

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

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

AMENDED INITIAL BRIEF OF SPONSOR
FairDistrictFlorida.org

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STATEMENT OF THE CASE

Whether the fiscal impact statements prepared by the Financial Impact Estimating Conference (“FIEC”) for the proposed initiative amendments to the State Constitution providing standards for legislative and congressional district boundaries were misleading was previously considered by this Court. *Advisory Opinion to the Attorney General re: Standards for Establishing Legislative District Boundaries – Fiscal Impact Statements*, 2 So. 3d 161 (Fla. 2009). This Court held that the statements were misleading and remanded the statements to the FIEC to be redrafted pursuant to Section 100.371(5)(e)1., Florida Statutes. Stat. See 2 So. 3d at 166.

On February 13, 2009, the Conference submitted revised fiscal impact statements to the Attorney General, who forwarded them to this Court for review. The revised financial impact statements for both the Legislative Redistricting Amendment and the Congressional Redistricting Amendment are identical. They read: The fiscal impact cannot be determined precisely. 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.¹

¹ The earlier invalidated fiscal impact statements for the two proposed amendments were also identical. They provided:

STANDARD OF REVIEW

The standard of review is *de novo*, and the issue before the Court is whether a fiscal impact statement complies with Article XI, Section 5(b) of the State Constitution and Section 100.371(5), Florida Statutes (2006).

SUMMARY OF ARGUMENT

Like the previous fiscal impact statements rejected by this Court, the two revised impact statements in the instant case are patently based on speculation. The revised impact statements continue to speculate by saying that the state “*may* incur additional costs *if* litigation increases beyond the number or complexity of cases [that would have occurred absent the constitutional amendment].” (Emphasis added.) Any impact is still represented only as a possibility, dependent on uncertain factors.

As Sponsors argued earlier and as this Court noted in its opinion, some litigation has occurred after every past redistricting of congressional seats or after reapportionment of legislative seats. Any future litigation may

The amendment’s fiscal impact cannot be determined precisely. State government will probably incur increased costs (millions of dollars), including attorney and expert witness fees, due to expected additional litigation regarding the application and interpretation of the amendment standards as they relate to proposed redistricting plans. Also, state courts will likely incur additional costs to preside over hearings and render rulings. There is no expected impact to local government expenditures or government revenues.

be more or less substantial than in the past. Future litigation may be more or less expensive than in the past. It is impossible to know whether fewer or more legal challenges will be brought and even more impossible to put an actual dollar amount (or even a range) on an unknown amount of future litigation of an unknown kind. The revised fiscal impact statements continue to hypothesize as to impact and thereby leave citizens uncertain as to whether or not there are *probable* future costs. The best and most accurate statement for both proposals would simply inform citizens that “the fiscal impact cannot be determined.” Instead, the revised impact statements say there *may* be future costs.

ARGUMENT

I. THE CONSTITUTION AND STATUTES GIVE THIS COURT A SPECIFIC AND ESSENTIAL ROLE IN REVIEWING PROBABLE FINANCIAL IMPACT OF PROPOSED INITIATIVE AMENDMENTS.

This Court’s review of financial impact statements is defined by Article XI, Section 5(c), Florida Constitution, which provides that the Legislature shall provide by law “for the provision of a statement to the public regarding the **probable** financial impact of any amendment proposed by initiative” (emphasis added). The Court’s review is further defined by Section 100.371(5)(b)3, Florida Statutes, which provided for

fiscal impact statements to be “clear and unambiguous [and] no more than 75 words in length”² As this Court said most recently when invalidating the previous fiscal impact statement, there is an “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 Legislative District Boundaries – Fiscal Impact Statements*, 2 So. 3d at 164 (emphasis in original).

When determining the validity of a fiscal impact statement, this Court’s inquiry is whether the statement relates to the *probable* financial impact of the proposed initiative on revenues or costs to state or local government and whether it does so in clear and unambiguous language. *Advisory Op. to the Att’y General re: Repeal of the High Speed Rail Amendment*, 880 So. 2d 628, 629 (Fla. 2004); *Advisory Op. to the Att’y General re: Public Protection from Repeated Medical Malpractice*, 880 So. 2d 686, 687 (Fla. 2004); and *Advisory Op. to the Att’y General re: Authorizes Miami-Dade & Broward County Voters to Approve Slot Machines in Parimutuel Facilities*, 880 So. 2d 689, 690 (Fla. 2004).

² Section 100.371(5)(a), Florida Statutes, provides that fiscal impact statements to be placed on the ballot should describe “estimated increase or decrease in any revenues or costs to state or local governments resulting from the proposed initiative.”

As this Court noted in *Advisory Opinion to the Attorney General re: Standards for Establishing Legislative District Boundaries – Fiscal Impact Statements*:

It would make little sense to require that a proposed amendment title and summary not be misleading to voters, but then allow a financial impact statement that contains inaccurate or completely speculative predictions of potential financial impact to be placed on the ballot.

2 So. 3d at 164.

II. THE FISCAL IMPACT STATEMENTS CONTINUE TO SPECULATE ON UNKNOWN AND UNKNOWABLE COSTS.

The revised impact statements for the two proposed redistricting amendments are more carefully worded than were the earlier ones invalidated by this Court. However, the revised fiscal impact statements still fail to provide voters with a *clear* and *unambiguous* statement of the *probable* cost of the amendment to the state.

The revised statements are once again based on speculation that is overtly part of the text. A statement that costs “*may occur if* litigation increases” is, on its face, clearly speculative. In fact, this Court held in its first opinion that, because of the history of varied costs in previous redistricting years, “the purported establishment of a litigation-cost baseline by the Conference from which to measure any alleged increased cost of the proposed amendments is dubious and highly speculative.” *Advisory Opinion*

to the Attorney General re: Standards for Establishing Legislative District Boundaries – Fiscal Impact Statements, 2 So. 3d at 165-166. Accordingly, the revised fiscal impact statements should reflect that the probable financial impact simply cannot be determined.

The text on its face explains that expenses may or may not increase. In actuality, they may or may not increase even if litigation increases. There is no finding – and no way of knowing if litigation will increase.

Furthermore, the statements are one-sided. There is no mention that costs will go down if litigation decreases. This Court has warned that financial impact statements should “not devolve into a tool used to manipulate the public based solely upon whether the entity empowered and entrusted with preparing the statements favors or disfavors a proposal.” *Id.* at 165. Sponsors steadfastly maintain that speculative fiscal impact has no place in the statements. But if the *possibility* of an increase is mentioned in the statement, the possibility of a decrease should be mentioned too.

As cited in previous proceedings, the most relevant case remains *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). In that case, this Court rejected a financial impact statement which included the phrase, “Over each two year

election cycle, local governments cumulatively will incur significant costs (millions of dollars statewide).” *Id.*

This Court held:

Upon review, we find that [this sentence] is indeed misleading. . . . This statement . . . assumes that numerous local governments will have out-of-cycle changes to their respective comprehensive land use plans, necessitating special elections. Although the Financial Impact Estimating Commission is **speculating** that local governments will be holding special out-of-cycle elections, the statement itself does not indicate that the estimated millions of dollars is dependant upon how many times counties and cities throughout the State will attempt out-of-cycle amendments to their comprehensive land use plans.

Id. (Emphasis added.).

In the instant case, the FIEC continues to speculate that the new districting standards will spawn more litigation than there would be had the standards not been in place. As this Court noted, “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.” *Advisory Opinion to the Attorney General re: Standards for Establishing Legislative District Boundaries – Fiscal Impact Statements*, 2 So. 3d at 166. The extent to which increased litigation over the new districts or plans occurs depends on how closely these standards are adhered to. If the standards are closely followed, there will be less cause for litigation.

Furthermore, as the FIEC recognized in its Financial Information Statement and as this Court noted in its opinion, costs of reapportionment in successive decades are subject to multi-million dollar swings – even under identical Constitutional provisions. *Id.* at 165; *cf.* FIEC, Initiative Financial Information Statement, at 4 (finding average litigation related costs for the 1990 & 2000 reapportionment/redistricting cycles). While costs in the decade of the 90’s were \$15 million, for the districting after the 2000 census, in which the rules for districting were identical, costs actually decreased to \$11.7 million. *See* FIEC, Initiative Financial Information Statement, at 4. Even if there is litigation after the standards are passed, it will be impossible to know whether that would have been a more costly litigation year even under the old rules.

Because the financial impact statement is based on speculation that the standards will lead to more and not less litigation, and because the statement does 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*, it is misleading and violates Section 100.371(5), Florida Statutes.

As this Court rightly noted when rejecting the previous impact statements, a finding that the impact statement indulges in speculation as to probable costs of an amendment does not amount to a substitution of the Court's judgment for that of the FIEC. *Advisory Opinion to the Attorney General re: Standards for Establishing Legislative District Boundaries – Fiscal Impact Statements*, 2 So. 3d at 164-165. It does, however, require the impact statement to be grounded on something more substantial than the mere possibility that litigation may occur and that attendant costs might be higher.

CONCLUSION

Accordingly, the Sponsor, FairDistrictsFlorida.org, respectfully asks this Court to reject the revised fiscal impact statements because they continue to violate Article XI, Section 5(b), Florida Constitution and Section 100.371(5)(e)1, Florida Statutes, and because the revised impact statements do not provide voters with a clear and unambiguous statement as to *probable* fiscal impacts caused by the proposed amendments.

Respectfully submitted,

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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, 20th 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

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.

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