinez v. Scanlan,
582 So. 2d 1167 (Fla. 1991) 18

Metropolitan Dade County v. Chase Federal Housing Corp.,
737 So. 2d 494 (Fla. 1999) 23

Moreau v. Lewis,
648 So.2d 124 (Fla. 1995) 28

Orange County v. Singh,
268 So. 3d 668 (Fla. 2019) 19, 22, 26

Phantom of Brevard, Inc. v. Brevard County,
3 So. 3d 309 (Fla. 2008) 22

Ray v. Mortham,
742 So. 2d 1276 (Fla. 1999) .... passim

Schmitt v. State,
590 So. 2d 404 (Fla. 1991) 25, 45

Searcy, Denney, Scarola, Barnhart & Shipley, etc. v. State,
209 So. 3d 1181 (Fla. 2017) 18, 25, 35

State v. Rife,
789 So. 2d 288 (Fla. 2001) 36

U.S. Term Limits, Inc. v. Thornton,
514 U.S. 779 (U.S. 1995)...43

Village of Wellington v. Palm Beach County,
941 So. 2d 595 (Fla. 4th DCA 2006)...30

STATUTES

§101.161(1), Fla. Stat...41

§212.055(1)(d), Fla. Stat. .... passim

OTHER AUTHORITIES

Chapter 2019-64, Laws of Florida 9, 47

RULES

Fla. R. App. P 9.020(a)(1)(B)(i) 1

CONSTITUTIONAL PROVISIONS

Art. VII, §1(a), Fla. Const. 3, 22

Article VIII, Section 1(g), Fla. Const. 5

PRELIMINARY STATEMENT

Because these two consolidated appeals include a direct appeal of a final judgment in a bond validation proceeding, the record is provided in a multi-volume appendix. It will be cited as (A*:**). The appendix of key documents provided with Mr. White's brief will be citied (W.A.___).

All emphasis is counsel's unless otherwise noted.

NATURE OF THE TWO CASES ON APPEAL

This is an appeal of two final judgments addressing the constitutionality of Article 11 of the Hillsborough County Charter. Article 11 was created by citizens' initiative and approved by the voters during the November 2018 election. It establishes a complex, 30-year transportation improvement plan. That plan is funded by a 1% sales surtax, subject to the requirements of section 212.055(1), Florida Statutes (2018).

The final judgment directly appealed to this Court was entered in a bond validation proceeding approving bonds under Article 11. *See* Fla. R. App. P. 9.020(a)(1)(B)(i). (A. 12:807) (W.A. 27-37).

The second judgment on appeal is the final summary in an action for declaratory relief filed by Mr. White challenging the constitutionality of Article 11. (A. 9:740) (W.A. 25-26). That judgment was appealed to the Second District Court of Appeal. The Second District passed the appeal through to this Court because the legal issues resolved in the circuit court and the issues on appeal in the two cases are essentially identical and require immediate resolution. *See* Fla. R. App. P. 9.020(a)(2)(B).

In the two judgments, the circuit court agreed with Mr. White and held fourteen parts of Article 11 unconstitutional. Those parts are unconstitutional because they conflict with general law, primarily section 212.055(1)(d). That statute

requires the surtax proceeds to be dedicated to local uses selected by the "county commission" as it "deems appropriate."

But the sponsors of Article 11 had framed it as a mandatory plan for transportation improvements. Article 11 distributed all the surtax proceeds for the entire 30-year term under a predetermined "formula." Article 11 largely excluded the county commission from the local decision-making process even though the Legislature had expressly delegated that policy-making and budgetary process to the commission. Article 11 even provided for an "independent oversight committee" empowered to disapprove specific projects approved by the county commission.

After striking these major substantive parts of Article 11, the circuit court decided that the tax could be saved under the doctrine of severability. It decided the tax could be levied without the mandated plan of transportation improvements that had been the centerpiece of Article 11 as presented to the voters.

Mr. White appeals the two judgments, challenging that decision.

STATEMENT OF THE CASE AND FACTS

A. Section 212.055(1), *Florida Statutes*, permits a local transportation sales surtax so long as the proceeds are spent on transportation uses selected by the County Commission from a list of uses authorized by the Legislature.

Because this case concerns a county charter amendment that is unconstitutional due to the supremacy of a provision of general Florida law, it is sensible to start with a description of that law.

With the exception of ad valorem taxes, the subject of levying taxes is "preempted to the state except as provided by general law." Art. VII, §1(a), Fla. Const. Thus, no sales tax can be levied by a local government unless the Legislature passes a general law expressly authorizing the tax.

The Legislature over the years has exercised its preemptive authority over sales taxes to authorize certain discretionary, local sales surtaxes, which are typically located in subsections of section 212.055, Florida Statutes. The beginning paragraph of section 212.055 specifies certain provisions that must or can be included in any enactment of a surtax under that section. Those provisions include "the purpose for which the proceeds may be expended; and such other requirements as the Legislature may provide." (W.A. 3).

At issue in this case is the "Charter County and Regional Transportation System Surtax" ("the transportation surtax"), which is located in section 212.055(1), Florida Statutes. Mr. White provides of copy of this law in his appendix. (W.A. 3).

This enactment authorizes a charter county to create a transportation surtax of no more than 1 percent. The County Commission can establish the tax in an ordinance, approved by the voters. The tax can also be created by a charter amendment. In Hillsborough County, a charter amendment may be proposed to the voters either by the County Commission or by citizens' initiative.

In section 212.055(1)(d), the Legislature specifies that the surtax proceeds can be used only for "uses" identified in that statutory provision. It contains a relatively broad list of possible local uses for the transportation surtax. These authorized uses include remitting proceeds "of the surtax <u>by the governing body of the county</u> to an expressway, transit, or transportation authority created by law to be used, at <u>the discretion of such authority</u>. . . ." §212.055(1)(d)(2), Fla. Stat. (2018). It also provides that the funds "<u>may</u>" be "distributed by <u>the governing body of the county"</u> to a municipality "[p]ursuant to an interlocal agreement." §212.055(1)(d)(4), Fla. Stat.

In light of the wide range of uses permitted by the statute, some decision-making process needed to exist to select uses. Given the County Commission's overall policy-making and budgetary responsibilities, the Legislature required in section 212.055(1)(d) that: "<u>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</u>." This requirement becomes a central feature of the

law in this case because the private citizens who drafted the charter amendment in 2018 that became Article 11 mandated that 100% of the surtax proceeds go automatically to certain users for restricted uses.

Article VIII, section 1(g) of the Florida Constitution provides that: "Counties operating under county charters shall have all powers of local self-government not inconsistent with general law. . . ." The circuit court concluded that fourteen parts of Article 11 of the Hillsborough County Charter were inconsistent with the general law in section 212.055(1)(d), Florida Statutes.

B. Prior unsuccessful efforts to establish a transportation tax by ordinance

The citizens' initiative at issue in this case was not the first effort to establish a transportation surtax in Hillsborough County. In 2010, the Hillsborough County Commission passed Ordinance 10-7 in an effort to create such a surtax. (A5:66). That proposal was submitted to the voters with the following ballot title: "*Countywide Transportation System Construction Maintenance Operations Through The Levy Of A One Percent Sales Surtax*." The 2010 proposal failed at the polls. (A7:403).

Following that failure, the Hillsborough County Metropolitan Planning Organization (MPO) conducted a two-year, three-phase study, called the "2035 LRTP Post Referendum Analysis," "to better understand whether there is local citizen interest in raising taxes for transportation investments, and if so, what mix of

investments is publicly supported." (A7:403). This study was reported in the 2040 Long Range Transportation Plan. (A7:263). The study found a "mistrust in government spending" and a belief among voters that the 2010 proposal had too great an emphasis on "rail" and not enough emphasis on roads. (A77:405). It also found that a high percentage of voters would approve a ½ cent tax. Projects that voters found most attract were: "road/bridge maintenance" 96%, "intersection improvements" 86%, "local bus 'service expansion'" 84%, and "sidewalks, crosswalks, safer pedestrian connections" 83%. (A7:405).

After this study, a "Policy Leadership Group" was established. It presented a recommended ordinance to the County Commission creating a transportation plan to be placed on the ballot in November 2016. (A5:118). This proposed plan had many restrictions on the use of the funds and included an extensive "independent oversight" structure. (A6:123). It was funded by a ½ cent surtax. (A6:119). The County Commission declined to adopt this ordinance.

C. The sponsors of the citizens' initiative in 2018 opted for a charter amendment that would not require County Commission support.

The third attempt at a transportation plan began in June 2018. On June 8, 2018, a not-for-profit corporation, Keep Hillsborough Moving, Inc., was formed. (A9:196). It immediately created a political committee, All for Transportation, ("AFT"). There is no material distinction between the two groups for purposes of this appeal and they will be referred to collectively as AFT.

AFT submitted its proposed Article 11 to the Hillsborough County Supervisor of Elections six days later on June 14, 2018. (A9:196). Other than a one-hour meeting with an assistant county attorney, AFT did not seek the advice or approval of any of the affected governmental "agencies" prior to its submission. (A7:485-90). The content of Article 11 will be described in the next section of this statement.

The Supervisor certified that the petition drive could begin on June 15, 2018, (A9:197, 265). Although petitioners normally have six months to collect signatures, the Supervisor required this petition drive to be completed by July 27, 2018, a period of approximately 6 weeks. This short period was necessitated by the fact that the Supervisor needed time to validate the submitted signatures and prepare ballots for the fall election.

With $750,000 in backing from 5 major donors, (A7:547-50, 8:67-69), AFT was able to use both paid and volunteer signature gatherers in its drive. (A7:560). It submitted its final signed petitions on the last day of the authorized period. (A9:197). On August 8, 2018, the Supervisor informed the County Commission that the petition had fulfilled the requirements for placement on the ballot. (A9:197).

Section 212.055(10), Florida Statutes, requires the Office of Program Policy Analysis and Government Accountability to arrange for the preparation of a performance audit. It must be placed on the county's website at least 60 days before

the election. In this instance, the performance audit was performed by Houston-based CPAs who filed the audit just within the deadline. (A9:197-98).

Pursuant to the statute, the performance audit is required to study:

1. The economy, efficiency, or effectiveness of the program;
2. The structure or design of the program to accomplish its goals and objectives.
3. Alternative methods of providing program services or products;
4. Goals, objectives, and performance measures used by the program to monitor and report program accomplishments;
5. The accuracy or adequacy of public documents, reports, and requests prepared by the county or school district which relate to the program;
6. Compliance of the program with appropriate policies, rules, and laws.

The Houston-based CPAs who prepared the audit did not actually study the transportation plan presented in the proposed Article 11 as "the program." Instead, they studied the effectiveness of the Hillsborough County Public Works Department and the Hillsborough Area Regional Transit Authority (HART). (A9:267, 270). Thus, no analysis was done under requirement 6 to determine whether the proposed Article 11 complied with the general laws of Florida. (A9:444). No study was done under requirement 1 to determine whether the extensive funding requirements and restrictions in the proposed Article 11 would be efficient, effective, or achieve the

goals and objectives of its framers at AFT.[1] The "goals, objectives, and performance measures" of AFT were never determined under requirement 4. (A9:352). Indeed, even during litigation, AFT provided limited discovery because it maintained that most of its internal information about proposed Article 11 was protected by the First Amendment as the "core" of its "protected political activity and strategy." (A7:482-83, 507-09, 566, 571). It admitted, however, that it had not obtained any formal legal opinion that Article 11 was constitutional. (A7:575-76).

Prior to the election there was substantial news coverage about the proposed Article 11 being on the ballot in November. Various forms of political advertising both for and against the measure occurred. In discovery, AFT refused to provide copies of its advertising and campaign mailers or other information about the campaign, again raising its First Amendment "core political strategy" as a basis to withhold this information. (A7:575-76).

Mr. White was able to obtain mailers that AFT had sent to voters. (A7:537-45, 8:63-66) (W.A. 43-46). Those mailers advertise "a plan" providing "$151 million per year for improved roads and intersections," resulting in "240,000 fewer accidents according to experts." The plan claims to "expand access for 100,000

[1] Chapter 2019-64, Laws of Florida, amended section 212.055(1) & (11) for future elections. It is unclear whether such major defects in a future report would render an elections void.

seniors and disabled residents." It is "[a] $280 Million Plan to Help Reduce Congestion Along Dale Mabry, Hillsborough Avenue, Gunn Highway – and more!" It creates "An Independent Oversight Committee [that] Keeps Political Hands Out of the Cookie Jar." (W.A. 44).

The election began with the mailing of overseas ballots to registered voters on September 21, 2018. Early voting started on October 22, 2018. And the general election occurred on Tuesday, November 6, 2018. (A9:198). The ballot was very long due to the many constitutional amendments presented at this election.

The ballot title and summary presented to the voters emphasized "Funding." It listed projects mandated by the framers of Article 11 in the unconstitutional sections, using phrases that the MPO study had determined to be favorable to voters. It never used the word "tax" and placed the word "surtax" near the end of the summary. (A9:260) (W.A. 4).

There is no dispute that the proposed Article 11 was approved by 57.3% of the voters. (A9:198).

D. The content of Article 11

Article 11 is complex. This Court will undoubtedly need to read and study it more than once to digest it all. It is provided in Mr. White's appendix. (W.A. 4-8). The "purpose of the surtax" in section 11.01 is to fund the mandated uses that had been listed in the ballot summary, such as "fixing potholes."

Sections 11.02 and 11.03 are generally the neutral provisions that create the tax under the statute. If AFT had been content to create a transportation surtax almost everything required to do so is contained in these provisions.

Section 11.04 creates the duties of the Clerk. This section begins to demonstrate constitutional concerns when it compels the Clerk to disperse funds "in accordance with the distribution allocations provided in Section 11.05" "within five (5) business days of the Clerk's receipt of Surtax Proceeds. . . ." The Clerk is mandated to disperse funds that will total $9 billion without any action by the County Commission.

Section 11.05 is the core of the problem. It compels the Clerk to distribute the proceeds pursuant to a "formula" that give 45% to HART, 1% to the MPO, and 54% to be shared among the County and the municipalities by a separate formula borrowed from an unrelated tax statute. The County Commission has no decision-making role in these mandatory distributions.

Sections 11.07 and 11.08 then create restrictions and limitations on the uses of the portions restricted for HART and the other "Agencies." Certain percentages of the funds must be spent on designated uses. Funds for new roads and road widening are sharply restricted. Section 11.08(2) provides that at least 35% of the funds given to HART must be spent on "expanding public transit options." This money must be spent on services "that utilize exclusive transit right-of-way for at

least seventy-five percent (75%) of the length of the applicable service." This restriction further requires that HART consider factors including "utilizing or extending existing fixed guideways." During discovery in this lawsuit it was determined that, when the petition was submitted to the Supervisor of Elections, AFT knew that there was only one such guideway in Hillsborough County and that only the downtown streetcar tracks fit this seemingly generic description. (A7:514-16).

Sections 11.10, 11.09, and 11.06 should be examined together. They create an "Independent Oversight Committee" or IOC that is far more than an advisory board. This group, a majority of whose members are not selected by the County Commission, are given the power to order the Clerk to suspend distributions of funds to an "Agency," including the County if the IOC "determine[s]" by a 2/3's vote that the Agency has failed to comply with Article 11. This quasi-judicial function has no provision for appeal, and the IOC is empowered to adopt its own by-laws, rules and regulations.

Section 11.06 requires "Agency Project Plans" to be submitted in September to the IOC. "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 hearing." Thus, the County Commission has no role in approving projects of the municipalities or HART, but the IOC has the power to disapprove a plan

approved by the County Commission. During litigation, it was claimed by the supporters of the constitutionality of Article 11 that this provision had changed the governing body of Hillsborough County to either the IOC or the voters for purposes of determining uses and projects. (A1:565-66, 3:264-65, 7:164-65).

E. The two lawsuits

In light of the content of Article 11, Mr. White filed an action for declaratory relief on December 4, 2018, four weeks after the election and about a month before the tax went into effect. (A1:13). Because no one was paying the tax at that time, he filed the action in his official capacity as a member of the county commission who was required to implement a local law that he believed was in violation of state law. AFT was not named as a party in that action, but it was allowed to intervene as a party. (A1:135). Mr. White filed an amended complaint in March 2019 alleging standing as a taxpayer after the circuit court sustained challenges to his standing in his official capacity. (A1:480).

In this amended complaint, Mr. White sought a declaration that Article 11 conflicted with general law because of the numerous conditions and restrictions described in the preceding section, because of the extraordinary powers given to the IOC, and because the County Commission did not control disbursements by the Clerk. His action also claimed that, as a proposal on the ballot, Article 11 had contained more than one subject, violating the rules against logrolling. Finally, he

claimed that the ballot language was deceptive by suggesting that the county neighborhoods of “Brandon, Town ‘n’ Country, and Sun City” were municipalities to be given special rights, and by failing to disclose that Article 11 contained restrictions on the use of funds to build new roads and to widen roads.

Mr. White’s initial complaint pointed out that Hillsborough County would be unable to sell bonds supported by this transportation surtax unless the issues in this action were resolved. (A1:14-15). The county commission passed a bond resolution for $10 million dollars for “2019 bond projects” and filed a bond validation proceeding on February 7, 2019. (A10:13). Mr. White filed an “answer, defenses and objections” as an intervenor in the bond validation proceeding about the same time that he filed his amended complaint in his own action. (A10:92). He raised an identical set of issues in both cases. The circuit court consolidated the two cases for most purposes. (A1:244).

The parties cooperated to complete abbreviated discovery quickly. Only the depositions of Mr. White and Mr. Tyler Hudson, the Chair of AFT, were taken and filed in the court record. (A1:278, 7:465). The parties entered into a stipulation with accompanying documents to expedite matters. (A9:195).

Most of the parties filed motions for summary judgment that applied to both cases. (A1:192, A1:557-A3:197, A3:256-A7:242). The parties filed extensive

memoranda in support and opposition to those motions in the combined proceeding. (A8:139-432).

To expedite the cases, without objection, the circuit court scheduled the two cases for hearing on the motions for summary judgment and for trial in the bond validation proceeding on May 3, 2019. (A1:246). The time allotted proved insufficient for the extensive legal arguments. The hearing concluded on May 31, 2019. (A9:671). The record contains transcripts of those legal proceedings. (A9:755-1311). At the hearing on May 3 the County presented evidence needed to fulfill the requirements for a bond validation proceeding, but that evidence is probably not relevant to the issues presented by the parties in this appeal.

F. The circuit court's orders.

On June 17, 2019, the circuit court issued an order granting, in part and denying in part, the various motions for summary judgment. (A9:673) (W.A. 9-24). It ruled against Mr. White on the single-subject issue and on the ballot language issue. He is not challenging those rulings on appeal.

It ruled in his favor on most of his claims that Article 11 conflicted with general law. The circuit court found that "Article 11 Sections 5 – 9," (i.e. sections 11.05 through 11.09), "fly directly in the face of general law as enunciated in section 212.055(1)(d)(1)-(4), citing *Charlotte County Bd. of County Com'rs v. Taylor,* 650 So. 2d 146, 149 (Fla. 2d DCA 1995). (A9:683) (W.A. 19). It attached a redlined

version of Article 11 that removes all of the percentage formulas from these sections, but not the text of the restrictions. This issue will be more fully discussed in the argument. It removed all of the provisions giving superpowers to the IOC. But it declined to strike the levy of the tax, reasoning that the tax was saved by the severance clause in section 11.11(2). The circuit court concluded that this allowed the court to sever and retain the tax in the county charter under the 4-part test announced in *Cramp v. Board of Public Instruction of Orange County*, 137 So. 2d 828, 830 (Fla. 1962) and *Ray v. Mortham*, 742 So. 2d 1276 (Fla. 1999).

Mr. White quickly filed a motion for reconsideration requesting that an additional portion of section 11.05(1) be stricken because it was a mandatory allocation between the County and the municipalities that was unconstitutional for the same reason that the percentages removed by the circuit court were unconstitutional. (A9:694). The parties, with the exception of Mr. Emerson, reached a stipulation to remove the pertinent language while reserving all rights to challenge the issue on appeal. (A9:740). The circuit court then entered both judgments, attaching an identical redlined version of Article 11 to each order.

Mr. Emerson appealed the final judgment in the bond validation. Mr. White filed a timely joinder as an appellant. Mr. White appealed the final declaratory judgment. Most of the appellees have filed cross-appeals in both cases.

SUMMARY OF THE ARGUMENT

Mr. White appeals two final judgments in which the circuit court agreed with Mr. White and held unconstitutional major sections of Article 11 of the Hillsborough County Charter. The circuit court correctly ruled that the stricken provisions, created by citizens' initiative, repeatedly conflicted with an unambiguous general law of Florida, section 212.055(1), Florida Statutes.

Article 11 had been drafted by its sponsors shortly before the 2018 election to create a mandatory plan for funding transportation improvements. It was framed in a manner that foreclosed the County Commission from making budgetary decisions or passing ordinances that could alter the sponsors' plan.

The funds for the plan were derived from a newly created local 1% transportation sales surtax, authorized by section 212.055(1), Florida Statutes. But that general statute did not give the framers of the citizens' initiative the right to control the use of the surtax proceeds. The statute unambiguously states that the County Commission "shall" select the uses for the surtax proceeds.

Because the plan in Article 11 did not allow the County Commission to control the uses of the surtax during the 30-year term of this plan, the circuit held fourteen parts of Article 11 unconstitutional. Nevertheless, the circuit court concluded that the tax could be severed and continue to be levied for thirty years

even without the mandated plan of transportation improvements. But the plan had been the clear purpose of Article 11 as presented to the voters by its framers.

The circuit court did not explain its ruling on severance in detail. However, it relied heavily on a severance clause in Article 11 that was available for the voters to read. That severance clause unambiguously had no application to this issue.

After holding the many provisions in Article 11 unconstitutional, the circuit court left most of the text of those provisions in the charter, striking primarily numeric percentages from the unconstitutional provisions. It left sentences and phrases that are grammatically incorrect and incomplete. More important, it left restrictions on the use of the surtax proceeds that are still unconstitutional restrictions upon the County Commissions' statutory discretion. If the court had properly struck the entire text, and not merely the percentages within the subsections it had declared unconstitutional, the sheer volume of the redlining would have demonstrated that severing a tax from the unconstitutional transportation plan was impossible. *See* (W.A. 38-43).

"The key [to severability] is whether the overall legislative intent is still accomplished without the invalid provision." *Searcy, Denney, Scarola, Barnhart & Shipley, etc. v. State*, 209 So. 3d 1181, 1196 (Fla. 2017); *See Martinez v. Scanlan,* 582 So. 2d 1167, 1173 (Fla. 1991); *Eastern Air Lines, Inc. v. Department of Revenue,* 455 So. 2d 311, 317 (Fla. 1984). In testing the legislative intent, this Court normally

considers a four-part test announced in *Cramp v. Board of Public Instruction of Orange County*, 137 So. 2d 828, 830 (Fla. 1962). The Court has applied this test to citizens' initiatives, *see Ray v. Mortham*, 742 So. 2d 1276 (Fla. 1999), and to county charter amendments. *See Orange County v. Singh*, 268 So. 3d 668 (Fla. 2019).

Under the *Cramp* test, Mr. White maintains that the tax cannot be severed from the transportation plan it funded because (1) "the legislative purpose expressed in the valid provisions can[not] be accomplished independently of those which are void," and (2) "the good and the bad features are. . . so inseparable in substance that it can[not] be said that the Legislature would have passed the one without the other." *Ray* at 1281.

As expressed—in its text, in the ballot title and summary used to explain it to the voters, and in the political campaign of its sponsors—Article 11's purpose, and the intent of its framers, was to achieve the funding of a detailed transportation plan. It accomplished this by placing numerous restrictions on a $9 billion fund. Those restrictions were designed to prevent the members of the County Commission, over the next thirty years, from making their own decisions on the appropriate uses of the funds based on then-existing traffic conditions and technology.

The transportation surtax was merely the means to the framers' end. The only stated "legislative" purpose for the tax was to fund the mandated transportation plan.

Without the plan, the tax is a fragment of Article 11 without its own legislative purpose.

Likewise the "good" tax and the "bad" transportation plan cannot be separated in substance. As framed in Article 11 and as presented to the voters, the plan was the goal and the tax was merely the financial tool to accomplish the goal. They are "inextricably intertwined." *See Allen v. Butterworth*, 756 So. 2d 52, 65 (Fla. 2000).

This is an unusual case because the local metropolitan planning organization had conducted a thorough two-year study to determine why the voters had rejected a simpler transportation tax in 2010. The voters had distrust of government and wanted assurances that money would be spent on certain uses. The study allowed the sponsors to know the correct buzzwords to put in Article 11 and in the ballot summary to make a mandated plan, controlled by an IOC, attractive to the voters. They marketed a transportation plan to the voters, not a tax. But for the provisions in Article 11 that have been declared unconstitutional, the voters would not have adopted a regressive, $9 billion, 30-year sales tax, placing them at a competitive disadvantage in commerce with their neighboring counties.

Mr. White has the burden of persuasion on these issues as announced in *Ray v. Mortham*, 742 So. 2d 1276 (Fla. 1999). But *Ray* extended the *Cramp* test both to constitutional provisions and citizens' initiatives under an odd set of facts. The sponsors of citizens' initiatives are not a branch of government to which this Court

should defer. They do not work in the sunshine, they have their own political strategies in mind when they fund these initiatives, and they cannot be voted out. At the local level, their ballot summaries are not approved by a court for placement on a ballot.

When substantial portions of a local citizens' initiative are declared unconstitutional immediately following the election, the entire initiative should fail. At a minimum, the sponsors of that initiative should be required to establish to this Court, clearly and convincingly, that the remnant remaining would have been adopted by the voters with a ballot summary describing only the tax in neutral and objective terms.

The Court should reverse and hold that no part of Article 11 can be severed.

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.

Although this brief focuses on the issue of whether the circuit court erred in severing the tax from the unconstitutional plan to fund transportation improvements, especially in light of the cross-appeals, it may be helpful to briefly explain the decision-making process that brought us to this point and the applicable standards of review for each major decision in that process.

Mr. White filed his action for declaratory relief maintaining that many provisions in Article 11 were unconstitutional because they were local law that conflicted with the general law of Florida. The lead case on this issue is *Phantom of Brevard, Inc. v. Brevard County*, 3 So. 3d 309 (Fla. 2008). It explains that a local law can conflict with general law if the local law is preempted by state law or if there is textual conflict with a general state law. Concerning textual conflict, it explains:

> **There is conflict between a local ordinance and a state statute when the local ordinance cannot coexist with the state statute**. See *City of Hollywood*, 934 So. 2d at 1246; see also *State ex rel. Dade County v. Brautigam*, 224 So. 2d 688, 692 (Fla. 1969) (explaining that "inconsistent" as used in article VIII, section 6(f) of the Florida Constitution "means contradictory in the sense of legislative provisions which cannot coexist"). **Stated otherwise, "[t]he test for conflict is whether 'in order to comply with one provision, a violation of the other is required.' "** *Browning v. Sarasota Alliance for Fair Elections, Inc.*, 968 So. 2d 637, 649 (Fla. 2d DCA 2007) (quoting *Phantom of Clearwater*, 894 So. 2d at 1020), review granted, No. SC07-2074 (Fla. Nov. 29, 2007).

Id. at 314. *See also Orange County v. Singh,* 268 So. 3d 668 (Fla. 2019); *Demings v. Orange County Citizens Review Bd.*, 15 So. 3d 604 (Fla. 5th DCA 2009).

In this case, the trial court held that the core provisions in Article 11 were unconstitutional because they were in conflict with the text of section 212.055(1)(d). It did not rule that the local law was preempted by state law. But the fact that sales taxes are constitutionally preempted to the Legislature is a factor that should contribute to an analysis protecting the supremacy of state law over local law. *See* Art. VII, §1(a), Fla. Const.; *Metropolitan Dade County v. Chase Federal Housing*

Corp., 737 So. 2d 494, 504 (Fla. 1999) (whenever any doubt exists as to the extent of a power attempted to be exercised which may affect the operation of a state statute, the doubt is to be resolved against the ordinance and in favor of the statute); *City of Tampa v. Birdsong Motors, Inc.*, 261 So. 2d 1, 3 (Fla. 1972).

This decision to determine the constitutionality of the local law is a pure legal decision in which the text of the charter amendment is compared to the text of the general law. It is reviewed de novo. *See Demings* at 606.

Once the circuit court ruled that many provisions in Article 11 were unconstitutional, it was required to strike the unconstitutional portions. Although the presumption of constitutionality should cause a court to endeavor to save all portions of a charter that are constitutional, it must strike a sufficient portion of the local law to eliminate the actual conflict with general law. In this case, the circuit court struck the percentages of the mathematical formula used to impose most of the restrictions and conditions on the County Commission, but it left intact the text of many requirements that, at least to some degree, force the County Commission to fund specific uses. Case law does not address this issue, but the proper portion of a local law that must be removed to eliminate the constitutional problem is a legal decision that this Court should review de novo.

Finally, once the local charter has been redlined to eliminate the unconstitutional portions, the legal status of the remainder is determined under the

doctrine of severability. With little legal analysis, the circuit court ruled that the 30-year transportation tax could remain in the Hillsborough County Charter without the extensive, mandatory plan the sponsors of Article 11 had included in Article 11 to convince the voters to tax themselves,

To date, the courts have used a four-part test to determine the severability of portions of a county charter. As stated in *Cramp v. Board of Public Instruction of Orange County*, 137 So. 2d 828, 830 (Fla. 1962):

> The rule is well established that the unconstitutionality of a portion of a statute will not necessarily condemn the entire act. When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided:
>
> (1) the unconstitutional provisions can be separated from the remaining valid provisions,
>
> (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void,
>
> (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and,
>
> (4) an act complete in itself remains after the invalid provisions are stricken.

Although this rule began as a rule applicable only to statutes, it has once been used to address a constitutional amendment to the Florida Constitution. *See Ray v. Mortham,* 742 So. 2d 1276, 1280 (Fla. 1999). It has also been used to address amendments to county charters. *See Demings v. Orange County Citizens Review Bd.,* 15 So. 3d 604, 611 (Fla. 5th DCA 2009).

Because "legislative purpose" should not be a subjective test, this Court has emphasized a more objective and textual approach: "the key is whether the overall legislative intent is still accomplished without the invalid provision." *Searcy, Denney, Scarola, Barnhart & Shipley, etc. v. State*, 209 So. 3d 1181, 1196 (Fla. 2017).

This doctrine has its foundation in the constitutional separation of powers and the judiciary's duty to respect the role of the Legislature. *See Ray v. Mortham*, 742 So. 2d 1276, 1280 (Fla. 1999); *Schmitt v. State*, 590 So. 2d 404, 415 (Fla. 1991). Nevertheless, this Court in *Ray* applied the doctrine to a citizens' initiative, placing the burden of persuasion on the party seeking to have the court strike the entire provision, rather than on the private group that had drafted the unconstitutional amendment. In the next section of this brief, Mr. White questions whether the tests and the burden of persuasion established in *Ray* should apply in the context of a citizens' initiative proposing a charter amendment. But for purposes of this section, he assumes that it does.

In the circuit court, Mr. White argued that the taxing provisions of Article 11 could not be severed under the second and third tests in *Cramp*. He did not argue the first and fourth tests. Because section 11.02, contains a provision that could be edited down to "all proceeds from the Transportation Surtax. . . shall be expended

only as permitted by . . . F.S. § 212.055(1)," he had to concede that, with a drastic edit, language could be separated in Article 11 to provide for a tax complete in itself.

Thus, Mr. White maintained in the circuit court and maintains now that the doctrine of severance cannot apply in this case because:

(1) "the legislative purpose expressed in the valid provisions can[not] be accomplished independently of those which are void," and

(2) "the good and the bad features are . . . so inseparable in substance that it can[not] be said that the Legislature would have passed the one without the other." *Ray* at 1281.

This Court appears to review the issue of severance as a matter of law. *See Orange County v. Singh*, 268 So. 3d 668, 669 (Fla. 2019). Indeed, this Court has conducted the analysis even when the lower courts have not. *See Lawnwood Medical Center, Inc. v. Seeger*, 990 So. 2d 503, 518 (Fla. 2008). As further explained in this section of the brief, so long as the analysis is based on the text of the local ordinance or the ballot language used during the election, the issue should be an issue of law. If, in the context of a charter amendment, it became necessary to resolve this issue by a determination of whether the voters, hypothetically, would have voted differently if presented with a proposal that was constitutional, the issue could become intensely factual, and probably speculative. It does not appear that

this court has taken such an approach in prior cases, but that approach would affect the standard of review.

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

The circuit court's analysis of severance is very succinct. It states:

> In the instant case, the Court finds that (1) the unconstitutional portions of the provisions can be separated from the remaining valid portions of the provisions, (2) the purpose expressed in the valid provisions can be accomplished independently of the portions which are void, (3) the valid and invalid features are not so inseparable in substance that it can be said that the voters would not have passed it without the invalid features, and (4) the amendment is completely operational without the invalid portions. In finding that the valid and invalid features are not so inseparable in substance that it can be said that the voters would not have passed it without the invalid features, the Court finds it clear from the initiative petition that severability was anticipated by the voters.
>
> The initiative petition contained a severability clause as well as a supremacy clause, which is persuasive that the framers intended severability to save the amendment in case portions of it were declared invalid. Voters were provided with a clear notice of severability because: the full text of the amendment, including the severability and supremacy clause, was available throughout the county prior to the election; there was substantial news coverage regarding the proposed Article 11 being on the November ballot, and; there were various forms of political advertising for and against the measure prior to the election.
>
> **As such, the Court finds that the amendment survives the severability analysis and should not be stricken.**

(A9:686) (W.A. 22-23).

Although the circuit court rules on both of the material *Cramp* tests, there is no explanation of either ruling except to say that "it is clear from the initiative petition that severability was anticipated by the voters," that "the framers intended severability to save the amendment in case portions of it were declared invalid," and that the voters were on notice of the framers' intent.

The inclusion of a specific severability clause can be persuasive, but not dispositive, in the analysis of an issue of severability. *See Moreau v. Lewis*, 648 So.2d 124, 127 (Fla. 1995). In this case, the circuit court is correct that there was a severability clause in Article 11. But that clause has no application to this case.

The severability clause in section 11.11(2) of Article 11 states:

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

In this case, the parties actually stipulated that the uses described in section 11.07 and 11.08 would be permissible uses of the proceeds under section 212.055(1)(d). (A9:200). Sections 11.07 and 11.08 are unconstitutional, not because the uses are "impermissible," but because the uses are "mandated." Section 11.11(2) simply does not address what happens when both of these sections are held unconstitutional as a violation of supremacy, as compared to when a "mandated expenditure category" is "impermissible."

Thus, the severability that the circuit court found the voters "anticipated" has nothing to do with this case. If anything, the inclusion of this narrow severability clause by its framers at AFT might cause a knowledgeable voter to believe that the broader general doctrine of severability did not apply.

It may be that the circuit court is correct the framers of Article 11 "intended severability to save" the tax. If the framers read section 212.055(1)(d) even once before they submitted their proposal to the Supervisor of Elections, they had to be concerned that the mandated, restricted funding proposal they had drafted had major constitutional problems. But any goal of the framers to salvage the tax if the funding plan they marketed to the voters succumbed to the doctrine of supremacy, was not communicated to the voters in Article 11 or the ballot summary. Section 11.11(2) did not say: **"If Sections 11.05, 11.07 and 11.08 are held unconstitutional, the tax herein that funds the plan contained in those sections will still be levied."**

The Hillsborough County Charter contains a generic severability clause in section 9.05, which was adopted at an earlier time and was not a part of the amendment presented to the voters in November 2018. (A9:222). The circuit court gave no special weight to this provision. It would be, at best, a legal fiction to suggest that this clause influenced the intent of the voters who were presented with a short summary of this citizens' initiative on the ballot. It should not alter the case law approach to severance.

Thus, Mr. White submits that the analysis of the doctrine of severability in this case should be performed under the applicable case law establishing this judicial doctrine without any special consideration to the severability clauses. *See Village of Wellington v. Palm Beach County*, 941 So. 2d 595, 600–01 (Fla. 4th DCA 2006) (using the four-part test with a similar severability clause in a charter).

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.

After ruling that Section 11.05, 11.07, and 11.08 "fly directly in the face of general law," the circuit court did not remove these sections and, thereby, the entire mandatory distribution plan from Article 11. Mr. White recognizes that a court should remove unconstitutional text from an amendment conservatively to save all valid portions. But the court must remove all of the text that creates the constitutional issue. Here, in most instances, the circuit court removed the mathematical percentages, but not the language mandating specific uses.

Admittedly, by eliminating the percentages the circuit court has gutted the heart of the framers' plan. But it still left a constitutional problem of smaller monetary dimension; it did not eliminate the problem. Moreover, the circuit court's edit creates an ambiguous document with numerous grammatical errors. In one important section, the court's edit creates a vague, incomplete, run-on sentence.

Mr. White demonstrates these issues, not merely because he wants more language removed from Article 11. If Article 11 is properly edited to remove the constitutional problems identified by the circuit court, the following portions must be removed: 1) all of section 11.05, 2) a substantial portion of 11.06, 3) all of section 11.07, 4) all of section 11.08, 5) all of section 11.09[2], and 6) a small, but critical portion of section 11.10 which effectively transforms the "independent oversight committee" into a mere advisory board. This leaves Article 11 with the basic provisions creating a tax and a "Purpose of Surtax" in section 11.01 that no longer accurately describes the purpose of the remainder of Article 11.

Properly edited, as demonstrated by the colorized version of Article 11 in the appendix to this brief, (WA. 38-42), it is obvious that no portion of Article 11 can withstand the tests for severability in *Cramp*. The extent of the substance removed from the article is massive.

1. Section 11.05

The circuit court, in its partial summary judgment, agreed with Mr. White that section 11.05 was unconstitutional because this mandatory distribution formula overrides the County Commission's statutory authority and obligation to apply the

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[2] The circuit court eliminated all of the first paragraph of section 11.09. The second paragraph remains but it is meaningless because there is no "foregoing" paragraph for it to address.

surtax "to as many or as few of the uses enumerated [in the statute] in whatever combination the county commission deems appropriate." (W.A. 19). However, the circuit court's remedy for this problem is too narrow and creates problems of its own.

Following the additional language removed on reconsideration, the circuit court struck only the percentage requirements from Section 11.05, plus a few additional words in subsection 11.05(2). (W.A. 5). Thus, the Clerk is still required to distribute the surtax proceeds "in accordance with the following formula." The formula no longer contains percentages, but it mandates that a "portion" of the surtax proceeds must go to the municipalities. A portion must fund HART. A portion must fund the MPO. This is still in direct conflict with the section 212.055(1) because the general law mandates that the county commission "shall" give surtax proceeds to the uses of the municipalities, HART, and the MPO only if it deems these uses appropriate.

With the percentages removed, "the Surtax Proceeds" must be distributed by the clerk as the "General Purpose Portion," as the "Transit Restricted Portion," and also as the "Planning and Development Portion." Clearly, the Surtax Proceeds cannot be distributed by the Clerk in their entirety to each of these three different locations. Apparently, the circuit court intends this ambiguity to be resolved by reading the edited provision to mean "some portion of the Surtax Proceeds as

determined by the county commission. . ." But it does not say that, and a court cannot add words to Article 11 in this process. *See Lawnwood Medical Center, Inc. v. Seeger*, 990 So. 2d 503, 512 (Fla. 2008).

The circuit court also removed "with Section 11.08. Subject to compliance" from subsection 11.05(2). This creates a vague subsection that is not a sentence or even a hanging phrase. Subsection 11.05(2) has been reduced to a grammatically incorrect run-on phrase with no clear meaning.

Section 11.05 was drafted by its framers at AFT to create a mandatory formula for the distribution of 100% of the surtax proceeds by the Clerk for the entire 30-year period without allowing the county commission any role in this distribution. Thus, the entire purpose and intent of section 11.05 is unconstitutional. The constitutional problem cannot be cured by the removal of the percentages alone. The circuit court should have stricken the entire section.

2. Section 11.07

This section mandates more specific uses for the distribution of the "general purpose portion." As a practical matter, there would be no mandated "general purpose portion" if section 11.05 had been removed by the circuit court. Section 11.05 is the foundational section upon which much of Article 11 is based. If it is properly removed, many of the other sections must either be removed in whole or part or they have no remaining meaning.

Again, the circuit court primarily removed the mathematical percentages in this section, along with the restrictions on building new roads. But even without the percentages, this section mandates expenditures on designated uses when section 212.055 leaves the uses entirely to the discretion of the county commission. Admittedly, the county commission could probably apply a penny to bicycle paths and satisfy the edited requirement of subsection 11.07(4). But there is no minimum amount in controversy when it comes to the supremacy of general law. To eliminate the conflict with general law completely, the complete section needs to be extracted.

3. Section 11.08

Comparable to section 11.07, if section 11.05 is removed there is no "transit restricted portion" of the surtax proceeds and no need for this section. Oddly, the circuit court struck a reference to section 11.08 in section 11.05(2), but then did not strike section 11.08 itself.

Section 11.08 has an additional problem. Subsection 11.08(1) mandates expenditures on enhancing bus service and subsection 11.08(2) mandates expenditures on expanding public transit options. But Section 212.055(d)(2) provides that, if a county commission deems appropriate to remit surtax proceeds to a transit authority like HART, those proceeds are required to be "used, <u>at the discretion of such authority</u>. . . ." Just as Article 11 directly conflicts with the requirement of the general statute that the county commission have discretion to

select uses, it does the same with the discretion the general statute gives to the transit authority. To eliminate the conflict with general law entirely, section 11.08 needs to be removed in its entirety.

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

The circuit court gave no explanation why it concluded the legislative purpose expressed in the valid provisions can be accomplished independently of those that are void. Likewise it gave no explanation why it concluded the good parts of Article 11 and the bad parts were not so inseparable in substance that it can be said that the Legislature, i.e., the voters, would have passed one without the other. Accordingly, this Court's review of these tests is truly de novo. Whether this Court analyzes these two issues using Article 11 as redlined by the circuit court or using the version in Mr. White's appendix with the additional words removed, it is clear from the text of Article 11 that severance is impossible.

When examining the issue of severance for an enactment by the Legislature, this Court avoids any backroom search for the subjective "purpose" of the drafters and looks instead to the more justiciable issue of legislative "intent." "The key is whether the overall legislative intent is still accomplished without the invalid provision." *See Searcy, Denney, Scarola, Barnhart & Shipley, etc. v. State*, 209 So. 3d 1181, 1196 (Fla. 2017). "The severability of a statutory provision is determined by its relation to the overall legislative intent of the statute of which it is a part, and

whether the statute, less the invalid provisions, can still accomplish this intent." *Eastern Air Lines, Inc. v. Department of Revenue*, 455 So. 2d 311, 317 (Fla. 1984).

Thus, Mr. White assumes that in this context "legislative purpose" is some attempt to measure objectively the collective intent of the 200,000+ voters who voted "yes." That collective decision certainly cannot be distilled into one or two goals that caused all of these voters to say "yes." The framers of Article 11 obviously knew when they drafted their proposed Article 11 that they needed more than one way to get to "yes." The long list of "purposes" in section 11.01 quoted below includes at least one improvement that almost any voter might like. It was the type of generic logrolling that gets "yes" votes for no clear, unified purpose.

The Legislature itself often explains its intent by inserting into a bill an express statement of its purpose.[3] That was done by the framers of Article 11:

> 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.

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[3] This aligns with the rule of statutory construction that intent is first derived from the text of a statute. *See State v. Rife*, 789 So. 2d 288, 292 (Fla. 2001).

The voters were told the "purpose" of the tax was to fund a list of transportation improvements, which were uses guaranteed in sections 11.05 through 11.08. These uses were mandatory: "The proceeds of the surtax shall be distributed and disbursed. . . in accordance with the provisions of this Article 11." The County Commission would have no opportunity to mess with this distribution plan as it had with the plan in 2016. The voters were not told that they were being taxed 1% simply to be taxed. They were not told they were imposing a regressive sales tax that might put them in a competitive disadvantage with businesses in the adjacent counties.

Even without the additional deletions suggested in the preceding section of this brief, after the circuit court redlined Article 11 in Exhibit A of its final judgments, the mandatory distributions to the three "portions" in Section 11.05 presumably shifted from 54%, 45% and 1% of 9 billion dollars to a requirement to give each portion a penny. And the mandate in section 11.07(8) that the purpose for much of this funding could not be used to build new roads or wider roads was gone. The "expansion of public transit options," (which was code for building a new modern transit system in downtown Tampa to replace the old streetcar line), was no longer mandatory. And the Independent Oversight Committee could no longer override the county commission.

From an examination of the text of Article 11 alone, "the legislative purpose expressed in the valid provisions [of Article 11] cannot be accomplished

independently of those which are void." This is true because the tax was not a purpose in and by itself; it was a source of money to "fund" all of the purposes guaranteed in section 11.01 and throughout Article 11. It was inextricably intertwined with the plan because it was merely a means to the end envisioned by the drafters of Article 11.

Likewise, an examination of the text of Article 11 establishes that "the good and the bad features [of Article 11] are [actually] so inseparable in substance that it can be said that the Legislature would not have passed the one without the other." Here, it is clear that the "Legislature" means the voters.

This is probably the first time in history that the tax is the "good" feature of the enactment, and the plan it funds is the "bad" feature. As framed in Article 11 and as presented to the voters, the plan was the purpose and the goal. The tax was not a stand-alone purpose or a goal; it was merely the financial tool to accomplish the goal.

Although not dispositive, all the Appellees maintained the plan and tax were one unified single subject for ballot purposes. (A7:49, 172, 210). And its framers knew they had to attach the tax to a controlled funding proposal that had something in it for everyone in order to logroll this regressive tax through the electorate. The plan and the tax were intentionally created in the text of Article 11to be "inseparable in substance" by its framers.

The best legal analysis of "purpose" is textual in this case, and that analysis supports Mr. White on not one, but two of the grounds that prohibit severance of the taxing provisions from the funding provisions.

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

As a matter of law, there is good reason to measure severability by the text of the amendment alone. But if we are honest about it, it is almost unquestionably true that the overwhelming majority of voters did not read the full text of Article 11, especially given the great length of the ballot in 2018. Unfortunately, if they had gone to the performance audit on the County's website to learn more about Article 11, it would have told them little about the project up for vote. (A9:267). Thus, if we are to measure objectively the voters' intent outside the text of Article 11, it may be appropriate to consider the ballot title and summary.

In this case, the ballot title and summary stated:

> ***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?

(W.A. 4).

From the ballot summary, the legislative intent and purpose are essentially the same as expressed in section 11.01 of Article 11. Indeed, it seems likely that fixing potholes and relieving bottlenecks were inserted into section 11.01 so they could be featured on the ballot. Thus, quite similar to the analysis of the text, there is no separate purpose for the tax explained in the summary. It is intertwined with the improvement plan guaranteed to the voters in the ballot summary.

It should be noted that neither "tax" nor "surtax" are in the title. "Tax" is nowhere in the title or summary, and "surtax" shows up once near the end of the summary. If the unconstitutional plan is removed from discussion in the ballot summary, it would simply have said: "*Should the County Charter be amended to enact a one-cent sales surtax levied for 30 years and deposited in an audited trust fund for use by the county commission on transportation projects it deems appropriate?*" That obviously is not the question the framers of Article 11 intended to present to the voters as part of their core political strategy.

Mr. White argued below that this ballot was misleading because it included "Brandon, Town 'n' Country, and Sun City," which are merely neighborhoods in Hillsborough County that receive no special rights under Article 11. (A1:28). But

they do have lots of voters who might expect to get something special after reading this ballot summary. Mr. White also argued that the list of projects was illegal logrolling, derived from the MPO study, to convince voters to vote because they liked at least one project on this list. (A7:110-11). If we were to present the voters with just the "good" county-wide tax, there is no need for a ballot summary implying special status to large neighborhoods. In a hypothetical election to impose this 30-year tax without any reference to the "bad" guaranteed plan in the ballot summary, the "chief purpose of the measure" presented in a fair and neutral ballot summary would contain nothing that would cause the voters to vote differently from their negative vote in 2010. *See* §101.161(1), Fla. Stat. In this case, it can be said that the Legislature, i.e., the voters, would not have passed the tax without the plan.

F. Considering the Political Campaign.

Mr. White is not actually convinced that the content of the political campaign is a viable source of information for use in this Court's review of the issue of severability. We would not analyze a legislative enactment using comparable data. In the context of a citizens' initiative, AFT's refusal to provide any information on its "core political strategy" demonstrates the practical problems of using this method—unless the burden is placed on the proponent of the citizens' initiative.

But the case law does not clearly rule this method out. As a result, Mr. White did place into evidence a limited number of advertisements, identified by Mr.

Hudson during his deposition, that AFT mailed to voters during the election. (W.A. 43-46). They demonstrate that AFT was promoting its "plan" which would solve specific traffic problems, save lives, and keep the commissioners out of the "cookie jar." AFT did not advertise a "tax." The limited evidence on the campaign shows that voters were not encouraged by AFT to vote for a tax to be spent by the County Commission at its discretion. AFT, armed with the MPO's two-year study of why the proposal was defeated in 2010 and educated by that study on the rhetoric to use to flip the votes to "yes," engaged in a sophisticated marketing effort to pass a proposal that largely cut the County Commission out of the process for the entire thirty years.

Thus, accepting the burden of persuasion that this Court placed on the challengers of a citizens' initiative in *Ray v. Mortham,* 742 So. 2d 1276 (Fla. 1999), Mr. White submits that the tax cannot be severed from the funding plan that is the centerpiece of Article 11.

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.*

In *Ray v. Mortham,* 742 So. 2d 1276 (Fla. 1999), this Court addressed the doctrine of severability in a rather odd context. A constitutional amendment had been proposed by citizens' initiative in 1992. The amendment was designed to

create term limits for many elected officials in Florida. In addition to state constitutional officers, it applied to members of the U.S. Congress.

Prior to the 1992 election, this Court reviewed the ballot proposal and approved it, despite a challenge to it as a violation of the single-subject rule. *See Advisory Opinion to Attorney General--Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225 (Fla. 1991). The voters passed the amendment by a lopsided vote of 77 – 23%. *Id*. at 1280. Thereafter, the U.S. Supreme Court held that states could not place term limits on members of Congress. *See U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779 (U.S. 1995). As a result, the portion of the Florida Constitution placing term limits on members of Congress became unconstitutional.

Mr. Ray and others filed an action to have the entire term limits provision in the Florida Constitution declared invalid. They wanted to eliminate the rule for the 160 state officials affected, because it became unconstitutional for the 25 members of Congress after it was approved by the voters. This Court concluded that it could separate the state officials from the federal officials and retain the constitutional provision for state elections. *Id.* at 1284.

In so doing, this Court decided, as a matter of first impression, that the doctrine of severability should apply to constitutional provisions as well as legislative enactments, and that it should apply to amendments created by citizens'

initiative. *Id*. at 1280-81. This Court decided to apply the four-part test that had originated in *Cramp*. *Id*. at 1281.

Two reasons for this decision are important to highlight. First, the Court rejected a different approach used in Nebraska because the amendment had undergone Florida's "pre-ballot judicial review procedure," which Nebraska does not employ. *Id.* at 1282. While county charters are analogous to the state constitution, citizens' initiatives amending the charter are not subject to a statutory pre-ballot judicial review.

Second, the Court decided the burden of persuasion on the issue of severance should be placed on Mr. Ray because it would be an "inappropriate burden" to place on Secretary of State Mortham. *Id*. at 1281. Years after the election, placing that burden on the Secretary of State for a provision that was constitutional under U.S. Supreme Court case law at the time of the election does seem questionable. But placing the burden of persuasion on the sponsors who drafted a citizens' initiative that was unconstitutional in many substantial parts even when it was first filed with the Supervisor of Elections does not seem questionable at all. This is especially true when the sponsors never bothered to obtain a reputable written legal opinion that the content of the initiative was constitutional.

In *Ray,* the Court explained the policy justification for the four-part test in *Cramp* as follows:

> Severability is a judicial doctrine recognizing the obligation of the judiciary to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional portions. *See State v. Calhoun County*, 126 Fla. 376, 383, 170 So. 883, 886 (1936). This doctrine is derived from the respect of the judiciary for the separation of powers, and is "designed to show great deference to the legislative prerogative to enact laws." *Schmitt v. State*, 590 So.2d 404, 415 (Fla.1991).

Id. at 1280.

Mr. White has argued in the prior section of this brief that he has met his burden under *Ray* to prove that the tax cannot be severed under not one, but two, of the *Cramp* tests. However, in the circuit court, he also argued that the *Cramp* tests should not be used for citizens' initiatives. The undersigned disclosed to the court that *Ray* appeared to be the controlling case law for that court. The argument was made to preserve the right to argue it here. (A7:132-33).

In this Court, Mr. White submits that even if the Court concludes he has met one of the tests in *Cramp,* it should still examine whether those tests are the appropriate tests for this context. He submits that the policy justifications for deference to legislation are substantially different from those that should apply to citizens' initiatives.

- Legislation is created in an open, public process by elected, constitutional representatives.
- It is subjected to publicly available staff analysis of both its legality and its financial impact.
- It is subject to debate in both committees and on the floor of two chambers.
- Legislation is reviewed and can be signed or vetoed by the Governor.

- If the public does not like the outcome of legislation, they can vote their representatives out.
- Citizens' initiatives, like this one, can be created in secret by practically anyone.
- Citizens' initiatives can be placed on the ballot without any need to obtain or publish an unbiased legal opinion as to the constitutionality of the proposal.
- A handful of sponsors with sufficient financial interest can fund a petition drive with no need to explain their "core political strategies" to people signing the petitions or to people voting in the election.
- Especially when a local charter amendment is unconstitutional because it conflicts with general law, deference to the Legislature may often be a reason not to permit severance.

Likewise, the policy justifications for treating proposed constitutional amendments similar to legislation are substantially different from those that should apply to citizens' initiatives proposing local charter amendments.

- Many constitutional amendments are created by the Legislature or by the Constitutional Revision Commission operating in the sunshine.
- Constitutional amendments by statewide citizens' initiatives require a statewide petition process that is more likely to be subjected to public scrutiny.
- All such amendments are reviewed months ahead of the election by this Court to determine whether the ballot language is fair and accurate and whether the proposal is a single subject.
- Local citizen's initiatives have no statutory requirement for any judicial review prior to the election.
- Without the process of automatic judicial review, there is much less regulation of the fairness and accuracy of the ballot language. This allows the petition

> to be submitted on the last possible day, which effectively renders it almost impossible to obtain a judicial review prior to the election.[4]

Ray has not been applied or analyzed to any significant extent in this context in Florida or elsewhere since it was issued. It is helpful to consider that *Ray* involved an unconstitutional amendment to the Florida Constitution. That rare event should only occur when the Florida constitutional amendment becomes unconstitutional under the U.S. Constitution or perhaps another aspect of federal supremacy following the election. But a local charter amendment can be unconstitutional under Florida law or U.S. law at the time it is submitted to the supervisor of elections. This means that such constitutional problems are far more likely to arise in the context of local citizens' initiatives that are not pre-election tested by the courts. It is far more important to set a workable test for the doctrine of severance in this context than it was in the *Ray* context.

Mr. Whites submits that a better test for local citizens' initiatives amending county charters would begin with the assumption that a citizen's initiative containing substantial constitutional violations when submitted to the voters did affect the

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[4] Chapter 2019-64 amended section 212.055(1). In future elections, signatures will need to be obtained and other requirements performed 180 days before the election. This does not solve the core problem confronting severability in the local context because the constitutionality of the proposal cannot typically be addressed pre-election unless the entire proposal is unconstitutional. *See Dade County v. Dade County League of Municipalities,* 104 So. 2d 512, 518 (Fla. 1958).

outcome of the election and that it must be declared unconstitutional in its entirety. If we are actually to have a test based on whether, hypothetically, the voters would have adopted the good part without the bad, then the sponsors who placed the constitutionally defective measure on the ballot should have the burden on that issue. The entire amendment should be severed unless the sponsors establish, clearly and convincingly, that the "good" part of their initiative (in this case the tax) would have been adopted by the voters if it had been presented as a stand-alone measure with a fair and accurate ballot summary describing only the subject contained in the good part.

Otherwise, the framers of these initiatives are free to include unconstitutional content attractive to the voters in a petition and then shift the burden on the issue of severance to those who believe that voters should be dealt with fairly and accurately when amending things as important as a county charter. A rule of law that encourages such election abuses is not good governance. The tests used in *Cramp* for the Legislature should not be applied in this context.

CONCLUSION

This Court should hold that the transportation surtax, which was the means to the ends of this complex transportation funding plan, cannot be severed from that unconstitutional plan. This Court can do that under the *Cramp* tests, which work better for their intended purpose of deferring to the Legislature as a co-equal branch

of government when examining unconstitutional parts of statutes. But a better holding would be achieved by announcing a revised test that more accurately assesses the context of local citizens' initiatives.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF TYPE SIZE & STYLE

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