

IN THE SUPREME COURT OF FLORIDA

Case No.: SC08-1163 & SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL
RE: STANDARDS FOR ESTABLISHING LEGISLATIVE
DISTRICT BOUNDARIES – FISCAL IMPACT STATEMENT

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RE: STANDARDS FOR ESTABLISHING CONGRESSIONAL
DISTRICT BOUNDARIES - FISCAL IMPACT STATEMENT

ANSWER BRIEF OF SPONSOR
FairDistrictFlorida.org

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SUMMARY OF ARGUMENT

In its evaluation of the initial fiscal impact statement (FIS) for the two redistricting amendments, this Court rightly held that these statements are to be evaluated in the same manner as ballot titles and summaries for proposed amendments. Even as it is important the voters not be misled or confused by vague and inaccurate terminology in the ballot language, so also the same standards should apply to the statement of probable financial impacts presented to the voters. The only issue for the Court to review now is whether the facial language of the FIS's describe the *probable* impact of the amendments.

Here the revised FIS's remain speculative and vague. The statements, after noting that financial impacts "cannot be determined precisely," go on to add that additional costs *may* be felt by the state government and court system "*if* litigation increases beyond the number or complexity of cases which would have occurred in the amendment's absence." [emphasis added] This second sentence does not satisfy the constitutional requirement that a FIS provide voters with the probable financial impact, nor does it allow voters to evaluate the likelihood of increased or decreased litigation in this already highly litigious area. FairDistrictsFlorida.org, the Sponsor of the proposed redistricting amendments, maintains that the revised FIS's

continue to speculate on financial impacts that are contingent on unknowable circumstances. The revised FIS's state that costs would increase if litigation increases. However, no linkage is made between any increased litigation and the proposed amendments (as opposed to the already foreseeable litigation that always accompanies congressional redistricting and legislative reapportionment). There is no mention of the possibility that litigation would decrease under the new standards. Because the revised FIS's continue to speculate about financial impacts, they are clearly and conclusively defective and should be rejected.

ARGUMENT

- I. THIS COURT'S REVIEW OF THE PRESENT FISCAL IMPACT STATEMENTS IS LIMITED TO A DETERMINATION AS A MATTER OF LAW AS TO WHETHER THE STATEMENTS ON THEIR FACE PRESENT THE VOTER WITH AN ESTIMATE OF THE *PROBABLE* FINANCIAL IMPACT OF THE STATEMENTS.

The Fiscal Impact Statement falls within the Court's "obligation to review the ballot *as a whole* to ensure that no part of the ballot—which includes the financial impact statement -- is misleading." *Advisory Opinion to the Attorney General re: Standards for Establishing Legis. Dist. Boundaries*, 34 Fla. L. Weekly at S63 (citing *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982)) (emphasis in original). The Constitution mandates that a FIS present the *probable* financial impact to the voters. In this case, on

their faces, the FIS's fail to describe any *probable* financial impacts. Therefore, the only issue for the Court to review now is whether the facial language of the FIS's describe *probable* impact.

The Senate's claim that the "substance" of the fiscal impact statements are not subject to this Court's review [Senate Br. at 3], is irrelevant to the case at hand. This case involves a challenge to the speculative *language* used in the revised FIS's.¹

The Court has accurately analogized the standards for fiscal impact statements to those for the ballot title and summary. *Id.* This Court's review of ballot titles and summaries is a legal, not a factual review. The same criteria as apply to ballot titles and summaries also apply to a fiscal impact statement, with the addition of the constitutional requirement that the fiscal impact statement must describe the *probable* financial impact of the proposed initiative on revenues or costs to state or local government. *See Advisory Op. to the Att'y General re: Repeal of the High Speed Rail Amendment*, 880 So. 2d 628, 629 (Fla. 2004).

As with a proposed ballot title and summary, this Court will uphold an FIS unless it is "clearly and conclusively defective." *Askew v. Firestone*,

¹ The initial FIS's were challenged on the basis that they did not expressly describe probable impact and also on the basis that the impact described was incorrect. The standard of review for such a case may be different.

421 So. 2d 151, 153 (Fla. 1982). An identical presumption of validity thus applies to both ballot titles and summaries and to fiscal impact statements.

Where, however, the language of the FIS is speculative, vague or ambiguous, it should be invalidated. This is because, just as with the ballot title and summary, the electorate must be “advised of the true meaning, and ramifications, of an amendment.” *Advisory Opinion to the Atty. Gen’l re Tax Limitation*, 644 So. 2d 486, 490 (Fla. 1994); *Askew*, 421 So. 2d at 156. Both with regard to the substance of the amendment and its financial impacts, the voter ““must be able to comprehend the sweep of each proposal from a fair notification in the [title and summary or FIS] that it is neither less nor more extensive than it appears to be.”” *Askew*, 421 So. 2d at 155 (quoting *Smathers v. Smith*, 338 So. 2d 825, 829 (Fla. 1976)).

If - as in the case at bar - the FIS’s do not explain *probable* financial impact on some level of government, on that basis alone they can and should be rejected as speculative.² In this manner, the Court protects the rights of

² The Senate brief cites at length from testimony received by the FIEC regarding the possibility of increased litigation. [Senate Br., at 14-16.] This testimony is irrelevant to this case and the language used in the FIS’s. There was also testimony contrary to the testimony cited by Senate. However, this Court need not consider background testimony where, as with the FIS’s here, the statements are facially defective and do not attribute probable increased litigation and specific attendant costs to the operation of the proposed amendments. As the Court noted when it considered the earlier FIS’s, “the purported establishment of a litigation-cost baseline by the

the voters to be accurately and clearly informed about the probable financial effects of a proposed amendment.

II. BECAUSE THE FISCAL IMPACT STATEMENTS DO NOT ATTRIBUTE ANY *PROBABLE* FINANCIAL IMPACT TO THE PROPOSED AMENDMENTS, THEY ARE SPECULATIVE AND SHOULD BE REJECTED.

As the Sponsor argued previously, the revised FIS's make no clear distinction between possible increased litigation if the amendments are adopted and the current inevitability of litigation of any newly apportioned congressional or legislative districts. Again, statements that costs "*may occur if litigation increases*" are speculative. *See Standards for Establishing Legis. Dist. Boundaries*, 34 Fla. L. Weekly at S63.

The impact statements simply note that expenses may or may not increase. In actuality, they may or may not increase even if litigation increases. There is no way of knowing if any increased litigation will be *caused by the proposed amendment*. Likewise, the fiscal impact statements speculate as to whether increased litigation, if any, will be more complex than would otherwise be the case. However, if the Legislature follows the

Conference from which to measure any alleged increased cost of the proposed amendments is dubious and highly speculative." *Standards for Establishing Legis. Dist. Boundaries*, 34 Fla. L. Weekly at S63.

standards in the new amendments, litigation may well decrease in number and complexity.

Because the financial impact statements are based on speculation that the standards will lead to more and not less litigation, and because the statements do not explain that the contingency is based on circumstances that are impossible to predict, like the statement in *Advisory Opinion to the Attorney General re Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans*, 963 So. 2d 210, 214-215 (Fla. 2007), they are misleading to voters and violate Article XI, Section 5(c), Florida Constitution, and Section 100.371(5), Florida Statutes.

As this Court rightly noted when rejecting the previous impact statements, a holding that the impact statement speculates as to probable costs of an amendment does not amount to a substitution of the Court's judgment for that of the FIEC. *See Standards for Establishing Legis. Dist. Boundaries*, 34 Fla. L. Weekly at S63. Such a holding, however, does require the impact statements to provide voters with *probable* financial impacts that are more than a mere statement that more litigation may or may not occur.

CONCLUSION

Accordingly, the Sponsor, FairDistrictsFlorida.org, respectfully asks this Court to reject the revised fiscal impact statements.

Respectfully submitted,

/s/Mark
Herron

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail this, 6th day of April, 2009 to The Honorable Bill McCollum, Esquire, Office of the Attorney General, PL 01, The Capitol, Tallahassee, Florida, 32399-1050; JASON VAIL, Esquire, General Counsel, Florida Senate, R. 402, Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100; and JEREMIAH M. HAWKES, Esquire, General Counsel, Florida House of Representatives, R. 422 The Capitol, Tallahassee, Florida 32399-1300.

| /s/ Mark
Herron

Attorney

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CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman 14-point font, in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

| /s/ Mark
Herron

Attorney

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