In the Supreme Court of Florida

Case Nos. SC19-1250, SC19-1343

ROBERT EMERSON, ET AL.,
Appellants,

v.

HILLSBOROUGH COUNTY, ET AL.,
Appellees.

STACY WHITE,
Appellant,
v.

HILLSBOROUGH COUNTY, ET AL.,
Appellees.

BRIEF OF *AMICUS CURIAE* FLORIDA HOUSE OF REPRESENTATIVES IN SUPPORT OF APPELLANTS EMERSON AND WHITE

Adam S. Tanenbaum
General Counsel

W. Jordan Jones
Staff Attorney, House Judiciary Committee

The Florida House of Representatives
418 The Capitol, 402 South Monroe Street
Tallahassee, Florida 32399-1300
Phone: (850) 717-5500

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Other Authorities

Constitutional Provisions

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Florida House of Representatives is one of two chambers of the Legislature, in which the Florida Constitution vests all legislative power of the State. The Constitution sets strict limits on non-ad valorem taxation, generally preempting the matter to the Legislature. *See* Art. VII, § 1, Fla. Const. The Constitution likewise prohibits a county from levying non-ad valorem taxes, except as expressly authorized by the Legislature through general law. Art. VII, § 9, Fla. Const. The House has an interest in preserving this legislative prerogative to strictly control non-ad valorem taxation. Hillsborough County's effort at levying a sales surtax without strictly complying with the Legislature's requirements for doing so, and the trial court's application of the severability doctrine to preserve a portion of an otherwise unconstitutional levy, threatens to diminish the Legislature's exclusive constitutional power regarding non-ad valorem taxation.

SUMMARY OF ARGUMENT

The Florida Constitution gives the Legislature exclusive control over the levy of non-ad valorem taxes against the State's citizens and visitors. The Legislature's statutory grant of authority to counties to levy these taxes are to be strictly construed, and the conditions for exercising that grant of authority must be strictly adhered to.

Hillsborough County's effort at levying the sales surtax authorized by section 212.055(1), *Florida Statutes*, violated the Legislature's requirement that the levy question be put to the voters free of any descriptions of projects on which the tax proceeds might be spent and free of any proposed language governing how the surtax will be collected or handled. In fact, for this particular surtax, the Legislature charges the county commission, and no other person or entity, to decide how the tax proceeds will be spent across several statutorily enumerated categories of transportation projects. The county's failure to put a "clean" levy question to the voters renders the proposed surtax invalid.

The severability doctrine cannot save the sales surtax at issue here. The doctrine arises out of judicial deference to constitutionally assigned authority. Hillsborough County's authority to levy the sales surtax is statutorily derived, so there is no need for deference. Indeed, deference to the Legislature's exercise of its constitutional authority calls for a refusal to apply the severability doctrine.

The trial court's application of this doctrine, in turn, constitutes error. The case should be remanded with instructions to invalidate the sales surtax in its entirety.

ARGUMENT

I. Hillsborough County's effort to levy a sales surtax through a complex charter amendment went well beyond what the Legislature authorized in section 212.055(1), *Florida Statutes*. The proposal put before the voters more than just the single authorized question of whether they approve the levy of a sales surtax, so the proposal was an "unclean" and invalid levy.

"An unlimited power to tax involves, necessarily, a power to destroy." *M'Culloch v. Maryland*, 17 U.S. 316, 327 (1819). This sobering reality finds voice in the Florida Constitution, which preempts all non-ad valorem taxing power to the State. Art. VII, § 1(a), Fla. Const. The Constitution prohibits counties from levying taxes on economic activity unless the Legislature expressly authorizes them to do so through general law. *See Collier County v. State*, 733 So. 2d 1012, 1014 (Fla. 1999); *cf.* Art. VII, § 9, Fla. Const. ("Counties, school districts, and municipalities . . . may be authorized by general law to levy other taxes [besides ad valorem taxes] . . . .").

The Legislature itself exercised its exclusive constitutional authority and levied a tax throughout the State on the retail sale of myriad tangible personal property. *See* § 212.05, Fla. Stat. (2018) ("Sales, storage, use tax").[1] In the exercise of its power under Article VII, the Legislature also authorized charter

[1] The levy also is on the rental or furnishing of "any of the things or services taxable under this chapter," on the storage of tangible personal property "for use or consumption in this state," and on the leasing or rental of such property.

counties, Hillsborough County included, to "levy a discretionary sales surtax," the proceeds of which may be used only for certain, statutorily enumerated transportation purposes. § 212.055(1), Fla. Stat. (2018). In the statute, the Legislature precisely limned the scope of the authorization and the mechanisms by which a locality may "levy" the tax.

The Legislature's authorization in this respect is narrow. A charter county may levy the sales surtax, at a rate of up to one percent, but a majority of the county's electorate first must approve the levy, either directly or via charter amendment. *See* § 212.055(1)(a), (b), Fla. Stat. (2018). At all events, the proposal to levy "shall be placed on the ballot in accordance with law." § 212.055(1)(c), Fla. Stat. (2018).

The applicable "law" requires that the ballot summary "be printed in clear and unambiguous language on the ballot . . . followed by the word 'yes' and also by the word 'no,' and [] styled in such a manner that a 'yes' vote will indicate approval of the proposal and a 'no' vote will indicate rejection." § 101.161(1), Fla. Stat. (2018). The ballot must state the proposal's "chief purpose." *Fla. Dep't of State v. Fla. State Conference of NAACP Branches*, 43 So. 3d 662, 667 (Fla. 2010) (quotations and citation omitted). This ensures that the voters have "fair notice" of the proposal's content and "that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot." *Fla. Dep't of State v. Hollander*, 256

So. 3d 1300, 1307 (Fla. 2018) (quotations and citation omitted); *cf. Wadhams v. Bd. of County Com'rs of Sarasota County*, 567 So. 2d 414, 416 (Fla. 1990) (statutory provisions governing the ballot measure process exist to ensure that the electorate is "advised of the true meaning, and ramifications" of the measure).

Section 212.055(1)'s authorization subjects the county's *levy* to approval by the voters, and only its levy. To "levy" is to actually engage in the act of imposing or laying a tax. *See* BLACK'S LAW DICTIONARY 907 (6th Deluxe ed. 1990) (defining the verb to mean to "assess, exact, raise, or collect" a tax); *cf.* § 192.001(9), Fla. Stat. (2018) (defining "levy" to mean "imposition"); § 197.3632(1)(a), Fla. Stat. (2018) (same); § 166.233(1)(c), Fla. Stat. (2018) (same). In turn, this particular legislative authorization requires that a single question be put to the charter county's voters through the ballot. Shall a sales surtax, at the rate specified (up to one percent), be *levied* in the county pursuant to this particular subsection? Only in this way can the ballot isolate for the voters the *chief* purpose of the statutory authorized proposal, which is the levy itself.

The ballot question to authorize the levy can include only two items. The ballot can include the proposal to levy the surtax, plus one to create a trust fund in the county's accounts. *See* § 212.055(1)(c), Fla. Stat. (2018). The authorization does not include an allowance for descriptions of possible uses for the levy. For the transportation surtax, the Legislature authorizes the surtax levy, subject to

approval by the voters, but specifies the only uses to which the surtax proceeds may be applied, "in whatever combination the *county commission* deems appropriate." § 212.055(1)(d), Fla. Stat. (2018) (emphasis supplied). There is no authority for the county to put onto the ballot, for this particular surtax levy, an enumeration of what the proceeds might be used for if approved. The Legislature already decided the permissible uses in the statute, and it tasked the county commission—and no other—with deciding how to allocate the tax proceeds across those permissible uses. Presumably, the Legislature in this subsection chose not to allow for adornment of the levy question with detail about the projects the proceeds might fund because it sought to ensure that the voters are clear that their choice is only whether to levy the surtax; they do not get to vote on how the proceeds will be spent.

Contrast the laconic nature of the transportation surtax's authorization with those for other surtaxes in the same subsection. *Cf.* § 212.055(2), Fla. Stat. (2018) ("Local Government Infrastructure Surtax"); § 212.055(3), Fla. Stat. (2018) ("Small County Surtax"); § 212.055(4), Fla. Stat. (2018) ("Indigent Care and Trauma Center Surtax"); § 212.055(5), Fla. Stat. (2018) ("County Public Hospital Surtax"); § 212.055(6), Fla. Stat. (2018) ("School Capital Outlay Surtax"); § 212.055(7), Fla. Stat. (2018) ("Voter-Approved Indigent Care Surtax"). For these surtaxes, the Legislature requires that the ballot include both the question of

whether to levy the surtax *and* a brief description of the projects, purposes, or services to be funded by the proposed surtax.

Because the Florida Constitution preempts to the Legislature the authority to levy non-ad valorem taxes, courts strictly construe legislative authorizations of local levies of such taxes against the local taxing authority and in favor of the public. *Cf. City of Tampa v. Birdsong Motors, Inc.*, 261 So. 2d 1, 3 (Fla. 1972) (reviewing statutory authorization of municipality to tax); *see Alachua County v. Adams*, 677 So. 2d 396, 398 (Fla. 1st DCA 1996), *aff'd*, 702 So. 2d 1253 (Fla. 1997) (applying strict construction principle to county infrastructure sales surtax authorization). These legislative authorizations of local non-ad valorem taxes "are not to be extended by implication, and are not to be enlarged so as to include any matter not specifically included, even though said matter may be closely analogous to that included." *Birdsong Motors*, 261 So. 2d at 3.

Moreover, it "is a cardinal rule that a statute should be construed so as to ascertain and give effect to the intention of the Legislature as expressed in the statute." *Deltona Corp. v. Florida Pub. Serv. Comm'n*, 220 So. 2d 905, 907 (Fla. 1969); *see Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 390–91 (2000) (Scalia, J., concurring) ("The only reliable indication of that intent—the only thing we know for sure can be attributed to all of them—is the words of the bill that they voted to make law.") (emphasis omitted). "[A]ll parts of a statute must be read

together in order to achieve a consistent whole." *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992) (emphasis in original); *see* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 167–68 (2012) (discussing "Whole-Text Canon").

There is meaning to legislative inclusion of particular language in one part of a statute and its omission in another part of the same statute. *Cf. Beach v. Great W. Bank*, 692 So. 2d 146, 152 (Fla. 1997), *aff'd sub nom. Beach v. Ocwen Fed. Bank*, 523 U.S. 410 (1998). In this respect, the Court presumes that the Legislature "acts intentionally and purposely in the disparate inclusion or exclusion." *Id.* Here, the Legislature's inclusion of "description" language for ballot questions on some sales surtaxes implies the Legislature's deliberate choice to exclude "description" language from transportation surtax measures like the one at issue here.

Hillsborough County exceeded its authority by putting both the surtax levy question *and* potential project descriptions and other governing language before the voters as a single charter amendment question. In other words, Hillsborough County failed to limit the ballot question to the singular question of whether to levy that particular sales surtax, as it was required to do by section 212.055(1). Instead, the proposal sought to add an entirely new article to Hillsborough County's charter, one that was comprehensive and that improperly combined the

surtax levy with a myriad of complicated provisions describing how the proceeds would be used and governing operation and collection of the surtax. The proposed additional language went beyond what the Legislature authorized in section 212.055(1), Florida Statutes.

Moreover, the ballot title did not even mention the one question that the Legislature required be put on the ballot—the proposed levy of a sales surtax—and the summary hides that levy question beneath a list of proposed projects that subsection one does not authorize to be placed on the ballot at all. The proposed charter amendment's multiple pages of text also hides from the voter the simple, "clean" levy question that the Legislature required as part of its authorization for a charter county to levy the tax.

A surtax proposal submitted to the people in this deceptive and unauthorized manner must be stricken in its entirety to protect the people from voting "yes" on a constitutionally infirm surtax proposal. *Cf. Wadhams*, 567 So. 2d at 416–18 (where the people had already voted "yes" on a ballot measure which did not follow statutory requirements, the Court struck the measure as a "deception of the voting public").

II. Separation of powers and judicial deference to the Legislature counsel *against* the application of the severability doctrine and instead require that the entire charter amendment be invalidated.

As discussed above, the Constitution and the Legislature's tax authorizing statutes effectively forbid a county from imposing non-ad valorem taxes in a willy-nilly manner. To levy such a tax, a county must strictly comply with the carefully crafted conditions of the Legislature's authorization. Florida's severability doctrine, born out of a respect for the Florida Constitution's strict separation of powers requirements, in turn does not apply to save a county's effort at levying a sales surtax when it fails to hew to the precise requirements set out by the Legislature for doing so. In fact, deference to legislative power counsels in favor of *not* severing any portion of a non-compliant proposal and instead invalidating the *entire* charter amendment, levy and all.

The severability doctrine is a judicial doctrine born out of deference. Regarding a statute, the doctrine "is designed to show great deference to the legislative prerogative to enact laws." *Schmitt v. State*, 590 So. 2d 404, 415 (Fla. 1991). The doctrine stems from the judiciary's obligation to strike only those portions of a statute that are unconstitutional and to allow the remainder of the statute to stand, if what remains of the statute still validly expresses the Legislature's will. *See State v. Calhoun County*, 170 So. 883, 886 (Fla. 1936).

When this Court more recently addressed the novel question whether that doctrine applies to citizen-initiated constitutional amendments, it still spoke in terms of constitutionally allocated powers. *See Ray v. Mortham*, 742 So. 2d 1276, 1280–81 (Fla. 1999). According to this Court,

> [s]everability 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. This doctrine is derived from the respect of the judiciary for the *separation of powers*. . . .

Id. at 1280 (internal citations omitted) (emphasis supplied); *see* Art. II, § 3, Fla. Const. (setting out the Florida Constitution's strict separation of powers requirement).

In holding that the severability doctrine should be extended to initiative petitions, the Court explained that the deference afforded to "the legislative prerogative to enact the law" applies to the same extent "to constitutional amendments initiated by our citizens." *Ray*, 742 So. 2d at 1281; *see also id.* at 1286 (holding that "severability analysis applies to constitutional amendments").

Severability, in turn, is appropriate when necessary to avoid judicial overreach vis-à-vis a constitutionally allocated power. When a court considers excising the unconstitutional portion of a *statute*, the severability analysis is appropriate because of the deference owed to the Legislature's power under Article III and the separation of powers mandated by Article II of the Constitution. When

it comes to a *constitutional provision* added through the initiative power of Article XI, section 3, of the Constitution, severability applies out of deference to that constitutionally reserved power.

Here, the situation is markedly different. Hillsborough County does not have any constitutional authority to levy a sales surtax. Its authority to levy comes directly from the Legislature's exercise of its own, exclusive constitutional authority under Articles III and VII of the Florida Constitution. Indeed, that statutory grant of authority is construed strictly against the county. *See Birdsong Motors*, 261 So. 2d at 3; *Adams*, 677 So. 2d at 398.

There is no need to apply the severability doctrine in this case—not to protect the separation of powers between the branches and not to protect the people's inherent right to amend the Constitution—because there are no local constitutional prerogatives to which to defer. Rather, the Legislature is the sole source of authority for the local initiative proposal at issue in this case, and the proposal does not comply with the Legislature's grant of that authority.

Application of the severability doctrine to the county's non-compliant surtax actually would constitute deference in favor of the county's exercise of its statutorily delegated authority *over and against* strict enforcement of the Legislature's exercise of its constitutional prerogatives regarding non-ad valorem taxation. This would run counter to the policy behind the severability doctrine.

Under our Constitution, the Legislature has exclusive control over how non-ad valorem taxation may be levied. To preserve the proper separation of powers and uphold the legislative prerogative, the Court should refuse to extend the severability doctrine to local exercises of legislatively delegated taxation power.

CONCLUSION

The Court should reverse the trial court's decision to sever the invalid parts of Article 11 of the Hillsborough County Charter and remand with instructions for the trial court to strike the charter amendment in its entirety, including the levy itself.

Respectfully submitted,

Adam S. Tanenbaum
ADAM S. TANENBAUM (FBN 117498)
General Counsel
adam.tanenbaum@myfloridahouse.gov
W. JORDAN JONES (FBN 87766)
Staff Attorney, House Judiciary Committee
jordan.jones@myfloridahouse.gov

FLORIDA HOUSE OF REPRESENTATIVES
418 The Capitol
402 South Monroe Street
Tallahassee, Florida 32399-1300
Phone: (850) 717-5500

Counsel for Amicus Curiae Florida House of Representatives

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this third day of September, 2019, a true copy of the foregoing amicus brief was furnished to the Clerk of the Court through the Florida Courts eFiling Portal, which shall serve a copy via e-mail to the counsel service list below, constituting compliance with the service requirements of Florida Rule of Judicial Administration 2.516(b) and Florida Rule of Appellate Procedure 9.420(c).

/s/ Adam S. Tanenbaum
ADAM S. TANENBAUM
Attorney

Service List

ALAN S. ZIMMET, ESQUIRE
NIKKI C. DAY, ESQUIRE
ELIZABETH W. NEIBERGER, ESQUIRE
azimmet@bmolaw.com
nday@bmolaw.com
eneiberger@bmolaw.com
nakins@bmolaw.com
cmiller@bmolaw.com
agarner@bmolaw.com
BRYANT MILLER OLIVE, P.A.
One Tampa City Center, Suite 2700
Tampa, FL 33602
(813) 273-6677
Counsel for Hillsborough County

KENNETH BUCHMAN, ESQUIRE
kbuchman@plantcitygov.com
kenbuchman@gmail.com
lyoung@plantcitygov.com
PLANT CITY ATTORNEY'S OFFICE
302 W. Reynolds St.
Plant City, FL 33566
(813) 659-4200 x.4242
Counsel for Plant City

WILLIAM D. SHEPHERD, ESQUIRE
shepherdw@hcpafl.org
HILLSBOROUGH COUNTY PROPERTY APPRAISER
601 E. Kennedy Blvd., 15th Floor
Tampa, FL 33602
(813) 276-8890
Counsel for Hillsborough County Property Appraiser

HARRY COHEN, ESQUIRE
harry.cohen@hillsclerk.com
HILLSBOROUGH COUNTY CLERK OF COURT
601 E. Kennedy Blvd., 13th Floor
P.O. Box 1110
Tampa, FL 33601
(813) 276-8100 x. 3803
Counsel for Pat Frank

ROBERT E. BRAZEL, ESQUIRE
brazelr@hillsboroughcounty.org
matthewsl@hillsboroughcounty.org
johnsonni@hillsboroughcounty.org
HILLSBOROUGH COUNTY ATTORNEY'S OFFICE
P.O. Box 1110
Tampa, FL 33601
(813) 272-5670
Counsel for Doug Belden, Hillsborough County Tax Collector

DAVID L. SMITH, ESQUIRE
KRISTIE HATCHER-BOLIN, ESQUIRE
david.smith@gray-robinson.com
kristie.hatcher-bolin@gray-robinson.com
jane.larose@gray-robinson.com
linda.august@gray-robinson.com
GRAYROBINSON, P.A.
401 E. Jackson St., Suite 2700
Tampa, FL 33602
(813) 273-5000
Counsel for Hillsborough Transit Authority ("HART")

CAMERON CLARK, ESQUIRE
clarkc@hillsboroughcounty.org
HILLSBOROUGH COUNTY ATTORNEY'S OFFICE
P.O. Box 1110
Tampa, FL 33601
(813) 272-5670
Counsel for Hillsborough MPO

DAVID E. HARVEY, ESQUIRE
david.harvey@tampagov.net
angela.armstrong@tampagov.net
CITY OF TAMPA ATTORNEY'S OFFICE
315 E. Kennedy Blvd., 5th Floor
Tampa, FL 33602
(813) 274-8842
Counsel for City of Tampa

WILLIAM H. STAFFORD, III, ESQUIRE
william.stafford@myfloridalegal.com
FLORIDA DEPARTMENT OF LEGAL AFFAIRS
PL-01, The Capitol
Tallahassee, FL 32399
(850) 414-3785
Counsel for Florida Department of Revenue

RAOUL G. CANTERO, ESQUIRE
DAVID P. DRAIGH, ESQUIRE
ZACHARY B. DICKENS, ESQUIRE
rcantero@whitecase.com
ddraigh@whitecase.com
zdickens@whitecase.com
ldominguez@whitecase.com
miamilitigationfileroom@whitecase.com
WHITE & CASE LLP
200 S. Biscayne Blvd., Suite 4900
Miami, FL 33131
(305) 371-2700
Counsel for Keep Hillsborough Moving, All for Transportation and Tyler Hudson

DEREK T. HO, ESQUIRE
COLLIN R. WHITE, ESQUIRE
dho@kellogghansen.com
cwhite@kellogghansen.com
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, PLLC
1615 M St., N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
Counsel for Robert Emerson

HOWARD C. COKER, ESQUIRE
CHELSEA R. HARRIS, ESQUIRE
hcc@cokerlaw.com
crh@cokerlaw.com
COKER LAW
136 East Bay St.
Jacksonville, FL 32202
(904) 299-0808
Counsel for Robert Emerson

CHRIS W. ALTENBERND, ESQUIRE
caltenbernd@bankerlopez.com
BANKER LOPEZ GASSLER P.A.
501 East Kennedy Blvd., Suite 1700
Tampa, FL 33602
(813) 221-1500
Counsel for Stacy White

ADA CARMONA, ESQUIRE
mailprocessingstaff@sao13th.com
STATE ATTORNEY'S OFFICE
419 N. Pierce Street
Tampa, Florida 33602
(813) 272-5400
Counsel for State of Florida

BEN H. HILL, ESQUIRE
ROBERT A. SHIMBERG, ESQUIRE
J. LOGAN MURPHY, ESQUIRE
ben.hill@hwhlaw.com
robert.shimberg@hwhlaw.com
logan.murphy@hwhlaw.com
debra.whitworth@hwhlaw.com
regina.bigness@hwhlaw.com
tina.mcdonald@hwhlaw.com
HILL WARD HENDERSON, P.A.
101 E. Kennedy Blvd., Suite 3700
Tampa, Florida 33602
(813) 221-3900
Counsel for Keep Hillsborough Moving and All for Transportation

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief was generated by computer using Microsoft Word with Times New Roman 14-point font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Adam S. Tanenbaum
ADAM S. TANENBAUM
Attorney