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

AMENDED INITIAL BRIEF

OF THE FLORIDA SENATE

IN SUPPORT OF THE FINANCIAL

IMPACT STATEMENTS

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STATEMENT OF THE CASE AND FACTS

The Attorney General seeks review of a financial impact statements pursuant to Article IV, s. 10, Fla.Const.

The statements read:

> STANDARDS FOR THE LEGISLATURE TO FOLLOW IN . . . REDISTRICTING . . .
>
> 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.

This court rejected the previous statements. Advisory Opinion to the Attorney General re Standards for Establishing Legislative District Boundaries, 2 So.3d 161 (Fla. 2009).

SUMMARY OF THE ARGUMENT

The court should defer to the fact-based findings and conclusions of the Financial Impact Estimating Conference (FIEC) unless an examination of the record supporting the statement shows it clearly and convincingly lacks evidentiary support.

The burden of persuasion should fall on the challenger of any impact statement. Unless the burden is met, a statement is presumptively correct.

The financial impact statements do not clearly and convincingly lack support in the factual record complied by the conference, they are not clearly erroneous, and they meet the requirements of s. 100.371, Fla.Stat.

ARGUMENT

I. The court should not reject an impact statement without examining the record before the Financial Impact Estimating Conference. Nor should the court reject an impact statement without finding that the record clearly and convincingly fails to support the statement.

The financial impact statements find that the probable impact of the proposed amendments cannot be determined precisely.[1] They go on to qualify this estimate by stating an unremarkable observation that if litigation increases from historical levels, there may be an increased cost.[2] As inoffensive as this sentence

[1] This sentence is consistent with s. 100.371(5)(c)(2) and (3), Fla.Stat. Section 100.371(5)(c)(3) contemplates statements that impact cannot be precisely determined. See Advisory Opinion to the Attorney General Re: Florida Marriage Protection Amendment, 926 So.2d 1229, 1240 (Fla. 2006), approving a statement that said "expenditures cannot be determined, but [are] expected to be minor."

[2] 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 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).").

is, the sponsors contend it is fatally speculative. But whether it is speculative in fact is an evidentiary matter. And to the extent the sentence rests on a conclusion that there is a reasonable likelihood there will, in fact, be increased litigation over what Florida has experienced in the past, the court must defer to this finding if it is supported by evidence in the record.

Whether an impact statement is speculative and unsupported by evidence is a fact question. The conference is required by the Constitution. Art. XI, s. 5 (c), Fla.Const. Conference members are appointed by the President of the Senate, Speaker of the House, and the Governor. Sec. 100.371(5)(c)(1), Fla.Stat. The conference is charged by statute with reviewing and analyzing the financial impact of proposed amendments. Sec. 100.371(5)(c)(1), Fla.Stat. Analyzing a proposed amendment's financial impact necessarily involves a fact-based inquiry. The conference is a panel of experts charged with making that fact-based inquiry, and then expressing an expert opinion on the anticipated fiscal effect of the amendment. Id. Section 100.371(5)(c)(1) requires the conference to *estimate* the probable fiscal impact. Estimation necessarily involves an element of speculation. The question is whether that speculation is *informed*, which can only be determined by examination of the conference's record. Such conferences are no different in form and operation that other estimating conferences employed by

state government. See e.g., s. 216.136, Fla.Stat. All branches of state government are required to use the product of some of these conferences. Sec. 216.135, Fla.Stat. (requiring the executive and judicial branches to use the results of the consensus estimating conference). Conference products therefore are considered to be reliable. Thus, the court cannot — and should not — dismiss an impact statement without looking at the material the conference relied upon in reaching its opinion.

In past cases, the court has set a high standard for when it is appropriate and permissible to reject ballot language. This court holds that ballot language should not be rejected unless it is *clearly* and *conclusively* defective. Kainen v. Harris, 769 So.2d 1029 (Fla. 2000); Askew v. Firestone, 421 So.2d 151, 153 (Fla. 1982). The court has said that it will reject ballot language only when the evidence is *clear* and *convincing* that ballot language is misleading. Id. at 156. Finally, the court only rejects ballot language "where the *record* clearly and convincingly establishes that the public is being misled on material elements of the amendment." Id., at 157, Justice Boyd concurring (emphasis added).

Given the constitutional basis of the court's power to review the substance of ballot language,[3] the standard the court has set for itself is a constitutional test.

[3] The court has found its constitutional authority to review ballot language and

Thus, under the court's cases, the Constitution only authorizes the court to reject an impact statement when the *record* underlying the statement *clearly* and *convincingly* supports a conclusion that the statement lacks evidentiary support.

The court departs from this constitutional test when it dismisses an impact statement as speculative in an evidentiary vacuum. The court thus has a constitutional obligation to inquire into that factual basis, the same as when confronted with the findings of any other fact finder.

In other settings, the court defers to the factual findings of legislative agencies. For instance, the court gives considerable deference to the findings and conclusions of the Public Service Commission.[4] The commission's findings are entitled to a presumption of correctiveness.[5] Those challenging the commission's findings have the burden of showing a departure from the essential requirements of law, or that the commission's findings are not supported by competent,

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financial impact statements in Art. XI, s. 5(a), Fla.Const., Armstrong v. Harris, 773 So.2d 7, 12 (Fla. 2000), and the Constitution's due process clause. Advisory Opinion to the Attorney General re Standards for Establishing Legislative District Boundaries, 2 So.3d 161 (Fla. 2009).

[4] Chiles v. Public Service Com'n Nominating Council, 573 So.2d 829, 832 (Fla. 1991): "the Public Service Commission is an entity of the legislative branch."

[5] GTC Inc. v. Edgar, 967 So.2d 781, 790 (Fla. 2007).

substantial evidence.[6] The court must approve the commission's findings and conclusions if they are based on competent, substantial evidence and are not clearly erroneous.[7] See also, Crist v. Jaber, 908 So.2d 426, 432 (Fla. 2005).

This is the same standard an appellate court applies when reviewing findings and conclusions of trial or administrative law judges. Fitzpatrick v. State, 900 So. 2d 495, 507 (Fla. 2005); s. 120.68(6)(b), Fla.Stat.

The conclusions of all such fact-finders reach the appellate courts with a presumption of correctness. Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150, 1152 (Fla. 1979); Florida East Coast Ry. Co. v. Department of Revenue, 620 So.2d 1051, 1061 (Fla. 1st DCA 1993); Brandenburg Investment Corp. v. Farrell Realty Inc., 463 So.2d 558, 560 (Fla. 1st DCA 1985); Board of Trustees of Internal Imp. Trust Fund v. Levy, 656 So.2d 1359 (Fla. 1st DCA 1995).

The conference's findings are entitled to the same presumption. Given the constitutional standard of review, the court should not reject them unless the record clearly and convincingly shows they are unsupported. It is enough if there is evidence in the record supporting the statement. Board of Trustees of Internal Imp. Trust Fund v. Levy, 656 So.2d at 1364 (upholding Board decision if it is "a

[6] Id.

[7] Id.

choice based upon facts, logic and reason" and is not arbitrary and capricious).

In sum, the clear-and-convincing standard this court has established as the constitutional test for ballot language requires the court to look at the underlying factual basis of any statement. The court should not reject such fact-based conclusions outright simply because it disagrees with them or would reach a different result. Doing so usurps the Legislature's constitutional authority to set standards for drafting and publishing financial impact statements.[8] The Florida Constitution requires the court to accord the conference's findings and conclusions at least the same deference as any other fact finder's. And in fact, the Constitution imposes a high standard: the court should not reject a statement unless that record contains no evidence to support an impact statement, or it is not based on fact, logic and reason — in other words, the court should not reject the statement unless it is arbitrary and capricious. Board of Trustees of Internal Imp. Trust Fund v. Levy, 656 So.2d at 1363-1364.

Because the conference's findings are entitled to a presumption of correctness, the burden of demonstrating error naturally should fall on anyone

[8] Art. XI, s. 5(c), Fla.Const.: "The legislature shall provide by general law, prior to the holding of an election pursuant to this section, for the provision of a statement to the public regarding the probable financial impact of any amendment proposed by initiative pursuant to section 3."

challenging the statement — as it does in any other case. Applegate v. Barnett Bank of Tallahassee, at 1152; see also Askew v. Firestone, at 159, Justice Adkins dissenting ("The burden is on the appellants [challengers] to show 'on the record that the proposal is clearly and conclusively defective' . . ."); Board of Trustees of Internal Imp. Trust Fund v. Levy, 656 So.2d at 1363.

II. The Financial Impact Estimating Conference's findings and conclusions are supported by the evidence and not clearly and conclusively erroneous.

The financial impact statements are 34 words long and are clear and unambiguous. The conference's findings and conclusions are supported by information and witness input, as follows.

The conference sees the possibility that the proposed amendments will provoke more litigation than reapportionment has in the past. That possibility arises from the newness and complexity of the standards in the amendments and the fact that most of those standards are not readily defined.[9] It is not unreasonable to expect litigation to flesh out the amendments' meaning.

The basis for this finding rests, in part, on the input of reapportionment lawyer George Meros. Exhibit 1, exhibit 3, at 1:09-35:25.

[9] Exhibit 3, at 3:50, 4:02-5:12, 5:20-31, 8:06-10:30, 12:04-15:00, 15:50-:16:00, 21:20-28, 24:04-25:00, 26:06-27:00, 36:40-37:00, 40:40-42:50, 44:30-50, 46:15-21. These times are approximate.

At that workshop, the conference also heard from George Waas, special counsel in the Attorney General's Office. Exhibit 3 at 35:30-48:59. Mr. Waas "agree[d] wholeheartedly" with what Mr. Meros said. Id. at 36:40. Mr. Waas said that the proposed standards were such that people would have differing views on "what the words mean" which would provoke increased litigation over what the state has seen in the past. Id. at 39:30. "The amount of [potential] litigation here to me is mind boggling . . . certainly greater than in 1992." Id. at 44:30-50.

The conference also relied on input from the state court administrator's office, which believed that the number of reapportionment lawsuits is likely to rise under the proposed standards. Exhibit 2.

Thus, the findings of the conference are not clearly and conclusively lacking in support. They certainly are supported by substantial reliable evidence, including an opinion from the court's own agency. The statements are clear, unambiguous and non-speculative. Therefore, the court should find these financial impact statements to be adequate.

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, 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 20, 2009.

_____
Jason Vail

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Jason Vail