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' REPLY BRIEF ON CROSS-APPEAL

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White and Emerson mostly respond to the brief of Hillsborough County (which they refer to as "Local Government"). Indeed, White (at 8) states that "[t]his brief follows the outline of the brief submitted by Local Government," and he does not directly address many of All For Transportation's arguments. Instead, as we show below, he repeatedly attacks straw-man arguments that All For Transportation did not make. White and Emerson's limited responses to All For Transportation's brief do not rebut its showing (I) that there is no express conflict between Article 11 and general law. And neither White nor Emerson even responds to All For Transportation's showing (II) that the Court should disregard arguments of amici because neither White nor Emerson raised them below.

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

As shown below and in our brief on cross-appeal, (A) 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) its Independent Oversight Committee provisions also do not expressly conflict with general law.

A. Only Charter Provisions That Expressly Conflict With General Law Are Invalid

White (at 8) concedes that Article 11 is "presumed to be constitutional." He argues (at 9; *see also* Emerson at 4) that "AFT . . . seems to believe there is some super presumption that arises from the political power of the people of Hillsborough County." But as he does throughout his brief, White responds to an argument that All For Transportation did not make. Rather, All For Transportation showed (at 31-32) that a court should not undermine charter counties' ability to govern themselves unless there is an express conflict between a charter amendment and general law—an exceedingly high standard. White and Emerson do not dispute that showing, and neither addresses All For Transportation's authority in support of it.

Instead, White argues (at 8-9) that, "when there is doubt about whether a local law will affect the operation of a state statute, the doubt must be resolved in favor of the statute and against the local law," citing *Metropolitan Dade County v. Chase Federal Housing Corp*., 737 So. 2d 494, 504 (Fla. 1999). But *Metropolitan Dade County* did not address a charter amendment and does not stand for that proposition, stating only the uncontroversial holding that state statutes govern over local laws, and must be construed so as "to maintain such supremacy." *Id*.

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

White argues (at 12-14; *see also* Emerson at 5) that "county commissioners are faced with hard issues," and "need [] a significant degree of flexibility" to allocate tax proceeds responsibly as conditions change over time. In an elaborate discussion that purports to explicate the math of Article 11, he argues (at 1-3) that it makes available to the County Commission "only $729 million or $24.3 million per year . . . for projects it actually deems appropriate." And he argues (at 11-12) that "AFT . . . cannot deny that under . . . Article 11, **all** of the tax proceeds are distributed automatically by the Clerk . . . for the entire 30-year term of the tax, largely to be spent on uses determined without any role whatsoever for the County Commission." But All For Transportation *did* deny that. White *nowhere* addresses—because it upends all of his arguments—All For Transportation's argument (at 33) that, under Article 11's supremacy clause, "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." Emerson does respond to that argument, but only to dismiss it (at 11) as "beside the point," arguing that it does not "cure the conflict[] because the Commission did not even set Article 11's initial allocation."

Both White and Emerson are missing the point, which is that the supremacy clause allows the Commission the flexibility to reallocate tax proceeds, subject to

commitments made in bond issuances and interlocal agreements. Indeed, 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. The only way to restrict allocations for the "entire 30-year term of the tax" (White at 12) is for the Commission to bind *itself* through a bond resolution or an interlocal agreement, as expressly provided by Florida law. *See* § 125.013(1), Fla. Stat. (permitting a board of county commissioners to issue bonds "for the purpose of paying all or a part of the cost of any one or more projects"); § 212.055(1)(d)(2), (3), Fla. Stat. (authorizing the governing body of the county to pledge tax proceeds for bonds issued for public transportation purposes); § 212.055(1)(d)(4), Fla. Stat. (authorizing the governing body of the county to distribute tax proceeds to local agencies pursuant to an interlocal agreement); § 163.01, Fla. Stat. (permitting parties to an interlocal agreement to determine how public funds are shared and distributed). And the Commission prepared both the bond resolution and the interlocal agreement and is a party to them both (*see* E.A. 10:21; E.A. 9:476; E.A. 9:533; E.A. 9:548-49). White is simply wrong (at 16) that "AFT . . . minimize[s] the mandatory role of the County Commission in applying surtax proceeds." All For Transportation expressly *emphasized* the Commission's role.

Although White acknowledges (at 3) that Article 11 refers eleven times to section 212.055(1), Florida Statutes, he argues (at 21) that "many of the references to section 212.055(1) are in sentences where the statute is paired with a reference to Article 11 under circumstances in which obedience to both is impossible." But White again ignores All For Transportation's showing that the Commission retains the ability to reallocate tax proceeds other than as set forth in Article 11. He also asks the Court to imagine a charter amendment "prohibit[ing] the free exercise of the Muslim faith in Hillsborough County" and argues (at 21) that such a law could not be saved by a "reference to a supreme law." The hypothetical proves too much, because no supremacy clause could save such a single-purpose law. Here, however, there is no dispute that Hillsborough County can tax itself—either by ordinance or charter amendment—for transportation improvements, and the parties have stipulated that the uses to which Article 11 allocates tax proceeds are permissible under section 212.055(1) (*see* E.A. 9:200). The only dispute is over *how* the tax proceeds are allocated.

White then resorts to ad hominem attacks on what he calls (at 27) "AFT's undisclosed framers of Article 11." He argues (at 22-23) that the references to section 212.055(1) are evidence of the drafters' "guilty conscience," that those references "tell us" that Article 11 was "drafted with the intent to save the tax bill after all the attractive window dressing was removed," and that they are just a

litigation strategy. As All For Transportation showed in its answer brief (at 22), however, such rank speculation on the framers' intent is improper where statutory language is clear, and White does not assert any ambiguity in Article 11. *See also Myers v. Hawkins*, 362 So. 2d 926, 930 (Fla. 1978) (noting that "the intent of the framer of a constitutional provision adopted by initiative petition will be given less weight . . . [than] the probable intent of the people who reviewed the literature and the proposal submitted for their consideration"); *Williams v. Smith*, 360 So. 2d 417, 420 n.5 (Fla. 1978) (noting that the "intent of the voters as evidenced by materials they had available" has more weight than "the intent of an amendment's framer").

White complains (at 28, 30, 32-33) that it is "no solution" that the County Commission passed a bond resolution, entered into an interlocal agreement, and passed an ordinance deeming appropriate the allocations set forth in Article 11, arguing that they are "inferior to the charter, as well as to the general laws of Florida." He reserves (at 32) particular disdain for "an ordinance that [reinstates] **all** of the unconstitutional conditions, limitations, and restrictions of Article 11." But All For Transportation does not contend that an ordinance can bind future commissions. *See*, *e.g.*, *Town of Longboat Key v. Islandside Prop. Owners Coal., Ltd. Liab. Co.*, 95 So. 3d 1037, 1042-43 (Fla. 2d DCA 2012) ("As the circuit court noted, the Town is free to amend the Code."); *Carroll v. City of Miami Beach*, 198 So. 2d 643, 645 (Fla. 3d DCA 1967) ("T]he City is bound by the express terms of its

own ordinance . . . . If the City desires a different meaning for its ordinance in the future, it may amend, modify, or change the same by legislative process."); Hillsborough Cty. Code of Ordinances and Laws, Part A, Chapter 1 §§ 1.4, 1.5 (a)-(d) (2019) (providing for effect of repeal or amendment of ordinances).

All For Transportation did not argue that the bond resolution, interlocal agreement, and ordinance are *superior* to general law. Rather, it showed (at 33) that, when the County Commission passed the resolution and ordinance and entered the interlocal agreement, it was exercising its discretion to deem appropriate certain of the allocations expressed in Article 11—just as section 212.055 requires. White also, again, resorts to ad hominem attacks: he complains (at 28-30, 32-33) that the County Commission "had the audacity to attempt to bind all future commissions for the next thirty years" by passing the bond resolution; that the commissioners who voted for the bond resolution and interlocal agreement and ordinance were "compelled" to do so by the Commission's lawyers; and that these actions of the Commission were a mere "litigation tactic." Such rhetorical excesses are based on nothing but speculation and mischaracterization, and are contrary to fact. Indeed, Commissioner White was not "compelled" to vote in favor of these Commission actions—he voted against all of them (*see*, *e.g.*, E.A. 10:21).

Emerson, for his part, argues (at 15) that the Commission's actions cannot "revive[]" Article 11 because it was "void from the start." But he, too, ignores All

For Transportation's showing that the Commission was exercising its "deem-appropriate" discretion. Nothing in section 212.055 dictates *when* a county must deem appropriate the uses for the surtax; and it does not prohibit the Commission from deeming appropriate the uses outlined in Article 11. And the County retains its ability to reallocate tax proceeds as it deems appropriate, subject to commitments made in bond issuances and interlocal agreements, as shown above. Thus, two of Emerson's cases, which addressed laws passed specifically to attempt to "fix" unconstitutional ordinances—are irrelevant. *See State ex rel. Ervin v. Mellick*, 68 So. 2d 824 (Fla. 1953); *Broward Cty. v. Plantation Imps.*, 419 So. 2d 1145 (Fla. 4th DCA 1982). And he cannot rely on *Newman v. Schiff*, 778 F.2d 460, 467 (8th Cir. 1985), which applies Missouri law and addresses only the contract law of ratification.

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

White does not dispute that an oversight committee would not run afoul of any law, and he states (at 23) that he is "not opposed to an advisory board." He disputes (at 25; *see also* Emerson at 13-14) All For Transportation's supposed position that the Independent Oversight Committee ("IOC") "was actually given the same power to 'approve' a project plan as the . . . County Commission." But All For Transportation did not take that position. And in fact, the IOC became an advisory board when the County Commission, exercising its authority under the supremacy

clause, passed an interlocal agreement (*see* E.A. 9:552)—which is authorized by section 212.055(1)(d)(4), Florida Statutes—and an ordinance that did not grant the IOC the power to disapprove projects, restricting it to "certify[ing] . . . whether the projects in each Agency Project Plan comply with the Charter Amendment and this Ordinance" (H.A. 13-14). *See D'Agastino v. City of Miami*, 220 So. 3d 410, 426-27 (Fla. 2017) (applying the supremacy clause to invalidate unconstitutional powers of the City of Miami Civilian Investigative Panel ("CIP") and noting that "our holding does not address any other functions of the CIP").

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

Neither White nor Emerson disputes All for Transportation's showing (at 37-38) that the Court should disregard the new arguments of amici (the Florida House of Representatives, the Florida Senate, and the Associated Industries of Florida) because they were not made below by any party. And neither White nor Emerson attempts to defend the extreme positions taken by the Florida House of Representatives.

CONCLUSION

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

Dated: December 12, 2019

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 12th day of December, 2019 to:

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