

IN THE SUPREME COURT OF FLORIDA

Case No.: SC08-1163

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

INITIAL BRIEF OF SPONSOR
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TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF CITATIONSii

STATEMENT OF THE CASE AND FACTS 1

STANDARD OF REVIEW.....2

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE REDISTRICTING AMENDMENT COMPLIES
WITH THE SINGLE SUBJECT RULE BECAUSE IT HAS
THE UNIFIED PURPOSE OF PROVIDING STANDARDS
FOR REDISTRICTING, AND BECAUSE THE PROPOSAL
AFFECTS ONLY THE LEGISLATIVE BRANCH..... 3

CONCLUSION 8

CERTIFICATE OF SERVICE 9

CERTIFICATE OF TYPEFACE COMPLIANCE.....9

TABLE OF CITATIONS

Cases:

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 (Fla. 2004) 3

Advisory Op. to the Att’y General
re: Public Protection from Repeated Medical Malpractice,
880 So. 2d 686, 687 (Fla. 2004) 3

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) 4, 5, 6

Advisory Op. to the Att’y General
re: Repeal of the High Speed Rail Amendment,
880 So. 2d 628, 629 (Fla. 2004) 3

Florida Constitutional Provisions:

Article XI, Section 5(b) 1, 2

Florida Statutes:

Section 100.371.....1
Section 100.371(5)..... 1, 2, 6
Section 100.371(5)(a).....1
Section 100.371(5)(e)1.....8

STATEMENT OF THE CASE

On May 22, 2008, the Secretary of State sent to the Attorney General and to the Financial Impact Estimating Conference, the petition for the constitutional initiative, “Standards for Legislature to Follow in Congressional Redistricting.” The Attorney General petitioned this Court for an advisory opinion as to the validity of the initiative. (Case No. SC08-1149). That petition is currently before this Court.

When it received the proposed initiative, the Financial Impact Estimating Conference offered the sponsor and public the opportunity to testify with regard to the financial impact of the initiative. On June 18, 2008, the Conference forwarded its prepared financial impact statement and financial information statement to the Attorney General pursuant to Article XI, Section 5, Florida Constitution, and Section 100.371(5)(a), Florida Statutes.

On June 20, 2008, the Attorney General petitioned this Court for an advisory opinion as to whether the Financial Impact Estimating Conference’s financial impact statement complies with Section 100.371, Florida Statutes. The financial impact statement is at issue in this proceeding.

STANDARD OF REVIEW

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

SUMMARY OF THE ARGUMENT

The principal issue in determining whether any Fiscal Impact Statement complies with constitutional and statutory requirements is the accuracy of the statement issued. The purpose of the statements is to inform the public and accuracy is paramount. The statement must reflect “*probable* financial impact.”

The impact statement in the instant case is admittedly based on speculation. The alleged “probable” financial impact concerns costs of future litigation over the Legislature’s adherence (or not) to new standards of apportionment after passage of the proposed amendment.

There has been litigation after every reapportionment in the past. So, there may be litigation. However, it may be more or less substantial than in the past. It may be more or less expensive than in the past. If it is no more expensive than the past then there is no fiscal impact attributable to the proposal.

Ultimately, it is impossible to put an actual dollar amount (or even a range) on an unknown amount of future litigation of an unknown kind. An assertion that the costs would probably be higher after a reapportionment with these standards is pure speculation.

ARGUMENT

I. FISCAL IMPACT STATEMENTS MUST REFLECT PROBABLE COSTS AND NOT SPECULATE ON UNKNOWN COSTS.

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).

In this case the financial impact statement provides:

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.

Thus the question presented is whether the statement provides the voter with a *clear* and *unambiguous* statement of the *probable* cost of the amendment to the state. The answer is that it does not. The statement is based on assumptions that are contrary to or absent from the findings of the Financial Impact Estimating Conference ("FIEC"). It is also based on speculation as to whether the amendment will actually cause more litigation. It fails to inform the voter that the cost will increase or decrease depending on the amount of litigation and that the amount of litigation will be determined in large part by how closely the Legislature adheres to the new standards in drawing the districts.

The most relevant case to the instant proposal is *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). There, this court rejected a financial impact statement that bore a definite resemblance to the one at bar. In that case the proposed

amendment would require local governments to submit desired changes to their master plans to the voters through referenda. The Financial Impact Estimating Conference stated, "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 Financial Impact Estimating Conference speculates that the new districting standards will spawn more litigation than there would be had the standards not been in place. While it is possible that there will be additional litigation, the standards are designed to place clear parameters on the way districts are designed. Whether or not additional challenges to the districts or plans will be filed depends on how closely the

standards are followed. If the standards are closely followed, there will be less supportable cause for litigation. The financial impact statement does not inform the voter that the “probable” increase in litigation is contingent on this factor.

Furthermore, as the Financial Impact Estimating Conference recognized in its Financial Information Statement, costs of reapportionment in successive decades are subject to multi-million dollar swings – even under identical Constitutional provisions. 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, the costs went down to \$11.7 million. 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), Fla. Stat.

While the Conference studiously avoids using any words less certain than the constitutionally required “probable” in its statement, its own analysis does not support the conclusion that additional costs will probably result. The Financial Information Statement is rife with statements such as, “**may** expand the scope and complexity of litigation”; “**may** spawn challenges”; “the state court system **may** incur costs”; “It is **assumed** that the number of litigations will increase”; “the amount of increased litigation is **unknown**”; “the estimated impact on [the court system] is **indeterminate**”; “The state **may** be required to pay attorney’s fees”; but “the number of awards is **unknown** and the fiscal impact is **indeterminate**”. Initiative Financial Information Statement, Standards for Legislature to follow in Congressional Redistricting, which was attached to the petition of the Attorney General filed June 30, 2008, pp. 1, 4-6.

In fact, the words of the information statement are the best evidence that the conclusion cannot be based on probability. There are far too many unknowns.

This amendment does not have a predictable financial impact. It is speculative to suggest any range of added cost given the complete and admitted unpredictability of whether there will be additional litigation, if

there is how much it will cost, and what the direct cause of the litigation might be.

CONCLUSION

The Court is respectfully urged to reject the fiscal impact statement because it violates Section 100.371(5)(e)1, Florida Statutes.

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, _____ day of July, 2008 to The Honorable Bill McCollum, Esquire, Office of the Attorney General, PL 01, The Capitol, Tallahassee, Florida, 32399-1050.

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) of the Florida Rules of Appellate Procedure.

Attorney