IN THE SUPREME COURT OF FLORIDA

Case No. SC08-1163 and SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES

CONCERNING FINANCIAL IMPACT STATEMENTS

ANSWER BRIEF

OF THE FLORIDA SENATE

IN SUPPORT OF THE FINANCIAL

IMPACT STATEMENTS

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SUMMARY OF THE ARGUMENT

The sponsor attacks the second sentence of the financial impact statement as vague and ambiguous, but in fact it does nothing more than state a truism: if you have more litigation than in the past, it will likely cost the state more money.

The sponsor also contends that the sentence says that there will be more litigation if the amendment passes, but the thing says nothing of the sort. It is an "if ... then" sentence that expresses the probability of one event occurring if another reasonably foreseeable event happens. This is neither confusing to voters nor objectionable.

The sponsors argue that no prediction about the likelihood of lawsuits arising from the proposed standards is permissible because the only possible cause of litigation is the Legislature's failure to follow the Constitution. This ignores the real world causes for lawsuits, which vary widely. Underlying most lawsuits challenging the constitutionality of a legislative act, however, is a plaintiff's *belief* the Legislature acted improperly. Southern Reporter is full of cases where legislative acts have unsuccessfully been challenged as unconstitutional.

The failure to mention that costs might instead go down if litigation declines from past levels is neither confusing nor prejudicial. The reasonable voter needs

no one's help to understand the obvious converse inference in the sentence that if litigation declines, so will costs.

ARGUMENT

The impact statements reach the unobjectionable conclusion that the "fiscal impact cannot be determined precisely." The Financial Impact Estimating Conference qualifies this determination with the equally unobjectionable observation that if litigation increases from historical levels, there may be an increased cost. As the Senate argued in its initial brief, the conference's conclusions — the concerns about the potential for increased litigation — are not crystal ball gazing but are supported by the record.

The amendments' supporter finds fault only with the impact statements' second sentence — "State government and state courts may incur additional costs if litigation increases beyond the number or complexity of cases which would have occurred in the amendment's absence." This statement is not fatally speculative, as the sponsor supposes. The sentence merely states an unremarkable truism. No reasonable person could find it confusing, vague or ambiguous: more litigation, especially more complex litigation, results in more and higher costs; so if the amendments provoke more litigation, which may also be more complex, state government may end up paying more than it has in the past. Everybody

understands that litigation is expensive. Everybody understands that the more litigation you have, the more expensive things get. This is hardly the sort of confusing statement that this court has feared would lead voters to reject an amendment. See, e.g., Advisory Opinion to Atty. Gen. re Authorizes Miami-Dade and Broward County Voters to Approve Slot Machines in Parimutuel Facilities, 882 So.2d 966, 969 (Fla. 2004).

The sponsor's core complaint is that the conference "continues to speculate that the new districting standards *will* spawn more litigation." Initial Brief of Sponsor at 10 (emphasis added). But the sentence does not state a certainty or contain a firm prediction; it expresses a probability. "If ... then" statements are conditional statements that express probabilities, not truths or certainties. See Robert Fogelin, Understanding Arguments 31-32 (3d ed. 1987).[1]

The fact that the statement is couched as an "if ... then" statement, or a simple contingency with the outcome dependent on the happening of a certain event, has not been fatal in the past. See Advisory Opinion to the Attorney General re Extending Existing Sales Tax to Non-taxed Services Where Exclusion Fails to

[1] "The sentence that occurs between the 'if' and the 'then' is called the *antecedent* of the conditional; the sentence that occurs after the 'then' is called its *consequent*. In using an indicative conditional, we are not asserting the truth of its antecedent, and we are usually not asserting the truth of the consequent, either." (e.o.)

Serve Public Purpose, 953 So.2d 471(Fla. 2007); Advisory Opinion to the Attorney General re Florida Marriage Protection Amendment, 926 So.2d 1229, 1241 (Fla. 2006) (court approved statement where impact "may occur" and "The fact that the FIEC is unable to discern the actual financial impact does not render a proposed FIS in violation of applicable law when those laws in fact contemplate such a scenario. See § 100.371(6)(b)(4), Fla. Stat. (2005)."). So, there is no reason why this impact statement is flawed, either.

The sponsor seems to think that, in its prior opinion in the matter, this court foreclosed any mention that the amendments might provoke more litigation than the state has seen in the past. Specifically, the sponsor points to the court's statement that "the prediction of increased litigation is premised on the unsupported assumption that the Legislature will fail to adhere to the guidelines and fail to fulfill its constitutional duty." Initial Brief of Sponsor at 10. The court's view rests on the presumption that only legislative deviance from the Constitution sparks lawsuits. But what provokes lawsuits often is not so much a legislative failure to follow the Constitution as a plaintiff's *belief* the Legislature has failed to do so. Southern Reporter is full of cases in which litigants have unsuccessfully questioned the constitutionality of legislative acts. In fact, this court recently entertained such a case, Florida Association of Professional Lobbyists, Inc. v.

Division of Legislative Information Services, 34 Fla. L. Weekly S271 (March 19, 2009). The legislative action in that matter, enactment of lobbyist regulations, spawned two separate lawsuits, one of which ended up in federal court, rose to the 11th Circuit Court of Appeals, and landed here for a determination of state law issues. It is doubtful there is an ironclad cause-effect relationship between the Legislature's adherence to constitutional principles and the frequency of lawsuits that excludes other reasons for litigation. For a discussion of the logical principle involved, see Understanding Arguments, pp. 105-110.

This brings us back to the Senate's main position. As the Senate argued at length in its initial brief, the question whether the amendments will provoke, or the degree they are likely to provoke, litigation is not one the court can answer in a factual vacuum. To the extent they express concern about the prospect of increased litigation, the impact statements are conclusions resting on the resolution of fact questions. Consequently, the court cannot review the statements without examining the record before the conference. Only then is the court in a position to say whether the conference's conclusion lacks merit — or is unfounded speculation.

Last, the sponsor complains that because the impact statement mentioned the possibility of increases, it should also have mentioned the possibility of

decreases. Thus, in its view, without mentioning the down with the up, the statement is defective, apparently on the ground that it is overly negative. This argument treats voters as mindless robots, incapable of thinking for themselves. Obviously, if increases in litigation are likely to cost more, then it is reasonable to suppose the opposite is true: decreases in litigation result in fewer costs. This contrary inference about the effect of less litigation is clear and obvious. Voters are capable of understanding this. Thus, the second sentence is not unduly negative or prejudicial.

CONCLUSION

For these reasons, the court should approve the statements.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by U.S. mail on Attorney General Bill McCollum and Scott Makar, Solicitor General, PL-01, The Capitol, Tallahassee, FL 32399; Barry Richard and Hope Keating, Greenberg Traurig, 101 East College Ave., Tallahassee, FL 32301; and Mark Herron, Messer, Caparello & Self, 2618 Centennial Place, Tallahassee, FL 32308; and Jon Mills and Timothy McLendon, PO Box 2099, Gainesville, FL 32602-2099, on April 6, 2009.

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Jason Vail

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