

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

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, -- So.2d --, 2009 WL 196406 (Fla. Jan. 29, 2009).

The present draft was prepared and presented to the Attorney General pursuant to s. 100.371(5)(c)(2), Fla.Stat.

Because both financial impact statements are identical, if we refer to the statements in the singular, we mean both of them.

SUMMARY OF THE ARGUMENT

The court's cases interpreting its constitutional authority to review ballot language and financial impact statements and the standards for rejecting them

require the court to defer to the 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 court should impose the burden of persuasion on the challenger of any impact statement. Unless the burden is met, a statement is presumptively correct.

The court should amend its process for reviewing impact statements by requiring challengers to file their briefs first, followed by supporters of the statement.

The financial impact statement does not clearly and convincingly lack support in the factual record compiled by the conference, it is not clearly erroneous, and it meets 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 court's prior opinions establish a constitutional test for determining whether ballot language, including financial impact statements, pass muster. That constitutional test requires the court to look at the record underlying an impact

statement and precludes its rejection unless that record clearly and convincingly fails to support the statement.

Until recently, the court's specific constitutional authority to review the substance of ballot language and financial impact statements has been unclear. The first explicit indication of this court's authority to review ballot language came in Armstrong v. Harris, 773 So.2d 7, 12 (Fla. 2000). There, the court identified its authority as stemming from an implicit requirement for accuracy arising from the general constitutional provision governing referenda for citizens' constitutional initiatives, Art. XI, s. 5(a), Fla.Const.¹

In Legislative District Boundaries, the court found a different constitutional basis for its authority. The court expressly located the source of its authority to review the substance of ballot language generally and financial impact statements in particular in the state Constitution's due process clause. Legislative District Boundaries, at *2. Presumably the court meant the procedural due process prong, because Legislative District Boundaries cites to Askew v. Firestone's determination that voters are entitled to fair notice of a proposed amendment's contents. Askew v. Firestone, 421 So.2d 151, 155 (Fla. 1982).

¹ However, the Senate agrees with Justice Wells' dissent in Legislative District Boundaries that the court lacks jurisdiction to review the substance of a financial impact statement.

In Legislative District Boundaries, the court did not explain its reasoning, but it appears to have proceeded like this. Ballot language — including impact statements — must provide fair notice and advise voters about the measure on which they are asked to vote. Fair notice requires that ballot language and impact statements should not be misleading. Ballot language and impact statements that are vague and contain unsupported statements are misleading. Therefore, they do not provide fair notice. Consequently, they violate the procedural due process prong of the state Constitution.

But whether an impact statement is unsupported is a fact question. The Financial Impact Estimating Conference is charged by statute with reviewing, *analyzing* and estimating 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.* In Legislative District Boundaries, the court rejected the previous statements on the ground they were speculation. That criticism was unfair. Section 100.371(5)(c)(1) requires the conference to *estimate* the 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.

In this case, the conference conducted the necessary inquiry. In reaching its conclusions, the conference faced the task of having to resolve evidentiary conflicts. In Exhibit 3, the court can see the conflicting evidence the conference faced. Exhibit 3 is a video of a May 2008 workshop held by the conference, one of several on these amendments. Three people provided information and opinion to the conference at that workshop, George Meros, a lawyer with substantial experience litigating elections and apportionment cases; George Waas, special counsel with the Attorney General's Office, who also has extensive experience litigating apportionment and elections matters; and Ben Wilcox, director of Common Cause, who spoke on behalf of the amendments' sponsors. Meros and Waas told the conference that the proposed amendments would provoke considerable litigation and they went into detail about the reasons they thought so. Wilcox said he believed it would not, that whether litigation would increase was speculation. He also argued that passage of the amendments would cause a decline in litigation. The conference resolved these conflicting views, as any fact finder must, in this instance in favor of the view that the amendments likely would result in increased litigation.

This court would not dismiss the factual findings of a trial judge or an administrative hearing officer, who must resolve similar evidentiary conflicts, without looking at the record. It should not do so here, either. 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. They have a specific statutory charge. Id. They are no different in form and operation than 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 itself 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, the standard the court has set for itself is a constitutional test. 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 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.² The commission’s findings are

² *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.”

The conference is an agency created by law to carry out the requirements of Art. XI, s. 5(c), Fla.Const. The conference is a legislative agency, much like the

entitled to a presumption of correctness.³ 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, substantial evidence.⁴ The court must approve the commission's findings and conclusions if they are based on competent, substantial evidence and are not clearly erroneous.⁵

As this court has said:

“While there may be legitimate disagreements as to the weight and credibility of the evidence presented below, this Court's review is limited to a determination of whether evidence exists to support the Commission's findings.”

Crist v. Jaber, 908 So.2d 426, 432 (Fla. 2005).

Public Service Commission, in that three of its four members are drawn from legislative staff. A financial impact estimating conference is a committee composed of one Senate and one House of Representatives staff member, one representative of the Office of Economic and Demographic Research (also a legislative agency; see ss. 16.615(5)(c) and 921.0019(4)(e), Fla.Stat.), and a representative of the Governor's Office. See s. 100.371(5)(c)(1), Fla.Stat. The conference's sole task is to determine the potential fiscal impact of a citizen initiative. Sec. 100.371(5), Fla.Stat. To carry out its statutory and constitutional duties, a conference conducts an investigation, gathers and analyze facts, and then expresses members' majority opinion on an initiative's probable fiscal impact.

³ GTC Inc. v. Edgar, 967 So.2d 781, 790 (Fla. 2007).

⁴ Id.

⁵ Id.

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) (“On appellate review we are guided by the rule that the trial court's findings of fact and conclusions of law are presumptively correct and will not be overturned unless they are clearly erroneous.”); Brandenburg Investment Corp. v. Farrell Realty Inc., 463 So.2d 558, 560 (Fla. 1st DCA 1985). Indeed, the courts have accorded the presumption to decisions of the Board of Trustees of the Internal Improvement Fund. See Board of Trustees of Internal Imp. Trust Fund v. Levy, 656 So.2d 1359 (Fla. 1st DCA 1995).

The conference’s findings should be given 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 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.⁶ 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 1363-1364.⁷

⁶ 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.”

⁷ Board rule prohibiting dock to extend more than 500 feet from the mean high water mark ““appears to have been the product of a process involving the

II. The burden of demonstrating the lack of factual support lies with the challenger.

Because the conference’s findings are entitled to a presumption of correctness, the burden of demonstrating error naturally should fall on anyone challenging the statement — as it does in any other case. Applegate v. Barnett Bank of Tallahassee, at 1152 (burden of showing error is on the challenger); 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 (hearing officer improperly placed burden of persuasion on the Board: “The burden of proving abuse of agency discretion is upon the challenger of the rule, who must meet that burden with a preponderance of the evidence.”).

Thus, any challenger must contest, and offer evidence and citations to the conference’s record, that undermine any contention that the conference’s findings are supported by the evidence. The failure of a challenger to make such a showing is a failure of their burden of persuasion.

thoughtful balancing of varying factors.’ In our view, these findings of fact contained in the order under review are inconsistent with the conclusion that the rule is arbitrary. To the contrary, we view these findings as ample to show that the trustee's decision was a reasoned one, supported by facts and logic, and that their decision could in no sense be labeled ‘despotic.’”

As an aside, the process the court currently employs to review financial impact statements is not calculated to take the challenger's burden into account. Presently, the court requires both challengers and supporters to file their initial brief by the same deadline, with an answer brief deadline following shortly thereafter. As a practical matter, most filers wait until the last minute. Thus, a supporter files her brief in the dark — uncertain there will be a challenger and ignorant of any potential challenger's reasons for attacking the statement. Thus, the supporter's brief is mainly wasted effort. This is not fair to supporters, who have no notice of a challenger's reasons for opposing a statement and who have no meaningful way to respond in the first go-round of briefing. It also makes for unnecessary and unproductive reading by the members of the court.

The better approach is the traditional pattern of briefing followed in appellate courts: the challenger goes first, the supporter then has a chance to respond, and the challenger gets a reply. This traditional approach is consistent with fundamental notions of due process and properly puts the burden of persuasion where it belongs: on the challenger.

III. The Financial Impact Estimating Conference's findings and conclusions are supported by competent substantial evidence, are not clearly erroneous and are in compliance with s. 100.371.

The financial impact statement is 34 words long and is clear and unambiguous. Its findings and conclusions are supported by information and input collected by the Financial Impact Estimating Conference, as follows.

The fiscal impact cannot be determined precisely.

This statement 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.”

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.

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.⁸ It is not unreasonable to expect litigation to flesh out the amendments’ meaning.

⁸ 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.

The basis for this finding rests, in part, on the input of reapportionment lawyer George Meros. He provided the conference with this written analysis:

The districting initiatives will dramatically expand the scope and complexity of litigation to determine the validity of each new plan of apportionment. The initiatives will increase the cost of litigation involving legislative and congressional apportionment plans to levels at least seven to ten times those experienced in the most recent apportionment.

* * *

Because the initiatives would create new state constitutional imperatives, the Court would review the plan's compliance with its requirements despite their fact-intensive nature. The Court's review would extend to (1) whether the plan or any district was intended to favor or disfavor at party or incumbent; (2) whether the districts have the intent or effect of denying or abridging the opportunity of racial or language minorities to participate in the political process of their ability to elect representatives or their choice; (3) whether districts are as nearly equal in population as practicable; (4) whether districts are compact; (5) whether districts, to the extent feasible, employ existing political and geographical boundaries.

The determination of these issues is exceedingly more complex and intricate than those the Court has traditionally examined. It will require the Court to undertake new and probing inquiries regarding the intent of the Legislature with respect to each district and the plan as a whole, the effect of each district on the political influence of racial and language minorities throughout the state, the compactness of each district, and the feasibility of using political and geographical boundaries.

More specifically, and simply by way of example, the requirement that every district be drawn so as not to favor or disfavor any incumbent or political party will spawn challenges to virtually every district, census tract by census tract, without guidance on what "favor" or "disfavor" means in this highly specialized context.

These inquiries are not only more fact-specific but also more subjective and malleable than those previously considered by the Court. The Court will be required to create new legal standards for evaluating the intent of the Legislature and the political influence of minority groups, to define the concept of compactness, and to engage in a completely subjective analysis of whether the use of existing boundaries would have been feasible.

This review will take place district by district and will require the Court to consider the views of adversary interests. The new subjective and fact-specific inquiries will subject each district individually to attack, whether by political parties, incumbents, challengers, or interest groups, and will invite a proliferation of experts to analyze each district according to the new constitutional standards. Adversary interests can be expected not only to assail the legislatively drawn plan, but to present plans that each purport to comply with the constitutional mandate. The thirty-day period allotted to the Court will likely require it to appoint special masters to evaluate the evidence and argument presented by adversary interests. The Legislature, instead of offering argument on a limited number of objective issues, will be required to defend every boundary of every district against every attack interests might bring in opposition to the apportionment plan. And a judicial revision of the apportionment plan, without regard to the Voting Rights Act, will likely spawn additional challenges under Section 2 in local litigation.

Congressional districting plans are not subject to review by the Supreme Court but are liable to challenge in federal court. The same increase in the scope, complexity, and cost of litigation is likely to attend the new standards for congressional districting. Individual challenges to specific districts will become increasingly likely and far more complex than it presently is.

Exhibit 1.

Mr. Meros provided an oral presentation outlining the bases of his written analysis at the May 2008 conference workshop. Exhibit 3, at 1:09-35:25.

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. Mr. Waas said there was a real possibility that cases will be filed in “multiple counties,” and that a decision in one case would have a “ripple effect” on other districts leading to other lawsuits in other districts because the adjustment of the boundary of one district necessarily affected the boundaries of its neighbors. Id. at 40:40-42:17, 46:15-21.

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:

Due to the proposed constitutional amendments, the Office of the State Courts Administrator believes there will be an impact at the trial and appellate level. The number of lawsuits filed related to the current redistricting standards following the 1990 and 2000 census were 13 and 5, respectively. It is assumed that the number of litigations will increase. In addition, it is assumed the nature of the litigation will remain the same under the proposed constitutional amendment standards. Unfortunately, the amount of increased litigation is unknown and the estimated impact on the trial court and judicial workload is indeterminate. In addition, the estimated impact on appellate workload is indeterminate.

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. 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 March 17, 2009.

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CERTIFICATE OF TYPE SIZE AND STYLE

The brief is printed in 14 point Times New Roman.

Jason Vail