IN THE SUPREME COURT OF FLORIDA

CASE NO. SC19-1250

ROBERT EMERSON, *et al.*,

Appellants/Cross-Appellees,

vs.

HILLSBOROUGH COUNTY, FLORIDA, *et al.*,

Appellees/Cross-Appellants. /

L. T. Case No.:
2019-CA-001382-A001-HC

ON MANDATORY REVIEW OF A FINAL ORDER
OF THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN A BOND VALIDATION PROCEEDING

INTERVENOR-APPELLEES' ANSWER BRIEF ON APPEAL AND INITIAL BRIEF ON CROSS-APPEAL

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STATEMENT OF THE CASE AND FACTS

In 2018, Hillsborough County voters approved a charter amendment ("Article 11") enacting a 1% surtax for transportation improvements (E.A. 9:198).[1] This appeal arises from Hillsborough County's action to validate $10 million in bonds backed by the Article 11 surtax (E.A. 10:13-89), which the trial court consolidated with Hillsborough County Commissioner Stacy White's action seeking a declaration that Article 11 violates the Florida Constitution (E.A. 1:13-40). Intervenors Keep Hillsborough Moving, Inc., All for Transportation, and Tyler Hudson (together, "All for Transportation") intervened in support of Hillsborough County. Robert Emerson intervened in opposition.

Emerson and White appeal the trial court's final orders, which found certain portions of Article 11 to be unconstitutional and severed them from the remainder (E.A. 9:673-93; 723-39; 747-54). All for Transportation cross-appeals the trial court's finding that portions of Article 11 are unconstitutional. Thus, the two questions on appeal are (1) whether Article 11 is constitutional in its entirety, and (2) if not, whether invalid provisions can be severed from it.

A. Facts Relevant to the Appeal

With the exception of ad valorem taxes on real estate or tangible personal property, "[a]ll other forms of taxation shall be preempted to the state except as

[1] "E.A. #:#" refers to the volume and page number of Emerson's appendix. "H.A. #" refers to the page number of the appendix submitted with this brief.

provided by general law." Art. VII, §1(a), Fla. Const. The Florida Legislature, however, has authorized discretionary sales surtaxes, providing that charter counties such as Hillsborough "may levy a discretionary sales surtax, subject to approval by a majority vote of the electorate of the county or by a charter amendment approved by a majority vote of the electorate of the county." § 212.055(1)(a), Fla. Stat. *See also* Home Rule Charter of Hillsborough Cty., Art. VIII, § 8.03 (2018) (allowing citizens initiatives to amend the Charter).

All for Transportation sponsored the proposed Article 11 and collected the necessary signatures to place it on the ballot, where it appeared under the title "Funding for Countywide Transportation and Road Improvement" (E.A. 1:39). The entire ballot summary read:

> 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?

(E.A. 1:39).

Article 11 itself is titled "Surtax for Transportation Improvements" (E.A. 1:33). Section 11.01, "Purpose of Surtax," provides that the "purpose of the surtax levied in accordance with section 11.02 below is to fund transportation improvements throughout Hillsborough County . . . . 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" (E.A. 1:33). Section 11.02 provides that the surtax would be levied throughout Hillsborough County at the rate of one cent per dollar, "in accordance with F.S. §§ 212.054 and 212.055(1)," and "shall be expended only as permitted by this Article 11 [and] F.S. § 212.055(1)" (E.A. 1:34). Section 11.03 provides that the duration of the surtax is 30 years (E.A. 1:34). Section 11.04 provides that the clerk shall receive the proceeds of the surtax and hold them in trust until disbursed in accordance with Article 11, and shall also engage an independent accounting firm to conduct an annual audit of the distribution of all surtax proceeds" (E.A. 1:34). No party contends on appeal that Sections 11.01, 11.02, 11.03, and 11.04 conflict with general law.

Sections 11.05 through 11.09 address the distribution and uses of surtax proceeds (E.A. 1:34-36). Section 11.10 establishes an Independent Oversight Committee (E.A. 1:36-37). And Section 11.11 contains both a supremacy clause—which provides that, "in the event of any conflict between the provisions of this Article 11 and the laws of Florida, the laws of Florida shall prevail"—and a

severability clause, which provides that if any expenditures provided in Section 11.07 or 11.08 are impermissible, such funds shall be expended "on any project to improve public transportation permitted by F.S. § 212.055(1)" (E.A. 1:36).

All said, Article 11 refers to section 212.055(1) eleven times, repeatedly providing that the surtax shall be collected and distributed "in compliance with" or "in accordance with" section 212.055(1), or as "permitted by" or "to the extent permitted by" that section (E.A. 1:33-37 (§§ 11.01, 11.02, 11.07, 11.08, 11.11)).

On November 6, 2018, 282,753 voters in Hillsborough County, or 57.3%, approved Article 11 (E.A. 9:198). It was approved in every city in Hillsborough County (Tampa (63%), Temple Terrace (64%), and Plant City (54%)), as well as in the unincorporated area (54.6%) and in every county commission district (District 1 (57%), District 2 (53%), District 3 (67%), and District 4 (52%)) (E.A. 9:199) (percentages are approximate).

In December 2018, before the tax took effect, White filed a declaratory judgment action to resolve his "doubt about the validity of Article 11" (E.A. 9:200-01). After the County began collecting the surtax on January 1, 2019, its Board of County Commissioners authorized the filing of a bond validation action to determine its authority to issue $10 million of bonds backed by the surtax (E.A. 9:201). Its complaint was filed on February 7, 2019 (E.A. 10:13-89). A week later, the trial court consolidated the two cases (E.A. 1:244-45).

In both cases, Emerson and White alleged, among other things, that Article 11, which provides that surtax proceeds be distributed to certain agencies or municipalities and allocated to specific uses, violated section 212.055(1)(d), Florida Statutes, which provides that "[p]roceeds 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." § 212.055(1)(d), Fla. Stat. The parties have stipulated that all of the uses of surtax proceeds specified by Article 11 are proper under section 212.055(1) (E.A. 9:200), and the bond validation resolution that the County Commission passed in February 2019—with only White voting "no"—declared that the "provisions of Article 11, including the allocation and uses of the funds set forth therein, are hereby deemed appropriate pursuant to Section 212.055(1)(d), Florida Statutes" (E.A. 9:199; 1:402).

In April 2019, the County Commission approved an interlocal agreement among the Board of County Commissioners, the City of Tampa, the City of Temple Terrace, Plant City, the Hillsborough Area Regional Transit Authority ("HART"), and the Metropolitan Planning Organization (E.A. 549). The interlocal agreement provides that each party "ratifies and deems appropriate the allocation, distribution and uses of Surtax Proceeds as provided for in [Article 11]" (E.A. 9:552). In addition, in September 2019, the County Commission—again over only White's

dissent—passed an ordinance providing for the "use, allocation and distribution" of surtax proceeds that mirrors the provisions of Article 11 (H.A. 9-14).[2]

B. Course of Proceedings and Disposition in the Circuit Court

In the consolidated case below, all parties moved for summary judgment regarding the constitutionality of Article 11. Hillsborough County and All for Transportation argued that Article 11 is a valid exercise of the County's home rule authority that does not conflict with general law and is constitutional in its entirety (E.A. 7:31-60; 7:159-85). Appellants' arguments included (1) that Article 11 violates the single-subject rule and that its ballot summary is misleading; (2) that certain of its provisions conflict with general law, particularly section 212.055(1)(d), Florida Statutes; and (3) that it must be struck down in its entirety because its valid provisions cannot be severed from the invalid ones (E.A. 7:98-158; 11:214-26). The trial court heard argument in May 2019 (E.A. 9:755-1311).

The trial court granted the parties' summary judgment motions in part and denied them in part (the "Summary Judgment Order") (E.A. 9:673-93). Although the parties had conducted limited discovery, the Summary Judgment Order addressed only pure questions of law. The trial court rejected White's argument that Article 11 violates the single-subject rule, holding that "the initiative has 'a logical

[2] The Court may take judicial notice of "[d]uly enacted ordinances and resolutions of municipalities and counties located in Florida," provided they are "available in printed copies or as certified copies." § 90.202(1), Fla. Stat.

and natural oneness of purpose,'" which is "to enact a thirty year, one-cent sales surtax to fund transportation improvements throughout Hillsborough County" (E.A. 9:679). The trial court also rejected White's argument that the ballot summary was misleading, holding that it adequately informed voters of the "chief purpose of the proposal—a tax over thirty years for the purpose of transportation needs in Hillsborough County, municipalities and agencies in Hillsborough County" (E.A. 9:680). Emerson did not argue that Article 11 violated the single-subject rule or that its ballot summary was misleading, and White does not challenge either ruling here.

The trial court also held that certain provisions of Article 11 conflict with general law and are therefore unconstitutional (E.A. 9:681-86). It held that Article 11's allocation of the uses of surtax proceeds, and certain of the powers granted to the Independent Oversight Committee, conflict with powers granted to the Board of County Commissioners under section 212.055(1) (E.A. 9:681-86). On an amended petition form attached to its order, the court struck portions of sections 11.05, 11.06, 11.07, 11.08, 11.10, and 11.11, and most of section 11.09 (E.A. 9:690-93). The court did not strike any of sections 11.01, 11.02, 11.03, or 11.04 (E.A. 9:689-90).

The trial court, noting that the Hillsborough County Charter contains a severability provision and that Article 11 "contained a severability clause as well as a supremacy clause," found it "clear from [Article 11] that severability was anticipated by the voters" (E.A. 9:687). The court held 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" (E.A. 9:686-87).

In the bond-validation action, the trial court entered an amended final judgment, validating the bonds and attaching an amended petition form striking out the portions of Article 11 that it had found invalid (the "Bond Judgment") (E.A. 9:706-22). In the declaratory-judgment action, the court entered a final judgment incorporating the Summary Judgment Order and the same amended petition form (E.A. 9:747-54) (the "Declaratory Judgment" and, together with the Bond Judgment and the Summary Judgment Order, the "Final Orders").

Emerson appealed the Bond Judgment directly to this Court. *See* § 75.08, Fla. Stat.; Fla. R. App. P. 9.030(a)(1)(B)(i). White appealed the Declaratory Judgment to the Second DCA, which certified the judgment as requiring immediate resolution by this Court. *See* Fla. R. App. P. 9.125. Hillsborough County, City of Tampa, City of Plant City, HART, and All for Transportation cross-appealed. This Court has consolidated the appeals.

C. Standard of Review

This Court reviews *de novo* the constitutional validity of a county charter or ordinance. *See City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1241 (Fla. 2006).

SUMMARY OF THE ARGUMENT

The Florida Constitution grants the citizens of home rule counties extensive power to govern their affairs. The citizens of Hillsborough County exercised that power when they voted overwhelmingly to approve Article 11. The Appellants' only argument here is that, rather than sever those portions of Article 11 that it found invalid, the trial court should have stricken the entire amendment. As we show in the cross-appeal, however, Article 11 should be upheld in its entirety and this Court need not reach severability. If the Court does conclude that portions of Article 11 are invalid, the trial court correctly upheld the remainder of Article 11.

To invalidate all of Article 11, there must be an express, irreconcilable conflict with general law—a conflict so extensive that when the conflicting provisions are severed, the amendment's chief purpose cannot be accomplished. Because of the presumption of constitutionality, courts should endeavor to save all charter provisions that are constitutional, and the voters here had clear notice of severability, because Article 11 itself contains a severability provision. In addition, the Hillsborough County Charter contains a severability provision that applies to the entire charter, and this Court has held that courts should apply severability even

without such provisions, noting that they merely buttress the need for severability. Thus, if Article 11, less its invalid provisions, still carries out the chief purpose of the charter amendment, the valid provisions should stand. Article 11 satisfies that test.

Courts determine voter intent for the chief purpose of an amendment from the text of the amendment itself, as well as from the ballot title and summary. Here, the title of Article 11 is "Surtax for Transportation Improvements," the ballot summary states that the County Charter would be amended "to enact a one-cent sales surtax" for 30 years to fund "transportation improvements," and Section 11.01 of Article 11 states that the "purpose of the surtax . . . is to fund transportation improvements throughout Hillsborough County." Those texts could not be clearer—voter intent was to pass a 30-year, one-cent surtax to fund transportation improvements in Hillsborough County. And the portions of the amendment the trial court left standing more than fulfill that purpose.

Indeed, the trial court struck only 500 of the roughly 3,050 words in Article 11. It did not strike a single word of sections 11.01-.04, and no Appellant contests them. Those provisions are the heart of Article 11. Section 11.01 states the purpose; Section 11.02 establishes the levy of a one-cent surtax; Section 11.03 provides for a duration of 30 years; and Section 11.04 provides that the surtax will be collected by the clerk and disbursed as allowed by Article 11 and Florida law. Those four sections alone are a self-contained whole, and even White concedes that "an act

complete in itself remains after the invalid provisions are stricken," and that "language could be separated in Article 11 to provide for a tax complete in itself" (br. at 26). In short, because the trial court severed nothing from Article 11 that would impede the people's intent to create a 30-year surtax to fund transportation improvements throughout Hillsborough County, the trial court applied severance principles to uphold about 85% of Article 11.

This Court need not reach severability at all, however, because Article 11 does not conflict with general law and should be upheld in its entirety. The trial court held that Article 11 conflicts with one sentence in section 212.055(1)(d), Florida Statutes, which provides that "[p]roceeds 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." Because Article 11 itself provides for certain allocations of surtax proceeds to certain uses, the trial court found that it interferes with the County Commission's authority. However, through the supremacy clause and repeated references to section 212.055(1), Article 11 itself recognizes that section 212.055(1) controls. Indeed, consistent with that supremacy clause, Article 11 repeatedly states—*eleven* times—that the surtax shall be collected and distributed "in compliance with" or "in accordance with" or as "permitted by" or "to the extent permitted by" section 212.055(1). Thus, it is simply not possible for Article 11 to conflict with that statute. No conflict exists now because the County

Commission has voted, on at least three occasions, to "deem appropriate" the precise allocations indicated in Article 11. If a future Commission exercises its authority under section 212.055(1) to deem appropriate some other allocation scheme, that allocation would supersede those indicated in Article 11 to the extent of any conflict—subject, of course, to any interlocal agreement specifying the use of surtax proceeds, or to the conditions of any bonds to which proceeds have been pledged.

This Court should reverse the Final Orders and uphold Article 11 in its entirety, or, in the alternative, affirm the Final Orders.

ARGUMENT

Appellants assume that the trial court correctly found portions of Article 11 unconstitutional; their only argument is that it should have stricken the entire amendment. As we show in the cross-appeal, however, no portion of Article 11 conflicts with general law. Therefore, this Court should reverse the Final Orders and uphold Article 11 in its entirety. If this Court agrees, it need not decide the issue of severability. Therefore, All for Transportation suggests that the Court first consider the cross-appeal below. If this Court concludes that portions of Article 11 are invalid, All for Transportation shows, in Section I, that even with those portions severed, the remainder of Article 11 can stand.

I. THIS COURT SHOULD AFFIRM THE FINAL ORDERS BECAUSE EVEN WITH THE INVALID PORTIONS OF ARTICLE 11 SEVERED, A COMPLETE CHARTER AMENDMENT REMAINS THAT FULFILLS ITS CHIEF PURPOSE

White concedes (br. at 23) that the "presumption of constitutionality should cause a court to endeavor to save all portions of a charter that are constitutional." As the trial court noted, the "[Hillsborough] County Charter provides 'that if any section, subsection, sentence, clause term or word of this Charter is held invalid, the remainder of the Charter shall not be affected" (E.A. 9:686 (quoting Home Rule Charter of Hillsborough Cty., Art. IX, § 9.5f (2018))). The court further noted that "[v]oters were provided with clear notice of severability," and that Article 11 itself "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 (E.A. 9:687).

This Court has held that an "initiative petition . . . specifically contain[ing] a severability clause . . . is persuasive of the fact that the framers intended severability to save the amendment in case portions of it were declared invalid." *Ray v. Mortham*, 742 So. 2d 1276, 1283 (Fla. 1999). *See also Vill. of Wellington v. Palm Beach Cty.*, 941 So. 2d 595, 600 (Fla. 4th DCA 2006) (noting that "severability clauses have been found to indicate an intent to retain the legislation without the invalid portions"). In *Ray*, the Court noted that "the initiative power of fully informed citizens to amend the Constitution must be respected as an important

aspect of the democratic process." 742 So. 2d at 1281. Therefore, it held that, when part of a citizens initiative 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 [] 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 [voters] would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken." *Id.* *See also Vill. of Wellington*, 941 So. 2d at 600 (applying the test to a county charter amendment).

White correctly states that the "key is whether the overall legislative intent is still accomplished without the invalid provisions" (br. at 25 (citing *Searcy, Denney, Scarola, Barnhart & Shipley v. State*, 209 So. 3d 1181, 1196 (Fla. 2017))). Thus, Appellants must show that the Amendment "in its entirety" violates general law, since any proposed law "can have a valid field of operation even though segments of the proposal or its subsequent applicability to particular situations might result in contravening the organic law." *Dade Cty. v. Dade Cty. League of Municipalities*, 104 So. 2d 512, 515 (Fla. 1958). As this Court held in *Ray*, it must discern the amendment's overall intent and determine whether, "less the invalid provisions, [it] can still accomplish this intent." 742 So. 2d at 1280 (citation omitted).

Article 11 passes that test. In fact, White concedes (br. at 25-26) that Article 11 survives the first and fourth prongs—that the "unconstitutional provisions can be separated from the remaining valid provisions" and that "an act complete in itself remains after the invalid provisions are stricken"—and concedes that "language could be separated in Article 11 to provide for a tax complete in itself" (*id.* at 26). Appellants focus on the second and third prongs (White br. at 25; Emerson br. at 24-25), arguing that Article 11's purpose cannot be fulfilled without the stricken provisions, and that the valid and invalid parts are so inseparable that voters would not have passed some without the others. The trial court correctly held otherwise.

Below we demonstrate that: (A) the portions of Article 11 the trial court found valid fulfill the voters' intent to fund transportation improvements in Hillsborough County; (B) Appellants cannot rely on material outside Article 11's text, and outside the ballot title and summary, to argue that voter intent was otherwise; and (C) the Court should reject White's argument that the Court should craft a new severability test, particularly because the proposed test is unworkable.

A. The Portions of Article 11 the Trial Court Found Valid Fulfill the Voters' Intent to Fund Transportation Improvements in Hillsborough County

This Court has held that, to determine an amendment's purpose, it "analyzes the text . . . and identifies the proposed amendment's chief purpose based on the results of that analysis." *Dep't of State v. Fla. Greyhound Ass'n*, 253 So. 3d 513,

521 (Fla. 2018). *See also Oliva v. Fla. Wildlife Fed'n, Inc.*, 44 Fla. L. Weekly 2268, D2270 (Fla. 1st DCA Sept. 9, 2019) (noting that courts have held that "[v]oter intent is discerned through the plain meaning of the text"). This Court also has noted that, for laws passed by voter initiative, the "ballot summary . . . is indicative of voter intent." *Graham v. Haridopolos*, 108 So. 3d 597, 605 (Fla. 2013).

White suggests that the trial court excised so much of Article 11 that what is left is incoherent and ungrammatical and bears little to no relation to what the voters intended (br. at 18). But the full text of Article 11 contains about 3,050 words, and the court excised only about 500 of them. And both the text and the ballot summary make clear that the remaining 2,550 words fully express the voters' intent to collect a 30-year surtax to fund transportation improvements in Hillsborough County.

Indeed, the trial court did not disturb a single word of sections 11.01, 11.02, 11.03, and 11.04. Nor do Appellants contest them. And those provisions are the heart of Article 11. Section 11.01, titled "Purpose of Surtax," provides that the "purpose of the surtax levied in accordance with Section 11.02 below is to fund transportation improvements throughout Hillsborough County" (E.A. 1:33). Voter intent to pass a surtax to fund transportation improvements could not be made more clear, and even White has acknowledged that a "chief purpose" of Article 11 "is to establish the transportation tax authorized by the Legislature" (E.A. 7:108). Although Appellants argue (White br. at 36; Emerson br. at 20) that the chief

purpose of Article 11 is expressed in the *last* sentence of Section 11.01—"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"—they ignore the first sentence's clear explication of the "*purpose of the surtax*" (E.A. 1:33 (emphasis added)). *See Bd. of Pub. Instruction v. State*, 188 So. 2d 337, 343 (Fla. 2d DCA 1966) (rejecting an attempt "to divine the legislative intention by departing from the plain meaning of the amendment" in favor of "using common sense in construing laws as saying what they obviously mean").

Section 11.02 then establishes the levy of a one-cent surtax to be expended as permitted by Florida law and "in accordance with the purpose set forth in Section 11.01," and section 11.03 provides that the tax will be collected for 30 years (E.A. 1:34). White concedes that "[s]ections 11.02 and 11.03 are generally the neutral provisions that create the tax under the statute. . . . [A]lmost everything required to [create a transportation surtax] is contained in these provisions" (br. at 11). Section 11.04 provides that the surtax will be collected by the clerk and disbursed as allowed by Article 11 and Florida law (E.A. 1:34).

Thus, the first four sections of Article 11 are self-contained—establishing the amount and duration of the tax, how it will be collected and maintained, and for what purpose. *See*, *e.g.*, *Hall v. Recchi Am.*, 671 So. 2d 197, 201-02 (Fla. 1st DCA 1996)

(applying the severability doctrine to uphold a statute where "[t]he remaining provisions of this statute will serve those goals" evident in its text).

The ballot title and summary reflect the same intent, and both Appellants concede that it is "appropriate to consider" the title and summary "to measure objectively the voters' intent" (White br. at 39; Emerson br. at 20). White complains that "neither 'tax' nor 'surtax' are in the [ballot] title" and that the word "surtax" only "shows up once at the end of the summary" (br. at 40). But the ballot summary contains only 74 words, as required by the 75-word limit in section 101.161, Florida Statutes; and it refers to a "one-cent sales surtax" (E.A. 1:39). And the full title of Article 11 is "Surtax for Transportation Improvements" (E.A. 9:195). White concedes (br. at 40) that, "[f]rom the ballot summary, the legislative intent and purpose are essentially the same as expressed in section 11.01," which, as noted above, states that the purpose of the surtax is to fund transportation improvements. Emerson (br. at 20) complains that the "summary also informed voters that '[r]evenues will be shared'" by various Hillsborough County Agencies and "promised voters that '[e]xpenditures will be governed by the Charter Amendment.'" But Emerson quotes not the ballot summary but the financial impact statement, which is separately "prepared by the county budget director and placed on the ballot immediately following the ballot question." Home Rule Charter of

Hillsborough Cty., Art. VIII, § 8.05. He cites no authority suggesting that a financial impact statement provides any insight into voter intent.

The ballot summary is particularly notable here because the trial court upheld all the Article 11 sections it summarizes. Indeed, the ballot summary says that Article 11 will fund "transportation improvements . . . throughout Hillsborough County . . . "[b]y amending the County Charter to enact a one-cent surtax" (sections 11.01 and 11.02) (E.A. 1:39). It notes that the duration of the surtax is 30 years (section 11.03) (E.A. 1:39). It notes that the surtax proceeds will be "deposited in an audited trust fund" (section 11.04) (E.A. 1:39). And the summary also refers to the "independent oversight" committee that is described in the 667 words of section 11.10—only *six* of which the trial court excised (E.A. 1:39). Thus, the trial court's amended version of Article 11 gives citizens precisely what the ballot title and summary described: a 30-year surtax held by the clerk in an audited account, with independent oversight, to be used to fund transportation improvements.

In short, the text of section 11.01 and the ballot title and summary are in total accord: citizens who voted yes intended that "transportation improvements be funded throughout Hillsborough County . . . [b]y amending the County Charter to enact a one-cent sales surtax levied for 30 years" (E.A. 1:39), and the "chief purpose" of Article 11 could not be clearer. *See, e.g.*, *Grose v. Firestone*, 422 So. 2d 303, 305 (Fla. 1982) (finding that a "ballot summary . . . clearly state[d] the chief

purpose of this amendment and provides the electorate with fair notice of the intent of the amendment").

Because the trial court severed nothing that would impede Article 11's creation of a 30-year tax to fund transportation improvements, the amendment's core purpose can "be accomplished independently of those [provisions] which are void," and the trial court properly applied severance principles to uphold about 85% of Article 11's text. *See Ray*, 742 So. 2d at 1283 (upholding a law whose purpose "still [can] be accomplished after the unconstitutional portion is stricken"); *Presbyterian Homes of Synod v. Wood*, 297 So. 2d 556, 559 (Fla. 1974) (applying the severability doctrine to uphold a tax statute whose chief purpose was "quite apparent" and could be accomplished without provisions that "mistakenly exceeded" constitutional limits); *Tropical Park v. Dep't of Bus. Regulation, Div. of Pari-Mutuel Wagering*, 433 So. 2d 1329, 1332 (Fla. 3d DCA 1983) (applying severability to preserve a statute where the "invalid allocation provision . . . can be separated from the remaining valid portions" while preserving the law's stated purpose to "generate tax revenue for the state"). Because the transportation surtax in Article 11 can be applied without including the distribution percentages, the valid and invalid provisions are not so inseparable that the voters would not have passed one without the other. *See Ray*, 742 So. 2d at 1281.

B. Appellants Cannot Rely on Material Outside the Text of Article 11, and Outside the Ballot Title and Summary, to Argue That Voter Intent Was Otherwise

As shown above, the portions of Article 11 the trial court excised directed that surtax proceeds be allocated to particular uses in particular percentages. White argues that "all the Appellees maintained the [allocation] plan and tax were one unified single subject for ballot purposes" (br. at 38). But White argued below that the surtax and the allocation plan were *separate* subjects, and he repeats the argument now, complaining that the "long list of 'purposes' in section 11.01 . . . was the type of generic logrolling that gets 'yes' votes for no clear, unified purpose" (br. at 36). But the trial court ruled against him on his single-subject claim, and—because appealing that ruling would sharply undercut his argument that provisions regarding the allocation plan cannot be severed from the tax itself—he has not challenged that ruling on appeal. This Court should not consider the argument. *See D.H. v. Adept Cmty. Servs.*, 271 So. 3d 870, 880 (Fla. 2018) ("[P]oints covered by a decree of the trial court will not be considered by an appellate court unless they are properly raised and discussed in the briefs."); *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990) ("Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived."). For the same reason, this Court should

not consider White's argument that "this ballot was misleading" (br. at 40)—which he also lost below and chose not to appeal.

Although White concedes that, "[w]hen examining the issue of severance," this Court "avoids any backroom search for the subjective 'purpose' of the drafters and looks instead to the more justiciable issue of legislative 'intent'" (br. at 35 (citing *Searcy, Denney,* 209 So. 3d at 1196)), both he and Emerson rely heavily on such a "backroom search." For example, they argue that All for Transportation studied a similar, 2010 initiative that failed to win voter support, and a later study of why voters rejected it, to fashion a more-palatable initiative (*see* White br. at 5-10, 41-42; Emerson br. at 5-9, 21-23). Although White admits he 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" (br. at 41), he nevertheless argues that certain advertisements supporting Article 11 establish the voters' intent; and Emerson cites to All For Transportation's website pages—retrieved in *August 2019*—that are not even in the record (br. at 23).

As this Court has warned, "if the language of a statute is clear and unambiguous, the legislative intent must be derived from the words used without involving rules of construction or speculating as to what the legislature intended." *Zuckerman v. Alter,* 615 So. 2d 661, 663 (Fla. 1993). *See also Knowles v. Beverly Enters.-Fla., Inc.,* 898 So. 2d 1, 10 (Fla. 2004) (declining to consider the statute's

legislative history because the language was unambiguous); *Gallagher v. Manatee Cty.*, 927 So. 2d 914, 919 (Fla. 2d DCA 2006) (citation omitted) ("The legislative history of a statute is irrelevant where the wording of a statute is clear."); *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (noting that courts "do not resort to legislative history to cloud a statutory text that is clear"). And this Court has found that, when analyzing an 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 predicate for their collective decision." *Williams v. Smith*, 360 So. 2d 417, 420 n.5 (Fla. 1978) (emphasis added). *See also Advisory Op. to the Att'y Gen. re: Add'l Homestead Tax Exemption*, 880 So. 2d 646, 653 (Fla. 2004) (stating citizens vote "based only on the ballot title and the summary"). Moreover, "[t]hat an appellate court may not consider matters outside the record is so elemental that there is no excuse for any attorney to attempt to bring such matters before the court." *Konoski v. Shekarkhar*, 146 So. 3d 89, 90 (Fla. 3d DCA 2014) (quoting *Altchiler v. State, Dep't of Prof'l Regulation*, 442 So. 2d 349, 350 (Fla. 1st DCA 1983)).

White also argues that the trial court should have 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, and 6) a small, but critical portion of section 11.10" (br. at 31). But White is not arguing that this Court should sever *more* of Article 11

to save the amendment. Rather, both Appellants argue that no amount of severance can save it. And the trial court, largely adopting the Appellants' rationale, invalidated and severed those provisions that (1) "dictate[d] the uses [the County Commission] may apply the proceeds to as well as how much of the proceeds [the Commission] may apply to each one," and (2) allowed the Independent Oversight Committee to determine or approve uses of the tax, usurping the power expressly granted to the County Commission (E.A. 9:684-85).

None of the provisions that, according to White, the trial court also should have severed poses any challenge to the County Commission's authority, and his only case, on which Emerson also relies (br. at 24), holds that a court cannot add words to an amendment, which the trial court did not do (*see* White br. at 33 (citing *Lawnwood Med. Ctr., Inc. v. Seeger*, 990 So. 2d 503, 512 (Fla. 2008))). Emerson also cites *Eastern Air Lines, Inc. v. Department of Revenue*, 455 So. 2d 311, 317 (Fla. 1984), as holding that severance is inappropriate where it "would generate 'results' that were 'unanticipated' (even rejected) by the voters" (br. at 26). But there is nothing "unanticipated" or "rejected" in the trial court's revision of Article 11. Voters will still have approved a 1% surtax to be spent on transportation improvements; and in *Eastern Airlines*, this Court "believe[d] that the legislature's intent could still be accomplished if the full refund provisions relating to local

commercial fishing and agriculture were to be eliminated and the remainder of the statute left intact." 455 So. 2d at 317.

White's real complaint is that the trial court's excisions create "an ambiguous document with numerous grammatical errors" (br. at 30; *see also id.* at 32, 33). But the doctrine of severability does not require grammatical perfection—removal of invalid language from a law is permitted so long as they do not "render[] the enactment nonsensical or otherwise chang[e] its essential meaning." *Schmitt v. State*, 590 So. 2d 404, 415 (Fla. 1991). As shown above, the court's excisions leave a cohesive statute that accomplishes Article 11's chief purpose and fulfills the voters' intent.

Finally, both Appellants argue that the severability clause in section 11.11 does not save Article 11 because it addresses only sections 11.07 and 11.08 (*see* White br. at 28; Emerson br. at 27). But a severability clause is not necessary to allow severance of statutory (or, in this case, charter) provisions. "The *Cramp* [*v. Board of Pub. Instruction*, 137 So. 2d 828 (Fla. 1962)] test rests on another Florida rule that severability does not always depend on the inclusion of a severability clause in a legislative enactment. Such a clause only buttresses the case for severability. If the four parts of the *Cramp* test are met, severability can occur whether or not the enactment contains a severability clause." *Schmitt*, 590 So. 2d at 415. *See also Dade Cty. v. Keyes,* 141 So. 2d 819, 821 (Fla. 3d DCA 1962) ("When

a portion of a statute or ordinance is declared invalid the remaining portions thereof which are severable ordinarily should be recognized as valid, and it is the duty of the court to preserve their validity whether or not a severability clause was included.").

Both the severability clause in section 11.11 and the supremacy clause in the same section—providing that Florida general law prevails in the event of any conflict with Article 11—buttresses the case for severability. They clearly show voter intent to save as much of Article 11 as possible in the event of a conflict. *See Ray*, 742 So. 2d at 1283 (applying the severability doctrine to uphold amendment where "it is clear from the initiative petition that severability was anticipated by the voters"). Indeed, although White (br. at 30) cites *Village of Wellington*, 941 So. 2d at 600-01, to argue that this Court should simply apply the *Ray* test without considering the severability clause, that case notes that "[s]uch severability clauses have been found to indicate an intent to retain the legislation without the invalid portions." 941 So. 2d at 600 (citing *Ray*, 742 So. 2d at 1283). Emerson similarly argues (br. at 28) that the "inclusion of a severability clause will not save a statute if the unconstitutional portions clearly cannot be severed," citing *Schmitt*, 590 So. 2d at 415 n.12. But in *Schmitt* the court also upheld the law after severing certain provisions because it was "self-evident that the legislature would have approved the remainder of the statute without the illegal portion had it appreciated the deficiencies of the latter." 590 So. 2d at 415.

Not only does Article 11's severability clause buttress the case for severability; the Hillsborough County Charter itself also contains a severability clause. It provides that "[i]t is the intent of the electorate in adopting this Charter that if any section, subsection, sentence, clause, term or word of this Charter is held invalid, the remainder of the Charter shall not be affected." Home Rule Charter of Hillsborough Cty., Art. IX, § 9.05 (2018). Citing *Gretz v. Florida Unemployment Appeals Commission*, 572 So. 2d 1384, 1386 (Fla. 1991), Emerson argues that the Charter's severability clause is irrelevant "because the specific language in Article 11, rather than the general language in the Charter's clause, controls" (br. at 29 n.13). But *Gretz* held that a specific statute controls a general statute covering the same subject. 572 So. 2d at 1385-86. In this case, Article 11 became an amendment to the County Charter, and therefore section 9.05 applies to it, in its entirety, just as it applies to every other Charter provision.

In short, because the framers and voters clearly intended for Article 11 to comply with general law, and clearly contemplated that contrary provisions would yield to the laws of Florida, the trial court properly severed those contrary portions. *See St. Johns Cty. v. Ne. Fla. Builders Ass'n*, 583 So. 2d 635, 640 (Fla. 1991) (stating that portions of an ordinance are severable if deleting provisions does not "cause results not contemplated by the legislative body"); *D'Agastino v. City of Miami*, 220 So. 3d 410, 426 (Fla. 2017) ("When confronted with an ordinance enacted pursuant

to home rule authority that operates in an unconstitutional manner, we have a duty to construe the ordinance in a manner that maintains its constitutionality, if possible.").

C. The Court Should Reject White's Argument For a New Severability Test and His Proposed Test Is Unworkable

White argues that the Court should discard the severability analysis established in *Cramp v. Board of Pub. Instruction*, 137 So. 2d 828, 830 (Fla. 1962), and refined in *Ray*, 742 So. 2d at 1280-84, in favor of an a-textual, hypothetical test in which an amendment sponsor must prove "whether, hypothetically, the voters would have adopted the good part without the bad" (br. at 48). Under White's test, if portions of a citizens initiative approved are later found to be invalid, a plan sponsor would have to prove that voters would still have approved the initiative if they had known, at the time they cast their votes, that specific provisions would later be stricken. White cites no authority that would support such an unworkable test.

White argues that this Court in *Ray* only extended *Cramp* to citizens initiatives to amend the constitution because such amendments undergo a "pre-ballot judicial review procedure" and placing the burden of persuasion on a secretary of state would be "inappropriate" (br. at 44). But this Court—being "mindful that the initiative power of fully informed citizens to amend the Constitution must be respected as an important aspect of the democratic process"—held that "*[t]herefore*, just as we view the severability of laws with deference to the legislative prerogative to enact the law, we conclude that we must

afford no less deference to constitutional amendments initiated by our citizens." *Ray*, 742 So. 2d at 1281 (emphasis added).

White also argues that the *Ray* test does not apply to county charter amendments because the "policy justifications" for deference to legislation and constitutional amendments are "substantially different from those that should apply to citizens' initiatives proposing local charter amendments" (br. at 45-46). But this Court has held that courts must not infringe on "the ability of counties to govern themselves as that broad authority has been granted to them by home rule power through the Florida Constitution." *Telli v. Broward Cty.,* 94 So. 3d 504, 513 (Fla. 2012). That vital policy requires that, in "deciding the constitutionality of a charter amendment to a home rule charter, [the court] must presume that it is constitutional and construe it in harmony with the constitution if it is reasonable to do so." *Charlotte Cty. Bd. of Cty. Comm'rs v. Taylor*, 650 So. 2d 146, 148 (Fla. 2d DCA 1995). White cannot claim to value the policy of deference to laws passed by "elected, constitutional representatives" and "statewide citizens' initiatives" (br. at 45-46) on one hand, and on the other disparage the same power granted to citizens of home-rule charter counties. *See Seminole Cty. v. City of Winter Springs*, 935 So. 2d 521, 529 (Fla. 5th DCA 2006) (approving a charter amendment because "[a]ll political power is inherent in the people" and "the Constitution expressly grants the electorate a right" to amend their charter according to their "desire").

Finally, White's proposed test would require guessing at the thoughts of thousands of voters under hypothetical conditions—an unworkable rule. Courts have rejected such an approach. *See R.N. v. State*, 257 So. 3d 507, 510 n.1 (Fla. 4th DCA 2018) ("We note that our proper inquiry is not into the 'discernible purposes of the legislature,' but into all the words used in the statute in their context. . . . If the law was defined by the intent of the legislature, the law may be known only in the mind of the legislators. Which, of course, leads to another question: which legislator's mind would we use to determine the intent of the legislative body?").

ARGUMENT ON CROSS-APPEAL

I. ARTICLE 11 IS CONSTITUTIONAL IN ITS ENTIRETY BECAUSE IT DOES NOT EXPRESSLY CONFLICT WITH GENERAL LAW

As shown above, the Final Orders may be affirmed because the trial court properly applied severability principles. But this Court need not decide the question of severability because Article 11 does not conflict with general law and should be upheld in its entirety.

Below we demonstrate that (A) the Court should defer to the broad powers granted to home-rule counties, and only charter provisions that expressly conflict with general law are invalid; (B) Article 11's allocation provisions do not expressly conflict with general law; and (C) Article 11's Independent Oversight Committee provisions do not expressly conflict with general law.

A. The Court Should Defer to the Broad Powers Granted to Home Rule Counties, and Only Charter Provisions That Expressly Conflict With General Law Are Invalid

As White's own case recognizes, "[p]ursuant to our Constitution, chartered counties have broad powers of self-government." *Phantom of Brevard, Inc. v. Brevard Cty.*, 3 So. 3d 309, 314 (Fla. 2008). When "deciding the constitutionality of a charter amendment to a home rule charter, [the Court] must presume that it is constitutional and construe it in harmony with the constitution if it is reasonable to do so. The amendment to the charter is only invalid if it is inconsistent with general law." *Charlotte Cty. Bd. of Cty. Comm'rs*, 650 So. 2d at 148 (citations omitted). The same logic applies to charter amendments—because "all political power is inherent in the people," courts must, "if possible, interpret the amendment as constitutional." *Citizens for Responsible Growth v. City of St. Pete Beach*, 940 So. 2d 1144, 1146 (Fla. 2d DCA 2006).

This Court has emphasized the importance of deferring to these broad powers. In *Telli*, the Court held that finding "implied" conflicts between county charters and general law "undermines the ability of counties to govern themselves as that broad authority has been granted to them by home rule power through the Florida Constitution." 94 So. 3d at 513. Thus, to invalidate any portion of Article 11, "express restrictions must be found, not implied." *Id*. That standard is exceedingly high—"[t]he test for conflict is whether 'in order to comply with one provision, a

violation of the other is required.'" *Phantom of Brevard*, 3 So. 3d at 314. Under *Phantom of Brevard*, Article 11 is only invalid if compliance with it *requires* violating section 212.055(1), Florida Statutes. *See id*. As we show below, however, Article 11 expressly requires *complying* with section 212.055(1).

B. Article 11's Allocation Provisions Do Not Expressly Conflict With General Law; They Require Compliance with It

As noted above, the trial court found that Article 11 conflicted with one sentence in section 212.055(1)(d), Florida Statutes, which provides that "[p]roceeds 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" (E.A. 9:683). Finding that Article 11 interfered with the County Commission's authority, the court severed two types of provisions: (1) those establishing the allocations of surtax proceeds; and (2) those granting the Independent Oversight Committee the power to approve project plans and suspend distribution of tax proceeds (E.A. 9:681-87).

Article 11's plain language provides that it cannot conflict with section 212.055(1). Its supremacy clause provides that, "in the event of any conflict between the provisions of this Article 11 and the laws of Florida, the laws of Florida shall prevail" (E.A. 1:633). Therefore, in the event of a conflict, section 212.055(1) ultimately controls. Other provisions reinforce the supremacy clause as it relates to section 212.055(1): Article 11 repeatedly states—*eleven* times—that the surtax shall be collected and distributed "in compliance with" or "in accordance with" section

212.055(1), or as "permitted by" or "to the extent permitted by" that statute (E.A. 1:624-33). Such an amendment, which repeatedly provides that it shall not be applied to conflict with section 212.055(1), simply cannot conflict with that section.

Indeed, in compliance with section 212.055(1), in January 2019 the County Commission executed an interlocal agreement with Tampa, Temple Terrace, Plant City, HART, and the Metropolitan Planning Organization, in which "[e]ach party *ratifies and deems appropriate* the allocation, distribution and uses of Surtax Proceeds as provided for in [Article 11]" (E.A. 10:247, 249) (emphasis added). And in February 2019, the Commission approved a bond resolution providing that the "provisions of Article 11, including the allocation and uses of the funds set forth therein, are *hereby deemed appropriate* pursuant to" section 212.055(1)(d) (E.A. 10:60) (emphasis added). Then in September 2019, the Commission passed an ordinance providing for the "use, allocation and distribution" of surtax proceeds that mirrors the provisions of Article 11 (H.A. 9-14). Thus, as Article 11 contemplated, the distribution and use of surtax proceeds complies with section 212.055(1).

Consistent with both section 212.055(1) and Article 11's several references to it, if the County Commission were ever to deem appropriate another set of allocations, they would supersede those provided in Article 11 to the extent of any conflict—subject to any interlocal agreement specifying the use of surtax proceeds, or to the conditions of any bonds to which surtax proceeds have been pledged.

This Court has upheld a similar supremacy clause, finding that it "need not sever" a charter's unconstitutional provisions if the charter mandates that it will be applied "consistent with applicable law." *D'Agastino*, 220 So. 3d at 427 (finding that "[b]y its own ordinance" the commission created by the charter "has a duty to conduct its activities consistent with [the statute]," and therefore the conflicting provisions cease to operate without the need for severance). *See also Miami-Dade Cty. v. Dade Cty. Police Benevolent Ass'n*, 154 So. 3d 373, 380 (Fla. 3d DCA 2014) (holding that express conflict "will not be found where the ordinance and the statute can coexist such that compliance with one does not require violation of the other").

The trial court relied on *Charlotte County Board of County Commissioners* (E.A. 9:682-83). In that case, a statute provided that the "millage rate shall be set by the governing body of the county," but the county passed an initiative limiting that authority, providing that the county commission "shall not adopt any millage rate which would result in more than three percent (3%) increase in total revenue" from the prior year. 650 So. 2d at 147, 149. Here, however, because of its supremacy clause, Article 11 does not so limit the Commission's authority under section 212.055(1)(d). And White cannot rely on *Orange County v. Singh*, 268 So. 3d 668 (Fla. 2019). In that case, a Florida statute "expressly provide[d] that candidates listed on the general election ballot are 'candidates who have been nominated by a political party,'" but a charter amendment directly contradicted the statute,

providing that "[e]lections for all county constitutional offices shall be non-partisan." *Id*. at 674. Unlike here, no supremacy clause could have resolved that conflict created by the fundamental purpose of the amendment.

Accordingly, this Court should defer to the broad powers granted to home-rule counties and uphold Article 11 in its entirety, because Article 11's allocation and Independent Oversight Committee provisions do not conflict with general law; they require compliance with it.

C. The Independent Oversight Committee Provisions Do Not Expressly Conflict with General Law

Of the many responsibilities and rights Article 11 grants the Independent Oversight Committee, the trial court invalidated only two: its ability to "approve" Project Plans submitted by each Agency, and its ability to suspend the distribution of funds if an Agency has not complied with Article 11 (*see* EA. 9:681-87). But nothing in section 212.055(1) prohibits the creation of an oversight committee to review and approve the uses of surtax proceeds. Article 11 simply adds another layer of review to the process the statute contemplates—after the County Commission "deems appropriate" the allocations, the Agencies approve their project plans; and the Independent Oversight Committee's review ensures compliance with both Article 11 and section 212.055(1). A charter amendment does not conflict with a statute simply because it is more stringent. *City of Kissimmee v. Fla. Retail Fed'n, Inc.*, 915 So. 2d 205, 209 (Fla. 5th DCA 2005). *See also Phantom*

of Brevard, 3 So. 3d at 314-15 (holding that an ordinance requiring fireworks sellers to obtain insurance did not conflict with the statute regulating firework sales, which did not address insurance); *Sarasota Alliance for Fair Elections v. Browning*, 28 So. 3d 880, 888 (Fla. 2010) (upholding a charter provision imposing greater restrictions on voting machines than the Florida Election Code).

Moreover, Article 11's supremacy clause further insulates the Independent Oversight Committee from any conflict with section 212.055(1). In *D'Agastino*, this Court considered a city charter provision that created a Civilian Investigative Panel—a commission that would "act as independent citizens' oversight of the sworn police department." 220 So. 3d at 417. This Court found that the Panel's power to subpoena officers under investigation conflicted with the mandatory framework for investigating police officers prescribed in the Florida Statutes. *Id*. at 426. But the Court also held that, based on the charter's supremacy clause, the statute preempted the Panel's subpoena power, eliminating it as against police offers without any need to sever the provision. *See id.* at 425-27. And the Court explained that its ruling did not affect "any other functions of the [Panel] in its mission of acting as an 'independent citizens' oversight of the sworn police department." *Id*. at 427. That is precisely the case here with the Independent Oversight Committee.

II. THE COURT SHOULD DISREGARD ARGUMENTS OF AMICI BECAUSE NO PARTY HAS EVER RAISED THEM

Several amici argue that the Final Orders should be reversed and that all of Article 11 should be invalidated on grounds that neither White nor Emerson argued below and on which the trial court never ruled. For example, the Florida House of Representatives and Florida Senate assert the extreme position, unsupported by any authority, that the Article 11 ballot initiative should have asked voters to answer yes or no to "only two items . . . [whether] to levy the surtax [and whether] to create a trust fund in the county's accounts," and that Article 11 is invalid in its entirety because its ballot described the transportation uses that the surtax would fund (*see* House of Representatives br. at 5). It is axiomatic, however, that this Court cannot reverse an order based on an argument that cannot be found in the record. *See Hoffman v. Hoffman*, 793 So. 2d 128, 131 (Fla. 4th DCA 2001) (holding the court "cannot consider this issue on appeal since it was not argued below"); *Deutsche Bank Nat'l Tr. Co. v. Green*, 253 So. 3d 682, 684 (Fla. 5th DCA 2018) ("A tipsy coachman argument is not proper if it would result in an outcome other than an affirmance.") (citations omitted); *Millen v. Millen*, 122 So. 3d 496, 498 (Fla. 3d DCA 2013) (holding that an appellate court "will not consider issues for the first time on appeal except in cases of fundamental error"); *Advanced Chiropractic & Rehab. Ctr. v. United Auto. Ins. Co.*, 103 So. 3d 866, 868-869 (Fla. 4th DCA 2012) ("An appellate court's reversal based on an unpreserved error, on a ground not

argued in a brief, amounts to a denial of due process, which is a departure from a clearly established principle of law.").

The Associated Industries of Florida argues that the ballot summary was misleading. That is an issue that Emerson never raised below and that White raised below and lost, but does not appeal, and therefore waived. *See*, *e.g.*, *W.K. v. Dep't of Children & Families*, 230 So. 3d 905, 907 n.1 (Fla. 4th DCA 2017) (holding that an argument raised in the trial court but not raised on appeal "is waived and abandoned"); *Nationwide Mut. Ins. Co. v. Chillura*, 952 So. 2d 547, 553 n.7 (Fla. 2d DCA 2007) (refusing to consider an issue raised below but "not the thrust of the issue on appeal," because "this court cannot grant relief on an issue raised by the amicus brief but not by the appellant").

Moreover, this Court "do[es] not consider arguments raised by amici curiae that were not raised by the parties." *Westphal v. City of St. Petersburg*, 194 So. 3d 311, 315 n.2 (Fla. 2016) (rejecting the argument of amicus because "the parties have not raised such an expansive remedy"). *See also Fla. Dep't of Revenue v. Am. Bus. USA Corp.*, 191 So. 3d 906, 915 n.4 (Fla. 2016) ("We do not consider arguments raised by amici curiae that were not raised by the parties."); *Lee Mem'l Health Sys. v. Progressive Select Ins. Co.*, 260 So. 3d 1038, 1041 n.1 (Fla. 2018) ("However, we decline to address those issues because 'it is well-settled that amici are not permitted to raise new issues.'") (citation omitted).

CONCLUSION

For the reasons stated, this Court should reverse the Final Orders and uphold Article 11 in its entirety, or, in the alternative, affirm the Final Orders.

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Respectfully submitted,

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I CERTIFY that a copy of the foregoing has been filed through Florida's e-Filing Portal and a copy was served by electronic transmission on this 10th day of October, 2019 to:

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CERTIFICATE OF FONT COMPLIANCE

I certify that this brief complies with the requirements of Rule 9.210(a)(2) and is written in Times New Roman 14-point font.

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