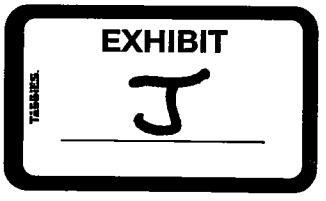
SUPREME COURT OF FLORIDA

Case No. SC08-986

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES

Consolidated for oral argument with
Case Nos. SC08-1149, SC08-1163, and SC08-1165



DOCKET

SHEET

Florida Supreme Court Case Docket

Case Number: SC08-986 - Closed

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR vs. ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES

03/10/2011 05:01

Date Docketed	Description	Filed By	Notes
05/29/2008	REQUEST-ADVISORY OPINION (ATTY GEN)	PT Advisory Opinion To The Attorney General ADVOP BY: PT Hon. Bill Mccollum 112233	
05/29/2008	No Fee Required		
05/29/2008	ORDER-HIGH PROFILE		
06/04/2008	ORDER-BRIEF SCHED (AG ADVISORY OPIN)		interested parties shall file their briefs on or before July 1, 2008, and serve a copy thereof on the Attorney General. Answer briefs shall be filed on or before August 1, 2008. Please file an original and eight copies of all briefs. (06/06/2008: ORDER CORRECTED TO REFLECT BILL MCCOLLUM AS AG)
07/01/2008	INITIAL BRIEF-MERITS	OP The Florida Legislature BY: OP Jason Vail 298824	O&8 & E-MAIL
07/01/2008	INITIAL BRIEF-MERITS	SPR Fair Districts Florida.Org BY: SPR M. Hope Keating 981915	O&8 & E-MAIL
07/18/2008	MOTION-EXT OF TIME (ANSWER BRIEF-MERITS)	OP The Florida Legislature BY: OP Jason Vail 298824	O&8 & E-MAIL (FILED AS "MOTION FOR EXTENSION OF TIME TO FILE REPLY/ANSWER BRIEFS")
07/21/2008	RESPONSE	SPR Fair Districts Florida.Org BY: PT Barry Scott Richard 105599	OF SPONSOR FAIRDISTRICTSFLORIDA.ORG TO MOTION OF LEGISLATURE FOR EXTENSION OF TIME TO FILE BRIEFS (E-MAIL)
07/29/2008	MOTION-CONSOLIDATION	SPR Fair Districts Florida.Org BY: PT Barry Scott Richard 105599	OF ORAL ARGUMENT (O&8 & E-MAIL)

07/29/2008	ANSWER BRIEF-MERITS	SPR Fair Districts Florida.Org BY: PT Barry Scott Richard 105599	O&8 & E-MAIL
07/31/2008	ORDER-OA SCHED		The Sponsor's motion to consolidate oral argument is hereby granted. The above cases are hereby consolidated for the purpose of oral argument and are scheduled for oral argument at 9:00 a.m., Wednesday, November 5, 2008. A maximum of twenty minutes to the side as consolidated is allowed for the argument, but counsel is expected to use only so much of that time as is necessary.
07/31/2008	ORDER-EXT OF TIME GR (ANSWER BRIEF-MERITS)		The Florida Legislature's motion for extension of time is granted and The Florida Legislature is allowed to and including August 20, 2008, in which to serve the answer brief on the merits. NO FURTHER EXTENSIONS OF TIME WILL BE GRANTED FOR THE FILING OF THE ANSWER BRIEF ON THE MERITS.
08/20/2008	ANSWER BRIEF-MERITS	OP The Florida Legislature BY: OP Jason Vail 298824	O&8 & E-MAIL
08/20/2008	REQUEST-ORAL ARGUMENT	OP The Florida Legislature BY: OP Jason Vail 298824	O&9 & E-MAIL
08/22/2008	ORAL ARGUMENT CALENDAR		
08/22/2008	ORDER-ORAL ARGUMENT RESCHEDULE		At the direction of the Court, the above cases which were scheduled for oral argument on November 5, 2008, have been rescheduled for oral argument at 9:00 a.m., Thursday, November 6, 2008. A maximum of twenty minutes to the side as consolidated is allowed for the argument, but counsel is expected to use only so much of that time as is necessary.
09/03/2008	MOTION-OTHER SUBSTANTIVE	SPR Fair Districts Florida.Org BY: SPR Mark Herron 199737	(O&9) FILED AS "MOTION TO EXPAND TIME FOR ORAL ARGUMENT"
09/15/2008	ORDER-OTHER SUBSTANTIVE GR		FairDistrictFlorida.org's motion to expand time for oral argument is hereby granted. A maximum of thirty minutes to the side is allowed for the argument, but counsel is expected to use only so much of that time as is necessary.
10/21/2008	NOTICE-SUPPLEMENTAL AUTHORITY	OP The Florida Legislature BY: OP Jason Vail 298824	O&8 & E-MAIL (DOES NOT CONTAIN COPY OF CITED AUTHORITY) ***STRICKEN. SEE ORDER DATED 10/21/2008)***
10/21/2008	ORDER-SUPP AUTHORITY STRICKEN		The Florida Legislature's Notice of Supplemental Authority does not comply with Florida Rule of Appellate Procedure 9.225 and is hereby stricken as it does not contain a copy of the cited authority.
10/24/2008	NOTICE-SUPPLEMENTAL AUTHORITY	OP The Florida Legislature BY: OP Jason Vail 298824	O&8 & E-MAIL ***STRICKEN. SEE ORDER DATED 10/24/2008***
10/24/2008	ORDER-SUPP AUTHORITY		The Florida Legislature's Notice of Supplemental Authority does not comply

	STRICKEN		with Florida Rule of Appellate Procedure 9.225 and is hereby stricken as it contains argument.
10/28/2008	NOTICE-SUPPLEMENTAL AUTHORITY	OP The Florida Legislature BY: OP Jason Vail 298824	O&8 & E-MAIL
11/06/2008	ORAL ARGUMENT HELD		
01/29/2009	DISP-APPROVED		In conclusion, we hold that the proposed amendments meet the legal requirements of article XI, section 3 of the Florida Constitution, and the ballot titles and summaries comply with section 101.161(1), Florida Statutes (2008). Accordingly, we approve the amendments for placement on the ballot.
02/12/2009	WEST CORRESPONDENCE		CORRECTED OPINION - On page 29, added law firm affiliation of Jon L. Mills.
04/15/2009	ARCHIVES		

May 29, 2008

The Honorable R. Fred Lewis
Chief Justice, and Justices of
The Supreme Court of Florida
The Supreme Court Building
Tallahassee, Florida 32399-1925

Dear Chief Justice Lewis and Justices:

In accordance with the provisions of Article IV, section 10, Florida Constitution, and section 16.061, Florida Statutes, it is the responsibility of the Attorney General to petition this Honorable Court for a written opinion as to the validity of an initiative petition circulated pursuant to Article XI, section 3, Florida Constitution.

On May 6, 2008, this office received a letter from the Secretary of State advising this office that the initiative petition seeking to amend the Florida Constitution to establish standards for the Legislature to follow in legislative redistricting had met the registration, submission, and signature criteria set forth in section 15.21, Florida Statutes. Pursuant to Rule 9.510(b), Florida Rules of Appellate Procedure, a petition by this office must contain, in addition to the language of the initiative, the following information:

1. The name of the sponsor and address: The sponsor of the initiative is FairDistrictsFlorida.org, whose address is 704 West Madison Street, Tallahassee, Florida 32304.

2. The name and address of the sponsor's attorney, if the sponsor is represented: Mr. Mark Herron is the sponsor's attorney; his address is 704 West Madison Street, Tallahassee, Florida 32304.

3. A statement as to whether the sponsor has obtained the requisite number of signatures to have the initiative placed on the ballot: As of April 23, 2008, the sponsor had not obtained the necessary number of signatures to place the initiative on the ballot.

4. The current status of the signature collection process: The Secretary of State in his April 23, 2008, letter states that as of that date the Supervisors of Elections have certified a total of 63,984 valid petition signatures to the Division of Elections in the Department of State.

5. The date of the election during which the sponsor is planning to submit the proposed amendment: The date is unknown; this office has been advised by the Department of State that the sponsor did not collect the requisite number of signatures by February 1, 2008, to place the initiative on the 2008 general election ballot. *See* Article XI, section 5(b), Florida Constitution.

6. The last possible date that the ballot for the target election can be printed in order to be ready for the election: Since the date of the election in which the sponsor is planning to submit the proposed amendment is unknown, this date is also unknown.

7. A statement identifying the date by which the Financial Impact Statement will be filed, if the Financial Impact Statement is not filed concurrently with the request: The Secretary of State has advised this office that a letter was sent to the Financial Impact Estimating Conference on April 23, 2008.

8. The names and complete mailing addresses of all of the parties who are to be served: Section 16.061(2), Florida Statutes, requires that a copy of the petition be provided to the Secretary of State and to the principal officer of the sponsor:

Mr. Thom Rumberger
Chair, FairDistrictsFlorida.org
704 West Madison Street
Tallahassee, Florida 32304-4324

Mr. Kurt S. Browning
Florida Department of State
R. A. Gray Building, Room 316
500 South Bronough Street
Tallahassee, Florida 32399-0250

As noted above, the name and address for the sponsor's attorney is:

Mr. Mark Herron
704 West Madison Street
Tallahassee, Florida 32304

While not required by law, this office provides copies of the petition to:

The Honorable Charlie Crist
Governor, State of Florida
The Capitol
400 South Monroe Street
Tallahassee, Florida 32399-0001

The Honorable Ken Pruitt
President, Florida Senate
Senate Office Building, Room 312
404 South Monroe Street
Tallahassee, Florida 32399-1100

The Honorable Marco Rubio
Speaker, Florida House of Representatives
420 The Capitol
402 South Monroe Street
Tallahassee, Florida 32399-1300

No other parties are known at this time.

The full text of the proposed amendment states:

Add a new Section 21 to Article III

Section 21. STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES

In establishing Legislative district boundaries:
(1) No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
(2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
(3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

The ballot title for the proposed amendment is "Standards For Legislature to Follow in Legislative Redistricting." The ballot summary for the proposed amendment states:

The Honorable R. Fred Lewis

> Legislative districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

Single Subject

Article XI, section 3, Florida Constitution, requires that a constitutional amendment proposed by citizens' initiative "embrace but one subject and matter directly connected therewith." As this Court stated in *Fine v. Firestone*, 448 So. 2d 984, 993 (Fla. 1984), this limitation protects the State Constitution from "precipitous" and "spasmodic" changes by preventing logrolling. Logrolling is "a practice whereby an amendment is proposed which contains unrelated provisions, some of which electors might wish to support, in order to get an otherwise disfavored provision passed." *Advisory Opinion to the Attorney General--Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans*, 902 So. 2d 763, 766 (Fla. 2005), quoting *Advisory Opinion to the Attorney General--Florida Transportation Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation System*, 769 So. 2d 367, 369 (Fla. 2000).

In addition, the single-subject rule "prevent[s] a single constitutional amendment from substantially altering or performing the functions of multiple aspects of government." *Advisory Opinion to the Attorney General--Florida Transportation Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation System, supra.* Thus, the single-subject rule ensures that the impact of a constitutional amendment proposed by a citizen's initiative is limited and accurately disclosed.

To comply with the single-subject requirement, an initiative must manifest a "logical and natural oneness of purpose." *Fine v. Firestone, supra.* This Court stated in *Advisory Opinion to the Attorney General--Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1020 (Fla. 1994), that "[t]o ascertain whether the necessary 'oneness of purpose' exists, we must consider whether the proposal affects separate functions of government and how the proposal affects other provisions of the constitution."

This Court in *Advisory Opinion to the Attorney General Re: Independent Nonpartisan Commission to Apportion Legislative and Congressional Districts Which Replaces Apportionment by Legislature,* 926 So. 2d 1218 (Fla. 2006), concluded that an initiative petition to amend the Constitution to create an apportionment and redistricting commission violated the single subject requirement by changing the standards applicable to creation of legislative districts and by creating a new commission to perform redistricting. The Court noted the language of the proposed amendment would have required the commission to divide the state into "single-member . . . districts of convenient contiguous territory." *Id.,* at 1226. The current Florida constitutional provision provides that legislative districts may be "of either contiguous, overlapping, or identical territory." Art. III, s. 16(a), Fla. Const. This "identical territory" provision allows the creation of multi-member districts. *See In re Apportionment Law Senate Joint Resolution No. 1305, 1972 Regular Session*, 263 So. 2d 797, 806-807 (Fla. 1972) which rejected challenges to multi-member districts in the legislative apportionment plan and citing the proceedings of the Florida Constitutional Revision Commission of 1966 which defeated a proposed amendment to change this language in Article III, Section 16, and require single-member districts.

The proposed amendment deals only with the standards to be used by the Legislature in legislative redistricting. However, the language of the proposed amendment does require that "districts shall consist of contiguous territory." As discussed by this court in *Advisory Opinion to the Attorney General Re: Independent Nonpartisan Commission to Apportion Legislative and Congressional Districts Which Replaces Apportionment by Legislature,* 926 So. 2d 1218 (Fla. 2006), this language would effect a change in the current legislative reapportionment scheme under Article III, section 16(a), Florida Constitution, by allowing challenges to multi-member districts as such districts would not comply with the standards established by the proposed amendment that all districts "shall consist of contiguous territory." No mention of how this proposal affects Article III, section 16(a), Florida Constitution, is made in the proposed amendment.

Therefore, I respectfully request this Honorable Court's opinion as to whether the constitutional amendment, proposed by initiative petition, complies with Article XI, section 3, Florida Constitution.

Ballot Title and Summary

Section 101.161(1), Florida Statutes, sets forth substantive and technical requirements for the ballot title and summary, stating in pertinent part:

> Whenever a constitutional amendment . . . is submitted to the vote of the people, the substance of such amendment . . . shall be printed in clear and unambiguous language on the ballot . . . . The wording of the substance of the amendment . . . shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. . . . The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.

This Court has stated that section 101.161(1), Florida Statutes, "requires that the ballot title and summary for a proposed constitutional amendment state in clear and unambiguous language the chief purpose of the measure. This is so that the voter will have notice of the issue contained in the amendment, will not be misled as to its purpose, and can cast an intelligent and informed ballot." *Advisory Opinion to the Attorney General re Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans*, 902 So. 2d at 770, quoting *In re Advisory Opinion to the Attorney General–Save Our Everglades*, 636 So. 2d 1336, 1341 (Fla. 1994). Thus, "the ballot [must] be fair and advise the voter sufficiently to enable him intelligently to cast his ballot." *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982), quoting, *Hill v. Milander*, 72 So. 2d 796, 798 (Fla. 1954). While the ballot title and summary must state in clear and unambiguous language the chief purpose of the measure, they need not explain every detail or ramification of the proposed amendment. *Carroll v. Firestone*, 497 So. 2d 1204, 1206 (Fla. 1986). The ballot, however, must give the voter fair notice of the decision he must make. *Askew v. Firestone, supra* at 155.

The initiative petition now under consideration establishes standards for the Florida Legislature to follow in legislative redistricting. The summary consists of 74 words and the ballot title does not exceed 15 words. The ballot title appears to advise the voter of the purpose of the amendment in clear and unambiguous language. However, nothing in the ballot summary for this proposed constitutional amendment advises the voters of the effect of a change from the current constitutional redistricting for "either contiguous, overlapping, or identical territory" as provided in Article III, section 16(a), Florida Constitution, and the standard of the proposed amendment that all districts "consist of contiguous territory." A constitutional amendment requiring single-member districts as the standard for legislative redistricting or apportionment would appear to be a significant change to the Constitution of which Florida voters should be advised pursuant to section 101.161(1), Florida Statutes, and the ballot summary for "Standards for Legislature to Follow in Legislative Redistricting" fails to do so.

Therefore, I respectfully request this Honorable Court's opinion as to whether the constitutional amendment's ballot title and summary comply with section 101.161, Florida Statutes.

Sincerely,

Bill McCollum
Attorney General

BM/tgh

Supreme Court of Florida

THURSDAY, MAY 29, 2008

CASE NO.: SC08-986

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES

Because of significant public and media interest in this matter, counsel for the parties are directed to hereafter file an original and eight copies of all pleadings filed with this Court. Per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all documents, including any attachments and appendices, in an electronic format as required by the provisions of that order. FOR GENERAL FILING INFORMATION AND ADMINISTRATIVE ORDER NO. AOSC04-84, PLEASE VISIT THE CLERK'S OFFICE WEBSITE AT http://www.floridasupremecourt.org/clerk/index.shtml.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

vm
Served:

EDWIN THOM RUMBERGER
HON. CHARLES J. CRIST, JR.
MARK HERRON
HON. KURT S. BROWNING
HON. MARCO ANTONIO RUBIO
HON. KEN PRUITT
HON. BILL MCCOLLUM

Supreme Court of Florida

WEDNESDAY, JUNE 4, 2008

CORRECTED ORDER
CASE NO.: SC08-986

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES

Bill McCollum, pursuant to the provisions of Article IV, section 10, Florida Constitution, and section 16.061, Florida Statutes, has requested this Court's opinion as to whether the text of the proposed amendment seeking to amend the Florida Constitution to establish standards for the Legislature to follow in legislative redistricting had met the registration, submission, and signature criteria set forth in section 15.21, Florida Statutes complies with Article XI, section 3, Florida Constitution, and whether the proposed ballot title and substance comply with section 101.161, Florida Statutes. The petition provides:

> Add a new Section 21 to Article III
>
> Section 21. STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES
>
> In establishing Legislative district boundaries:
> (1) No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
> (2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
> (3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

The ballot title and summary for the proposed amendment provides:

> STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE REDISTRICTING
>
> Legislative districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

Section 16.061, Florida Statutes, requires the Attorney General, within thirty days after receipt of the proposed amendment or revision to the State Constitution by initiative petition, to petition this Honorable Court for an advisory opinion regarding compliance of the text of the proposed amendment with Article XI, section 3, Florida Constitution, and compliance of the proposed ballot title and substance with section 101.161, Florida Statutes.

The full text of the Attorney General's letter is attached hereto as an exhibit and made a part thereof.

IT IS, THEREFORE, the order of the Court that interested parties shall file their briefs on or before July 1, 2008, and serve a copy thereof on the Attorney General. Answer briefs shall be filed on or before August 1, 2008. Please file an original and eight copies of all briefs. In addition to paper briefs, per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all briefs in an electronic format as required by the provisions of that order. Briefs submitted will be placed on the Court's Internet site (http://www.floridasupremecourt.org).

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

vm
Served:

EDWIN THOM RUMBERGER
HON. CHARLES J. CRIST, JR.
MARK HERRON
HON. KURT S. BROWNING
HON. MARCO ANTONIO RUBIO
HON. KEN PRUITT
HON. BILL MCCOLLUM

IN THE SUPREME COURT OF FLORIDA

Case No. SC08-986

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES

_____/

BRIEF

OF THE FLORIDA LEGISLATURE

IN OPPOSITION TO THE PETITION

JASON VAIL
General Counsel
Florida Senate
Florida Bar no. 298824

R. 402, Senate Office Building
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(850)487-5173

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Counsel for The Florida Legislature

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STATEMENT OF THE CASE AND FACTS

The Attorney General seeks review of a constitutional amendment brought by citizens' initiative, pursuant to Article 4, s. 10, Fla.Const.

The ballot title and summary read:

> STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE REDISTRICTING
>
> Legislative districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographic boundaries.

The text of the petitions reads:

> Add a new section 21 to Article III
>
> Section 21. STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES
>
> In establishing Legislative district boundaries:
>
> (1) No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

(2) Unless in compliance with the standards in this subsection, conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; districts shall, where feasible, utilize political and geographic boundaries.

(3) The order in which the standards within subsections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within the subsection.

The amendment's first paragraph would establish these independent, freestanding standards:

1. No plan or district shall be drawn with the intent to favor or disfavor a political party.

2. No plan or district shall be drawn with the intent to favor or disfavor an incumbent.

3. No plan or district shall be drawn with the intent or result of denying or abridging the equal opportunity of racial minorities to participate in the political process or to diminish their ability to elect representatives of their choice.

4. No plan or district shall be drawn with the intent or result of denying or abridging the equal opportunity of language minorities to participate in the political process or to diminish their ability to elect representatives of their choice.

5. Districts shall consist of contiguous territory.

The second paragraph would establish these independent, freestanding standards, which are to be met unless doing so conflicts with a requirement in paragraph 1 or with federal law:

6. Districts shall be as nearly equal in population as is practicable.

7. Districts shall be compact.

8. Districts shall, where feasible, utilize political and geographic boundaries.

Thus the proposed amendment creates a list of eight independent redistricting objectives to be achieved by any entity drafting an apportionment plan or any individual district.

The use of the passive voice in paragraph 1 — "No apportionment plan or district *shall be drawn*" — indicates that any entity drafting an apportionment plan or creating a district must comply with these criteria, including this Court acting pursuant to Article 3, s. 16, Fla.Const.

SUMMARY OF THE ARGUMENT

The proposed amendment violates the single subject rule.

The proposed amendment violates both facets of the Constitution's single subject rule. First, the amendment establishes eight independent objectives to be achieved in redistricting, depriving it of sufficient "oneness" to comply with the Constitution. These objectives, embodied in the amendment's standards, are disparate, unconnected goals so that the proposal constitutes impermissible logrolling.

Second, the amendment will substantially alter the constitutional roles of the Legislature and the judiciary. The amendment's vague, conflicting standards ensure that no legislatively drafted redistricting plan will escape judicial challenge. Furthermore, one goal of the amendment — to eliminate politics from legislative redistricting decisions — is humanly impossible to achieve. The combined force of these standards will inevitably compel the judiciary to make the ultimate decision — a result which is contrary to Article 3, s. 16, Fla.Const., and which potentially threatens the courts' independence.

In short, the amendment constitutes the kind of precipitous, spasmodic, cataclysmic governmental change that the single subject rule is intended to prevent.

The ballot summary is vague and misleading.

The ballot title is misleading because it says the amendment addresses standards the Legislature must follow in redistricting. However, the text of the amendment requires the Court, when imposing a redistricting plan pursuant to its constitutional authority, to obey those same standards as well.

The ballot summary is misleading because it misrepresents the amendment's goal and purposes. For instance, the summary clearly implies that the *effect* of districts or reapportionment plans cannot be to favor or disfavor anyone or any party. But under the amendment, proof of *intent* alone must be shown. In addition, the summary uses words inconsistent with those in the amendment, words that have very different meanings. For instance, the summary states districts should be drawn to respect city or county boundaries; the amendment's text instead refers to "political boundaries," a far broader term. Some terms used in the summary are vague and misleading. Finally, the summary fails to identify constitutional provisions that are substantially affected.

STANDARD OF REVIEW

> The overall standard of review for the proposed amendment and the ballot title and summary are the same. In Advisory Opinion to the Attorney General re Amendment to Bar Government from Treating People Differently Based on Race in Public Education, 778 So.2d 888 (Fla. 2000), this Court summarized its standard of review in initiative petition cases as follows:

> The Court's inquiry, when determining the validity of initiative petitions, is limited to two legal issues: whether the petition satisfies the single-subject requirement of article XI, section 3, Florida Constitution, and whether the ballot titles and summaries are printed in clear and unambiguous language pursuant to section 101.161, Florida Statutes (1999). In order for the Court to invalidate a proposed amendment, the record must show that the proposal is clearly and conclusively defective on either ground. In determining the propriety of the initiative petitions, the Court does not review the merits of the proposed amendments.

Advisory Opinion to the Atty. Gen. re: Protect People, Especially Youth, from Addiction, Disease, and Other Health Hazards of Using Tobacco, 926 So.2d 1186, 1190-1191 (Fla. 2006).

Article 11, s. 3, Fla.Const. states than an amendment proposed by citizen initiative can only "embrace but one subject and matter directly connected therewith."

ARGUMENT

I. The proposed amendment violates the single subject rule.

The proposed amendment violates both facets of the Constitution's single subject rule. First, the amendment establishes eight independent objectives to be achieved in redistricting, depriving it of sufficient "oneness" to comply with the Constitution. These objectives, embodied in the amendment's standards, are disparate, unconnected goals so that the proposal constitutes impermissible logrolling.

Second, the amendment will substantially alter the constitutional roles of the Legislature and the judiciary. The amendment's vague, conflicting standards ensure that no legislatively drafted redistricting plan will escape judicial challenge. Furthermore, one goal of the amendment — to eliminate politics from legislative redistricting decisions — is humanly impossible to achieve. The combined force of these standards will inevitably compel the judiciary to make the ultimate decision — a result which is contrary to Article 3, s. 16, Fla.Const., and which potentially threatens the courts' independence.

In short, the amendment constitutes the kind of precipitous, spasmodic, cataclysmic governmental change that the single subject rule is intended to prevent. Advisory Opinion to the Atty. Gen. Re: Protect People, Especially Youth,

from Addiction, Disease, and Other Health Hazards of Using Tobacco, 926 So.2d 1186 (Fla. 2006); Advisory Opinion to the Attorney General Re: Independent Nonpartisan Commission to Apportion Legislature and Congressional Districts Which Replaces Apportionment by Legislature, 926 So.2d 1218, 1224 (Fla. 2006).

A. The amendment addresses separate purposes and constitutes logrolling.

"Logrolling is 'a practice whereby an amendment is proposed which contains unrelated provisions, some of which electors might wish to support, in order to get an otherwise disfavored provision passed.'" Hazards of Using Tobacco, 926 So.2d at 1190. The single subject rule prohibits initiative amendments that contain such unrelated provisions. Id.; Apportionment by Legislature, 926 So.2d at 1224-1225; In re Advisory Opinion to the Attorney General — Save our Everglades, 636 So.2d 1336, 1339-1340 (Fla. 1994).

To determine if a measure constitutes impermissible logrolling, the court examines the text for whether it exhibits "oneness of purpose." Save our Everglades, 636 So.2d 1340; In re Advisory Opinion to the Attorney General — Restricts Laws Related to Discrimination, 632 So.2d 1018, 1020 (Fla. 1994) ("to comply with the single-subject requirement, the proposed amendment must manifest a 'logical and natural oneness of purpose.'"). The proposal must be

complete within itself relating to one subject. Adams v. Gunter, 238 So.2d 824, 831 (Fla. 1970). "'[U]nity of object and plan is the universal test' . . . A proposed amendment meets this test when it 'may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme. [internal citations omitted].'" 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, 480-481 (Fla. 2007). An amendment's parts must be functionally and facially unified, so that any one aspect is a necessary component of a single dominant plan, and is logically related to the amendment's purpose. Advisory Opinion to the Attorney General re Local Trustees, 819 So.2d 725, 730 (Fla. 2002); Advisory Opinion to the Attorney General re Funding of Embryonic Stem Cell Research, 959 So.2d 195, 197 (Fla. 2007).

Proposals that force voters to choose "in the 'all or nothing' fashion" when they might disagree with unrelated parts of an amendment violate the one subject rule. Independent Nonpartisan Commission to Apportion Legislative and Congressional Districts, 926 So.2d at 1226. Save Our Everglades, 636 So.2d at 1341.[1]

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[1] "One objective — to restore the Everglades — is politically fashionable, while the other — to compel the sugar industry to fund the restoration — is more problematic. Many voters sympathetic to restoring the Everglades might be

The proposal at issue today fails these fundamental tests. The various standards in the proposal are independent and freestanding. They have nothing to do with one another and do not work together toward a common goal. In fact, each standard establishes an independent goal by itself. Moreover, as we will argue in more detail below, some standards are in tension with each other to the point that compliance with one will force noncompliance with another. By their nature, these elements are not functionally and facially unified so that each aspect is a necessary component of a single dominant plan. In reality, they are not unified in any meaningful sense; they are just a list of unrelated standards aiming toward unrelated targets. A voter easily could favor one standard and reject another. But because they are wrapped in a single package, the voter must make the classic "all or nothing" judgment which this Court has repeatedly condemned.

These disparate elements are:

- No plan or district shall be drawn with the intent to favor or disfavor a political party.
- No plan or district shall be drawn with the intent to favor or disfavor an incumbent.

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antithetical to forcing the sugar industry to pay for the cleanup by itself, and yet those voters would be compelled to choose all or nothing."

- No plan or district shall be drawn with the intent or result of denying or abridging the equal opportunity of racial minorities to participate in the political process or to diminish their ability to elect representatives of their choice.
- No plan or district shall be drawn with the intent or result of denying or abridging the equal opportunity of language minorities to participate in the political process or to diminish their ability to elect representatives of their choice.
- Districts shall consist of contiguous territory.

A district also must meet another set of standards unless compliance with them conflicts with the requirements listed above. This second set says a district:

- shall be as nearly equal in population as is practicable.
- shall be compact.
- shall, where feasible, utilize political and geographic boundaries.

The most obvious defect is that the proposal does not have the necessary oneness of purpose. The fact that the amendment's drafters are willing to sacrifice the second set of standards to satisfy the first set shows that even they realized that the amendment's standards were in conflict. That one set has to be subordinated to

the other set demonstrates on its face that there are separate and conflicting goals set out by the different standards.

In fact, the proposal has eight unrelated purposes, because each standard establishes its own goal. Even if one struggles to find commonality among the standards, five separate objectives are apparent. First, the amendment strives for political neutrality or balance when it prohibits districts favoring any party or an incumbent. Second, it aims to eliminate two types of discrimination. Third, it seeks to dictate districts' geography by requiring contiguity, compactness and conformity with political and geographic boundaries. Fourth, it hopes to ensure equal populations among districts. Fifth, the contiguity requirement in paragraph 1 also would require single-member districts.[2]

No matter how one parses the objectives, whether by eight parts or five, each stands alone and none works together with, nor buttresses another, as is to be expected in a proposal whose elements have "a natural relation and connection as component parts or aspects of a single dominant plan or scheme." 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, 478 (Fla.

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[2] The Attorney General appears to agree with this view. See Attorney General's letter to the Chief Justice dated June 18, 2008.

2007); Advisory Opinion to the Attorney General re Independent Nonpartisan Commission to Apportion Legislative and Congressional Districts Which Replaces Apportionment by Legislature, 926 So.2d 1218 (Fla. 2006) (proposal invalid because it had two purposes, creation of an apportionment commission and establishment of apportionment standards); In re Advisory Opinion to the Attorney General — Save Our Everglades, 636 So.2d 1336, 1341 (Fla. 1994) (duality of purposes in requiring restoration of the Everglades at the expense of the sugar industry).

Because the amendment is merely a list of standards or classifications (each with a separate goal or objective), it is more like the amendment at issue in In re Advisory Opinion to the Attorney General — Restricts Laws Related to Discrimination, 632 So.2d 1018 (Fla. 1994), than any other proposal to come before this Court. In Laws Related to Discrimination, the proposed amendment would have altered Article 1, s. 10, Fla.Const., to prohibit the state and any other units of Florida government from enacting or adopting any law, ordinance or rule

> regarding discrimination against persons which creates, establishes or recognizes any right, privilege or protection for any person based upon any characteristic, trait, status, or condition other than race, color, religion, sex, national origin, age, handicap, ethnic background, marital status, or familial status.

Id. at 1019. This Court concluded that the amendment constituted impermissible logrolling, in violation of the single subject rule, "because it enumerates ten classifications of people that would be entitled to protection from discrimination if the amendment were passed. The voter is essentially being asked to give one 'yes' or 'no' answer to a proposal that actually asks ten questions. . . . Requiring voters to choose which classifications they feel most strongly about, and then requiring them to cast an all or nothing vote on the classifications listed in the amendment, defies the purpose of the single-subject limitation." Id. at 1020.

The current proposal is defective for the same reason. It presents the voter with eight independent standards for what is desirable in writing a redistricting plan, none of which have any more to do with the others than the 10 standards listed in Laws Related to Discrimination. For instance, whether a redistricting plan or district is politically neutral has nothing to do with whether the plan discriminates against minorities or provides for contiguous districts. Thus, the proposal requires voters "to choose which classifications they feel most strongly about," but also compels them to vote all-or-nothing for the whole package of standards, even if they agree with some and disagree with others. For instance, a voter may believe strongly about prohibiting racial discrimination in redistricting, but could have reservations about the vague category "language minority."

Similarly, a voter may like the notion that districts should be drawn so as not to favor a particular party, but be less enthusiastic about a prohibition against favoring incumbents. Yet either way, the voter must accept the bitter with the sweet. See also Advisory Opinion to the Attorney General re Independent Nonpartisan Commission to Apportion Legislative and Congressional Districts Which Replaces Apportionment by Legislature, 926 So.2d 1218, 1226 (Fla. 2006) (where the court regarded a standard requiring the creation of single-member districts, which this amendment again attempts to require, as a stand alone goal).

The Court addressed the permissibility of multiple classifications or standards again in Advisory Opinion to the Attorney General re Amendment to Bar Government from Treating People Differently Based on Race in Public Education, 778 So.2d 888, 892-893 (Fla. 2000), where it held an initiative petition violated the single subject rule because it contained three separate classifications.[3] See also Fine v. Firestone, 448 So.2d 984, 991 (Fla. 1984) (taxes and user fees created separate classifications or subjects).

Furthermore, the amendment subordinates some goals to others. A voter very well could disagree with that setting of priorities.

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[3] Education, employment and contracting. Id. at 893.

Because of these deficiencies, the amendment involves impermissible logrolling. This Court should bar the amendment from the ballot.

B. The amendment substantially alters the functions of multiple branches of government.

A proposal that substantially alters the functions of more than one branch or level of government violates the one subject rule. 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, 478 (Fla. 2007); Advisory Opinion to the Attorney General re Requirement for Adequate Public Education Funding, 703 So.2d 446, 449 (Fla. 1997); In re Advisory Opinion to the Attorney General — Save Our Everglades, 636 So.2d 1336, 1340 (Fla. 1994). A proposal that substantially affects more than one constitutional provision is also impermissible. Adequate Public Education Funding, 703 So.2d at 449-450. Furthermore, a proposal that substantially affects a constitutional provision must advise voters of this fact to avoid single subject problems. Race in Public Education, 778 So.2d at 894-895.[4]

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[4] Although one would think this point goes to the adequacy of the summary, the court in Race in Public Education saw the failing as both a single subject violation and a summary defect. Id. at 894-895, 898.

It cannot be disputed that the proposal substantially alters the Legislature's power to establish appropriate legislative districts: it substantially constrains the Legislature's broad discretion under Article 3, s. 16, Fla.Const. (within prevailing constitutional limits). See e.g., In re Constitutionality of House Joint Resolution 1987, 817 So.2d 819, 832 (Fla. 2002) ("The only standards that the Legislature is constitutionally required to follow in redistricting are the equal protection standard of 'one-person, one-vote,' the Florida Constitutional requirement that legislative districts be 'either contiguous, overlapping, or identical territory,' and the requirement not to discriminate against any racial or language minority or political group;" the court went on to say that standards identical to those proposed in the amendment before the Court today were not constitutionally required.); Independent Nonpartisan Commission to Apportion Legislative and Congressional Districts, 926 So.2d at 1227.

What is not so obvious to the casual reader is how clearly the proposal's practical effect divests the Legislature of its Article 3, s. 16 responsibilities and transfers them to the judiciary. The most troublesome provisions are those requiring the intent behind a plan or district to be politically neutral, neither favoring nor disfavoring any party or incumbent. This objective is humanly impossible to achieve. As the U.S. Supreme Court has observed, political

neutrality simply cannot be achieved in any practical way because politics and political considerations inevitably play major roles in redistricting decisions:

> Indeed, quite aside from the anecdotal evidence, the shape of the House and Senate Districts, and the alleged disregard for political boundaries, we think it most likely that whenever a legislature redistricts, those responsible for the legislation will know the likely political composition of the new districts and will have a prediction as to whether a particular district is a safe one for a Democratic or Republican candidate or is a competitive district that either candidate might win. . . '*it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another.* It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. *District lines are rarely neutral phenomena.* They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. *The reality is that districting inevitably has and is intended to have substantial political consequences.*'
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> * * *
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> '*The key concept to grasp is that there are no neutral lines for legislative districts ... every line drawn aligns partisans and interest blocs in a particular way different from the alignment that would result from putting the line in some other place.*" Dixon, Fair Criteria and Procedures for Establishing Legislative Districts 7-8, in Representation and Redistricting Issues (B. Grofman, A. Lijphart, R. McKay, & H. Scarrow eds. 1982).
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> *As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.*

Davis v. Bandemer, 478 U.S. 109, 128-129 (1986) (emphasis added). See also Vieth v. Jubelirer, 541 U.S. 267, 281 , 285-286 (2004).[5]

Because — by its very nature — legislative redistricting cannot be politically neutral or devoid of political intentions, any plan propounded by the Legislature necessarily will be subject to challenge in the Supreme Court pursuant to Article 3, s. 16. See Vieth v. Jubelirer, 541 U.S. at 286.[6] See also, Nadler v. Schwarzenegger, 137 Cal.App.4th 1327, 41 Cal.Rptr.3d 92, 99 (Cal.App. 3 Dist. 2006).[7]

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[5] Quoting Bandemer; and also making the point that: "The Constitution clearly contemplates districting by political entities, see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics. See Miller, supra, at 914, 115 S.Ct. 2475 ('[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition ...'); Shaw, supra, at 662, 113 S.Ct. 2816 (White, J., dissenting) ('[D]istricting inevitably is the expression of interest group politics ...'); Gaffney v. Cummings, 412 U.S. 735, 753, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973) ('The reality is that districting inevitably has and is intended to have substantial political consequences')."

[6] "Moreover, the fact that partisan districting is a lawful and common practice means that there is almost *always* room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation . . ." Emphasis the court's.

[7] "So, too, has the United States Supreme Court recognized that the difficulty of reapportionment requires that state legislatures be allowed the discretion necessary to balance competing interests. (Miller v. Johnson, supra, 515 U.S. at p. 915, 115 S.Ct. at p. 2487, 132 L.Ed.2d at p. 779.) Courts should not be 'second-guessing *what has consistently been referred to as a political task for the legislature*, a task that should not be monitored too closely [by the courts].'

Likewise, any plan or district adopted pursuant to the proposal *necessarily will be subject to judicial nullification*. Because the Legislature will be unable to draft a plan or create all districts in compliance with paragraph 1 of the proposed amendment, the Supreme Court will be tasked with the constitutional obligation pursuant to Article 3, ss. 16(b) and (f) to conduct reapportionment.[8] This effect is certain, not speculative. See e.g., In re Advisory Opinion to Atty. Gen. English--The Official Language, 520 So.2d 11, 13 (Fla. 1988) (speculative impact not enough by itself to create a single subject problem).

This Court will find the task of eliminating political considerations as impossible as it is for the Legislature. See Vieth v. Jubelier, where a plurality of justices held that gerrymandering cases are nonjusticiable because of the lack of any meaningful standards. Courts attempting politics-free plans have been unable to avoid them. In fact, judges find themselves facing the fact that no substantive standards exist for such an effort, and the resulting districts end up favoring one

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(Davis v. Bandemer, supra, 478 U.S. at p. 133, 106 S.Ct. at p. 2810, 92 L.Ed.2d at p. 106.)." Emphasis added.

[8] Some of the standards in the proposal call for intensive fact-finding (such as gerrymandering and protecting racial and language minorities) which this Court has said properly belong in the circuit court in the first instance. See In re Constituionality of House Joint Resolution 1987, 817 So.2d at 829. Nonetheless, the courts, and more particularly this Court, will be the final decision-maker in apportionment matters if the proposal passes.

party or individual over another anyway. Even when judges attempt to avoid political considerations, the question arises whether it is humanly possible to do so. See e.g., Henderson v. Perry, 399 F.Supp.2d 756, 768 (E.D.Tex. 2005)[9]. Because of this inherent problem, the courts will be subject to accusations that they are partisan rather than neutral bodies, putting their credibility and independence at risk.

The dramatic shift of responsibility to the courts upsets the scheme established in Article 3, s. 16, Fla.Const., to provide for judicial review of

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[9] "The map drawn by this court in 2001 perpetuated much of this gerrymander. It did so because this court was persuaded that it could not achieve 'fairness' to political parties without some substantive measure of what is 'fair.' Simply undoing the work of one political party for the benefit of another would have forced this court to make decisions that could not be defended against charges of partisan decision-making — again, for the lack of a substantive standard. As the panel explained, it would follow only 'neutral' redistricting standards. Once the panel had left majority-minority districts in place and followed neutral principles traditionally used in Texas — such as placing the two gained seats in the areas of growth that produced them, following county lines, avoiding the pairing of incumbents and the splitting of voting precincts, and undoing transparent offsetting movements of the same number of residents between districts — the drawing ceased, leaving the map free of further change except to conform it to one-person, one-vote. Make no mistake, this undertaking, while shorn of partisan motive, had political impact in the placement of every line. The results of this court's plan did ameliorate the gerrymander and placed the two districts gained by Texas in the census count; however, doing more necessarily would have taken the court into each judge's own notion of fairness. The practical effect of this effort was to leave the 1991 Democratic Party gerrymander largely in place as a 'legal' plan."

legislative redistricting plans. Not only does it shift the burden to this Court in the final instance, but it devolves the duty from this Court, constitutionally tasked with such review under ss. 16(b), (c), (e) and (f), to the trial courts. This is the inevitable result of the fact the amendment prohibits gerrymandering and requires extraordinary steps to protect minority voting rights. Challenges in both areas require extensive fact-finding that this Court has said is beyond its capability given the review deadlines in s. 16. See In re Constitutionality of House Joint Resolution 1987, 817 So.2d 819, 829-831, esp. n. 15 (Fla. 2002). In short, the amendment renders those review deadlines in ss. 16(b), (c), (e) and (f) meaningless — an effect not pointed out in the summary.

Thus, the amendment in fact substantially affects two branches of government, which initiative amendments cannot do, 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, 478 (Fla. 2007), because not only does the amendment throw to the courts final redistricting decisions but substantially broadens the courts' scope of review, which presently is limited. In re Constitutionality of House Joint Resolution 25E, 863 So.2d 1176, 1178 (Fla. 2003).

Moreover, some requirements of paragraph 1 are so at odds that one provision cannot be obeyed without violating another. For instance, racial minorities often favor a political party or candidate. Thornburg v. Gingles, 478 U.S. 30, 68 (1986). Thus drawing a district or creating a plan to facilitate minority participation in the political process or enhancing their ability "to elect representatives of their choice" necessarily collides with the requirement that the intent behind districts be party neutral and not favor or disfavor an incumbent. Inevitably, the court will be forced to sort things out and order adoption of a judicially-created plan.

In addition, an amendment may not substantially affect more than one constitutional provision. Adequate Public Education Funding, 703 So.2d at 449-450. Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers, 705 So.2d 563, 566 n. 1 (Fla. 1998) (violation of single subject rule when amendment affected rights of privacy and collective bargaining). Here, Article 3, s. 16 is substantially affected. It already contains standards for redistricting which would be substantially altered. The equal protection clause in Article 1, s. 2 also is substantially affected. Currently, the equal protection clause does not require equality of population; some deviation is allowed. See In re Constitutionality of House Joint Resolution 25E, 863 So.2d 1176, 1178-1179 (Fla.

2003). See also, In re Constitutionality of House Joint Resolution 1987, 817 So.2d at 826 ("the goal of achieving population equality among districts is not paramount"). Yet the amendment appears to prohibit even the amount of population variation currently allowed under the equal protection clause. Moreover, the amendment permits gerrymandering claims, which seem to be foreclosed now under the equal protection clause. Vieth v. Jubelirer, 541 U.S. 267 (2004) (plurality opinion). Thus, the proposal substantially alters the constitutional test so that the standards under the equal protection clause no longer would apply.

Finally, nothing in the proposal announces the intention to radically circumscribe the Legislature's discretion pursuant to Article 3, s. 16. As Race in Public Education, 778 So.2d at 894-895, points out, the failure to identify substantially affected constitutional provisions is a single subject violation. In addition, constant litigation and the uncertainty it brings would disrupt both the electoral and legislative processes so that Article 3, ss. 2, 3, 4 and 7, Fla.Const., would be substantially adversely affected. See e.g., Dean v. Leake, --- F.Supp.2d ----, 2008 WL 728543 *9 (E.D.N.C. 2008). Yet the proposal does not identify Article 1, s. 2; and Article 3, ss. 2, 3, 4 and 7.

For these reasons, the proposal violates the single subject provision of Article 11, s. 3, Fla.Const. Therefore, the proposed amendment presents the

precipitous, cataclysmic change this Court has abhorred in the past. Consequently, the Court should deny it a place on the ballot.

II. The ballot title and summary are defective.

The ballot title is misleading because it says the amendment addresses standards the Legislature must follow in redistricting. However, the text of the amendment requires the Court, when imposing a redistricting plan pursuant to its constitutional authority, to obey those same standards as well.

The ballot summary is misleading because it misrepresents the amendment's goal and purposes. For instance, the summary clearly implies that the *effect* of districts or reapportionment plans cannot be to favor or disfavor anyone or any party. But under the amendment, proof of *intent* alone must be shown. In addition, the summary uses words inconsistent to those in the amendment, words that have very different meanings. Some terms used in the summary are vague and misleading. Finally, the summary fails to identify constitutional provisions that are substantially affected.

The Court reviews the title and ballot summary of initiative petitions for compliance with s. 101.161(1), Fla.Stat., which requires "the substance of such

amendment or other public measure shall be printed in clear and unambiguous language on the ballot."

This Court has said that the "clear and unambiguous" command in s. 101.161(1) requires two things. First, the ballot title and summary must describe the amendment's chief purpose, which is the specific thing the amendment does or is intended to do — or more to the point, the legal effect of the amendment. Advisory Opinion to the Attorney General re Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans, 902 So.2d 763, 771 (Fla. 2005). The summary should not contain editorial comment, but rather should be a dispassionate, informative and accurate synopsis. Id. In short, the summary should be a fully informative analysis of the amendment's meaning and effect and should not "fly under false colors" or "hide the ball." In re Advisory Opinion to the Attorney General — Save Our Everglades, 636 So.2d 1336, 1342 (Fla. 1994); Advisory Opinion to the Attorney General re Additional Homestead Tax Exemption, 880 So.2d 646, 653 (Fla. 2004); Armstrong v. Harris, 773 So.2d 7, 17-18 (Fla. 2000). However, the summary need not detail every ramification of an amendment. Advisory Opinion to the Atty. Gen. Re: Protect People, Especially Youth, from Addiction, Disease, and Other Health Hazards of Using Tobacco, 926 So.2d 1186 (Fla. 2006).

As part of this requirement, the Court has held that an amendment summary must identify substantially affected constitutional provisions in order for the public to fully comprehend the proposed changes. Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers, 705 So.2d 563, 565-566 (Fla. 1998) ("it is imperative that an initiative identify the provisions of the constitution substantially affected by the proposed amendment in order for the public to fully comprehend the contemplated changes and to ensure that the initiative's effect on other unnamed provisions is not left unresolved and open to various interpretations."). Identification is unnecessary if the impact is potential. Advisory Opinion to the Attorney General re Local Trustees, 819 So.2d 725, 731 (Fla. 2002).

Second, the title and summary should not be vague, ambiguous or misleading. Right of Citizens to Choose Health Care Providers, 705 So.2d at 566; Advisory Opinion to the Attorney General re Amend to Bar Government from Treating People Differently Based on Race in Public Education, 778 So.2d 888, 899 (Fla. 2001) ("ballot summaries which do not adequately define terms, use inconsistent terminology, fail to mention constitutional provisions that are affected, and do not adequately describe the general operation of the proposed amendment must be invalidated.").

The Ballot Title

The ballot title is misleading because it describes the amendment as "STANDARDS FOR *LEGISLATURE* TO FOLLOW IN *LEGISLATIVE* REDISTRICTING." (Emphasis added.) But the amendment's text does not say this. Certainly it would require the Legislature to follow its standards — but its plain language would also require this Court to comply with them. The text of the amendment says "Legislative districts or districting plans may not *be drawn* . . ." (Emphasis added.) The use of the passive voice leaves unclear the identity of the actor doing the drawing (the main literary crime of the passive voice). The obvious intent of this language, then, is that anyone drafting and imposing a redistricting plan must comply with the proposed amendment. Because this Court has the authority to impose a redistricting plan under Article 3, ss. 16(b) and (f), it defies common sense to suppose that the Legislature must comply with the amendment but the Court can ignore it.

The amendment's title (as distinguished from the ballot summary title) supports the notion that the amendment is intended to apply to this Court as well. The title in the text identifies the amendment as "STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES." There is no limitation to the Legislature here.

Thus it is clear that the amendment is drafted to apply both to the Court and to the Legislature. Consequently, the title is grossly misleading.

The Ballot Summary

The ballot summary is misleading in several places. First, the summary says, "Legislative districts or districting plans shall not be drawn to favor or disfavor an incumbent or political party." The amendment's text is significantly different: it says "shall not be drawn with the *intent* to favor or disfavor." The summary clearly implies that the *effect* of districts or reapportionment plans cannot be to favor or disfavor anyone or any party. But under the amendment, proof of *intent* alone must be shown. The two are not the same. Relying on the summary, the voter will undoubtedly think he or she is voting to prohibit redistricting plans *whose effect* is to favor a party or incumbent. However, the amendment itself theoretically would allow districts that favor a party or incumbent so long as the lines were drawn without intending that result. Such misleading discrepancies between the summary and the amendment's text warrant exclusion from the ballot. Right of Citizens to Choose Health Care Providers, 705 So.2d at 566; Race in Public Education, 778 So.2d at 897; Save Our Everglades, 636 So.2d at 1341.

Misleading as to the effect of the change is also impermissible. Advisory Opinion to the Attorney General re Independent Nonpartisan Commission to

Apportion Legislative and Congressional Districts Which Replaces Apportionment by Legislature, 926 So.2d 1218, 1228-1229 (Fla. 2006) (amendment suggested nonpartisan selection of apportionment commission when appointment was in fact highly partisan); Save Our Everglades, 636 So.2d at 1341 (claiming that Everglades needed to be saved in the summary where the text addressed restoring the Everglades); Advisory Opinion to the Attorney General re People's Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects, 699 So.2d 1304, 1311 (Fla. 1997) (misleading because text eliminated 10 millage property tax cap; summary silent). Here, the summary is misleading because one purpose of the amendment is to eliminate political partisanship from the redistricting process, an effort we have already seen is humanly impossible, and which will result in the Court writing the plans rather than the Legislature. The summary does not inform the voters of this significant, inevitable effect.

Nor does it inform the voter that the amendment substantially diminishes the Legislature's constitutional redistricting powers. The Legislature has considerable discretion in establishing district boundaries that can take political concerns into consideration. Vieth v. Jubelirer. Moreover, the courts permit some variation in district populations, which it appears the proposal is intended to eliminate,

although that is not clear. See e.g., Moore v. Itawamba County, Miss., 431 F.3d 257 (5th Cir. 2005) (population deviations of less than 10 percent do not state a prima facie case for violation of the one-person/one-vote rule).

Second, the ballot summary misleads as to the substance of the proposed amendment because terms in the summary are different from those used in the text of the amendment. For example, the summary says that district boundaries "where feasible must make use of existing city, county and geographical boundaries." The amendment, however, does not say this. Rather, it says districts must use "existing *political* and geographical boundaries." "Political boundaries" is a broader term than "city/county" boundaries. For instance, a similar term in the Florida Statutes, "political subdivision," is defined to "include counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all other districts in this state." Sec. 1.01(8), Fla.Stat. Likewise, Florida courts have viewed "political boundary" to mean more than a city/county boundary:

> Political boundaries are artificial divisions that may and sometimes should be transcended when planning for the most beneficial use of our state's water resources. The borders of water management districts are also artificial divisions, and the area on either side of the boundaries of neighboring districts are in the same geographical region.

Osceola County v. St. Johns River Water Management Dist., 486 So.2d 616, 619 (Fla. 5th DCA 1986) (concerning the boundaries of a water management district); *approved* Osceola County v. St. Johns River Water Management Dist., 504 So.2d 385 (Fla. 1987). Courts in other states also have viewed "political boundary" as meaning more than city/county boundaries. Springfield Utility Bd. v. Emerald People's Utility Dist., 125 P.3d 740 (Or. 2005) ("people's utility district," an entity charged with the provision of electricity, had political boundaries); Bexar Metropolitan Water Dist. v. City of Bulverde, 234 S.W.3d 126 (Tex. App. 2007) (water management district). Florida has many special districts whose borders would constitute "political boundaries": voting precinctss, water management districts, fire control districts, children's services districts, community development districts, independent special districts, regional special districts, neighborhood preservation and enhancement districts, health care districts, and so on. See ss. 101.001, 125.901, 163.524, 189.404, 190.004, 191.014, 373.069, Fla.Stat. It follows that the summary's use of "city/county" boundaries rather than "political boundaries" is inaccurate and therefore misleading.

The use of inconsistent terms which have different meanings is inherently misleading. See People's Property Rights Amendments , 699 So.2d at 1308 (summary used the word "owner," text used the word "people"); Race in Public

Education, 778 So.2d at 897; Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers, 705 So.2d 563, 566 (Fla. 1998) (summary said "citizens" while text said "natural person").

Here, a voter reading the summary will certainly believe that he is voting for a requirement that legislative districts track city or county lines. But that is a bait-and-switch because the term "political boundary" also encompasses lines of a very different nature.

Third, the summary is misleading because it relies on vague, ambiguous terms. "Language minority" is one such term. It may have a legal definition well known to some specialty lawyers, but it is unlikely to be readily understood by the lay voter. See Polish American Congress v. City of Chicago, 211 F.Supp.2d 1098, 1107 (N.D. Ill. 2002), where the plaintiffs reasonably thought that they constituted a language minority only to find that they fell outside the very narrow statutory definition of "language minority" in 42 U.S.C. s. 1973l(c)(3). In such circumstances, the failure to define the term is a substantial, fatal defect. See e.g., Race in Public Education, 778 So.2d at 899 (failure to define legal term "bona fide qualification based on sex," voters "not informed of its legal significance. . . . voters would undoubtedly rely on their own conceptions of what constitutes a bona fide qualification," which rendered the summary fatally vague); People's Property

Rights Amendments , 699 So.2d at 1311 ("the absence of a more complete definition of the term 'exemption' is misleading because the voting public would not readily understand the distinction between an exemption and immunity from taxation").

Fourth, the summary is misleading because it gives the impression that no law exists addressing discrimination in voting. Such negative implications in ballot summaries render the summary defective. See Advisory Opinion to the Attorney General, re Amendment to Bar Government from Treating People Differently Based on Race in Public Education, 778 So.2d 888, 898 (Fla.. 2000) (ballot title "defective because of the misleading negative implication that no such constitutional provision addressing differential treatment currently exists, and for the negative implication that the government is presently practicing discrimination"). Here, the summary implies there is no constitutional provision preventing discrimination against racial or language minorities. However, there is, Article 1, s. 2, Fla.Const. Furthermore, federal law implementing Fifteenth Amendment and the equal protection clause protects these classes as well. See In re Constitutionality of Senate Joint Resolution 2G, 597 So.2d 276, 280-282 (Fla. 1992) (explaining the purpose and impact of s. 2 of the federal Voting Rights Act);

Riley v. Kennedy, 128 S.Ct. 1970 (2008) (discussing s. 5 of the Voting Rights Act); 42 U.S.C. s. 1973b(f)(2), addressing language minorities and voting.[10]

Fifth, the summary is misleading because it varies in a material way from the text of the amendment. The summary says, "Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process ***and*** elect representatives of their choice." The amendment's text is slightly, but significantly, different: "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process ***or*** to diminish their ability to elect representatives of their choice." The summary tracks the language of 42 U.S.C. s. 1973(b), which gives the impression that the drafters may intend to import the standards of that statute into the Florida Constitution. The effect of that language is well known. See e.g., Thornburg v. Gingles, 478 U.S. 30 (1986). So the average voter might think that he is simply voting to conform the state Constitution with federal law. However, the amendment's text varies in a way that appears intended to do something broader, as was the case in Armstrong v. Harris, 773 So.2d 7, 17-

[10] "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group."

18 (Fla. 2000), where the use of "or" in the state constitutional phrase "cruel or unusual punishment" was found to confer broader rights than the contemplated change, which read "cruel and unusual." Here however, the voter is not told in the summary of any intention either to conform the state Constitution to federal law — or to confer even broader rights than already exist. This failure to inform the voter of such a crucial purpose is a significant defect in the summary.

Sixth, the summary fails to identify the constitutional provisions substantially and certainly affected by this amendment. As pointed about above, the amendment substantially and certainly affects the equal protection clause in Article 1, s. 2 and Article 3, ss. 2, 3, 4, 7 and 16, Fla.Const. But the summary fails to point this out.

Seventh, the amendment may be intended to nullify existing language in Article 3, s. 16(a). Paragraph 1 of the amendment requires districts to be "contiguous." This command may be intended to nullify criteria already in Article 3, s. 16(a), which allow districts to be "either contiguous, overlapping or identical territory." This Court has interpreted the phrase "overlapping or identical" to allow for multi-member districts. Advisory Opinion to the Attorney General re Independent Nonpartisan Commission to Apportion Legislative and Congressional Districts Which Replaces Apportionment by Legislature, 926 So.2d 1218, 1225-

1226 (Fla. 2006). Thus, the new language may require single-member districts. Yet if this is one goal of the amendment, the summary fails to point out this substantial change.

For these reasons, the ballot summary is vague and misleading and fails adequately to inform voters of the chief purpose of the amendment.

CONCLUSION

The petition fails the one-subject requirement and contains a defective ballot title and summary. Consequently, the court should order it stricken from the ballot.

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Jason Vail

CERTIFICATE OF TYPE SIZE AND STYLE

The brief is printed in 14 point Times New Roman.

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Jason Vail

IN THE SUPREME COURT OF FLORIDA

Case No. SC08-986

ADVISORY OPINION TO THE ATTORNEY GENERAL
RE: STANDARDS FOR ESTABLISHING LEGISLATIVE
DISTRICT BOUNDARIES

INITIAL BRIEF OF SPONSOR

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STATEMENT OF THE CASE AND FACTS

On April 23, 2008 the Division of Elections submitted to the Attorney General an amendment to the Florida Constitution proposed by initiative petition sponsored by FairDistrictsFlorida.org ("the Redistricting Amendment"). The Attorney General sent the Redistricting Amendment to this Court on May 29, 2008. The substance of the Redistricting Amendment reads as follows:

> Add a new Section 21 to Article III
>
> Section 21. STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES
>
> In establishing Legislative district boundaries:
> (1) No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
> (2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
> (3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within this subsection.

The title and summary of the Amendment read as follows:

STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE REDISTRICTING

Legislative districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

SUMMARY OF ARGUMENT

The Redistricting Amendment meets the requirements of the single subject requirement. It affects a function of only the legislative branch of state government and has a single purpose accomplished by a single plan. Because it does nothing more than establish standards, the proposed amendment is distinguishable from *Independent Nonpartisan Comm'n to Apportion Legislative and Congressional Districts*, 926 So. 2d 1218 (2006) in which the amendment held unconstitutional not only established standards, but in addition created an independent commission to draw district lines.

The ballot title and summary for the Redistricting Amendment meet the requirements of Florida law by stating in clear and unambiguous language the chief purpose of the amendment to create redistricting standards, and by making reference to each of such standards. Nothing in the title or summary is misleading. The standard requiring that district lines be "contiguous" does not require single-member districts. This Court has reviewed the term "contiguous" as used in the districting context four times and has always held that it means touching anywhere except at a common corner. Thus, the use of the term does not foreclose the creation of multi-member districts.

ARGUMENT

Single Subject

The parameters of the single subject requirement embodied in Article XI, Section 3 of the Florida Constitution are now well settled. A proposed amendment must not engage in logrolling or substantially alter or perform the functions of multiple branches of government. *Extending Existing Sales Tax to Non-Taxed Servs.,* 953 So. 2d 471 (Fla. 2007). The logrolling prohibition is intended to prevent combining separate issues into a single proposal to secure passage of an unpopular issue. A proposed amendment meets the logrolling test when it manifests "a logical and natural oneness of purpose," *Florida Marriage Protection Amendment,* 926 So. 2d 1229, 1233 (Fla. 2006) or otherwise stated, that it "may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme." *Extending Existing Sales Tax,* 953 So. 2d at 481.

The Redistricting Amendment easily meets the single subject requirements. It affects a function of only the legislative branch of state government and has a single purpose accomplished by a single plan. It creates standards for the drawing of legislative districts and nothing more. The Attorney General cites *Independent Nonpartisan Comm'n,* 926 So. 2d at 1218, a case in which the Court found that a proposed amendment violated

the single subject requirement. The amendment reviewed in that case is patently distinguishable from the Redistricting Amendment now under review. The 2006 decision found a logrolling violation because the proposal would not only have established standards, but would also have created an independent commission to perform the redistricting function instead of the Legislature. The Court explained that:

> A voter who advocates apportionment by a redistricting commission may not necessarily agree with the change in the standards for drawing the legislative and congressional districts. Conversely, a voter who approves the change in district standards may not want to change from the legislative apportionment process currently in place. Thus, a voter would be forced to vote in the "all or nothing" fashion that the single subject requirement safeguards against.

926 So. 2d at 1226.

The current Redistricting Amendment suffers from no such infirmity. A voter will either approve or disapprove of the imposition of standards for redistricting and is not compelled to accept or reject any other function in order to record his or her preference.

Ballot Title and Summary

The Court's analysis of the ballot title and summary focuses on two questions: (1) whether the title and summary, in clear and unambiguous language, fairly inform the voter of the chief purpose of the amendment; and (2) whether the language of the title and summary, as written, misleads the

public. *Florida Hometown Democracy,* 953 So. 2d 666 (Fla. 2007). The Redistricting Amendment accomplishes that purpose. The title and summary tell the voters the chief purpose of the amendment — to establish standards for legislative redistricting — and notes each of the standards included in the amendment. There is nothing either expressed or implicit in the amendment that would mislead a voter.

The Attorney General suggests that the inclusion of a standard requiring that districts be "contiguous" would prohibit multi-member districts, currently permitted by Article III, Section 16(a), allowing districts to consist of "either contiguous, overlapping or identical territory," and that the summary is misleading because it fails to inform the voter of this purported change. The Attorney General again cites *Independent Nonpartisan Comm'n*, 926 So. 2d at 1218. In fact, the Redistricting Amendment makes no change in the Legislature's ability to create districts that are either single-member or multi-member. Unlike the amendment at issue in *Independent Nonpartisan Comm'n,* which expressly prohibited multi-member districts by requiring single-member districts, the Redistricting Amendment only requires that districts be "contiguous," a term that the Attorney General concludes, without reference to either dictionary or case law definition, means single-member. This Court has disagreed. In

each of the last three reapportionment years, the Court has addressed the meaning of the word "contiguous" in Article III, Section 16(a) of the Florida Constitution. It has consistently defined the term to mean touching along a boundary or at a point other than a common corner. *In re Constitutionality of House Joint Resolution 25E,* 863 So. 2d 1176 (Fla. 2003); *In re Constitutionality of House Joint Resolution 1987,* 817 So. 2d 819 (Fla. 2002); *In re Constitutionality of Senate Joint Resolution 2G,* 597 So. 2d 276 (Fla. 1992); *In re Apportionment Law Appearing as Senate Joint Resolution 1E,* 414 So. 2d 1040 (Fla. 1982). As so defined, the term "contiguous" includes "identical" and "overlapping."[1] Thus, the proposed Redistricting Amendment would not change the current constitutional provision to the extent that it allows the Legislature to create either single-member or multi-member districts.

No language in the Redistricting Amendment expressly purports to amend or repeal the current constitutional language and the use of the term "contiguous" alone cannot be interpreted to impliedly amend or repeal current language. Implied repeal or amendment of one constitutional provision by a subsequent one is not favored and will not be found unless

[1] The Court's definition is consistent with the dictionary definition and, in fact, was originally quoted by the Court from *Webster's New Collegiate Dictionary. In re Apportionment Law,* 414 So. 2d at 1051.

the two provisions are irreconcilably repugnant to each other, and then only to the extent of the repugnancy. *Jackson v. Consolidated Gov't,* 225 So. 2d 497 (Fla. 1969); *Wilson v. Crews,* 34 So. 2d 114 (1948). There is no inconsistency, expressed or implied, between the Redistricting Amendment and current constitutional language with respect to single-member or multi-member districts.

CONCLUSION

The Court is respectfully urged to approve the Redistricting Amendment for placement on the ballot.

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I HEREBY CERTIFY that the foregoing document is in compliance with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure. This document is submitted in Times New Roman 14-point font.

M. HOPE KEATING

TAL 451,476,477v2 7-1-08

IN THE SUPREME COURT OF FLORIDA

Case No. SC08-986
SC08-1149

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING CONGRESSIONAL BOUNDARIES

_____/

MOTION FOR EXTENSION OF TIME TO FILE REPLY/ANSWER BRIEFS

The Florida Legislature, which opposes the petitions, moves for an extension of time to file reply/answer briefs to the proponent's main arguments in these two different, but related, cases.

The Court's scheduling orders in these two matters require "interested parties" to file their initial briefs by July 1 in the legislative districting petition case and July 15 in congressional districting case. The Court set deadlines for the filing of answer briefs of August 1 for the legislative districting case and August 4 for the congressional districting case.

Because the term "interested parties" could embrace an opponent to these amendment schemes, the Legislature filed its initial briefs in compliance with the July 1 and 15 deadlines. The proponent met those deadlines as well.

However, the briefs of the two parties are markedly different. The Legislature's briefs are more than 35 pages long and contain detailed criticisms of the proposed amendments and complex legal analysis. The proponent's briefs are only nine and 10 pages long respectively, including required certificates. These latter briefs are cursory and provide no meaningful legal analysis of the proposed amendments.

The scheduling orders do not appear to permit a party to file a reply to an answer brief.

Consequently, the Legislature is deprived of any meaningful ability to respond to the proponent's substantive arguments, which undoubtedly will appear in their answer brief. Without the opponents' ability to file a reply, the Court is deprived of full briefing on the issues.

For this reason, the Legislature requests enlargements of time to file reply briefs to the proponent's answer briefs. Specifically, the Legislature requests 20 days from service of the proponent's answer briefs or, in the alternative, August 20 in the legislative districting case and August 24 in the congressional districting case, whichever is earlier.

Counsel for the Legislature has contacted the attorneys for the proponent about the motion. The proponent opposes the motion.

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IN THE SUPREME COURT OF FLORIDA

Case No. SC08-986
Case No. SCO08-1149

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

RESPONSE OF SPONSOR FAIRDISTRICTSFLORIDA.ORG TO MOTION OF LEGISLATURE FOR EXTENSION OF TIME TO FILE BRIEFS

The Sponsor, FairDistrictsFlorida.org, does not object to the motion of the Legislature for leave to file a reply brief 20 days after service of the Sponsor's answer brief, provided that such reply brief complies with Rule 9.210(d) in that it is limited to containing argument in response and rebuttal to argument presented in the answer brief.

The undersigned has conferred with counsel for the Legislature, Jason Vail, and he agrees with the above proviso.

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TAL 451,478,480v1 7-21-08

IN THE SUPREME COURT OF FLORIDA

Case No. SC08-986

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

REQUEST FOR AND MOTION TO CONSOLIDATE ORAL ARGUMENT

The Sponsor, FairDistrictsFlorida.org, requests oral argument in this appeal and moves to consolidate the argument with oral argument already scheduled in Case SC08-1149 for November 5, 2008.

This case and Case SC08-1149 involve companion petitions, the only difference being that the petition in this case establishes standards for legislative districts and the petition in Case SC08-1149 establishes standards for congressional districting. The issues are almost entirely the same.

The undersigned has conferred with opposing counsel and they agree that the arguments should be consolidated.

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TAL 451,478,611v1 7-29-08

IN THE SUPREME COURT OF FLORIDA

Case No. SC08-986

ADVISORY OPINION TO THE ATTORNEY GENERAL
RE: STANDARDS FOR ESTABLISHING LEGISLATIVE
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ANSWER BRIEF OF SPONSOR

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SUMMARY OF ARGUMENT

The Legislature's scattershot attack on the petition fails to identify any defects that rise to the level of substance required by this Court in order to deny the electorate the opportunity to vote on the measure.

The argument that the standards violate the single subject requirement simply because they are not presented in eight separate petitions would apply to any proposal involving multiple components, a proposition that this Court has consistently rejected. This petition complies because the standards "have a natural relation and connection as component parts or aspects of a single dominant plan."

The proposed amendment would change the function of only one branch of Florida government. The speculative scenario presented by the Legislature illustrates only a potential *effect* of the amendment, which this Court has stated is not a violation of the single subject requirement.

The initiative meets the two requirements for a ballot title and summary. It clearly and unambiguously informs the voter of the chief purpose of the amendment and there is nothing in the title or summary that is misleading. The summary is not required to mention every possible effect or ramification of passage of the amendment.

The difference between the term "drawn with the intent to favor or disfavor" used in the amendment and "drawn to favor or disfavor" used in the summary is not misleading. Contrary to the Legislature's assertion, "drawn to favor" is more indicative of intent than effect. Moreover, courts may look to effect in order to give the element of intent an objective standard. In any case, the summary language is broad enough to include intent and there is nothing about the distinction that would cause a voter to vote for or against the measure.

The fact that the phrase "existing political boundaries" used in the amendment could be interpreted to include towns, villages and special districts in addition to cities and counties is not such a substantive difference as to render the petition materially different from the amendment.

The term "language minority" is reasonably understandable to the average voter and distinguishable from the broad catch-all terms used in the cases cited by the Legislature.

Unlike past petitions that provided the same generic protections to the same classes of persons already protected without so indicating, the current petition imposes specific standards on a particular process that may or may not be covered by the more generic protections included in voting rights and

equal protection provisions. Even the Legislature acknowledges that the standards appear to impose more stringent standards than currently exist.

ARGUMENT

The Legislature sifts the initiative petition through an extremely fine-meshed sieve in an effort to squeeze out every possible misreading of the title and summary, however strained, and every conceivable application to multiple branches, however speculative and unlikely. This Court has long eschewed such a hyper-technical analysis in order to avoid unduly restricting the ability of Florida citizens to amend their constitution through the initiative process. Instead, the Court has adopted a common-sense approach designed to serve the underlying purposes of the single-subject and fair notice requirements without overly burdening the initiative process. Application of those approaches to the petition under review provides the answers to the Legislature's arguments and establishes that the petition meets all requirements for placement on the ballot.

SINGLE SUBJECT

The Legislature argues that the proposed amendment violates the single-subject requirement because it includes eight separate standards. Based upon this theory, the only way the standards could be added to the Constitution would be for the Sponsor to circulate eight separate petitions

and place eight separate amendments on the ballot. The same would be true of most amendments containing separate items or components. Such a restriction would make it extraordinarily difficult, if not impossible, for citizens to amend the Constitution in ways that necessarily require multiple components. It would also be bad public policy, significantly increasing the number of petitions being circulated and the number of proposed amendments on already overcrowded ballots.

This Court has never viewed the single-subject rule as a single-item or single-component restriction. Instead, the Court has looked at whether the various components are an integral part of a "single dominant plan or scheme:"

> This Court has held that to satisfy the single-subject requirement, the proposed amendment must have a "natural relation and connection as component parts or aspects of a single dominant plan or scheme. Unity of object and plan is the universal test."*** In other words, a proposed amendment must manifest a "logical and natural oneness of purpose."

Limited Casinos, 644 So. 2d 71 (Fla. 1994).

Accordingly, the Court has consistently upheld proposed amendments having multiple component parts so long as they were part of a single dominant scheme. *E.g., Local Trustees*, 819 So. 2d 725 (Fla. 2002); *Prohibiting Public Funding of Political Candidates' Campaigns*, 693 So. 2d 972 (Fla. 1997); *Limited Casinos*, 644 So. 2d

at 71; *Fish and Wildlife Conservation Comm'n*, 705 So. 2d 1351 (Fla. 1998); *Limited Political Terms*, 592 So. 2d 225 (Fla. 1991).

The current petition would establish a set of standards to be used by a single body — the "Florida Legislature" — for a single purpose: the drawing of legislative district lines. Contrary to the Legislature's contention that the standards are "unrelated," they are, in fact, integrally related. Because the standards influence the shape of districts that make up a single whole, the application of every standard can affect all others and they must be read *in pari materia*. Moreover, the language of the amendment provision itself makes the standards interdependent.[1] The Legislature's argument that the standards constitute logrolling because a voter is forced to take all or none could have been made (and in some cases was) in each of the above-cited cases. Nevertheless, the Court found that none violated the single-subject requirement.

The Legislature's reliance upon *Laws Related to Discrimination*, 632 So. 2d 1018 (Fla. 1994) and *Race In Public Education*, 778 So. 2d 888 (Fla. 2000), is misplaced and the distinction between those cases and the current

[1] "(2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) * * *."
"(3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection."

proposed amendment is informative. The proposition reviewed in *Laws Related to Discrimination* would have guaranteed protection from discrimination for ten separate classifications of people. In *Race In Public Education*, the proposed amendment would have prohibited discrimination in the areas of education, employment and contracting. In neither of these cases did the Court suggest that it would have found unacceptable the establishment of multiple standards of conduct, so long as they were applicable to only one class of persons.

The proposed amendment would change a single constitutional function of the legislative branch. The Legislature, however, constructs an elaborate logic that piles one assumption upon another to reach the conclusion that the amendment would impose a duty upon the judicial branch as well as the legislative. The Legislature reasons that it is "humanly impossible" to achieve a districting scheme that is politically neutral and, consequently, "the Legislature will be unable to draft a plan" in compliance with the standards set forth in the amendment and this Court will always be compelled ultimately to perform the redistricting function pursuant to Article III, Sections 16(b) and (f). Despite the Legislature's insistence that, "this effect is certain, not speculative" [Brief of the Florida Legislature, p. 20], it is indeed purely speculative, and such speculation is insufficient to

invalidate a petition. *Limited Casinos*, 644 So. 2d at 71; *English - the Official Language*, 520 So. 2d 11 (Fla. 1988).

In addition to the speculative nature of the Legislature's argument, it confuses a *change in the function* of a branch created by the language of the amendment with an *effect* that might flow from application of the change. The only function changed by the proposed amendment is the redrawing of legislative district boundaries by the Legislature. The scenario contrived by the Legislature is not a change created by the amendment, but an indirect possible effect of the failure of the Legislature to fulfill its duty in applying the standards. This Court has consistently held that the fact that a proposed amendment might affect more than one branch is not alone sufficient reason to invalidate it. *Extending Existing Sales Tax*, 953 So. 2d 471 (Fla. 2007); *Marriage Protection*, 926 So. 2d 1229 (Fla. 2006); *Health Hazards of Using Tobacco*, 926 So. 2d 1186 (Fla. 2006); *Term Limits Pledge*, 718 So. 2d 798 (Fla. 1998); *Fish and Wildlife Conservation Comm'n*, 705 So. 2d 1351 (Fla. 1998).

BALLOT TITLE AND SUMMARY

The Legislature's multiple challenges to the ballot summary fall into two broad categories. First, the Legislature asserts that the summary fails to give notice of all possible effects or ramifications of the amendment. This

includes that the summary doesn't state: that the standards might also have to be applied by this Court in the event that legislative reapportionment should fall to it by virtue of the Legislature's default, that the amendment would diminish the Legislature's discretion, and that the summary doesn't identify constitutional provisions that would be substantially affected.

The title and summary must inform the voter of the chief purpose of the proposed amendment and all material changes *created by the amendment.* It is not necessary for the title and summary to explain all possible effects or ramifications of the amendment. *Extending Existing Sales Tax*, 953 So. 2d at 471; *Independent Nonpartisan Comm'n*, 926 So. 2d 1218 (Fla. 2006); *Grose v. Firestone*, 422 So. 2d 303 (Fla. 1982). In this case, the chief purpose and sole material change created by the proposed amendment is to require the Legislature to apply particular standards to the redistricting process. Both the title and summary state as much in clear and unambiguous language. It is not necessary for the summary to explain that, in the speculative event that the Legislature fails to reapportion in accordance with its constitutional duty and the function then falls to this Court, the existence of the new standards might affect this Court's review. It is also unnecessary for the summary to tell the voter that the standards diminish the Legislature's discretion, a conclusion that any reasonable

person can surmise from the fact alone that it would have to comply with standards that did not previously appear in the Constitution.

The second category of challenges asserted by the Legislature is composed of nitpicking distinctions in the language of the summary compared to the amendment. The amendment provides that "no apportionment plan or district shall be drawn *with the intent* to favor or disfavor a political party or an incumbent" (italics supplied). The Legislature argues that the summary statement differs from the amendment because the summary's phrase "drawn to favor or disfavor," "implies" an effect rather than an intent. In actuality, the term "drawn to" is more reasonably read to imply intent than effect. Moreover, regardless of the language of the amendment, courts might ultimately look to the effect of a plan in order to apply an objective test to the intent requirement, something often done when statutes include an intent element. But this is the type of ramification that the Court has not required to be included in the ballot summary. The phrase "may not be drawn to favor or disfavor" is broad enough to include intent and there is nothing about the summary language that would be misleading to a voter in any material fashion.

The Legislature asserts that the summary is defective because the summary states that districts, where feasible, must make use of existing

"city, county and geographical boundaries," whereas the actual amendment refers to "existing political boundaries." The Legislature argues that the summary is misleading because the phrase "existing political boundaries" can include towns, villages, special tax districts, school districts, and special road and bridge districts as well as cities and counties. It is difficult to conceive of why a voter would be moved to change his or her vote, and therefore be misled, because of the possibility that the Legislature in a given instance might use the boundaries of a town, village or special tax district rather than just a city or county. In any case, the distinction is not so material as to make the proposition "clearly and conclusively defective" as required to strike it from the ballot. *Tax Limitation*, 673 So. 2d 864 (Fla. 1996).

Finally, the Legislature argues that when the summary states that, "districts shall not be drawn to deny racial or language minorities" equal opportunity, the phrase "language minorities" is vague and ambiguous. In the first place, the Legislature fails to explain what meaning the term "language minority" can be interpreted by a voter to mean other than a native language other than English. More importantly, the Legislature fails to explain why a voter would be misled into voting for or against the amendment because of the phrase even if it is vague and ambiguous.

In support of its argument, the Legislature cites *Race In Public Education*, 778 So. 2d at 888 and *People's Property Rights*, 699 So. 2d 1304 (Fla. 1997), in which the Court held, respectively, that the terms "bona fide qualifications based on sex" and "exemption" were so ambiguous as to render the summaries defective. However, those terms in the context of the summaries in which they were used had a misleading effect not present in the case at bar. *Race In Public Education* reviewed four petitions, one of which prohibited differential treatment based on sex, but exempted classifications necessary for privacy or medical or psychological treatment, undercover law enforcement, film, video, audio or theatrical casting, or athletics. The summary referred only to "bona fide qualification based on sex," which the Court found was so broad as to leave the voter guessing as to what the exemptions would be. *People's Property Rights* also reviewed several petitions. The one referred to in the Legislature's brief required voter approval for any new taxes, which the amendment defined to include the removal of an exemption. The summary referred to "eliminating tax exemptions." The Court found that the term "exemptions" was overly broad because the average voter wouldn't know the difference between an exemption and immunity. Such problems do not exist in the current summary.

Finally, the Legislature argues that the summary is misleading because it implies that there is no current law protecting language minorities from discrimination, citing *Race In Public Education*, 778 So. 2d 888 (Fla. 2000). The Legislature argues that in fact language minorities are currently protected by provisions of the federal and Florida constitutions. The circumstances in this case are distinguishable from those in *Race In Public Education.* There, the proposed amendment would provide the same broad protection against discrimination to the same classes of people who were already protected by other provisions of the constitution. Here, the amendment doesn't provide the same generic protections that are provided by voting rights and equal protection provisions. Instead, it would apply new standards to a particular process in which the more general provisions might or might not apply in a given situation. The Legislature itself, in support of a separate argument, asserts that the standards are probably more stringent than currently existing law. [2]

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[2] "The Legislature has considerable discretion in establishing district boundaries that can take political concerns into consideration. *Vieth v. Jubilirer.* Moreover, the courts permit some variation in district populations, which it appears the proposal is intended to eliminate, although that is not clear." Brief of the Florida Legislature, pp. 30-31.

CONCLUSION

The Court is respectfully urged to hold that the petition under review meets the legal requirements as to single subject and ballot title and summary.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this 29th day of July, 2008 to the following:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document is in compliance with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure. This document is submitted in Times New Roman 14-point font.

BARRY RICHARD

TAL 451,478,062v1 7-29-08

Supreme Court of Florida

THURSDAY, JULY 31, 2008

CASE NOS.: SC08-986; SC08-1163;
SC08-1149; SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES & (FIS)

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING & (FIS)

The Sponsor's motion to consolidate oral argument is hereby granted. The above cases are hereby consolidated for the purpose of oral argument and are scheduled for oral argument at 9:00 a.m., Wednesday, November 5, 2008. A maximum of twenty minutes to the side as consolidated is allowed for the argument, but counsel is expected to use only so much of that time as is necessary.

NO CONTINUANCES WILL BE GRANTED EXCEPT UPON A SHOWING OF EXTREME HARDSHIP.

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Clerk, Supreme Court

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MARK HERRON

Supreme Court of Florida

THURSDAY, JULY 31, 2008

CASE NOS.: SC08-986; SC08-1163
SC08-1149; SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES & (FIS)

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING & (FIS)

The Florida Legislature's motion for extension of time is granted and The Florida Legislature is allowed to and including August 20, 2008, in which to serve the answer brief on the merits. NO FURTHER EXTENSIONS OF TIME WILL BE GRANTED FOR THE FILING OF THE ANSWER BRIEF ON THE MERITS. Per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all briefs in an electronic format as required by the provisions of that order.

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IN THE SUPREME COURT OF FLORIDA

Case No. SC08-986

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES

_____/

ANSWER BRIEF

OF THE FLORIDA LEGISLATURE

IN OPPOSITION TO THE PETITION

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SUMMARY OF THE ARGUMENT

The sponsors' contention that the proposal's eight apportionment standards are "integrated" does not hold up. Unpacking the standards from the proposal and scrutinizing them plainly shows they have different goals and objectives which have nothing to do with each other and often conflict. Because voters can disagree about the desirability of one discrete standard over another, forcing them to accept this package is a classic exercise in logrolling.

The proposal substantially affects multiple branches of government. Historically apportionment is a legislative function. But the proposed standards will inevitably involve the courts in the process, far more than they are today — to the point that the courts will end up writing the plans instead of the Legislature.

Despite the sponsors' dismissive argument that the Legislature is picking nits, the defects the Legislature has identified are fatal. They are substantial and clearly violate the Constitution and court's case law. The summary uses material terms that very from those in the text:

- Dropping "intent" from the summary's first sentence so the voter is left with the impression he or she is voting to outlaw plans that effectively favor a party or incumbent.
- Substituting "city and county boundaries" in the summary when the text speaks of districts delineated by "political boundaries." This material divergence leaves voters with the impression that they are voting on a measure requiring districts to mirror city and county boundaries when the text does not.

The sponsors have put forward no meaningful argument that these disparities fail to violate this Court's precedents.

The proposals inclusion of "contiguity" as a standard wrongfully implies that no reapportionment standards exist, an implication this Court has disfavored. The sponsors belated contention that inclusion of "contiguity" does not really mean anything effectively would read the term out of the amendment and the Constitution itself, should the amendment pass, contrary to the well-accepted precept that all terms in the Constitution must be given the meaning the voters intended. Here, because the proposal purports to include the only standards for reapportionment, voters may well intend to write out of the Constitution the

prevailing standards, which include the ability to provide for multi-member districts.

ARGUMENT

I. Single subject flaws.

A. The amendment's standards are not integrated.

The supporters contend that the amendment is all right because its eight standards are "integrated." How are they integrated? "Because the standards influence the shape of districts that make up a single whole, the application of every standard can affect all others."[1] But the sponsors do not make any effort to describe how this is so. Unpacking the proposal shows that the claim is just not true.

It is worth remembering that the amendment requires the following:

1. No plan or district shall be drawn with the intent to favor or disfavor a political party.
2. No plan or district shall be drawn with the intent to favor or disfavor an incumbent.
3. No plan or district shall be drawn with the intent or result of denying or abridging the equal opportunity of racial minorities to participate in the political process or to diminish their ability to elect representatives of their choice.
4. No plan or district shall be drawn with the intent or result of denying or abridging the equal opportunity of language minorities to participate in the political process or to diminish their ability to elect representatives of their choice.
5. Districts shall consist of contiguous territory.

[1] Sponsors' answer brief at 9.

The second paragraph would establish these independent, freestanding standards, which are to be met unless doing so conflicts with a requirement in paragraph 1 or with federal law:

6. Districts shall be as nearly equal in population as is practicable.
7. Districts shall be compact.
8. Districts shall, where feasible, utilize political and geographic boundaries.

Thus, the amendment establishes eight independent requirements for any apportionment plan.

But if one looks at these requirements more closely, we see that they address two discrete, but broad, subjects: anti-discrimination (1, 2, 3, 4, 6) and geographic integrity (5, 7, 8).[2]

The anti-discrimination requirements provide protection for five different classes:

- Political parties.
- Non-incumbents.
- Racial minorities.
- Language minorities.

[2] Although the Legislature suggested in its initial brief that one might see five broad general purposes, if one is generous perhaps as few as two are apparent.

- All voters, who apparently are to be entitled to the most stringent interpretations of the "one person/one vote" requirement of the equal protection clause.

It doesn't take intellectual heavy lifting to see that — on their face — not one of the standards meshes with, or supports, another, the hallmark of integration. Each standard addressing discrimination has the separate goal of protecting a class. Whether a plan is drawn to favor racial, ethnic or language minorities, has nothing whatever to do with drawing a plan that is not intended to benefit a party or incumbent. Equality of population has nothing to do with compactness, and neither of them has anything to do with using political or geographic boundaries. In fact, as the bare text of the amendment acknowledges, some of the standards openly clash with others so that one must be sacrificed at the expense of another. (So if the standards "affect all others" they do so by cancelling another out.) Thus, while, rhetorically speaking, the proposal may address the artificial single subject of "standards for redistricting," each of the standards flies off in a different direction, aiming at different targets and having different, unrelated, and sometimes conflicting objectives. The proposal's "integration" is an illusion and the single subject proposed here is just clever labeling.

The sponsors struggle to distinguish the controlling case, In re Advisory Opinion to Attorney General — Restricts Laws Related to Discrimination, 632 So.2d 1018 (Fla. 1994), but the Court's reasoning in that case applies directly here. The proposal at issue in Laws Related to Discrimination prohibited all governmental entities from enacting "any law regarding discrimination against persons which creates, establishes or recognizes any right, privilege or protection for any person based upon any characteristic, trait, status, or condition other than race, color, religion, sex, national origin, age, handicap, ethnic background, marital status or familial status." Id. at 1019. The Court rejected the proponents' contention that the measure addressed the single subject of discrimination. In fact, the Court concluded that the label "discrimination" was merely an unacceptable "broad generality" which could not be relied on to sail past the one subject bar. Id. at 1020. The Court rejected the amendment for several reasons, but for our purposes, it is significant that the Court found that the amendment was an exercise in logrolling because "it enumerates ten classifications of people that would be entitled to protection from discrimination if the amendment were passed." Id. The enumeration of these classifications required "voters to choose which classifications they feel most strongly about, and then [required] them to cast an all or nothing vote on the classifications listed in the amendment." Id.

The amendment before us today forces voters to make the same sort of choice. It proposes a "broad generality" as a chief purpose, then enumerates eight standards for redistricting, five of which provide anti-discrimination protections to distinct classes in the same way as the amendment in Laws Related to Discrimination, and others that address geographic integrity (a separate goal entirely). Voters must accept or reject the entire package, although they may agree with one classification but strongly disagree with another. Ending discrimination or having voting standards thus is a broad generality that will not by itself constitute the chief objective of an amendment for one subject purposes.

The Court has taught us in its one subject cases that the task is to look at the goal of each individual standard. Where all the standards serve the same purpose, they pass constitutional muster. But where each serves a separate purpose, has an independent target or are so controversial that voters may disagree with some standards but not others, they do not. Thus, where ending discrimination against a defined class is the goal and each standard protects a distinct class, then each standard has a separate independent purpose.

If the Court accepts the sponsors' view, the single subject requirement of Article 11, s. 3, Fla.Const., will be significantly weakened.

B. The Court's authorship of redistricting plans is not speculative; it is inevitable. Thus, the proposal necessarily substantially affects multiple branches of government.

In its initial brief, the Legislature pointed out that the amendment would substantially alter the functions of multiple branches of government. We said that it would be impossible for the Legislature to avoid a finding that it intended a political result because the consequences of drawing the lines — which inevitably favor one party or another — would be known to the Legislature. Since the Legislature must know the result of its line drawing has a political effect, it is a short inferential hop to the conclusion that the Legislature must have intended the result. For instance, the legislature has to know the political and demographic makeup of the state to comply with the Federal Voting Rights act. In support of this argument the Legislature quoted Davis v. Bandemer, 478 U.S. 109, 128-129 (1986), which stated:

> "As long as redistricting is done by a legislature, it should not very difficult to prove that the likely political consequences of the reapportionment were intended."

The argument boils down to this simple formulation: because drawing districts has political consequences, the legislature will have a very good idea of what those consequences are when the lines are drawn; therefore, any court which looks at the districts that are drawn will have to assume those the consequences were intended.

In fact, it is an inference courts are required to make.[3] Because the Legislature will be unable to draft a plan without contemplating political consequences, the Court necessarily will be compelled to draw district lines.

In their answer brief, the sponsors dismiss this very real concern as pure speculation. But this unsupported argument ignores all the case law that says it is impossible to draw politically neutral districts, and that the legislature will not be able to comply with the standards.[4] In fact, the sponsors contradict themselves, recognizing that Court involvement is inevitable:

> Moreover regardless of the language of the amendment, courts might ultimately look to the effect of the plan in order to apply an objective test to the intent requirement, something often done when statutes include an intent requirement"[5]

When a court reviews the districts, the best, and probably only, evidence of intent will be the effect of the line drawing which will inevitably not be politically neutral. This is what the precedents cited in the Legislature's initial brief tell us time and again. Clearly, the sponsors know the underlying realities of

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[3] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Patterson v. McLean Credit Corp. 491 U.S. 164, 186-187 (1989) (discriminatory acts raise presumption of discriminatory intent).

[4]Sponsors' answer brief at p.9.

[5]Sponsors' answer brief at p. 12.

redistricting, but hope by mere rhetoric to convince their audience that the real is a mirage.

The second element of this argument is that the Constitution has provisions which provide for the Court to draw lines if the Legislature cannot. When those circumstances arise the Court will be bound to the same impossible standards as the Legislature. Yet, the sponsors gloss over this as speculative when the Constitution goes to great lengths to explain the role of the Court in the process.

Consequently, the proposal substantially rewrites the roles of both the Legislature and the judiciary, and constitutes the kind of precipitous, spasmodic, cataclysmic governmental change that the single subject rule is intended to prevent. Advisory Opinion to the Atty. Gen. Re: Protect People, Especially Youth, from Addiction, Disease, and Other Health Hazards of Using Tobacco, 926 So.2d 1186 (Fla. 2006); Advisory Opinion to the Attorney General Re: Independent Nonpartisan Commission to Apportion Legislature and Congressional Districts Which Replaces Apportionment by Legislature, 926 So.2d 1218, 1224 (Fla. 2006).

II. The ballot title and summary are misleading.

The sponsors do not address the Legislature's criticisms of the ballot title. So perhaps they agree with them. But they have taken issue with the Legislature's identification of obvious defects in the ballot summary. Calling the Legislature's

issue spotting nit-picking does not make the problems disappear, nor does it confer protection from this Court's case law.

A. "Drawn with the intent to favor . . ."

There is a material difference between the summary and the text of the proposal. The summary says: "Legislative districts or districting plans may not be drawn to favor or disfavor an incumbent or political party." On the other hand, the text says, "No apportionment plan or district shall be drawn *with the intent* to favor or disfavor a political party or incumbent . . ." Missing from the summary are the crucial words "with the intent." Without the missing words, a reasonable voter can, and probably will, read the summary to mean that he or she is voting on a standard requiring plans that do not *effectively* favor a party of incumbent.

The sponsors dismiss this fatal flaw with the sophistry that "the term 'drawn to' [in the summary] is more reasonably read to imply intent than effect."[6] But this misses the point. We should judge summaries not by how lawyers would read them, or how they could be read, but by how the average voter is likely to do so, and by whether they are subject to multiple readings or leave important things out. Here, the words of the summary leave out something really important. And they

[6] Sponsors' answer brief at 12.

are subject to multiple interpretations, the mostly likely of which is that the text bans plans that *effectively* favor a party or incumbent.

The sponsors then go on to argue that the summary is all right because, well, a court might look at the effect of a plan and from that infer the Legislature *intended* the effect, which of course nullifies the plan. (Remember, we said this not only was likely but inevitable?) But what reasonable voter is going to think about the legal tests the court might eventually impose while he or she stands in the polling place, marker poised over the ovals on the ballot? That answer is easy: none.

This lapse alone is enough to bring down the proposal.

B. The missing "political boundaries."

The summary replaces the phrase "political boundaries" from the text with "city and county boundaries." Like the AWOL "intent" in the summary's first sentence, this is a material deviation from the amendment's text that will lead a reasonable voter (and should lead any reasonable lawyer) into thinking he or she is voting for one thing when in fact they are voting for something altogether different.

The sponsors suppose this is no problem because, "It is difficult to conceive of why a voter would be moved to change his or her vote, and therefore, be mislead

. . ."[7] But the point of this Court's case law is not whether it is difficult for lawyers to "conceive" if a voter "would be moved to change his or her vote" over the inconsistency. Rather, the point is whether the inconsistency exists at all. Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers, 705 So.2d 563, 566 (Fla. 1998) (summary said "citizens" while text said "natural person"). When a retailer offers a customer a bait-and-switch, the point is not whether some customers might be happy with the switch, but whether the bait was offered in the first place. Here, the inconsistency is clearly material, since city/county boundaries are not synonymous with political boundaries. Thus, the impression voters take way from the summary is utterly inconsistent with the demands of the text. That is inherently misleading and warrants striking this measure from the ballot by itself.

C. Language minorities.

The sponsor contends that "the Legislature fails to explain what meaning the term 'language minority' can be interpreted by a voter to mean other than a native language other than English."[8] Since the sponsors seem unable fairly to restate our position before they try hacking it apart, we re-emphasise: Our position is that the

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[7] Sponsors' answer brief at 13.

[8] Sponsors' brief at 13.

term a technical term susceptible to multiple interpretations. Because it is vague and vulnerable to multiple interpretations, voters are invited to put whatever spin they wish on the term, which this Court has held is a fatal defect. Advisory Opinion to the Attorney General re Amend to Bar Government from Treating People Differently Based on Race in Public Education, 778 So.2d 888, 899 (Fla. 2001) (holding that when voters are "not informed of its legal significance. . . . voters would undoubtedly rely on their own conceptions of what constitutes a bona fide qualification," the amendment summary is fatally vague). The citation to Polish American Congress v. City of Chicago, 211 F.Supp.2d 1098, 1107 (N.D. Ill. 2002), supports this view because there the plaintiffs, as a small group of Polish speakers, reasonably thought they constituted a language minority, but found to their dismay that they did not. Their confusion is emblematic of any reasonable person's confusion when confronting this inherently vague term.

Nonetheless the sponsors raise an interesting point. They imply that the term means any language other than English. But does it really? Certainly, not on its face. Given recent immigration patterns, English could be the "language minority" for an area. This raises another question: What geographical area do you use to gauge when a language is a "language minority": by voting precinct? By city? By county? By a "political boundary" such as a special tax district? By the entire

state? Moreover, how many people does it take to constitute a language minority? Could Creole be a language minority in a predominantly Hispanic area? What should be done then? The term is just too fraught with uncertainties to expect the reasonable voter, let alone seasoned lawyers and legislators, to be able to work this out consistently.

The sponsors go on to state that just because a term is vague and ambiguous does not mean a voter would be misled.[9] Under the Court's unambiguous case law, the point of the ballot summary is to give the voters a *clear picture* of what they are voting on. While the average voter may not foresee every possible consequence of a constitutional amendment, clearly a voter cannot reasonably know what he or she is voting on if the terms included are vague and ambiguous. Allowing such misleading terms on the ballot does not comport with the goals of section 101.161, Fla.Stat. Citizens have a right to know the general impact of an amendment's provisions.

III. The proposal eliminates multi-member districts; but if the reference to "contiguity" alone is not intended to do that, the summary is misleading.

The Legislature and the Attorney General both point out that the language in the initiative prohibits multi-member districts — something now within the

[9] See Sponsor Brief p. 13.

Legislature's authority to permit. The Constitution currently allows districts to be "of either contiguous, overlapping, or identical territory." Art III, s. 16(a), Fla. Const. This provision allows districts be multi-member. Advisory Opinion to the Attorney General re Independent Nonpartisan Commission to Apportion Legislative and Congressional Districts Which Replaces Apportionment by Legislature, 926 So.2d 1218, 1225-1226 (Fla. 2006). Claiming to impose redistricting standards — as if there are no others now in force — the initiative requires districts to be contiguous but drops any mention of overlapping or identical territory. Thus, presumably, the new standards are to be the only ones applicable, superceding those in the Constitution as the people's most recent statement on the matter. Since the new standards mention only contiguity, one must assume that the people intend to eliminate the criteria allowing districts to be overlapping or identical; otherwise mentioning contiguity in the proposal is simply redundant and meaningless. Yet the Court does not presume that any words of the Constitution are meaningless.

The sponsors cite this Court for the notion that "contiguous" means touching along a boundary or at a point other than a common corner, a common definition for the word that essentially means "connected".[10] Then they say that this

[10] See Sponsors Initial Brief at p. 7.

definition includes "overlapping" and "identical." How that can be is a mystery, since the terms are not synonymous[11] — a fact underscored by the people's separate enumeration of these terms in Article 3, s. 16(a).

Even if the sponsors are correct in their assertion that the term is meaningless — an unfounded presumption, since all terms in the Constitution are presumed to mean something[12] — and makes no change to the Constitution, it still misleads voters because it implies that no apportionment standards already exist, a result this Court has forbidden. See Advisory Opinion to the Attorney General, re Amendment to Bar Government from Treating People Differently Based on Race in Public Education, 778 So.2d 898 (Fla. 2000). By stating in the summary that the initiative creates a requirement that districts must be contiguous, and then stating that this provision does nothing to change the current law, the sponsors acknowledge the summary is defective.

CONCLUSION

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[11] "Contiguous" means "sharing an edge or boundary; touching . .. neighboring; adjacent. . . . connected in time or space without a break." The American Heritage Dictionary, 3d ed. (Houghton Mifflin Co., New York 1993) at 301. "Overlapping" means "to lie over or partly cover something." Id. at 974. One needs no help to understand what "identical" means.

[12] In re Apportionment, 263 So.2d 797, 807 (Fla. 1972). The Court could rely on this concept to find that the proposal has not written out of the Constitution the standards of "overlapping" and "identical." But as the text above points out, the proposal wrongly implies that apportionment standards do not exist.

For these reasons, the petition fails the one-subject requirement and contains a defective ballot title and summary. Consequently, the court should order it stricken from the ballot.

RESPECTFULLY SUBMITTED,

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Herron, Messer, Caparello & Self, 2618 Centennial Place, Tallahassee, FL 32308, on August 20, 2008.

Jason Vail

CERTIFICATE OF TYPE SIZE AND STYLE

The brief is printed in 14 point Times New Roman.

Jason Vail

IN THE SUPREME COURT OF FLORIDA

Case No. SC08-986
SC08-1149

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING CONGRESSIONAL BOUNDARIES

_____/

REQUEST FOR ORAL ARGUMENT

The Legislature requests to be heard in SC08-986 and SC08-1149.

RESPECTFULLY SUBMITTED,

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_____
Jason Vail

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Jason Vail

Supreme Court of Florida

FRIDAY, AUGUST 22, 2008

CASE NOS.: SC08-986; SC08-1163;
SC08-1149; SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES & (FIS)

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING & (FIS)

At the direction of the Court, the above cases which were scheduled for oral argument on November 5, 2008, have been rescheduled for oral argument at 9:00 a.m., Thursday, November 6, 2008. A maximum of twenty minutes to the side as consolidated is allowed for the argument, but counsel is expected to use only so much of that time as is necessary.

A True Copy
Test:

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IN THE SUPREME COURT OF FLORIDA
Case Nos. SC08-986; SC08-1163; SC08-1149; SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL
RE: STANDARDS FOR ESTABLISHING
LEGISLATIVE DISTRICT BOUNDARIES & (FIS)

ADVISORY OPINION TO THE ATTORNEY GENERAL
RE: STANDARDS LEGISLATURE TO FOLLOW IN
CONGRESSIONAL REDISTRICTING & (FIS)

_____/

MOTION TO EXPAND TIME FOR ORAL ARGUMENT
FairDistrictFlorida.org

FairDistrictFlorida.org, as an Interested Party and Proponent of these initiative petitions, pursuant to Rules 9.300 and 9.320, Florida Rules of Appellate Procedure, respectfully moves this Court for an expansion of time, seeking an additional ten (10) minutes of oral argument for each side on November 6, 2008.

1. In the original order of June 25, 2008, this Court set oral argument for the Congressional Redistricting initiative (Case SC08-1149) and its accompanying Financial Impact Statement (Case SC08-1163). At that time, this Court also set the same oral argument for purposes of the Legislative Districts initiative Financial Impact Statement (Case SC08-11-65). No provision was made at that time for oral argument for the Legislative Districts initiative.

2. On July 31, 2008, this Court granted FairDistrictFlorida.org's motion to consolidate all four of these cases for purposes of oral argument, granting twenty minutes of time for each side, and setting oral argument for November 5, 2008.

3. On August 22, 2008, this Court rescheduled the oral argument for these consolidated cases to November 6, 2008.

4. The Florida Legislature has filed briefs in opposition to both the Congressional Redistricting and the Legislative Districts initiatives, and has asked to participate in oral argument.

5. FairDistrictsFlorida.org filed briefs supporting both initiatives, and also filed briefs challenging the financial impact statements.

6. This Court has allotted a total of only twenty minutes of oral argument for each of the initiatives and their accompanying financial impact statements.

7. Because the time allotted for all four cases may not be sufficient to address both the initiative petitions and their accompanying financial impact statements, FairDistrictsFlorida.org asks this Court to expand oral argument from twenty (20) to thirty (30) minutes per side.

8. The undersigned counsel has conferred with counsel for the Florida Legislature regarding this motion to expand the time for oral argument and represents that counsel for the Legislature does not object to this request.

WHEREFORE, FairDistrictsFlorida.org, as an interested party in this case, respectfully requests that oral argument on November 6, 2008 be expanded to thirty (30) minutes for each side.

Respectfully submitted by:

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Counsel for Sponsor, FairDistrictsFlorida.org

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail this, _____ day of September, 2008 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.

_____
Attorney

Supreme Court of Florida

MONDAY, SEPTEMBER 15, 2008

CASE NOS.: SC08-986; SC08-1163
SC08-1149; SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES & (FIS)

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING & (FIS)

FairDistrictFlorida.org's motion to expand time for oral argument is hereby granted. A maximum of thirty minutes to the side is allowed for the argument, but counsel is expected to use only so much of that time as is necessary.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

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IN THE SUPREME COURT OF FLORIDA

Case No. SC08-986, SC08-1149

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING CONGRESSIONAL BOUNDARIES

_____/

NOTICE OF SUPPLEMENTAL AUTHORITY

The opponents to the amendments provide the following supplemental authority, pursuant to Fla.R.App.P. 9.225. Chisom v. Roemer, 501 U.S. 380 (1991), is relevant to the discussion of the use of "and" in the ballot summaries rather than the "or," which appears in the text. The amendments' text reads in part, "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process **or** to diminish their ability to elect representative of their choice." This language is virtually identical to that in the federal Voting Rights Act, 42 U.S.C. s. 1973(b). On the significance of and/or distinction in the act, the Supreme Court said:

> Any abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence

the outcome of an election. As the statute is written, however, the inability to elect representatives of their choice is not sufficient to establish a violation unless, under the totality of the circumstances, it can also be said that the members of the protected class have less opportunity to participate in the political process. The statute does not create two separate and distinct rights. Subsection (a) covers every application of a qualification, standard, practice, or procedure that results in a denial or abridgment of " the right " to vote. The singular form is also used in subsection (b) when referring to an injury to members of the protected class who have less "opportunity" than others "to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973 (emphasis added). It would distort the plain meaning of the sentence to substitute the word "or" for the word "and." Such radical surgery would be required to separate the opportunity to participate from the opportunity to elect.

Chisom v. Roemer, at 397.

RESPECTFULLY SUBMITTED,

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_____

Jason Vail

Supreme Court of Florida

TUESDAY, OCTOBER 21, 2008

CASE NOS.: SC08-986

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES

CASE NOS.: SC08-1149

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING

The Florida Legislature's Notice of Supplemental Authority does not comply with Florida Rule of Appellate Procedure 9.225 and is hereby stricken as it does not contain a copy of the cited authority.

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Thomas D. Hall
Clerk, Supreme Court

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BARRY S. RICHARD

IN THE SUPREME COURT OF FLORIDA

Case No. SC08-986, SC08-1149

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING CONGRESSIONAL BOUNDARIES

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> Any abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence

the outcome of an election. As the statute is written, however, the inability to elect representatives of their choice is not sufficient to establish a violation unless, under the totality of the circumstances, it can also be said that the members of the protected class have less opportunity to participate in the political process. The statute does not create two separate and distinct rights. Subsection (a) covers every application of a qualification, standard, practice, or procedure that results in a denial or abridgment of " the right " to vote. The singular form is also used in subsection (b) when referring to an injury to members of the protected class who have less "opportunity" than others "to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973 (emphasis added). It would distort the plain meaning of the sentence to substitute the word "or" for the word "and." Such radical surgery would be required to separate the opportunity to participate from the opportunity to elect.

Chisom v. Roemer, at 397.

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_____

Jason Vail

Supreme Court of the United States
Ronald CHISOM, et al., Petitioners,
v.
Charles E. ROEMER, Governor of Louisiana, et al.
UNITED STATES, Petitioner,
v.
Charles E. ROEMER, Governor of Louisiana, et al.
Nos. 90-757 and 90-1032.

Argued April 22, 1991.
Decided June 20, 1991.

Black registered voters in Louisiana parish brought action challenging system of electing Louisiana Supreme Court Justices from multimember district. The United States District Court for the Eastern District of Louisiana, 659 F.Supp. 183,Charles Schwartz, Jr., J., dismissed. Voters appealed. The Court of Appeals for the Fifth Circuit, 839 F.2d 1056, reversed and remanded. United States filed complaint in intervention to challenge use of multimember district. On remand the District Court dismissed constitutional claims and determined that evidence did not establish violation of Section 2 of Voting Rights Act. Voters and United States appealed. The Court of Appeals, 917 F.2d 187, remanded. Certiorari was granted. The Supreme Court, Justice Stevens, held that state judicial elections are included within ambit of statute which prohibits imposition of voting qualification or prerequisite in manner resulting in denial or abridgement of right to vote on account of race or color.

Judgment of Court of Appeals reversed, and case remanded.

Justice Scalia filed dissenting opinion in which Chief Justice Rehnquist and Justice Kennedy joined.

Justice Kennedy filed dissenting opinion.

West Headnotes

[1] Elections 144 ⚿12(5)

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k12 Denial or Abridgment on Account of Race
144k12(2) Discriminatory Practices Proscribed
144k12(5) k. Tests and Devices to Determine Eligibility to Vote. Most Cited Cases
Statute which prohibits voting qualification or prerequisite to deny or abridge right of any citizen to vote on account of race or color was coextensive with Fifteenth Amendment and applied to judicial elections as originally enacted. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

[2] Elections 144 ⚿12(5)

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k12 Denial or Abridgment on Account of Race
144k12(2) Discriminatory Practices Proscribed
144k12(5) k. Tests and Devices to Determine Eligibility to Vote. Most Cited Cases
Proof of intent is not required to establish violation of statute that prohibits imposition of voting qualification or prerequisite in manner resulting in denial or abridgement right to vote on account of race or color. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

[3] Elections 144 ⚿12(3)

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k12 Denial or Abridgment on Account of Race
144k12(2) Discriminatory Practices Proscribed
144k12(3) k. Dilution of Voting Power. Most Cited Cases
Use of "representatives" in statutory phrase "have less

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opportunity than other members of electorate to participate in the political process and to elect representatives of their choice" was not evidence of Congressional intent to exclude vote dilution claims involving judicial elections from coverage of statute that prohibits imposition of voting qualification or prerequisite in manner resulting in denial or abridgement of right to vote on account of race or color; if Congress had such intent, Congress would have made it explicit in the statute or some members of Congress would have identified or mentioned it at some point in legislative history. Voting Rights Act of 1965, §§ 2, 2(b), as amended, 42 U.S.C.A. §§ 1973, 1973(b).

[4] Elections 144 ⚿12(5)

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k12 Denial or Abridgment on Account of Race
144k12(2) Discriminatory Practices Proscribed
144k12(5) k. Tests and Devices to Determine Eligibility to Vote. Most Cited Cases
Statute which prohibits imposition of voting qualification or prerequisite in manner resulting in denial or abridgement of right to vote on account of race or color does not create two separate and distinct rights. Voting Rights Act of 1965, §§ 2, 2(b), as amended, 42 U.S.C.A. §§ 1973, 1973(b).

[5] Elections 144 ⚿12(4)

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k12 Denial or Abridgment on Account of Race
144k12(2) Discriminatory Practices Proscribed
144k12(4) k. Election Officials' Actions; Registration; Voting Procedures. Most Cited Cases
Standard, practice, or procedure in judicial election, such as limit on times that polls are open, which has disparate impact on black voters for purposes of opportunity to cast ballots, may be challenged, even if different practice that merely affects their opportunity to elect representatives of their choice to judicial office may not. Voting Rights Act of 1965, §§ 2, 2(b), as amended, 42 U.S.C.A. §§ 1973, 1973(b).

[6] Elections 144 ⚿12(1)

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k12 Denial or Abridgment on Account of Race
144k12(1) k. In General. Most Cited Cases
Inability to elect representatives of choice is not sufficient to establish voting rights violation, unless, under totality of circumstances, it can also be said that members of protected class have less opportunity to participate in political process. Voting Rights Act of 1965, §§ 2, 2(b), as amended, 42 U.S.C.A. §§ 1973, 1973(b).

[7] Elections 144 ⚿12(5)

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k12 Denial or Abridgment on Account of Race
144k12(2) Discriminatory Practices Proscribed
144k12(5) k. Tests and Devices to Determine Eligibility to Vote. Most Cited Cases
Results test mandated by statute which prohibits imposition of voting qualification or prerequisite in manner resulting in denial or abridgement of right to vote on account of race or color applies to all claims arising under the statute. Voting Rights Act of 1965, §§ 2, 2(b), as amended, 42 U.S.C.A. §§ 1973, 1973(b).

[8] Elections 144 ⚿12(5)

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k12 Denial or Abridgment on Account of Race
144k12(2) Discriminatory Practices Proscribed
144k12(5) k. Tests and Devices to Determine Eligibility to Vote. Most Cited Cases
All claims for violation of statute which prohibits imposition of voting qualification or prerequisite in manner resulting in denial or abridgement of right to

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vote on account of race or color must allege abridgement of opportunity to participate in political process and to elect representatives of one's choice. Voting Rights Act of 1965, §§ 2, 2(b), as amended, 42 U.S.C.A. §§ 1973, 1973(b).

[9] Elections 144 ⚿12(1)

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k12 Denial or Abridgment on Account of Race
144k12(1) k. In General. Most Cited Cases
Substitution of "representatives" for "legislators" in statute establishing voting rights violation if members have less opportunity than other members of electorate to participate in political process and to elect representatives of their choice indicates, at very least, that Congress intended amendment of voting rights statute to cover more than legislative elections. Voting Rights Act of 1965, §§ 2, 2(b), as amended, 42 U.S.C.A. §§ 1973, 1973(b).

[10] Elections 144 ⚿12(1)

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k12 Denial or Abridgment on Account of Race
144k12(1) k. In General. Most Cited Cases
"Representatives" within statute which states that voting rights violation is established if some members have less opportunity than other members of electorate to participate in political process and to elect representatives of their choice describes winners of representative, popular elections and includes elected judges. Voting Rights Act of 1965, §§ 2, 2(b), as amended, 42 U.S.C.A. §§ 1973, 1973(b).

[11] Elections 144 ⚿12(5)

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k12 Denial or Abridgment on Account of Race
144k12(2) Discriminatory Practices Proscribed
144k12(5) k. Tests and Devices to Determine Eligibility to Vote. Most Cited Cases
If statute which prohibits imposition of voting qualification or prerequisite in manner resulting in denial or abridgement of right to vote on account of race or color does not apply to judicial elections, State covered by provision of Voting Rights Act requiring preclearance of voting procedure changes will be precluded from implementing new voting procedure having discriminatory effects with respect to judicial elections, whereas similarly discriminatory system already in place could not be challenged under the statute. Voting Rights Act of 1965, §§ 2, 5, as amended, 42 U.S.C.A. §§ 1973, 1973c.

[12] Elections 144 ⚿12(3)

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k12 Denial or Abridgment on Account of Race
144k12(2) Discriminatory Practices Proscribed
144k12(3) k. Dilution of Voting Power. Most Cited Cases
Inapplicability of one-person, one-vote rule to judicial elections does not mean that judicial elections are entirely immune from vote dilution claims. Voting Rights Act of 1965, §§ 2, 2(b), as amended, 42 U.S.C.A. §§ 1973, 1973(b).

[13] Elections 144 ⚿12(5)

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k12 Denial or Abridgment on Account of Race
144k12(2) Discriminatory Practices Proscribed
144k12(5) k. Tests and Devices to Determine Eligibility to Vote. Most Cited Cases
State judicial elections are included within ambit of statute which prohibits imposition of voting qualification or prerequisite in manner resulting in denial or abridgement of right to vote on account of race or color. Voting Rights Act of 1965, §§ 2, 2(b), as amended, 42 U.S.C.A. §§ 1973, 1973(b).

****2356 *380 *Syllabus* [FN*]**

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FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

The Louisiana Supreme Court consists of seven members, two of whom are elected at large from one multimember district, with the remainder elected from single-member districts. Petitioners in No. 90-757 represent a class of black registered voters in Orleans Parish, which is the largest of the four parishes in the multimember district and contains about half of the district's registered voters. Although more than one-half of Orleans Parish's registered voters are black, over three-fourths of the voters in the other three parishes are white. Petitioners filed an action in the District Court against respondents, the Governor and state officials, alleging that the method of electing justices from their district impermissibly dilutes minority voting strength in violation of, *inter alia,* § 2 of the Voting Rights Act of 1965. As amended in 1982, § 2(a) prohibits the imposition of a voting qualification or prerequisite or standard, practice, or procedure that "*results* in a denial or abridgement of the right ... to vote on account of race or color," and § 2(b) states that the test for determining the legality of such a practice is whether, "based on the totality of circumstances," minority voters "have less opportunity than other members of the electorate to participate in the political process *and* to elect *representatives* of their choice." (Emphasis added.) The United States, petitioner in No. 90-1032, subsequently intervened to support petitioners' claims, and the District Court ultimately ruled against petitioners on the merits. However, the Court of Appeals finally remanded the case with directions to dismiss the complaint in light of its earlier en banc decision in *League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620(*LULAC*), that judicial elections are not covered under § 2 of the Act as amended. There, the court distinguished between claims involving the opportunity to participate in the political process and claims involving the opportunity to elect representatives of minority voters' choice, holding that § 2 applied to judicial elections with respect to claims in the first category, but that ***381** because judges are not "representatives," the use of that term excludes judicial elections from claims in the second category.

Held: Judicial elections are covered by § 2 as amended. Pp. 2362-2369.

(a) As originally enacted, § 2 was coextensive with the Fifteenth Amendment, and it is undisputed that it applied to judicial elections. The 1982 amendment expanded § 2's protection by adopting a results test, thus eliminating the requirement that proof of discriminatory intent is necessary to prove a § 2 violation, and by adding § 2(b), which provides guidance about how to apply that test. Had Congress also intended to exclude ****2357** judicial elections, it would have made its intent explicit in the statute or identified or mentioned it in the amendment's unusually extensive legislative history. Pp. 2362-2364.

(b) The results test is applicable to all § 2 claims. The statutory text and this Court's cases foreclose the *LULAC* majority's reading of § 2. If the word "representatives" placed a limit on § 2's coverage for judicial elections, it would exclude all claims involving such elections, for the statute requires that all claims must allege an abridgment of the opportunity both to participate in the political process *and* to elect representatives of one's choice. Thus, rather than creating two separate and distinct rights, the statute identifies two inextricably linked elements of a plaintiff's burden of proof. See, *e.g., White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314. Pp. 2364-2366.

(c) The word "representatives" describes the winners of representative, popular elections, including elected judges. Although the *LULAC* majority correctly noted that judges need not be elected, when they are, it seems both reasonable and realistic to characterize the winners as representatives of the districts in which they reside and run. The legislative history provides no support for the arguments that the term "representatives" includes only legislative and executive officials or that Congress would have chosen the word "candidates" had it intended to apply the vote dilution prohibition to judicial elections. Pp. 2366-2367.

(d) Adopting respondents' view of coverage would lead to the anomalous result that a State covered by § 5 of the Act would be precluded from implementing a

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new voting procedure having discriminatory effects with respect to judicial elections, Clark v. Roemer, 500 U.S. 646, 111 S.Ct. 2096, 114 L.Ed.2d 691, but a similarly discriminatory system already in place could not be challenged under § 2. P. 2367.

(e) That the one-person, one-vote rule is inapplicable to judicial elections, *Wells v. Edwards*, 409 U.S. 1095, 93 S.Ct. 904, 34 L.Ed.2d 679, does not mean that judicial elections are entirely immune from vote dilution claims. *Wells* rejected a constitutional claim and, thus, has no relevance to a correct interpretation of this statute, which was enacted to provide additional protection***382** for voting rights not adequately protected by the Constitution itself. Cf. *City of Rome v. United States*, 446 U.S. 156, 172-183, 100 S.Ct. 1548, 1559-1565, 64 L.Ed.2d 119. Pp. 2367-2368.

917 F.2d 187 (C.A.5, 1990), reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, O'CONNOR, and SOUTER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C.J., and KENNEDY, J., joined, *post,* p. 2369. KENNEDY, J., filed a dissenting opinion, *post,* p. ----.

Solicitor General Starr argued the cause for the United States in No. 90-1032. With him on the briefs were *Assistant Attorney General Dunne, Deputy Solicitor General Roberts, Deputy Assistant Attorney General Clegg, Paul J. Larkin, Jr.,* Jessica Dunsay Silver, and *Mark L. Gross. Pamela S. Karlan* argued the cause for petitioners in No.90-757. With her on the briefs were *Julius LeVonne Chambers, Charles Stephen Ralston, Dayna L. Cunningham,* Ronald L. Wilson, *C. Lani Guinier,* William P. Quigley, Roy Rodney, Jr.
Robert G. Pugh argued the cause for respondents in both cases. With him on the brief were William J. Guste, Jr., Attorney General of Louisiana, *M. Truman Woodward, Jr., Moise W. Dennery,* and *A.R. Christovich,* Special Assistant Attorneys General, and Robert G. Pugh, Jr.†
†Briefs of *amici curiae* urging reversal were filed for the Lawyers' Committee for Civil Rights Under Law et al. by Frank R. Parker, Robert B. McDuff, Brenda Wright, *Robert F. Mullen, David S. Tatel,* Norman Redlich, Laughlin McDonald, *Neil Bradley,* Kathleen L. Wilde, Mary Wyckoff, *Samuel Rabinove, Richard T. Foltin, Antonia Hernandez* and Judith Sanders-Castro; for Supreme Court Justice for Orleans, Inc., by M. David Gelfand, Terry E. Allbritton, John S. Keller, and Ira J. Middleberg; and for Darleen M. Jacobs by *Ms. Jacobs, pro se,* and Brian C. Beckwith.
Briefs of *amici curiae* urging affirmance were filed for the State of Georgia by Michael J. Bowers, Attorney General, Carol Atha Cosgrove, Assistant Attorney General, and David F. Walbert; for the Pacific Legal Foundation by Ronald A. Zumbrun and Anthony T. Caso; and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and Paul D. Kamenar.
Edwin F. Hendricks filed a brief for the American Judicature Society as *amicus curiae.*

***383** Justice STEVENS delivered the opinion of the Court.
The preamble to the Voting Rights Act of 1965 establishes that the central purpose of the Act is "[t]o enforce the fifteenth amendment to the Constitution of the United States." [FN1] The Fifteenth Amendment provides:

FN1. Pub.L. 89-110, 79 Stat. 437, 42 U.S.C. § 1973*et seq.* (1964 ed., Supp. I).

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const., Amdt. 15, § 1.

****2358** In 1982, Congress amended § 2 of the Voting Rights Act [FN2] to make clear that certain practices and procedures that *result* in the denial or abridgment of the right to vote are forbidden even though the absence of proof of discriminatory intent ***384** protects them from constitutional challenge. The question presented by these cases is whether this "results test" protects the right to vote in state judicial elections. We hold that the coverage provided by the 1982 amendment is coextensive with the coverage provided by the Act prior to 1982 and that judicial elections are embraced within that coverage.

FN2. Section 2 of the Voting Rights Act of 1965, as amended, now reads:

"SEC. 2. (a) No voting qualification or

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prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

"(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 96 Stat. 134. Section 2 has been codified at 42 U.S.C. § 1973.

I

Petitioners in No. 90-757 represent a class of approximately 135,000 black registered voters in Orleans Parish, Louisiana. App. 6-7, 13. They brought this action against the Governor and other state officials (respondents) to challenge the method of electing justices of the Louisiana Supreme Court from the New Orleans area. The United States, petitioner in No. 90-1032, intervened to support the claims advanced by the plaintiff class.

The Louisiana Supreme Court consists of seven justices,[FN3] five of whom are elected from five single-member Supreme Court Districts, and two of whom are elected from one multi-member Supreme Court District.[FN4] Each of the seven members of the court must be a resident of the district from which he or she is elected and must have resided there for at least two years prior to election. App. to Pet. for Cert. 7a. Each of the justices on the Louisiana Supreme Court serves a term of 10 years.[FN5] The one multimember district, the First Supreme Court District, consists of the parishes of Orleans, St. Bernard, Plaquemines, and Jefferson.[FN6] Orleans Parish contains about half of the population of the First Supreme Court District and about half of the registered voters in that district. *Chisom v. Edwards,* 839 F.2d 1056, 1057 (CA5 1988). More than one-half of the registered voters of Orleans Parish are black, whereas more than three-fourths of ***385** the registered voters in the other three parishes are white. App. 8.

FN3. La. Const., Art. 5, § 3; La.Rev.Stat.Ann. § 13:101 (West 1983).

FN4. La. Const., Art. 5, § 22(A); La.Rev.Stat.Ann. § 13:101 (West 1983).

FN5. La. Const., Art. 5, § 3.

FN6. La. Const., Art. 5, § 4; La.Rev.Stat.Ann. § 13:101 (West 1983).

Petitioners allege that "the present method of electing two Justices to the Louisiana Supreme Court at-large from the New Orleans area impermissibly dilutes minority voting strength" in violation of § 2 of the Voting Rights Act. *Id.,* at 9. Furthermore, petitioners claimed in the courts below that the current electoral system within the First Supreme Court District violates the Fourteenth and Fifteenth Amendments of the Federal Constitution because the purpose and effect of this election practice "is to dilute, minimize, and cancel the voting strength" of black voters in Orleans Parish. ****2359** *Ibid.* Petitioners seek a remedy that would divide the First District into two districts, one for Orleans Parish and the second for the other three parishes. If this remedy were adopted, the seven members of the Louisiana Supreme Court would each represent a separate single-member judicial district, and each of the two new districts would have approximately the same population. *Id.,* at 8. According to petitioners, the new Orleans Parish district would also have a majority black population and majority black voter registration. *Id.,* at 8, 47.

The District Court granted respondents' motion to dismiss the complaint. *Chisom v. Edwards,* 659

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F.Supp. 183 (ED La.1987). It held that the constitutional claims were insufficient because the complaint did not adequately allege a specific intent to discriminate. *Id.*, at 189. With respect to the statutory claim, the court held that § 2 is not violated unless there is an abridgment of minority voters' opportunity "to elect representatives of their choice." *Id.*, at 186-187. The court concluded that because judges are not "representatives," judicial elections are not covered by § 2. *Id.*, at 187.

The Court of Appeals for the Fifth Circuit reversed. *Chisom v. Edwards*, 839 F.2d 1056, cert. denied *sub nom. Roemer v. Chisom*, 488 U.S. 955, 109 S.Ct. 390, 102 L.Ed.2d 379 (1988). Before beginning its analysis, the court remarked that "[i]t is particularly significant***386** that no black person has ever been elected to the Louisiana Supreme Court, either from the First Supreme Court District or from any one of the other five judicial districts." 839 F.2d, at 1058. After agreeing with the recently announced opinion in *Mallory v. Eyrich*, 839 F.2d 275 (CA6 1988), it noted that the broad definition of the terms "voting" and "vote" in § 14(c)(1) of the original Act expressly included judicial elections within the coverage of § 2.[FN7] It also recognized Congress' explicit intent to expand the coverage of § 2 by enacting the 1982 amendment. 839 F.2d, at 1061.[FN8] Consistent with Congress' efforts to broaden coverage under the Act, the court rejected the State's contention that the term "representatives" in the 1982 amendment was used as a word of limitation. *Id.*, at 1063 (describing State's ***387** position as "untenable"). Instead, the court concluded that representative " 'denotes anyone selected or chosen by popular election from among a field of candidates to fill an office, including judges.' " *Ibid.* (quoting *Martin v. Allain*, 658 F.Supp. 1183, 1200 (SD Miss.1987)). The court buttressed its interpretation by noting that "section 5 and section 2, virtually companion sections, operate in tandem to prohibit discriminatory practices in voting, whether those practices originate in the past, present, or future." 839 F.2d, at 1064. It also gleaned support for its construction of § 2 from the fact that the Attorney General had "consistently supported****2360** an expansive, not restrictive, construction of the Act." *Ibid.* Finally, the court held that the constitutional allegations were sufficient to warrant a trial, and reinstated all claims. *Id.*, at 1065.[FN9]

FN7. "Section 14(c)(1), which defines 'voting' and 'vote' for purposes of the Act, sets forth the types of election practices and elections which are encompassed within the regulatory sphere of the Act. Section 14(c)(1) states:

> "The terms 'vote' or 'voting' shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election." See 42 U.S.C. § 1973*l*(c)(1).

> "Clearly, judges are 'candidates for public or party office' elected in a primary, special, or general election; therefore, section 2, by its express terms, extends to state judicial elections. This truly is the only construction consistent with the plain language of the Act." 839 F.2d, at 1059-1060.

FN8. "It is difficult, if not impossible, for this Court to conceive of Congress, in an express attempt to expand the coverage of the Voting Rights Act, to have in fact amended the Act in a manner affording minorities less protection from racial discrimination than that provided by the Constitution.... [S]ection 2 necessarily embraces judicial elections within its scope. Any other construction of section 2 would be wholly inconsistent with the plain language of the Act and the express purpose which Congress sought to attain in amending section 2; that is, to expand the protection of the Act." *Id.*, at 1061.

FN9. After remand, but before trial, plaintiffs (here petitioners) moved for a preliminary injunction, enjoining the October 1, 1988, election for one of the two Louisiana Supreme Court seats from the First Supreme

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Court District. The District Court granted plaintiffs' motion, having found that they satisfied the four elements required for injunctive relief. *Chisom v. Edwards*, 690 F.Supp. 1524, 1531 (ED La.1988). The Court of Appeals, however, vacated the preliminary injunction and ordered that the election proceed as scheduled. *Chisom v. Roemer*, 853 F.2d 1186, 1192 (CA5 1988). It reasoned that if the election were enjoined, the resulting uncertainty would have a deleterious effect on the Louisiana Supreme Court and the administration of justice that would outweigh any potential harm plaintiffs might suffer if the election went forward. *Id.*, at 1190-1192.

After the case was remanded to the District Court, the United States filed a complaint in intervention in which it alleged that the use of a multimember district to elect two members of the Louisiana Supreme Court is a "standard, practice or procedure" that "results in a denial or abridgment of the right to vote on account of race or color in violation of Section 2 of the Voting Rights Act." App. 48. After a nonjury trial, however, the District Court concluded that the evidence did not establish a violation of § 2 under the standards set forth in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). ***388** App. to Pet. for Cert. 62a. The District Court also dismissed the constitutional claims. *Id.*, at 63a-64a. Petitioners and the United States appealed. While their appeal was pending, the Fifth Circuit, sitting en banc in another case, held that judicial elections were not covered under § 2 of the Act as amended. *League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620 (1990) (hereinafter *LULAC*).

The majority in *LULAC* concluded that Congress' use of the word "representatives" in the phrase "to elect representatives of their choice" in § 2(b) of the Act indicated that Congress did not intend to authorize vote dilution claims in judicial elections. The en banc panel reached this conclusion after considering (1) the "precise language" of the amendment, *id.*, at 624; (2) the character of the judicial office, with special emphasis on "the cardinal reason that judges need not be elected at all,"*id.*, at 622; and (3) the fact that the one-person, one-vote rule had been held inapplicable to judicial elections before 1982, *id.*, at 626.

The precise language of § 2 on which the *LULAC* majority focused provides that a violation of § 2 is established if the members of a protected class

> " 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.' " *Id.*, at 625 (quoting 42 U.S.C. § 1973(b)).

Noting that this language protects both the "the broad and general opportunity to participate in the political process and the specific one to elect representatives," *LULAC*, 914 F.2d, at 625, the court drew a distinction between claims involving tests or other devices that interfere with individual participation in an election, on the one hand, and claims of vote dilution that challenge impairment of a group's opportunity to elect representatives of their choice, on the other hand. The majority assumed that the amended § 2 would continue to apply to judicial elections with respect to claims in the first ***389** category, see *ibid.*, but that the word "representatives" excludes judicial elections from claims in the second category, see *id.*, at 625-628.

In the majority's view, it was "factually false" to characterize judges as representatives because public opinion is "irrelevant to the judge's role," *id.*, at 622; "the judiciary serves no representative function whatever: the judge represents no one," *id.*, at 625. The majority concluded that judicial offices ****2361** "are not 'representative' ones, and their occupants are not representatives." *Id.*, at 631. Thus, Congress would not have used the word "representatives," as it did in § 2(b) of the Act, if it intended that subsection to apply to vote dilution claims in judicial elections.

The majority also assumed that Congress was familiar with *Wells v. Edwards*, 347 F.Supp. 453 (MD La.1972), summarily aff'd, 409 U.S. 1095, 93 S.Ct. 904, 34 L.Ed.2d 679 (1973), a reapportionment case in which the District Court held that "the concept of one-man, one-vote apportionment does not apply to the judicial branch of the government." 347 F.Supp., at 454. The express reference in the Senate Report to the fact that the " 'principle that the right to vote is denied or abridged by dilution of voting strength derives from the one-person, one-vote reapportionment case of *Reynolds v. Sims*, [377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)],'

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" *LULAC*, 914 F.2d, at 629 (quoting S.Rep. No. 97-417, p. 19 (1982)), persuaded the majority that, in light of the case law holding that judges were not representatives in the context of one-person, one-vote reapportionment cases, see *LULAC*, 914 F.2d, at 626 (citing cases), Congress would not have authorized vote dilution claims in judicial elections without making an express, unambiguous statement to that effect.

Following the en banc decision in *LULAC*, the Court of Appeals remanded this litigation to the District Court with directions to dismiss the complaint. 917 F.2d 187 (1990) (*per curiam*). It expressed no opinion on the strength of petitioners' evidentiary case. We granted certiorari, 498 ***390** U.S. 1060, 111 S.Ct. 775, 112 L.Ed.2d 838 (1991), and set the case for argument with *LULAC*, see *post*, 501 U.S. 419, 111 S.Ct. 2376, 115 L.Ed.2d 379 (1991).

II

Our decision today is limited in character, and thus, it is useful to begin by identifying certain matters that are not in dispute. No constitutional claims are before us.[FN10] Unlike *Wells v. Edwards*,[FN11] *White v. Regester*,[FN12] and *Mobile v. Bolden*,[FN13] this case presents us solely with a question of statutory construction. That question involves only the scope of the coverage of § 2 of the Voting Rights Act as amended in 1982. We therefore do not address any question concerning the elements that must be proved to establish a violation of the Act or the remedy that might be appropriate to redress a violation if proved.

FN10. Petitioners did not seek review in this Court of the disposition of their constitutional claims. Brief for Petitioners in No. 90-757, p. 8, n. 2; Brief for United States 4, n. 2; Tr. of Oral Arg. 27.

FN11. 409 U.S. 1095, 93 S.Ct. 904, 34 L.Ed.2d 679 (1973), aff'g 347 F.Supp. 453 (MD La.1972) (whether election of State Supreme Court justices by district violated the Equal Protection Clause of the Fourteenth Amendment).

FN12. 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973) (whether population differential among districts established a prima facie case of invidious discrimination under the Equal Protection Clause of the Fourteenth Amendment).

FN13. 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980) (whether at-large system of municipal elections violated black voters' rights under the Fourteenth and Fifteenth Amendments).

It is also undisputed that § 2 applied to judicial elections prior to the 1982 amendment,[FN14] and that § 5 of the amended statute continues to apply to judicial elections, see *Clark v. Roemer*, 500 U.S. 646, 111 S.Ct. 2096, 114 L.Ed.2d 691 (1991). Moreover, there is no question that the terms "standard, practice, or procedure" are broad enough to encompass the use of multimember districts to minimize a racial minority's ability to influence the outcome of an election covered by § 2.[FN15] The only matter in ****2362** disputeis ***391** whether the test for determining the legality of such a practice, which was added to the statute in 1982, applies in judicial elections as well as in other elections.

FN14. See Brief for Respondents 16; Tr. of Oral Arg. 42.

FN15. In *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), the Court held that a local Act redefining the boundaries of the city of Tuskegee, Alabama, violated the Fifteenth Amendment. In his opinion for the Court, Justice Frankfurter wrote:

> "The opposite conclusion, urged upon us by respondents, would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions." *Id.*, at 345, 81 S.Ct., at 129.
>
> "A statute which is alleged to have worked unconstitutional deprivations of petitioners' rights is not immune to attack simply because the mechanism employed by the legislature is a redefinition of municipal boundaries. According to the allegations here made, the Alabama

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> Legislature has not merely redrawn the Tuskegee city limits with incidental inconvenience to the petitioners; it is more accurate to say that it has deprived the petitioners of the municipal franchise and consequent rights and to that end it has incidentally changed the city's boundaries. While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights." *Id.*, at 347, 81 S.Ct., at 130.

III

[1] The text of § 2 of the Voting Rights Act as originally enacted read as follows:

> "SEC. 2. No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 79 Stat. 437.

The terms "vote" and "voting" were defined elsewhere in the Act to include "all action necessary to make a vote effective *in any primary, special, or general election.*" § 14(c)(1) of the Act, 79 Stat. 445 (emphasis added). The statute further defined vote and voting as "votes cast with respect to candidates for public or party office and propositions for which votes are received in an election." *Ibid.*

***392** At the time of the passage of the Voting Rights Act of 1965, § 2, unlike other provisions of the Act, did not provoke significant debate in Congress because it was viewed largely as a restatement of the Fifteenth Amendment. See H.R.Rep. No. 439, 89th Cong., 1st Sess., 23 (1965), U.S.Code Cong. & Admin.News 1965, pp. 2437, 2454 (§ 2 "grants ... a right to be free from enactment or enforcement of voting qualifications ... or practices which deny or abridge the right to vote on account of race or color"); see also S.Rep. No. 162, 89th Cong., 1st Sess., pt. 3, pp. 19-20 (1965). This Court took a similar view of § 2 in *Mobile v. Bolden*, 446 U.S. 55, 60-61, 100 S.Ct. 1490, 1495-1497, 64 L.Ed.2d 47 (1980). There, we recognized that the coverage provided by § 2 was unquestionably coextensive with the coverage provided by the Fifteenth Amendment; the provision simply elaborated upon the Fifteenth Amendment. *Ibid.* Section 2 protected the right to vote, and it did so without making any distinctions or imposing any limitations as to which elections would fall within its purview. As Attorney General Katzenbach made clear during his testimony before the House, "[e]very election in which registered electors are permitted to vote would be covered" under § 2. [FN16]

> FN16. Hearings on H.R. 6400 and Other Proposals To Enforce the 15th Amendment to the Constitution of the United States before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., 21 (1965).

The 1965 Act made it unlawful "to deny or abridge" the right to vote "on account of race or color." 79 Stat. 437. Congress amended § 2 in 1975 [FN17] by expanding the original prohibition against discrimination "on account of race or color" to include non-English-speaking groups. It did this by replacing "race or color" with "race or color, or in contravention of the guarantees set forth in section 4(f)(2)" of the Act. 89 Stat. 402.[FN18] The 1982 amendment further expanded the protection afforded by § 2.

> FN17. Pub.L. 94-73, 89 Stat. 400.
>
> FN18. The 1975 amendment added a new subsection to § 4 of the Act. The new subsection reads in part as follows:
>
> > "(f)(1) The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English....
> >
> > "(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group." 89 Stat. 401. See 42 U.S.C. §§ 1973b(f)(1),

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(2).

**2363 *393 Justice Stewart's opinion for the plurality in *Mobile v. Bolden, supra,* which held that there was no violation of either the Fifteenth Amendment or § 2 of the Voting Rights Act absent proof of intentional discrimination, served as the impetus for the 1982 amendment. One year after the decision in *Mobile,* Chairman Rodino of the House Judiciary Committee introduced a bill to extend the Voting Rights Act and its bilingual requirements, and to amend § 2 by striking out "to deny or abridge" and substituting "in a manner which *results* in a denial or abridgment of." [FN19] The "results" test proposed by Chairman Rodino was incorporated into S.1992,[FN20] and ultimately into the 1982 amendment to § 2, and is now the focal point of this litigation.

FN19. H.R. 3112, 97th Cong., 1st Sess. (1981) (emphasis added).

FN20. "The objectives of S.1992, as amended, are as follows: (1) to extend the present coverage of the special provisions of the Voting Rights Act, Sections 4, 5, 6, 7 and 8; (2) to amend Section 4(a) of the Act to permit individual jurisdictions to meet a new, broadened standard for termination of coverage by those special provisions; (3) to amend the language of Section 2 in order to clearly establish the standards intended by Congress for proving a violation of that section; (4) to extend the language-assistance provisions of the Act until 1992; and (5) to add a new section pertaining to voting assistance for voters who are blind, disabled, or illiterate.

. . . . .

"S. 1992 amends Section 2 of the Voting Rights Act of 1965 to prohibit any voting practice, or procedure [that] results in discrimination. This amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2. It thereby restores the legal standards, based on the controlling Supreme Court precedents, which applied in voting discrimination claims prior to the litigation involved in *Mobile v. Bolden.* The amendment also adds a new subsection to Section 2 which delineates the legal standards under the results test by codifying the leading pre-*Bolden* vote dilution case, *White v. Regester.*

"This new subsection provides that the issue to be decided under the results test is whether the political processes are equally open to minority voters. The new subsection also states that the section does not establish a right to proportional representation." S.Rep. No. 97-417, p. 2 (1982), U.S.Code Cong. & Admin.News 1982, pp. 177-179 (footnotes omitted).

*394 [2] Under the amended statute, proof of intent is no longer required to prove a § 2 violation. Now plaintiffs can prevail under § 2 by demonstrating that a challenged election practice has resulted in the denial or abridgment of the right to vote based on color or race. Congress not only incorporated the results test in the paragraph that formerly constituted the entire § 2, but also designated that paragraph as subsection (a) and added a new subsection (b) to make clear that an application of the results test requires an inquiry into "the totality of the circumstances." [FN21] The full text of § 2 as amended in 1982 reads as follows:

FN21. "The amendment to the language of Section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system of practice in order to establish a violation. Plaintiffs must either prove such intent, or, alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process.

"The 'results' standard is meant to restore the pre-*Mobile* legal standard which governed cases challenging election systems or practices as an illegal dilution of the minority vote." *Id.,* at 27 (footnote omitted).

See also *Thornburg v. Gingles,* 478 U.S. 30, 83-84, 106 S.Ct. 2752, 2783-2784, 92

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L.Ed.2d 25 (1986) (O'CONNOR, J., concurring in judgment) ("Amended § 2 is intended to codify the 'results' test employed in *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), and *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), and to reject the 'intent' test propounded in the plurality opinion in *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980))."

**2364 "SEC. 2. (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on *395 account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

"(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 96 Stat. 134.

The two purposes of the amendment are apparent from its text. Section (a) adopts a results test, thus providing that proof of discriminatory intent is no longer necessary to establish *any* violation of the section. Section (b) provides guidance about how the results test is to be applied.

[3] Respondents contend, and the *LULAC* majority agreed, that Congress' choice of the word "representatives" in the phrase "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" [FN22] in section (b) is evidence*396 of congressional intent to exclude vote dilution claims involving judicial elections from the coverage of § 2. We reject that construction because we are convinced that if Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history of the 1982 amendment.[FN23] Our conclusion is confirmed when we review the justifications offered by the *LULAC* majority and respondents in support of their construction of the statute; we address each of their main contentions in turn.

FN22. The phrase is borrowed from Justice WHITE's opinion for the Court in *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), which predates *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). Congress explained that its purpose in adding section 2(b) was to "embod[y] the test laid down by the Supreme Court in *White*." S.Rep. No. 97-417, at 27, U.S.Code Cong. & Admin.News 1982, p. 205. In *White*, the Court said that the "plaintiffs' burden is to produce evidence ... that [the minority group's] members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." 412 U.S., at 766, 93 S.Ct., at 2339.

FN23. Congress' silence in this regard can be likened to the dog that did not bark. See A. Doyle, Silver Blaze, in The Complete Sherlock Holmes 335 (1927). Cf. *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 602, 100 S.Ct. 1889, 1902, 64 L.Ed.2d 525 (1980) (REHNQUIST, J., dissenting) ("In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night"). See also *American Hospital Assn. v. NLRB*, 499 U.S. 606, 111 S.Ct. 1539, 113 L.Ed.2d 675 (1991).

IV

[4][5] The *LULAC* majority assumed that § 2 provides

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two distinct types of protection for minority voters-it protects their opportunity "to participate in the political process" and their opportunity "to elect representatives of their choice." See *LULAC*, 914 F.2d, at 625. Although the majority interpreted **2365 "representatives" as a word of limitation, it assumed that the word eliminated judicial elections only from the latter protection, without affecting the former. *Id.*, at 625, 629. In other words, a standard, practice, or procedure in a judicial election, such as a limit on the times that polls are open, which has a disparate impact on black voters' opportunity to cast their ballots under § 2, may be challenged even if a different practice that merely affects their opportunity to elect representatives of their choice to a judicial office may *397 not. This reading of § 2, however, is foreclosed by the statutory text and by our prior cases.

[6] Any abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election. As the statute is written, however, the inability to elect representatives of their choice is not sufficient to establish a violation unless, under the totality of the circumstances, it can also be said that the members of the protected class have less opportunity to participate in the political process. The statute does not create two separate and distinct rights. Subsection (a) covers every application of a qualification, standard, practice, or procedure that results in a denial or abridgment of "*the right*" to vote. The singular form is also used in subsection (b) when referring to an injury to members of the protected class who have less "opportunity" than others "to participate in the political process *and* to elect representatives of their choice." 42 U.S.C. § 1973 (emphasis added). It would distort the plain meaning of the sentence to substitute the word "or" for the word "and." Such radical surgery would be required to separate the opportunity to participate from the opportunity to elect.[FN24]

> FN24. Justice Scalia argues that our literal reading of the word "and" leads to the conclusion that a small minority has no protection against infringements of its right " 'to participate in the political process' " because it will always lack the numbers necessary "to elect its candidate," *post*, at 2371. This argument, however, rests on the erroneous assumption that a small group of voters can never influence the outcome of an election.

The statutory language is patterned after the language used by Justice WHITE in his opinions for the Court in *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), and *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971). See n. 22, *supra*. In both opinions, the Court identified the opportunity to participate and the opportunity to elect as inextricably linked. In *White v. Regester*, the Court described the connection as follows: "The plaintiffs' burden is to produce evidence ... that its members*398 had less opportunity than did other residents in the district to participate in the political processes *and* to elect legislators of their choice." 412 U.S., at 766, 93 S.Ct., at 2339 (emphasis added). And earlier, in *Whitcomb v. Chavis*, the Court described the plaintiffs' burden as entailing a showing that they "had less opportunity than did other ... residents to participate in the political processes *and* to elect legislators of their choice." 403 U.S., at 149, 91 S.Ct., at 1872 (emphasis added).[FN25]

> FN25. See also *Reynolds v. Sims*, 377 U.S. 533, 565, 84 S.Ct. 1362, 1383, 12 L.Ed.2d 506 (1964) ("Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature").

[7][8] The results test mandated by the 1982 amendment is applicable to all claims arising under § 2. If the word "representatives" did place a limit on the coverage of the Act for judicial elections, it would exclude all claims involving such elections from the protection of § 2. For all such claims must allege an abridgment of the opportunity to participate in the political process *and* to elect representatives of one's choice. Even if the wisdom of Solomon would support the *LULAC* majority's proposal to preserve claims based on an interference with the right to vote in judicial elections while eschewing**2366 claims based on the opportunity to elect judges, we have no authority to divide a unitary claim created by Congress.

V

[9][10] Both respondents and the *LULAC* majority

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place their principal reliance on Congress' use of the word "representatives" instead of "legislators" in the phrase "to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973. When Congress borrowed the phrase from *White v. Regester*, it replaced "legislators" with "representatives." [FN26] This substitution indicates, at the very ***399** least, that Congress intended the amendment to cover more than legislative elections. Respondents argue, and the majority agreed, that the term "representatives" was used to extend § 2 coverage to executive officials, but not to judges. We think, however, that the better reading of the word "representatives" describes the winners of representative, popular elections. If executive officers, such as prosecutors, sheriffs, state attorneys general, and state treasurers, can be considered "representatives" simply because they are chosen by popular election, then the same reasoning should apply to elected judges.[FN27]

FN26. The word "representatives" rather than "legislators" was included in Senator Robert Dole's compromise, which was designed to assuage the fears of those Senators who viewed the House's version, H.R. 3112, as an invitation for proportional representation and electoral quotas. Senator Dole explained that the compromise was intended both to embody the belief "that a voting practice or procedure which is discriminatory in result should not be allowed to stand, regardless of whether there exists a discriminatory purpose or intent" and to "delineat[e] what legal standard should apply under the results test and clarif[y] that it is not a mandate for proportional representation." Hearings on S. 53 et al. before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 2d Sess., 60 (1982). Thus, the compromise was not intended to exclude any elections from the coverage of subsection (a), but simply to make clear that the results test does not require the proportional election of minority candidates in *any* election.

FN27. Moreover, this Court has recently recognized that judges do engage in policymaking at some level. See *Gregory v. Ashcroft*, 501 U.S. 452, 466-467, 111 S.Ct. 2395, 2404, 115 L.Ed.2d 410 (1991) ("It may be sufficient that the appointee is in a position requiring the exercise of discretion concerning issues of public importance. This certainly describes the bench, regardless of whether judges might be considered policymakers in the same sense as the executive or legislature"). A judge brings to his or her job of interpreting texts "a well-considered judgment of what is best for the community." *Id.*, at 466, 111 S.Ct., at 2403. As the concurrence notes, Justice Holmes and Justice Cardozo each wrote eloquently about the "policymaking nature of the judicial function." *Id.*, at 482, 111 S.Ct., at 2412 (WHITE, J., concurring in part, dissenting in part, and concurring in judgment).

Respondents suggest that if Congress had intended to have the statute's prohibition against vote dilution apply to the election of judges, it would have used the word "candidates" instead of "representatives." Brief for Respondents 20, and n. 9. But that confuses the ordinary meaning of the words. ***400** The word "representative" refers to someone who has prevailed in a popular election, whereas the word "candidate" refers to someone who is seeking an office. Thus, a candidate is nominated, not elected. When Congress used "candidate" in other parts of the statute, it did so precisely because it was referring to people who were aspirants for an office. See, *e.g.*, 42 U.S.C. §§ 1971(b) ("any candidate for the office of President"), 1971(e) ("candidates for public office"), 1973i(c) ("any candidate for the office of President"), 1973i(e)(2) ("any candidate for the office of President"), 1973*l*(c) ("candidates for public or party office"), 1973ff-2 ("In the case of the offices of President and Vice President, a vote for a named candidate"), 1974 ("candidates for the office of President"), 1974e ("candidates for the office of President").

The *LULAC* majority was, of course, entirely correct in observing that "judges need not be elected at all," 914 F.2d, at 622, and ****2367** that ideally public opinion should be irrelevant to the judge's role because the judge is often called upon to disregard, or even to defy, popular sentiment. The Framers of the Constitution had a similar understanding of the judicial role, and as a consequence, they established that Article III judges would be appointed, rather than

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elected, and would be sheltered from public opinion by receiving life tenure and salary protection. Indeed, these views were generally shared by the States during the early years of the Republic.[FN28] Louisiana, however, has chosen a different course. It has decided to elect its judges and to compel judicial candidates to vie for popular support just as other political candidates do.

FN28. See generally Winters, Selection of Judges-An Historical Introduction, 44 Texas L.Rev. 1081, 1082-1083 (1966).

The fundamental tension between the ideal character of the judicial office and the real world of electoral politics cannot be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for *401 elected office.[FN29] When each of several members of a court must be a resident of a separate district, and must be elected by the voters of that district, it seems both reasonable and realistic to characterize the winners as representatives of that district. Indeed, at one time the Louisiana Bar Association characterized the members of the Louisiana Supreme Court as representatives for that reason: "Each justice and judge now in office shall be considered as a representative of the judicial district within which is situated the parish of his residence at the time of his election." [FN30] Louisiana could, of course, exclude its judiciary from the coverage of the Voting Rights Act by changing to a system in which judges are appointed, and, in that way, it could enable its judges to be indifferent to popular opinion. The reasons why Louisiana has chosen otherwise are precisely the reasons why it is appropriate for § 2, as well as § 5, of the Voting Rights Act to continue to apply to its judicial elections.

FN29. "Financing a campaign, soliciting votes, and attempting to establish charisma or name identification are, at the very least, unseemly for judicial candidates" because "it is the business of judges to be indifferent to popularity." Stevens, The Office of an Office, Chicago Bar Rec. 276, 280, 281 (1974).

FN30. Louisiana State Law Institute, Project of a Constitution for the State of Louisiana with Notes and Studies 1039 (1954) (1921 Report of the Louisiana Bar Association submitted to the Louisiana Constitutional Convention). The editors of the project explained that they included the 1921 Report because "on the major issues involved in revising the judicial provisions of the present constitution, it offers many proposals, that even after the passage of thirty years, still merit serious consideration. Of particular interest are the procedures for the selection, retirement and removal of judges...." *Id.*, at 1035.

[11] The close connection between §§ 2 and 5 further undermines respondents' view that judicial elections should not be covered under § 2. Section 5 requires certain States to submit changes in their voting procedures to the District Court of the District of Columbia or to the Attorney General for preclearance. Section 5 uses language similar to that of § 2 *402 in defining prohibited practices: "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." 42 U.S.C. § 1973c. This Court has already held that § 5 applies to judicial elections. *Clark v. Roemer*, 500 U.S. 646, 111 S.Ct. 2096, 114 L.Ed.2d 691 (1991). If § 2 did not apply to judicial elections, a State covered by § 5 would be precluded from implementing a new voting procedure having discriminatory effects with respect to judicial elections, whereas a similarly discriminatory system already in place could not be challenged under § 2. It is unlikely that Congress intended such an anomalous result.

VI

[12] Finally, both respondents and the *LULAC* majority suggest that no judicially manageable standards for deciding vote dilution**2368 claims can be fashioned unless the standard is based on the one-person, one-vote principle.[FN31] They reason that because we have held the one-person, one-vote rule inapplicable to judicial elections, see *Wells v. Edwards*, 409 U.S. 1095, 93 S.Ct. 904, 34 L.Ed.2d 679 (1973), aff'g 347 F.Supp., at 454, it follows that judicial elections are entirely immune from vote dilution *403 claims. The conclusion, however, does not follow from the premise.

FN31. The "one-person, one-vote" principle was first set forth in *Gray v. Sanders*, 372 U.S. 368, 379, 381, 83 S.Ct. 801, 808, 809, 9

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L.Ed.2d 821 (1963):

> "... Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote-whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.
>
> . . . . .
>
> "... The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing-one person, one vote."
>
> Since then, the rule has been interpreted to mean that "each person's vote counts as much, insofar as it is practicable, as any other person's." *Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50, 54, 90 S.Ct. 791, 794, 25 L.Ed.2d 45 (1970).

The holding in *Wells* rejected a constitutional challenge based on the Equal Protection Clause of the Fourteenth Amendment. It has no more relevance to a correct interpretation of this statute than does our decision in *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), which also rejected a constitutional claim. The statute was enacted to protect voting rights that are not adequately protected by the Constitution itself. Cf. *City of Rome v. United States*, 446 U.S. 156, 172-183, 100 S.Ct. 1548, 1559-1565, 64 L.Ed.2d 119 (1980). The standard that should be applied in litigation under § 2 is not at issue here.[FN32] Even if serious problems lie ahead in applying the "totality of circumstances" standard described in § 2(b), that task, difficult as it may prove to be, cannot justify a judicially created limitation on the coverage of the broadly worded statute, as enacted and amended by Congress.

> FN32. We note, however, that an analysis of a proper statutory standard under § 2 need not rely on the one-person, one-vote constitutional rule. See *Thornburg v. Gingles*, 478 U.S., at 88-89, 106 S.Ct., at 2785-2787 (O'CONNOR, J., concurring in judgment); see also *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973) (holding that multimember districts were invalid, notwithstanding compliance with one-person, one-vote rule). Moreover, *Clark v. Roemer*, 500 U.S. 646, 111 S.Ct. 2096, 114 L.Ed.2d 691 (1991), the case in which we held that § 5 applies to judicial elections, was a vote dilution case. The reasoning in Justice SCALIA's dissent, see *post*, at 2374-2375 if valid, would have led to a different result in that case.

VII

[13] Congress enacted the Voting Rights Act of 1965 for the broad remedial purpose of "rid[ding] the country of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 315, 86 S.Ct. 803, 811, 15 L.Ed.2d 769 (1966). In *Allen v. State Board of Elections*, 393 U.S. 544, 567, 89 S.Ct. 817, 832, 22 L.Ed.2d 1 (1969), we said that the Act should be interpreted in a manner that provides "the broadest possible scope" in combating racial discrimination. Congress amended the Act in 1982 in order to relieve plaintiffs of the burden of proving discriminatory intent, after a plurality of this Court had concluded that the original Act, like the ***404** Fifteenth Amendment, contained such a requirement. See *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). Thus, Congress made clear that a violation of § 2 could be established by proof of discriminatory results alone. It is difficult to believe that Congress, in an express effort to broaden the protection afforded by the Voting Rights Act, withdrew, without comment, an important category of elections from that protection. Today we reject such an anomalous view and hold that state judicial elections are included within the ambit of § 2 as amended.

The judgment of the Court of Appeals is reversed, and the cases are remanded for ****2369** further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, with whom THE CHIEF JUSTICE

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and Justice KENNEDY join, dissenting.

Section 2 of the Voting Rights Act of 1965 is not some all-purpose weapon for well-intentioned judges to wield as they please in the battle against discrimination. It is a statute. I thought we had adopted a regular method for interpreting the meaning of language in a statute: first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not-and especially if a good reason for the ordinary meaning appears plain-we apply that ordinary meaning. See, *e.g.*, *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 98-99, 111 S.Ct. 1138, 1146-1147, 113 L.Ed.2d 68 (1991); *Demarest v. Manspeaker*, 498 U.S. 184, 190, 111 S.Ct. 599, 603, 112 L.Ed.2d 608 (1991); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989); *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 557-558, 110 S.Ct. 2126, 2130-2131, 109 L.Ed.2d 588 (1990); *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1917); *Public Citizen v. Department of Justice*, 491 U.S. 440, 470, 109 S.Ct. 2558, 2575, 105 L.Ed.2d 377 (1989) (KENNEDY, J., concurring in judgment).

***405** Today, however, the Court adopts a method quite out of accord with that usual practice. It begins not with what the statute says, but with an expectation about what the statute must mean absent particular phenomena ("[*W*] *e are convinced* that if Congress had ... an intent [to exclude judges] Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history,"*ante,* at 2364 (emphasis added)); and the Court then interprets the words of the statute to fulfill its expectation. Finding nothing in the legislative history affirming that judges were excluded from the coverage of § 2, the Court gives the phrase "to elect representatives" the quite extraordinary meaning that covers the election of judges.

As method, this is just backwards, and however much we may be attracted by the result it produces in a particular case, we should in every case resist it. Our job begins with a text that Congress has passed and the President has signed. We are to read the words of that text as any ordinary Member of Congress would have read them, see Holmes, The Theory of Legal Interpretation, 12 Harv.L.Rev. 417 (1899), and apply the meaning so determined. In my view, that reading reveals that § 2 extends to vote dilution claims for the elections of representatives only, and judges are not representatives.

I

As the Court suggests, the 1982 amendments to the Voting Rights Act were adopted in response to our decision in *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), which had held that the scope of the original Voting Rights Act was coextensive with the Fifteenth Amendment, and thus proscribed intentional discrimination only. I agree with the Court that that original legislation, directed toward intentional discrimination, applied to all elections, for it clearly said so:

> "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied***406** by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 79 Stat. 437.

The 1982 amendments, however, radically transformed the Act. As currently written, the statute proscribes intentional discrimination only if it has a discriminatory effect, but ****2370** proscribes practices with discriminatory effect whether or not intentional. This new "results" criterion provides a powerful, albeit sometimes blunt, weapon with which to attack even the most subtle forms of discrimination. The question we confront here is how broadly the new remedy applies. The foundation of the Court's analysis, the itinerary for its journey in the wrong direction, is the following statement: "It is difficult to believe that Congress, in an express effort to broaden the protection afforded by the Voting Rights Act, withdrew, without comment, an important category of elections from that protection." *Ante,* at 2368. There are two things wrong with this. First is the notion that Congress cannot be credited with having achieved anything of major importance by simply saying it, in ordinary language, in the text of a statute, "without comment" in the legislative history. As the Court colorfully puts it, if the dog of legislative history has not barked nothing of great significance can have transpired. *Ante,* at 2364, n. 23. Apart from the

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questionable wisdom of assuming that dogs will bark when something important is happening, see 1 T. Livius, The History of Rome 411-413 (1892) (D. Spillan transl.), we have forcefully and explicitly rejected the Conan Doyle approach to statutory construction in the past. See *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592, 100 S.Ct. 1889, 1897, 64 L.Ed.2d 525 (1980) ("In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark"). We are here to apply the statute, not legislative history, and certainly not the absence of legislative history. Statutes are the law though sleeping dogs lie. See, *e.g.*, ***407***Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495-496, n. 13, 105 S.Ct. 3275, 3284-3285, n. 13, 87 L.Ed.2d 346 1985); *Williams v. United States*, 458 U.S. 279, 294-295, 102 S.Ct. 3088, 3096-3097, 73 L.Ed.2d 767 (1982) (MARSHALL, J., dissenting).

The more important error in the Court's starting point, however, is the assumption that the effect of excluding judges from the revised § 2 would be to "withdr[aw] ... an important category of elections from [the] protection [of the Voting Rights Act]." *Ante*, at 2368. There is absolutely no question here of *withdrawing* protection. Since the pre-1982 content of § 2 was coextensive with the Fifteenth Amendment, the entirety of that protection subsisted in the Constitution, and could be enforced through the other provisions of the Voting Rights Act. Nothing was lost from the prior coverage; *all* of the new "results" protection was an add-on. The issue is not, therefore, as the Court would have it, *ante*, at 2364, whether Congress has cut back on the coverage of the Voting Rights Act; the issue is how far it has extended it. Thus, even if a court's expectations were a proper basis for interpreting the text of a statute, while there would be reason to expect that Congress was not "withdrawing" protection, there is no particular reason to expect that the supplemental protection it provided was any more extensive than the text of the statute said.

What it said, with respect to establishing a violation of the amended § 2, is the following:

> "... A violation ... is established if ... it is shown that the political processes leading to nomination or election ... are not equally open to participation by members of a [protected] class ... in that its members have less opportunity than other members of the electorate *to participate in the political process* and *to elect representatives of their choice*." 42 U.S.C. § 1973(b) (emphasis added).

Though this text nowhere speaks of "vote dilution," *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), understood it to proscribe practices which produce that result, identifying as the statutory basis for a dilution claim the second of the two ***408** phrases highlighted above-"to elect representatives****2371** of their choice." [FN1] Under this interpretation, the other highlighted phrase-"to participate in the political process"-is left for other, *nondilution* § 2 violations. If, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, blacks would have less opportunity "*to participate* in the political process" than whites, and § 2 would therefore be violated-even if the number of potential black voters was so small that they would on no hypothesis be able *to elect* their own candidate, see Blumstein, Proving Race Discrimination, 69 Va.L.Rev. 633, 706-707 (1983).

> FN1. As the *Thornburg* Court noted, the plaintiffs' allegation was "that the redistricting scheme impaired black citizens' ability to elect representatives of their choice in violation of ...§ 2 of the Voting Rights Act," 478 U.S., at 35, 106 S.Ct., at 2758. See also *id.*, at 46, n. 12, 106 S.Ct., at 2764, n. 12 ("The claim we address in this opinion is ... that their ability to *elect* the representatives of their choice was impaired by the selection of a multimember electoral structure"). And as we explained the requirement for recovery in the case:
>
> > "Minority voters who contend that the multimember form of districting violates § 2 must prove that the use of a multimember electoral structure operates to minimize or cancel out their ability *to elect* their preferred candidates." *Id.*, at 48, 106 S.Ct., at 2765 (emphasis added).
>
> While disagreeing with the Court's formulation of a remedy, Justice O'CONNOR acknowledged that this structure underlay the Court's analysis,

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pointing out that in the Court's view

> "minority voting strength is to be assessed *solely* in terms of the minority group's ability *to elect* candidates it prefers.... Under this approach, the essence of a vote dilution claim is that the State has created single-member or multimember districts that unacceptably impair the minority group's ability *to elect* the candidates its members prefer." *Id.*, at 88, 106 S.Ct., at 2786 (opinion concurring in judgment) (emphasis added and deleted).

The Court, however, now rejects *Thornburg*'s reading of the statute, and asserts that before a violation of § 2 can be made out, *both* conditions of § 2(b) must be met. As the Court explains,

> "As the statute is written, ... the inability to elect representatives of their choice is not sufficient to establish a ***409** violation unless, under the totality of the circumstances, it can also be said that the members of the protected class have less opportunity to participate in the political process. The statute does not create two separate and distinct rights.... It would distort the plain meaning of the sentence to substitute the word 'or' for the word 'and.' Such radical surgery would be required to separate the opportunity to participate from the opportunity to elect." *Ante,* at 2365.

This is unquestionably wrong. If both conditions must be violated before there is any § 2 violation, then minorities who form such a small part of the electorate in a particular jurisdiction that they could on no conceivable basis "elect representatives of their choice" would be entirely without § 2 protection. Since, as the Court's analysis suggests, the "results" test of § 2 judges a violation of the "to elect" provision on the basis of whether the practice in question prevents actual election, then a protected class that with or without the practice will be unable to elect its candidate can be denied equal opportunity "to participate in the political process" with impunity. The Court feels compelled to reach this implausible conclusion of a "singular right" because the "to participate" clause and the "to elect" clause are joined by the conjunction "and." It is unclear to me why the rules of English usage require that conclusion here, any more than they do in the case of the First Amendment-which reads "Congress shall make no law ... abridging ... the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." This has not generally been thought to protect the right peaceably to assemble only when the purpose of the assembly is to petition the Government for a redress of grievances. So also here, one is deprived of an equal "opportunity ... to participate ... and to elect" if *either* the opportunity to participate *or* the opportunity to elect is unequal. The point is in any event not central to the present case-and it is sad to see the Court repudiate ***410** *Thornburg,* ****2372** create such mischief in the application of § 2, and even cast doubt upon the First Amendment, merely to deprive the State of the argument that elections for judges *remain* covered by § 2*even though* they are not subject to vote dilution claims.[FN2]

> FN2. The Court denies that this conclusion follows, because, as it claims, it "rests on the erroneous assumption that a small group of voters can never influence the outcome of an election." *Ante,* at 2365, n. 24. I make no such assumption. I only assume that by "to elect" the statute does not mean "to influence," just as I assume that by "representatives" the statute does not mean "judges." We do not reject Conan Doyle's method of statutory interpretation only to embrace Lewis Carroll's.

The Court, petitioners, and petitioners' *amici* have labored mightily to establish that there is *a* meaning of "representatives" that would include judges, see, *e.g.,* Brief for Lawyers Committee for Civil Rights as *Amicus Curiae* 10-11, and no doubt there is. But our job is not to scavenge the world of English usage to discover whether there is any possible meaning of "representatives" which suits our preconception that the statute includes judges; our job is to determine whether the *ordinary* meaning includes them, and if it does not, to ask whether there is any solid indication in the text or structure of the statute that something other than ordinary meaning was intended.

There is little doubt that the ordinary meaning of "representatives" does not include judges, see Webster's Second New International Dictionary 2114 (1950). The Court's feeble argument to the contrary is that "representatives" means those who "are chosen

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by popular election." *Ante,* at 2366. On that hypothesis, the fan-elected members of the baseball all-star teams are "representatives"-hardly a common, if even a permissible, usage. Surely the word "representative" connotes one who is not only *elected by* the people, but who also, at a minimum, *acts on behalf of* the people. Judges do that in a sense-but not in the ordinary sense. As the captions of the pleadings in some States still display, it is ***411** the prosecutor who represents "the People"; the judge represents the Law-which often requires him to rule against the People. It is precisely because we do not *ordinarily* conceive of judges as representatives that we held judges not within the Fourteenth Amendment's requirement of "one person, one vote." *Wells v. Edwards,* 347 F.Supp. 453 (MD La.1972), aff'd, 409 U.S. 1095, 93 S.Ct. 904, 34 L.Ed.2d 679 (1973). The point is not that a State could not make judges in some senses representative, or that all judges must be conceived of in the Article III mold, but rather, that giving "representatives" its ordinary meaning, the ordinary speaker in 1982 would not have applied the word to judges, see Holmes, The Theory of Legal Interpretation, 12 Harv.L.Rev. 417 (1899). It remains only to ask whether there is good indication that ordinary meaning does not apply.

There is one canon of construction that might be applicable to the present cases which, in some circumstances, would counter ordinary meaning-but here it would only have the effect of *reinforcing* it. We apply that canon to another case today, concerning, curiously enough, the very same issue of whether state judges are covered by the provisions of a federal statute. In *Gregory v. Ashcroft,* 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 we say that unless it is *clear* that the term "appointee[s] on the policymaking level" does not include judges we will construe it to include them, since the contrary construction would cause the statute to intrude upon the structure of state government, establishing a federal qualification for state judicial office. Such intrusion, we say, requires a "plain statement" before we will acknowledge it. See also *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 65, 109 S.Ct. 2304, 2308, 105 L.Ed.2d 45 (1989); *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 242, 105 S.Ct. 3142, 3147, 87 L.Ed.2d 171 (1985); ****2373***Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 99, 104 S.Ct. 900, 907, 79 L.Ed.2d 67 (1984). If the same principle were applied here, we would have double reason to give "representatives" its ordinary meaning. It is true, however, that in *Gregory* interpreting the statute to include judges would make them the only high-level state ***412** officials affected, whereas here the question is whether judges were excluded from a general imposition upon state elections that unquestionably exists; and in *Gregory* it was questionable whether Congress was invoking its powers under the Fourteenth Amendment (rather than merely the Commerce Clause), whereas here it is obvious. Perhaps those factors suffice to distinguish the two cases. Moreover, we tacitly rejected a "plain statement" rule as applied to the unamended § 2 in *City of Rome v. United States,* 446 U.S. 156, 178-180, 100 S.Ct. 1548, 1562-1563, 64 L.Ed.2d 119 (1980), though arguably that was before the rule had developed the significance it currently has. I am content to dispense with the "plain statement" rule in the present cases, cf. *Pennsylvania v. Union Gas Co.,* 491 U.S. 1, 41-42, 109 S.Ct. 2273, 2302-2303, 105 L.Ed.2d 1 (1989) (opinion of SCALIA, J.)-but it says something about the Court's approach to this decision that the possibility of applying that rule never crossed its mind.

While the "plain statement" rule may not be applicable, there is assuredly nothing whatever that points in the opposite direction, indicating that the ordinary meaning here should *not* be applied. Far from that, in my view the ordinary meaning of "representatives" gives clear purpose to congressional action that otherwise would seem pointless. As an initial matter, it is evident that Congress paid particular attention to the scope of elections covered by the "to elect" language. As the Court suggests, that language for the most part tracked this Court's opinions in *White v. Regester,* 412 U.S. 755, 766, 93 S.Ct. 2332, 2339, 37 L.Ed.2d 314 (1973), and *Whitcomb v. Chavis,* 403 U.S. 124, 149, 91 S.Ct. 1858, 1872, 29 L.Ed.2d 363 (1971), but the word "legislators" was not copied. Significantly, it was replaced not with the more general term "candidates" used repeatedly elsewhere in the Act, see, *e.g.,*42 U.S.C. §§ 1971(b), (e); 1973i(c); 1973*l*(c)(1); 1973ff-2; 1974; 1974e, but with the term "representatives," which appears nowhere else in the Act (except as a proper noun referring to Members of the federal lower House, or designees of the Attorney General). The normal meaning of this term is broader than "legislators" (it includes, for example, school ***413** boards and city councils as well as senators and representatives) but narrower than "candidates."

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The Court says that the seemingly significant refusal to use the term "candidate" and selection of the distinctive term "representative" are really inconsequential, because "candidate" could not have been used. According to the Court, since "candidate" refers to one who has been nominated but *not yet* elected, the phrase "to elect candidates" would be a contradiction in terms. *Ante,* at 2366. The only flaw in this argument is that it is not true, as repeated usage of the formulation "to elect candidates" by this Court itself amply demonstrates. See, *e.g.,* *Davis v. Bandemer,* 478 U.S. 109, 131, 106 S.Ct. 2797, 2809, 92 L.Ed.2d 85 (1986); *Rogers v. Lodge,* 458 U.S. 613, 624, 102 S.Ct. 3272, 3279, 73 L.Ed.2d 1012 (1982); *id.,* at 639, n. 18, 641, n. 22, 649, 102 S.Ct., at 3287, n. 18, 3288, n. 22, 3292 (STEVENS, J., dissenting); *Mobile v. Bolden,* 446 U.S., at 75, 100 S.Ct., at 1504; *United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 430 U.S. 144, 158, 97 S.Ct. 996, 1006, 51 L.Ed.2d 229 (1977); *Moore v. Ogilvie,* 394 U.S. 814, 819, 89 S.Ct. 1493, 1496, 23 L.Ed.2d 1 (1969); *Allen v. State Bd. of Elections,* 393 U.S. 544, 569, 89 S.Ct. 817, 833, 22 L.Ed.2d 1 (1969). We even used the phrase repeatedly in *Thornburg. Thornburg v. Gingles,* 478 U.S., at 40, 44, 50, 54, 80, 106 S.Ct., at 2760, 2762, 2766, 2768, 2781; **2374*id.,* at 86, 103, 106 S.Ct., at 2785, 2793 (O'CONNOR, J., concurring in judgment); *id.,* at 107, 106 S.Ct., at 2795 (STEVENS, J., concurring in part and dissenting in part). And the phrase is used in the complaint of the minority plaintiffs in the other § 2 case decided today. *Houston Lawyers' Assn. v. Attorney General of Texas,* 501 U.S. 419, 111 S.Ct. 2376, 115 L.Ed.2d 379 (1991). App. in Nos. 90-813, 90-974, p. 22a. In other words, far from being an impermissible choice, "candidates" would have been the natural choice, even if it had not been used repeatedly elsewhere in the statute. It is quite absurd to think that Congress went out of its way to replace that term with "representatives," in order to convey what "candidates" naturally suggests (viz., coverage of *all* elections) and what "representatives" naturally does not.

A second consideration confirms that "representatives" in § 2 was meant in its ordinary sense. When given its ordinary meaning, it causes the statute to reproduce an established,*414 eminently logical, and perhaps practically indispensable limitation upon the availability of vote dilution claims. Whatever other requirements may be applicable to elections for "representatives" (in the sense of those who are not only elected by but act on behalf of the electorate), those elections, unlike elections for *all* officeholders, must be conducted in accordance with the equal protection principle of "one person, one vote." And it so happens-more than coincidentally, I think-that in every case in which, prior to the amendment of § 2, we recognized the possibility of a vote dilution claim, the principle of "one person, one vote" was applicable. See, *e.g.,* *Fortson v. Dorsey,* 379 U.S. 433, 436, 85 S.Ct. 498, 500, 13 L.Ed.2d 401 (1965); *Burns v. Richardson,* 384 U.S. 73, 88, 86 S.Ct. 1286, 1294, 16 L.Ed.2d 376 (1966); *Whitcomb v. Chavis, supra,* 403 U.S., at 149-150, 91 S.Ct., at 1872-1873; *White v. Regester, supra,* 412 U.S., at 765-767, 93 S.Ct., at 2339-2340; see also *Davis v. Bandemer, supra,* 478 U.S., at 131-132, 106 S.Ct., at 2809-2810. Indeed, it is the principle of "one person, one vote" that gives meaning to the concept of "dilution." One's vote is diluted if it is not, *as it should be,* of the same practical effect as everyone else's. Of course the mere fact that an election practice satisfies the constitutional requirement of "one person, one vote" does not establish that there has been no vote dilution for Voting Rights Act purposes, since that looks not merely to equality of individual votes but also to equality of minority blocs of votes. (*White* itself, which dealt with a multimember district, demonstrates this point. See also *Mobile v. Bolden, supra,* 446 U.S., at 65, 100 S.Ct., at 1498.) But "one person, one vote" has been the premise and the necessary condition of a vote dilution claim, since it establishes the baseline for computing the voting strength that the minority bloc *ought to have.* As we have suggested, the first question in a dilution case is whether the "one-person, one-vote" standard is met, and if it is, the second is whether voting structures nonetheless operate to " 'minimize or cancel out the voting strength of racial or political elements of the voting population.' " *Burns v. Richardson, supra,* 384 U.S., at 88, 86 S.Ct., at 1294. See also Note, Fair and Effective Voting Strength Under Section 2 of the Voting Rights Act: The *415 Impact of Thornburg v. Gingles on Minority Vote Dilution Litigation, 34 Wayne L.Rev. 303, 323-324 (1987).

Well before Congress amended § 2, we had held that the principle of "one person, one vote" does not apply to the election of judges, *Wells v. Edwards,* 347 F.Supp. 453 (MD La.1972), aff'd, 409 U.S. 1095, 93 S.Ct. 904, 34 L.Ed.2d 679 (1973). If Congress was

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(through use of the extremely inapt word "representatives") making vote dilution claims available with respect to the election of judges, it was, for the first time, extending that remedy to a context in which "one person, one vote" did not apply. *That* would have been a significant change in the law, and given the need to identify some other baseline for computing "dilution," *that* is a **2375 matter which those who believe in barking dogs should be astounded to find unmentioned in the legislative history. If "representatives" is given its normal meaning, on the other hand, there is no change in the law (except elimination of the intent requirement) and the silence is entirely understandable.

I frankly find it very difficult to conceive how it is to be determined whether "dilution" has occurred, once one has eliminated *both* the requirement of actual intent to disfavor minorities, *and* the principle that 10,000 minority votes throughout the State should have as much practical "electability" effect as 10,000 nonminority votes. How does one begin to decide, in such a system, how much elective strength a minority bloc *ought* to have? I do not assert that it is utterly impossible to impose "vote dilution" restrictions upon an electoral regime that is not based on the "one-person, one-vote" principle. Congress can define "vote dilution" to be whatever it will, within constitutional bounds. But my point is that "one person, one vote" is inherent in the normal concept of "vote dilution," and was an essential element of the pre-existing, judicially crafted definition under § 2; that Congress did *not* adopt any new definition; that creating a new definition is a seemingly standardless task; and that the word Congress selected ("representative") seems specifically designed*416 to avoid these problems. The Court is stoic about the difficulty of defining "dilution" without a standard of purity, expressing its resolve to stand up to that onerous duty inescapably thrust upon it: "Even if serious problems lie ahead in applying the 'totality of the circumstances' standard described in § 2(b), that task, difficult as it may prove to be, cannot justify a judicially created limitation on the coverage of the broadly worded statute, as enacted and amended by Congress." *Ante,* at 2368. One would think that Congress had said "candidates," rather than "representatives." In reality, however, it is the Court rather than Congress that leads us-quite unnecessarily and indeed with stubborn persistence-into this morass of unguided and perhaps unguidable judicial interference in democratic elections. The Court attributes to Congress not only the intent to mean something other than what it said, but also the intent to let district courts invent (for there is no precedent where "one person, one vote" did not apply that Congress could have been consulting) what in the world constitutes dilution of a vote that does not have to be equal.

Finally, the Court suggests that there is something "anomalous" about extending coverage under § 5 of the Voting Rights Act to the election of judges, while not extending coverage under § 2 to the same elections. *Ante,* at 2367. This simply misconceives the different roles of § 2 and § 5. The latter requires certain jurisdictions to preclear changes in election methods before those changes are implemented; it is a means of assuring in advance the absence of all electoral illegality, not only that which violates the Voting Rights Act but that which violates the Constitution as well. In my view, judges *are* within the scope of § 2 for nondilution claims, and thus for those claims, § 5 preclearance would enforce the Voting Rights Act with respect to judges. Moreover, intentional discrimination in the election of judges, whatever its form, is constitutionally prohibited, and the preclearance provision of § 5 gives the Government a method by which to prevent*417 that. The scheme makes entire sense without the need to bring judges within the "to elect" provision.

All this is enough to convince me that there is sense to the ordinary meaning of "representative" in § 2(b)-that there is reason to Congress' choice-and since there is, then, under our normal presumption, that ordinary meaning prevails. I would read § 2 as extending vote dilution claims to elections for "representatives," but not to elections for judges. For other claims under § 2, however-those resting on the "to participate in the political process" provision rather than the "to elect" provision-no similar restriction**2376 would apply. Since the claims here are exclusively claims of dilution, I would affirm the judgment of the Fifth Circuit.

* * *

As I said at the outset, these cases are about method. The Court transforms the meaning of § 2, not because the ordinary meaning is irrational, or inconsistent with other parts of the statute, see, *e.g.,* *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 510-511, 109

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S.Ct. 1981, 1985, 104 L.Ed.2d 557 (1989); *Public Citizen v. Department of Justice*, 491 U.S., at 470, 109 S.Ct., at 2574 (KENNEDY, J., concurring in judgment), but because it does not fit the Court's conception of what Congress must have had in mind. When we adopt a method that psychoanalyzes Congress rather than reads its laws, when we employ a tinkerer's toolbox, we do great harm. Not only do we reach the wrong result with respect to the statute at hand, but we poison the well of future legislation, depriving legislators of the assurance that ordinary terms, used in an ordinary context, will be given a predictable meaning. Our highest responsibility in the field of statutory construction is to read the laws in a consistent way, giving Congress a sure means by which it may work the people's will. We have ignored that responsibility today. I respectfully dissent.

***418** Justice KENNEDY, dissenting.

I join Justice SCALIA's dissent in full. I write to add only that the issue before the Court is one of statutory construction, not constitutional validity. Nothing in today's decision addresses the question whether § 2 of the Voting Rights Act of 1965, as interpreted in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), is consistent with the requirements of the United States Constitution.

U.S.La.,1991.
Chisom v. Roemer
501 U.S. 380, 111 S.Ct. 2354, 115 L.Ed.2d 348, 59 USLW 4696

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Supreme Court of Florida

FRIDAY, OCTOBER 24, 2008

CASE NOS.: SC08-986

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES

CASE NOS.: SC08-1149

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING

The Florida Legislature's Notice of Supplemental Authority does not comply with Florida Rule of Appellate Procedure 9.225 and is hereby stricken as it contains argument.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

ab
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Citizens' Initiatives on Redistricting

SC08-986 | SC08-1163 | SC08-1149 | SC08-1165

>> PLEASE RISE.
HEAR YE, HEAR YE, HEAR YE.
THE SUPREME COURT OF FLORIDA IS
NOW IN SESSION.
ALL WHO HAVE CAUSE TO PLEA,
DRAW NEAR, GIVE ATTENTION, AND
YOU SHALL BE HEARD.
GOD SAVE THESE UNITED STATES,
THIS GREAT STATE OF FLORIDA,
AND THIS HONORABLE COURT.
LADIES AND GENTLEMEN, THE
FLORIDA SUPREME COURT.
PLEASE BE SEATED.
>> GOOD MORNING AND WELCOME TO
THE ORAL ARGUMENT CALENDAR FOR
THURSDAY, NOVEMBER THE 6th.
THE FIRST CASE ON OUR AGENDA IS
ADVISORY OPINION TO THE
ATTORNEY GENERAL STANDARDS FOR
ESTABLISHING LEGISLATIVE
BOUNDARIES.
MR.^RICHARDS, ARE YOU READY TO
PROCEED OR --?
MR.^HUBENER?
>> INTRODUCTORY REMARKS.
LOUIS HUBENER ON BEHALF OF THE
ATTORNEY GENERAL'S OFFICE.
THIS MATTER IS BEFORE THE COURT
ON THE ATTORNEY GENERAL'S
REQUEST FOR AN ADVISORY
OPINION.
MR.^RICHARD WILL ARGUE IN, ON
BEHALF OF THE SPONSOR, AND
JASON VAIL ON BEHALF OF THE
OPPONENT, THE LEGISLATURE.
THANK YOU.
>> MADAM CHIEF JUSTICE, MEMBERS
OF THE COURT, MAY IT PLEASE THE
COURT.
MY NAME IS BARRY RICHARD AND I
AM COUNSEL FOR THE SPONSOR FAIR
DISTRICTS FLORIDA INC. THE
OPPONENTS OF THE MEASURE, THE

FLORIDA LEGISLATURE, RAISE BOTH SINGLE SUBJECT AND TITLE AND SUMMARY OBJECTIONS.
ON THE SINGLE SUBJECT ISSUE, THEY MAKE TWO ARGUMENTS:^THE FIRST IS THAT THE PROPOSED AMENDMENT VIOLATES THE SINGLE SUBJECT REQUIREMENT BECAUSE IT IMPOSES MULTIPLE STANDARDS UPON THE LEGISLATURE'S FUNCTION IN SETTING DISTRICTS.
THIS COURT HAS NEVER HELD THAT AN AMENDMENT VIOLATES SINGLE SUBJECT SIMPLY BECAUSE IT HAS MULTIPLE COMPONENTS.
IN FACT, THE COURT HAS HISTORICALLY UPHELD MANY AMENDMENTS THAT HAD MULTIPLE COMPONENTS.
INSTEAD WHAT THIS COURT HAS DONE IS IT HAS ADOPTED A PRAGMATIC TEST THAT'S DESIGNED TO DETERMINE AS THE COURT HAS SAID, WHETHER THERE IS A SINGLE DOMINANT PLAN OR SCHEME OR IN OTHER WORDS, WHETHER THERE IS A UNITY OF OBJECT IN PLAN OR A LOGICAL AND NATURAL ONENESS OF PURPOSE, AND SO --
>> HOW WOULD YOU BEST DISTINGUISH?
IT APPEARS THAT IN OUR ANALYSIS WITH REGARD TO DISCRIMINATION IN THAT BALLOT OPTIC, WE HAD SEVERAL DIFFERENT STANDARDS, SEVERAL DIFFERENT CATEGORIES, AND THE COURT THERE WAS OF THE VIEW THAT WAS LOGROLLING BECAUSE OF THE VARIOUS ITEMS INCLUDED AND FOR THOSE TO BE PROTECTED.
>> JUSTICE LEWIS, YES, AND INDEED I BELIEVE THAT BASED UPON THIS COURT'S SERIES OF OPINIONS THAT WAS A VIOLATION.
WHAT IT DID IS IT APPLIED A GENERAL ANTIDISCRIMINATION CONCEPT TO TEN SEPARATE CLASSIFICATIONS OF INDIVIDUALS THAT HAD NO COHESIVE UNITY AMONG THEM.

THEY SIMPLY WERE DIFFERENT
GROUPS THAT IT WAS APPLYING IT
TO.
IN THIS CASE, ON THE OTHER
HAND, IT IS, THE, THE AMENDMENT
WOULD APPLY TO A SINGLE BODY,
FLORIDA LEGISLATURE, A SINGLE
CONCEPT DESIGNED TO DO ONE
GOAL, AND THAT GOAL IS TO
ENSURE THAT WHEN THE
LEGISLATURE SETS LINES, THAT IT
SETS THEM SOLEY ON THE BASIS OF
PROPORTIONAL REPRESENTATION.
PERIOD.
ONE PERSON, ONE VOTE.
AND EACH OF THE STANDARDS
SERVES THAT SAME SINGULAR
PURPOSE BY PROVIDING THAT THE
LEGISLATURE SHALL NOT DISTORT
THAT SINGLE PURPOSE BY
UTILIZING THOSE THINGS THAT
HISTORICALLY HAVE BEEN USED TO
DISTORT IT.
SO IT SERVES ONE PURPOSE.
AND IF YOU LOOK AT EACH OF
THESE STANDARDS, THEY HAVE A
COHESIVE UNITY BECAUSE THEY
EACH SERVE THAT STANDARD WHICH
IS ENTIRELY DIFFERENT THAN THE
ANTIDISCRIMINATION AMENDMENT
WHERE THERE WAS NOTHING
COHESIVE.
IT SIMPLY SAID YOU SHALL NOT
DISCRIMINATE AGAINST THIS GROUP
OR THIS GROUP OR THIS GROUP.
SO THIS SERVES WHAT THIS COURT
HAS DEFINED AS A UNITY OR A
ONENESS OF PURPOSE.
IN ADDITION, BECAUSE OF THE
FACT THAT YOU ARE DRAWING LINES
IN A SINGLE PARAMETER, ANY
STANDARD YOU USE TO DRAW ONE
LINE IS NECESSARILY GOING TO
AFFECT THE OTHER ONE.
IT WOULD BE ENTIRELY
IMPRACTICABLE TO SAY THAT YOU,
THAT YOU MUST, IF YOU WANT MORE
THAN ONE STANDARD THAT
YOU MUST HAVE SEPARATE
AMENDMENTS FOR EACH ONE OF THEM
BECAUSE YOU WOULD BE DENYING

THE PEOPLE THE OPPORTUNITY TO
DECIDE HOW THOSE AMENDMENTS
AFFECT EACH OTHER.
SO I THINK THAT IN TERMS OF
WHAT THIS COURT WAS, HAS BEEN
SEEKING TO DO IN ITS EFFORT
OVER THE YEARS TO CREATE A
MEANINGFUL STANDARD THIS
CERTAINLY --
>> NOW WHY ISN'T THIS --
MR.^RICHARDS, WHY ISN'T THIS
QUINTESSENTIAL LOGROLLING WHERE
YOU'RE ASKING THE VOTER TO
CHOOSE OR SOME VOTERS TO CHOOSE
BETWEEN A DESIRE ON ONE HAND
NOT TO DISCRIMINATE AGAINST
RACIAL MINORITIES BUT ON THE
OTHER HAND, THAT MEANS THAT
THERE CANNOT BE A POLITICAL
PARTY JUDGMENT MADE IN
REAPPORTIONING THESE DISTRICT.
WHY ISN'T THAT LOGROLLING?
THAT'S A CHOICE BETWEEN TWO
SUBJECTS, ISN'T IT.
>> WELL, I THINK, JUSTICE WELLS
THAT IT IS ALWAYS A CHOICE
BETWEEN TWO SUBJECTS IF YOU
PARSE IT DOWN CAREFULLY ENOUGH
AND THERE'S MORE THAN ONE THING
IN AN AMENDMENT.
I, IN THIS CASE, THE REASON IS
BECAUSE IF YOU LOOK AT IT FROM
THE PERSPECTIVE OF WHAT, WHAT
THIS REALLY DOES, AGAIN, WHICH
I SAID IS IT SAYS THAT THE
DETERMINATION AS TO WHAT THE
LINE SHOULD BE SHOULD BE BASED
SOLEY UPON PROPORTIONAL
REPRESENTATION UNINFLUENCED BY
ANYTHING ELSE.
IF THAT'S WHAT YOU --, IF
THAT'S WHAT YOU ARE IN FAVOR
OF, THEN YOU WOULD VOTE FOR
THIS.
IF YOU ARE NOT IN FAVOR --
>> WHY DOESN'T IT JUST SAY
THAT?
RATHER THAN SAY THAT
LEGISLATIVE DISTRICTS MAY BE
DRAWN IN FAVOR OR DISFAVOR OF
AN INCUMBENT OR A POLITICAL

PARTY?
WHY DOESN'T IT JUST SAY WHAT
YOU SAID?
>> WELL, I COULD RESPOND TO
THAT TWO WAYS.
THE FIRST WAY IS, IT DOESN'T
SAY THAT BECAUSE THE SPONSORS
OF THIS AMENDMENT WANTED TO BE
SURE OF TWO THINGS:^FIRST, THAT
THE LEGISLATURE UNDERSTOOD
SPECIFICALLY WHAT -- IT WANTED
TO HAVE A CLEAR LINE RULE AS TO
WHAT THEY COULD AND COULDN'T DO
BUT SECOND IT WANTED TO PROVIDE
A REVIEW IN COURT WITH
STANDARDS THAT WERE VERY CLEAR,
THAT WERE NOT SUBJECT TO
INTERPRETATION.
THAT'S WHY IT DID IT, BUT MY
ADDITIONAL RESPONSE TO THAT IS
THAT YOU COULD ASK THAT SAME
QUESTION OF ANY OF THE
MULTITUDE OF CASES THAT THIS
COURT HAS UPHELD THAT INVOLVED
MULTIPLE COMPONENTS.
YOU COULD ALWAYS SAY WHY DIDN'T
YOU JUST SAY DO IT THIS WAY?
AND WHY WOULDN'T THIS BE
LOGROLLING BECAUSE SOMEBODY
MIGHT FAVOR ONE OF THOSE
COMPONENTS AND NOT ANOTHER ONE.

AT SOME POINT WE'VE GOT TO
ADOPT A PRACTICABLE APPROACH TO
THIS, AND THAT'S WHAT THIS
COURT HAS DONE IN THE ONENESS
OF PURPOSE, THE UNITY OF
PURPOSE, THE SINGULAR PURPOSE,
AND THIS HAS A SINGULAR PURPOSE
AND THE FACT IS THAT EVEN
THOUGH AN AMENDMENT HAS A
SINGULAR PURPOSE, IT MAY HAVE
SUBCOMPONENTS OF IT THEN ONE
COULD SAY MAYBE SOMEBODY WOULD
LIKE THIS AND NOT THAT.
HERE THE VOTER KNOWS THAT
EITHER I WANT MY DISTRICTS TO
BE BASED SOLEY ON PROPORTINAL
REPRESENTATION UNINFLUENCED BY
SOMETHING ELSE OR I WANT IT TO
BE INFLUENCED BY SOMETHING ELSE

SO I AM GOING TO VOTE AGAINST
THIS.
IT'S A CLEAR CHOICE.
THE SECOND ARGUMENT THAT'S MADE
BY THE LEGISLATURE UNDER THE
SINGLE SUBJECT TITLE IS THAT
BECAUSE, AND THEY BEGIN WITH A
SERIES OF ASSUMPTIONS, BECAUSE
IN THE OPINION OF THE
LEGISLATURE THE LEGISLATURE
POLITICALLY WILL NEVER BE ABLE
TO ACHIEVE WHAT THIS CALLS FOR,
THEREFORE IT WILL ALWAYS BE
THRUST UPON THIS COURT
ULTIMATELY UNDER THE WAY THAT
THE CONSTITUTION WORKS TO DO
THE REAPPORTIONMENT.
TO DO THE REALIGNING.
AND CONSEQUENTLY WHAT THIS
REALLY DOES IS THAT IMPOSES A
CHANGE UPON BOTH THE
LEGISLATIVE AND THE JUDICIAL
BRANCHES, AND THEREFORE, IT
VIOLATES THE SINGLE SUBJECT
RULE.
FIRST THING I THINK THAT
STRIKES ONE HERE IS THAT WHAT
THEY ARE SAYING IS THAT THE
PEOPLE OF THE STATE CAN NEVER
IMPOSE STANDARDS ON THE
REDISTRICTING BECAUSE THAT
WOULD ALWAYS BE THE CASE.
UNDER THE FLORIDA CONSTITUTION
AND THEREFORE YOU WOULD NEVER
BE ABLE TO DO THIS, SOMETHING
THAT IS ALWAYS A SIGNAL THAT
THERE IS APPARENTLY A FLAW IN
THE ARGUMENT.
IN THIS CASE, THERE IS A FLAW
IN THE ARGUMENT, AND THERE ARE
SEVERAL FLAWS.
THE FIRST IS, IT'S BASED UPON
PURE SPECULATION.
WHAT THE LEGISLATURE IS SAYING
IS IT'S OUR OPINION THAT THIS
COULD NEVER BE ACHIEVED.
THE SECOND THING IS THAT WHAT
THE, WHAT THE, WHAT THE SINGLE
SUBJECT REQUIREMENT IMPOSES IS
THAT YOU NOT HAVE MULTIPLE --
THAT THE AMENDMENT ITSELF NOT

HAVE MULTIPLE CHANGES IN
FUNCTION.
THIS AMENDMENT DOES NOT.
WHAT THIS COURT HAS OFTEN SAID
IS THE FACT THAT AN AMENDMENT
HAS AN EFFECT OR A RAMIFICATION
DOES NOT VIOLATE THE SINGLE
SUBJECT RULE AND THAT'S WHAT
WE'RE DEALING WITH HERE, A
POTENTIAL SPECULATIVE
RAMIFICATION OF THIS.
THE THIRD THING I WOULD NOTE BY
THE WAY IS THAT THIS COURT AND
THE DISTRICT COURTS FOR THAT
MATTER AND ARE OFTEN CALLED
UPON TO REVIEW WHAT THE
LEGISLATURE HAS DONE IN MANY
INSTANCES.
THE MERE FACT THAT THE
JUDICIARY HAS CALL UPON TO
CONDUCT A REVIEW BECAUSE OF THE
FACT THAT ANOTHER BRANCH MAY
NOT HAVE DONE ITS JOB PROPERLY
DOESN'T MEAN THAT WE ARE
IMPOSING SOMETHING UPON THE
FUNCTION OF THE COURT, WHICH IS
A, WHICH IS A CHANGE IN THE
FUNCTION OF THE COURT.
ON THE ISSUE OF THE TITLE AND
SUMMARY, THE LEGISLATURE RAISE
AS WHOLE MULTIPLICITY OF
ARGUMENTS BY PARSING OUT VERY
PARTICULARIZED LANGUAGE, AND I
WILL COVER ALL OF THEM IF TIME
PERMITS.
>> WELL, LET'S BE SURE WE HAVE
A COUPLE OF THEM FOR SURE WE
CAN TOUCH UPON.
THE -- WE ALWAYS RUN INTO
DIFFICULTIES IF THERE IS A
DIFFERENCE IF THE VERBIAGE
BETWEEN THE SUBSTANCE OF THE
PROPOSED AMENDMENT AND THE
SUMMARY.
AND HERE WE HAVE IT IN TWO
DIFFERENT AREAS.
AT LEAST TWO DIFFERENT AREAS
ONE IS THAT THE BALLOT SUMMARY
DOES NOT INCLUDE THE CONCEPT OF
INTENT.
AND THAT'S WHAT I GUESS THE

ALLEGED EVIL IS NAT WE ARE
TALKING ABOUT IS THAT NO MATTER
HOW YOU DRAW THE LINES THAT
THERE MAY BE SOME POLITICAL OR
PARTISAN EFFECT FROM THAT.
SO THE REAL GUTS THAT THET
INTENT MUST NOT BE AND THE
SUMMARY DOES NOT MENTION THE
WORD INTENT, SO WOULD YOU
ADDRESS THAT AND THEN ALSO
WOULD YOU PLEASE ADDRESS THE
CONCEPT OF THE LANGUAGE WITH
REGARD TO POLITICAL, THAT THE
BODY OF THE AMENDMENT ADDRESSES
POLITICAL LINES AND THE SUMMARY
ADDRESSES CITY, COUNTY, AND
THERE MAY BE OTHER POLITICAL
LINES THAT MAY BE INVOLVED.
THOSE TWO AS YOU PLEASE, BUT
PLEASE HIT ON THOSE.
>> YES, SIR, I MAY HAVE TO ASK
YOU TO REMIND ME OF THE SECOND
ONE.
I GET ON IN AGE, YOU DON'T
REMEMBER EVERYTHING.
>> THAT ASSUMES I HAVE.
WE'LL GO FROM THERE.
>> I HAVE TO BE CONCERNED THAT
YOU ALSO WILL REMEMBER --
>> THAT'S IT.
YOU DO.
>> THE, WHAT THE LANGUAGE OF
THIS AMENDMENT SAYS, AND BY THE
WAY, WHAT DISTINGUISHES IT FROM
THE SUPPLEMENTAL AUTHORITY THAT
THE ROMER CASE THAT WAS FILED
ON THIS ISSUE, IS THAT THIS
AMENDMENT IN ITS LANGUAGE, THE
ROMER CASE BY THE WAY, WAS A, A
STATUTORY CONSTRUCTION OF A
FEDERAL STATUTE IN WHICH THE,
IN WHICH THE COURT HELD THAT BY
ADDING THE AND LANGUAGE TO IT,
THAT IT ADDED A RESULTS TEST.
IN OUR AMENDMENT, WE DON'T HAVE
THAT ISSUE BECAUSE OUR
AMENDMENT EXPRESSLY
INCORPORATES BOTH AN INTENT AND
A RESULTS SAYS WHICH SAYS SHALL
NOT BE WITHDRAWN WITH THE
INTENT OR RESULT OF DENYING OR

ABRIDGING EQUAL OPPORTUNITY,
ET CETERA.
WHAT THE SPONSORS DID HERE
BECAUSE WITH THE 75-WORD LIMIT
IT'S VERY DIFFICULT TO INCLUDE
THIS WHOLE PHRASE.
>> BUT JUST TO BE CLEAR ON THE
RESULT TEST DOESN'T APPLY TO
THE FAVORING OR DISFAVORING OF
POLITICAL PARTY OR INCUMBENT,
RIGHT?
THAT'S THE ONLY THE INTENT
TEST.
>> NO APPORTIONMENT PLAN OR --
>> IT'S REALLY A KIND OF
VARIATION THERE IT HAS INITANT
OR -- INTENT OR RESULT WITH
RESPECT TO RACIAL OR LANGUAGE
MINORITY BUT JUST INTENT WITH
RESPECT TO POLITICAL --
POLITICAL PARTIES OR
INCUMBENTS.
>> THAT'S CORRECT, YOUR HONOR.
AND SO THE QUESTION IS IT IS
VIRTUALLY IMPOSSIBLE WITH THE
75-WORD LIMIT WITH THE SPONSORS
-- AND AS A MATTER OF FACT, I,
YOU MAKE MY POINT, JUSTICE
CANADY, BECAUSE THAT ENTIRE
PHRASEOLOGY WOULD HAVE TO BE
INCLUDED IN THE SUMMARY IN
ORDER TO COVER ALL OF IT.
WHAT THE SPONSORS DID HERE
INSTEAD IS THEY USED THE TERM
THAT WAS BROAD ENOUGH TO COVER
ALL OF IT BY JUST SAYING IT
SHALL NOT BE DRAWN TO CREATE
THOSE PURPOSES.
IT'S OUR POSITION THAT THE WORD
TO IS BROAD ENOUGH AS AN
UMBRELLA TERM TO INCLUDE BOTH
OR EITHER INTENT OR RESULTS,
AND WHAT WE DEAL WITH IN THE
SUMMARY, PARTICULARLY BECAUSE
OF THE 75-WORD LIMIT IS A
NOTICE REQUIREMENT.
DOES THIS PLACE A VOTER ON
NOTICE SUFFICIENT SO THAT THE
VOTER CARES ABOUT THOSE
PARTICULARS HERE SHE CAN GO
READ THE ENTIRE AMENDMENT.

THIS CLEARLY DOES.
THE WORD TO DOES NOT SAY TO THE VOTER THAT THIS IS LIMITED EITHER TO INTENT OR RESULTS.
OR THAT IT DOES BOTH.
IT SAYS THAT THIS DOES THIS THING AND IT COULD INCLUDE EITHER/OR BUT IT IS CERTAINLY SUFFICIENT NOTICE, PARTICULARLY GIVEN THE 75-WORD LIMIT.
IT'S NOT MISLEADING.
THERE'S NOTHING IN THAT TERMINOLOGY THAT FAILS TO TELL THE VOTER THAT THISES COULD INCLUDE EITHER/OR INTENT TO THE RESULT AND I WOULD JUST ARGUE TO THE COURT THAT IT'S SUFFICIENT NOTICE TO CALL TO THE ATTENTION OF ANY VOTER WHO CARES ABOUT THAT ISSUE THAT THIS DEALS WITH IT.
AND, AND IF WE ARE TO, AND THERE IS VIRTUALLY NO WAY THAT, THAT ENTIRE PHRASEOLOGY COULD'VE BEEN, COULD'VE BEEN INCLUDED AND THEREAGAIN THE COURT HAS ALWAYS WEIGHED THE IMPORTANCE OF GIVING FAIR NOTICE AGAINST THE BURDENS OF HAVING TO STAY WITHIN THE 75-WORD LIMIT, AND WHAT THE COURT HAS SAID IS YOU CANNOT DO ONE OF TWO THINGS.
YOU CANNOT DO SOMETHING THAT IS AFFIRMIVELY MISLEADING CLEARLY IF THIS SAID IT WAS ONLY INTENT WOULD'VE --
IT WOULD'VE BEEN MISLEADING BECAUSE IT WOULD NOT HAVE PERMITTED RESULTS.
THE SECOND THING IS YOU CANNOT FAIL TO GIVE NOTICE OF A MATERIAL CHANGE.
AND THIS DOES NOT.
IT GIVES NOTICE OF THE FACT THAT THE AMENDMENT DOES DEAL WITH THAT QUESTION.
AND, AND IF YOU WANT TO KNOW MORE, YOU NEED TO READ THE AMENDMENT.
THE SUMMARY AND THE, AND THE

TITLE, WHILE THIS COURT HAS
SAID THAT IT DOES NOT, THAT YOU
CANNOT RELY UPON PUBLIC
INFORMATION TO PROVIDE MATERIAL
INFORMATION THAT'S MISSING, THE
COURT HAS ALWAYS SAID THAT THE
TITLE AND SUMMARY IS NOT A
SUBSTITUTE FOR THE PUBLIC
INFORMING ITSELF IF IT HAPPENS
TO KNOW MORE ABOUT WHAT IT'S
BEEN GIVEN NOTICE OF
SUFFICIENTLY IN THE SUMMARY.
>> MR.^RICHARD, IN THIS
PROPOSAL, YOU USE THE LANGUAGE
CONTIGUOUS THAT THESE DISTRICTS
HAVE TO BE CONTIGUOUS, AND THEN
I NOTICED THAT IN SECTION 16 A,
I BELIEVE IT IS, OF ARTICLE 3,
THEY TALK ABOUT CONTIGUOUS
OVERLAPPING, AND IDENTICAL
TERRITORY.
>> CORRECT.
>> AND I'M WONDERING, DOESN'T
THIS CHANGE THAT LANGUAGE?
AND SHOULD THERE BE IN THIS
SOME REFERENCE TO THAT
PARTICULAR ARTICLE THAT IS
BEING CHANGED?
>> JUSTICE QUINCE, I THINK IT
DOES NOT CHANGE T. THE REASON
IT DOES NOT CHANGE IT IS
BECAUSE BY THE DEFINITION THAT
THIS COURT HAS GIVEN THE WORD
CONTIGUOUS, WHICH IS THAT
TOUCHING ANYWHERE EXCEPT ON A
COMMON CORNER, THE WORD
CONTIGUOUS INCLUDES OVERLAPPING
OR IDENTICAL BECAUSE
OVERLAPPING IDENTICAL WHILE
CONTIGUOUS DOES NOT HAVE TO BE
OVERLAPPING AND IDENTICAL.
OVERLAPPING AND IDENTICAL MUST
BE CONTIGUOUS BY THEIR VERY
NATURE.
>> SO THEY WERE VERY REDUNDANT
YOU ARE SAYING IN 16 A.
>> I WOULDN'T SAY REDUNDANT.
I WOULD SAY THAT THE SPONSORS
INCLUDED THE CONTIGUOUS TO
MAKE IT CLEAR THAT WERE
SUGGESTING IT NO LONGHAIR TO BE

CONTIGUOUS BECAUSE OF WHAT THE
SPONSORS WERE SPEAKING TO --
SEEKING TO DO HERE WHICH IS IT
TO SAY THIS SHOULD BE BASED
UPON PROPORTIONAL
REPRESENTATION.
THEY WANTED TO BE CLEAR WE ARE
NOT SAYING YOU CAN HAVE A
DISTRICT HERE AND AN
UNCONNECTED DISTRICT HERE.
WE ARE RETAINING THE
REQUIREMENT FOR CONTIGUITY SO
FAR AS THE CONSTITUTION IS
CONCERNED.
BUT WE ARE NOT ALSO CHANGING
THE LEGISLATURE'S ABILITY,
WHICH CURRENTLY EXISTS, TO MAKE
THE THEM CO-EXTENSIVE OR
OVERLAPPING IF THEY WANT TO
HAVE MULTIMEMBER DISTRICTS OR
PORTIONS OF DISTRICTS.
THE REASON THEY ONLY INCLUDED
ONE IS BECAUSE THEY DID NOT
WANT TO BIND THE LEGISLATURE IN
THE OTHER TWO BUT THEY DID WANT
TO BIND THE LEGISLATURE ON
CONTIGUITY WHICH NOW THE
ARGUMENT MADE BY THE
LEGISLATURE IS THAT THIS
SOMEHOW IS A CHANGE BECAUSE IT
PROHIBITS MULTIMEMBER DISTRICT.

IT DOES NOT.
YOU CAN HAVE MULTIMEMBER
DISTRICTS WHICH ARE CONTIGUOUS.

WHICH IS ALL THAT'S REQUIRED
HERE.
>> SO YOU'RE WELL INTO YOUR
REBUTTAL.
>> UNLESS THE COURT HAS
QUESTIONS ABOUT THE, THE OTHER
ISSUES THAT WERE RAISED, THANK
YOU, YOUR HONOR.
I WILL SIT DOWN.
>> GOOD MORNING.
I'M JAY VAIL HERE FOR THE
FLORIDA LEGISLATURE.
THESE AMENDMENTS ARE CLASSIC
EXAMPLES OF MEASURES THAT
CONTAIN ELEMENTS OF VOTER -- A

VOTER MIGHT DISFAVOR AND MIGHT
BE FORCED TO CAST AN ALL OR
NOTHING BALLOT.
THE AMENDMENTS AFFORD
CONSTITUTIONAL PROTECTION
AGAINST DISCRIMINATION TO FIVE
SEPARATE AND DISTINCT CLASSES.
NEITHER ONE OF THESE CLASSES IN
ANY WAY AFFECTS THE OTHER SO
THAT THEY SHOOT AT DIFFERENT
TARGETS TO ACHIEVE SEPARATE AND
DISTINCT GOALS.
FOR THE FIRST TIME I HAVE HEARD
THE OPPONENTS SAY THE --
PROPONENTS SAY THE INTENT WAS
TO ACHIEVE A ONE PERSON ONE
VOTE VOTE BY REDISTRICTING.
THAT'S ALREADY REQUIRED IN
FEDERAL LAW IN BOTH AREAS OF
REDISTRICTING STATE AND FEDERAL
BUT EVEN IF THAT IS THE PURPOSE
OF THIS PARTICULAR AMENDMENT,
WHETHER OR NOT WE HAVE
ANTIDISCRIMINATION PROTECTIONS
AGAINST RACIAL MINORITIES DOES
NOT WORK TO ACHIEVE THAT
PARTICULAR GOAL.
IT'S A GOAL THAT SHOOTS TOWARD
A DIFFERENT TARGET.
>> WELL, ISN'T THE REAL, I SEE
THIS AS THE REAL PURPOSE OF
THIS AMENDMENT REALLY IS TO
KEEP PARTIES WHO ARE IN POWER
FROM RIGGING DISTRICTS TO
REMAIN IN POWER.
ISN'T THAT THE REAL PURPOSE OF
THIS MOMENT?
>> WELL, THAT'S THE ISSUE WE
SEE IS TO PROHIBIT POLITICAL
GERRYMANDERING.
WHICH IF, IF THE COURT IS
FAMILIAR WITH THE VIETH CASE,
IT'S A VERY DIFFICULT THING TO
DO IN TERMS OF JUDICIAL REVIEW.
THERE'S NO WORKABLE TEST IN
WHICH TO DO THAT.
IT'S A --
>> BUT IF THAT'S WHAT THE
CITIZENS WANT TO DO, AND IF
THIS AMENDMENT REALLY IS A
SINGLE SUBJECT AMENDMENT AND IF

IT HAS NO, IF THE BALLOT TITLE
AND SUMMARY ARE NOT MISLEADING,
THEN THE CITIZENS ARE FREE TO
DO THAT, AREN'T THEY?
>> WELL THEY WOULD BE BUT THE
PROBLEM WITH THIS PARTICULAR
AMENDMENT IS IT'S JUST A CATCH
ALL.
IT'S A BIN WHERE ALL DIFFERENT
THINGS HAVE BEEN THROWN
TOGETHER AND I THINK YOU CAN
FAIRLY MAKE THE ARGUMENT THAT
SOME OF THESE ARGUMENTS ARE
MADE TO SIMPLY SWEETHEN POT IN
ORDER TO OVERCOME VOTER
OBJECTION TO OTHER ELEMENTS IN
THERE.
IF THE PEOPLE WANTED TO OFFER
AN AMENDMENT THAT DEALT
STRICTLY WITH POLITICAL
GERRYMANDERING THEY COULD DO
THAT BUT I DON'T THINK THAT
THEY COULD PUT IN ALL THESE
OTHER THINGS AS WELL.
THESE ARE STAND ALONE
REQUIREMENTS.
THEY AIM TOWARD DIFFERENT
SUBJECTS.
THE COURT'S CASES ARE VERY
CLEAR THAT WHERE VOTERS MAY
TEND TO DISFAVOR ONE OR ANOTHER
AND ARE FORCES TO MAKE AN ALL
OR NOTHING VOTE, THAT VIOLATES
THE ONE SUBJECT PROVISION.
YOU KNOW THE CASE WE'RE
RELYING ON CASE FOR
DISCRIMINATION IS VERY CLEAR ON
THAT.
>> SO TELL US SPECIFICLY THEN
WHAT IT IS THAT YOU CONTEND
THIS AMENDMENT, WHAT SEPARATE
SUBJECTS ARE THERE IN THIS.
>> WELL THERE ARE THE FIVE
ANTIDISCRIMINATION SUBJECTS
WHICH ARE IN OUR OPINION
SEPARATE.
IF YOU WANT TO CUT THIS PIE IN
THE MANNER MOST FAVORABLE TO
THE PROPONENTS YOU HAVE GOT A
BROAD GENERAL CATEGORY AND,
ANTIDISCRIMINATION, YOU HAVE

GOT ANOTHER BROAD GENERAL
CATEGORY DEALING WITH
GEOGRAPHY, THAT'S THE, THE ONE
VOTE OR EXCUSE ME, THE QUALITY
OF COMPACTNESS AND
CONTIGUOUSNESS.
BOUNDARY REQUIREMENTS, BUT
EVEN, AND I'M NOT SURE THAT I,
I, I WOULD TAKE AT FACE VALUE
THE ARGUMENT OF THE, OF THE
PROPONENTS THAT CONTIGUOUS IS
NOT MEANT TO BE A STEALTH
REQUIREMENT TO REQUIRE SINGLE
MEMBER DISTRICTS.
I'M NOT SURE WHAT IT MEANS.
WE DON'T HAVE REDUNDANT
LANGUAGE IN THE CONSTITUTION.
WE ALREADY HAVE A SET OF
STANDARDS THEREIN THAT AREN'T
GOING TO BE REPEALED BY THE
VOTERS, AND YET WE HAVE A
READOPTION OF THIS CONTIGUITY
REQUIREMENT AND I'M NOT SURE
WHERE THAT LEADS, AND IT
STRIKES ME THIS MAY WELL BE A
SINGLE MEMBER DISTRICTS
REQUIREMENT.
SO YOU HAVE GOT AT LEAST THE
FIVE ANTIDISCRIMINATION CLASSES
YOU HAVE GOT THE GEOGRAPHICAL
ONES ASSUMING THEY CAN BE
BROUGHT TOGETHER WHICH I'M NOT
SURE IS NECESSARILY TRUE AND
THEN YOU HAVE THE POTENTIAL FOR
THE SINGLE MEMBER DISTRICT
REQUIREMENT.
ON THE ISSUE OF AFFECTING THE
COURTS, IT'S OUR OPINION THAT
PARTICULARLY THE GERRYMANDERING
POSITION, THAT'S THE ONE WE'RE
CONCERNED ABOUT.
REDISTRICTING HAS BEEN A
POLITICAL PROCESS.
THROUGHOUT OUR HISTORY THE
FOUNDERS INTENDED IT TO BE A
POLITICAL PROCESS.
THEY PLACED IN THE U.S.
CONSTITUTION THE REQUIREMENT TO
DO CONGRESSIONAL REDISTRICTING
STRICTLY WITH THE LEGISLATURE
UNDER THE SUPERVISION OF

CONGRESS.
>> SO ARE YOU SAYING THEN THAT THE PEOPLE HAVE NO WAY IN -- SAY IN THIS.
THAT THEY CAN'T PUT REASONABLE RESTRICTIONS.
>> NO WE ARE NOT --
>> ON THE LEGISLATURE REDISTRICTING.
>> SO WE ARE NOT SAYING THAT BUT WHAT WE ARE SAYING IS THAT BECAUSE OF THE WAY THIS PARTICULAR AMENDMENT IS DRAFTED TO PROHIBIT THE INTENT, YOU CAN'T TAKE INTENT OUT OF THE CONSTITUTION.
AS THE COURT HAS NOTED IN THE TWO OPINIONS I'VE CITED YOU IT'S AN INHERENTLY POLITICAL PROCESS.
AN INTENT CAN'T BE EXTRACTED FROM IT IF THE LEGISLATURE IS INVOLVED IN THE PROCESS.
>> SOMETHING MAY BE INHERENTLY OF A POLITICAL NATURE.
DOES THAT MEAN THAT OUR DEMOCRACY HAS CONSTITUTIONALLY ELIMINATED THE JUDICIAL BRANCH FROM REVIEW?
>> NO, YOUR HONOR.
>> IN AREAS AS OPPOSED TO OTHERS BECAUSE IT SEEMS TO ME THAT VIRTUALLY ANYTHING THAT GOES INTO A CONSTITUTION AT ONE TIME OR ANOTHER MAY HAVE THE, THE CIRCUMSTANCE OF UNFORTUNATELY BEING DRAWN INTO JUDICIAL, A JUDICIAL FORUM.
>> NO, YOUR HONOR, WE'RE NOT SAYING THAT, THAT THE COURTS HAVE NO ROLE TO PLAY.
CLEARLY THEY DO UNDER BOTH THE STATE AND FEDERAL CONSTITUTION THEY HAVE THE OBLIGATION TO REVIEW PLANS BUT WHAT WE ARE SUGGESTING IS IS THAT THE INEVITABLE RESULT OF THIS PARTICULAR AMENDMENT, THE WAY IT'S DRAFTED RIGHT NOW, WILL BE TO VASTLY EXPAND THE COURT'S INVOLVEMENT IN REDISTRICTING IN

A MANNER NOT PRESENTLY
CONTEMPLATED BY EITHER THE
STATE OR FEDERAL CONSTITUTION.
>> IT SEEMS TO ME TO ACCEPT
THAT PROPOSITION ONE MUST
ACCEPT THE PROPOSITION THAT
THE LEGISLATURE WILL REFUSE TO
FALLEE INCONSTITUTION THEREBY
EVERY TIME SOMETHING'S DONE IT
THEREBY BECOMES A JUDICIAL ACT,
AND I, I FIND THAT HARD TO
UNDERSTAND.
>> WELL, OUR CONCERN IS WITH
THE PARTICULAR LANGUAGE IN THE
TEXT THAT SAYS WITH THE INTENT
TO.
AND OUR CONCERN IS THAT YOU ARE
ALWAYS GOING TO BE ABLE TO FIND
INTENT IN LEGISLATIVE ACT.
THERE'S, SUPREME COURT HAS SAID
FLAT OUT IN THE BANDEMER CASE
THAT YOU JUST CAN'T, YOU CAN'T
TAKE TYOU CAN'T AVOID IT SO
THAT EVERY, EVERY DISTRICT PLAN
IS GOING TO BE SUBJECT TO RE,
REDISTRICTING PLAN IS GOING TO
BE SUBJECT TO CHALLENGE.
I'M -- WE'RE NOT CONVINCED THAT
WE CAN, WE CAN MEET THE TEST
WITH INTENT.
AS PRESENTLY DRAFTED.
>> ARE YOU ARGUING IN SOME WAYS
THAT THE ACTUAL LANGUAGE IS
UNCONSTITUTIONAL?
>> WE HAVE CONCERNSUCT THAT,
PARTICULARLY RELATED TO THE
CONGRESSIONAL REDISTRICTING
AMENDMENT.
>> I'M NOT SURE IF YOU'RE
ANSWERING.
[INAUDIBLE]
>> I PERSONALLY BELIEVE THAT IT
IS.
BUT THAT'S NOT OUR OFFICIAL
POSITION.
>> OF COURSE, WE DON'T REACH
THAT ISSUE IN, IN THIS
PROCEEDING HERE.
AT LEAST OUR, THE WAY WE HAVE
HISTORICALLY DEALT WITH THESE
AMENDMENTS.

IS THAT WE DON'T RULE UPON
THEIR CONSTITUTIONALITY IN A
PROCEEDING TO DETERMINE WHETHER
IT MEETS THE CONSTITUTIONAL
REQUIREMENTS TO GO ON THE
BALLOT.
SO THAT'S NOT SOMETHING THAT
YOU'RE -- AS I UNDERSTAND IT,
YOU'RE TRYING TO --
>> NO, YOUR HONOR, I HAVE NOT
PREPARED THAT.
I MEAN I HAVE A PRELIMINARY
OPINION ABOUT IT BUT IT'S MY
PERSONAL OPINION THAT IT'S
FORMED BY THE READING OF ONLY A
FEW OF THE LEADING SUPREME
COURT OPINIONS IN THE AREA, BUT
AS YOU SAY, SIR, WE ARE NOT
HERE TO DISCUSS THAT.
AND I'M NOT PREPARED REALLY --
>> I AM NOT SPEAKING TO
MR.^RICHARD'S POINT THAT THIS
AMENDMENT HAS ONE PURPOSE AND
THAT IS TO TAKE THE POLITICAL
PARTIES AND INCUMBENT
DOMINATION REAPPORTIONMENT,
WHICH WE HAVE HISTORICALLY HAD,
AND TO HAVE IN THE CONSTITUTION
THAT THAT IS NOT TO BE THE
BASIS UPON WHICH
REAPPORTIONMENT IS TO BE
DETERMINED, AND THAT THE REASON
THAT YOU, YOU HAVE THIS
ANTIDISCRIMINATION FEATURE IS
TO, TO ALSO SAY THAT IN DOING
THAT, IN TAKING THE POLITICAL
PARTY AND INCUMBENT DOMINATION
OUT OF THE PROCESS, THAT DOES
NOT MEAN THAT YOU CAN REPLACE
IT WITH SOME TYPE OF
DISCRIMINATION IN THE
REAPORTIONMENT PROCESS.
>> WE ARE ALREADY BOUND BY
FEDERAL AND STATE STATUTE AND
JUDICIAL OPINIONS DEALING WITH
DISCRIMINATION, WE CAN'T -- THE
FEDERAL --
>> THAT DOES NOT MEAN IT CANNOT
GO IN THE FLORIDA CONSTITUTION.
I MEAN, AS WE HAVE CASES THAT
SAY THAT, THAT THERE, THERE CAN

BE GREATER CONSTITUTIONAL
RIGHTS UNDER THE STATE
CONSTITUTION THAN THERE ARE IN
THE -- UNDER THE FEDERAL
CONSTITUTION.
>> WELL, THAT'S TRUE, SIR BUT
THESE PARTICULAR STANDARDS ON
THEIR FACE STANDING ALONE DON'T
NECESSARILY WORK TOGETHER.
IN AN IDEAL WORLD, WE CAN WISH
THAT THEY WOULD WORK TOGETHER,
WHICH SEEMS TO BE THE INTENT OF
THE PROPONENTS, BUT THEY DON'T
NECESSARILY WORK TOGETHER.
THEY ARE INDEPENDENT.
THEY GO OFF IN DIFFERENT
DIRECTIONS, AND THEY DON'T
SUPPORT ONE ANOTHER.
IN THE WAY THAT THIS COURT HAS
EXPECTED VARIOUS ELEMENTS OF A
PROPOSAL TO DO.
>> I DON'T QUITE UNDERSTAND WHY
THEY DON'T WORK TOGETHER
BECAUSE UNDER THE PRESENT WAY
THAT THE LEGISLATURE DOES
REDISTRICTING, THEY HAVE TO
CONSIDER ALL OF THE --
DECISIONS THAT U.S. SUPREME
COURT HAS RENDERED.
INDEED THAT THIS COURT MAY
RENDER.
IN OTHER WORDS, THEY HAVE TO
FACTOR IN, BE SURE THEY DON'T
VIOLATE ANY OF THOSE DECISIONS
ALONG WITH THE OTHER FACTORS
THAT THEY USE IN REDRAWING
DISTRICT LINES.
I'M HAVING DIFFICULTY WITH YOUR
ARGUMENT THAT THEY, THAT THEY
CAN'T WORK TOGETHER.
WHY CAN'T THEY WORK TOGETHER?
THEY'VE BEEN WORKING TOGETHER.
I'M SURE, THAT YOU WOULD BE THE
FIRST TO SAY THAT THE
LEGISLATURE HAS BEEN VERY
CAREFUL AT WHILE DRAWING LINES
IN THE WAYS THAT THEY WANTED TO
DRAW THEM THAT THEY'VE BEEN
VERY CAREFUL NOT TO
DISCRIMINATE ON THE BASIS OF
RACE OR ETHNIC MINORITIES OR,

OR WHATEVER.
WOULD YOU NOT AGREE?
>> WE HAVE, YOUR HONOR.
BUT THERE IS A TENSION BETWEEN SOME OF THE REQUIREMENTS IN PARAGRAPH ONE THAT TO COMPLY WITH SOME OF THEM YOU MAY HAVE TO VIOLATE THE OTHER ONES.
>> INHERENT DIFFICULTY --
>> AT PRESENT, THERE'S NO LIMITATION ON --
>> BUT THAT'S ALWAYS GOING TO BE THERE.
IF YOU WERE GOING TO TRY TO COME UP WITH A QUOTE OBJECTIVE, WHATEVER THAT MEANS, PLAN, YOU KNOW, WHAT INGREDIENTS WOULD YOU CHOOSE TO PUT IN HERE?
FOR STANDARDS?
>> WELL, I CERTAINLY WOULD HAVE THE RACIAL DISCRIMMINATION PROVISIONS IN THERE.
I MEAN, PERSONALLY I WOULD AGREE WITH THAT.
I THINK TO OPPOSE THAT IS LIKE VOTING AGAINST THE FLAG.
THE LANGUAGE MINORITY REQUIREMENTS TO THE EXTENT THAT I CAN UNDERSTAND THEM, THEY APPEAR TO BE DRAWN FROM THE VOTING RIGHTS ACT.
THERE'S, WE HAVE NO QUARREL WITH THOSE.
AND WE --
>> I'M JUST HAVING DIFFICULTY WITH YOUR RESPONSE TO THE QUESTIONS ABOUT WHETHER OR NOT THE PEOPLE CAN DO THIS THAT WE SEE THE SPECTER OUT THERE BUT IF CALIFORNIA WHERE THEY DOMINATE THE LEGISLATURE WHERE THEY DRAW LINES TO PERPETUATE THE POWER AND CONTROL OF THE DEMOCRATIC PARTY THEN IN ANOTHER STATE WHERE THE REPUBLICAN PARTY DOMINATES IN THE LEGISLATURE THAT THEY AND THE PUBLIC HAS BEEN EXPOSED TO THAT AND APPARENTLY THE OPPONENT TO THIS AMENDMENT ARE COUNTING ON THE PUBLIC

ACCEPTING MORE OF A PLAN LIKE
THIS THAN ONE THAT THE SPECTER
THAT THE NEWS HAS POINTED OUT
TO US IS A PURE PARTISANSHIP.
SO WHY CAN'T THE PUBLIC LOOK AT
THIS AND SAY, WELL, NOPE, WE
WOULD RATHER HAVE THE, THE PURE
PART WHEREINSHIP.
BECAUSE WE'RE -- PARTISANSHIP
BECAUSE WE'RE OF A PARTICULAR
PARTY AND SO WE'RE HAPPY WITH
THAT OR WHATEVER, OR WE CAN
VOLUNTARILY CHOOSE TO ACTUALLY
PUT THIS IN OUR CONSTITUTION TO
MAKE IT LESS PARTISAN.
NOT AS YOU SAY, IT CAN NEVER
BE, NEVER GOING TO TAKE.
WHY CAN'T THEY DO THAT?
>> WE THINK THAT THEY CAN'T DO
IT IN A PACKAGE.
WE THINK THAT IF THE PROPONENTS
WANTED TO OFFER SEPARATE
AMENDMENTS WITH EACH OF THESE
STANDARDS BEING A SEPARATE
AMENDMENT THEY COULD DO THAT
AND THE PEOPLE COULD VOTE ON
IT.
>> -- RELATED OR NOT EVEN, YOU
KNOW, IT SEEMS TO ME ALL THESE
FACTORS THAT THEY'RE MENTIONING
ARE ALL LOGICAL FACTORS.
THE CONTIGUOUSNESS OF TTHE
COMPACTNESS, ALL OF THESE
THINGS THAT IN THERE, AREN'T
THESE THINGS THAT THE
LEGISLATURE CONSIDERS ALREADY?
>> WELL, ON SOME OF THESE
MATTERS THERE IS ROOM FOR
DISAGREEMENT ABOUT WHETHER ONE
STANDARD OUGHT TO BE IN THERE
OR NOT AND ACCORDING TO THIS
COURT'S CASES WHEN THAT IS THE
SITUATION, THE ONE SUBJECT RULE
IS VIOLATED BECAUSE IT FORCES
THE VOTER TO MAKE AN ALL OR
NOTHING CHOICE.
>> LET ME ASK YOU THIS
QUESTION.
I MEAN WE HAVE BEEN FOR A YEAR
AND A HALF TALKING ABOUT THE
STRAND CASE AND THE CITIZENS

OUGHT TO BE ABLE TO VOTE OR
OUGHT NOT TO VOTE ON
EXPENDITURE OF PUBLIC FUNDS AND
WE HAVE A CONSTITUTIONAL
PROVISION THAT TALKS IN TERMS
OF, WHICH I'M SURE YOU'RE
FAMILIAR WITH THE, THAT
YOU CAN'T DO CERTAIN THINGS
WITHOUT A PUBLIC VOTE.
WELL ARE YOU SUGGESTING THAT IF
THE CITIZENS DECIDED THEY
WANTED TO DEFINE WHAT KIND OF
LONG-TERM FINANCING REQUIRED
CITIZEN VOTE OR DID NOT, AND
THEY DREW, DREW UP WHAT THOSE,
THOSE STANDARDS OR FACTORS
WOULD BE IN A CONSTITUTIONAL
AMENDMENT, THEY COULD NEVER DO
THAT?
>> I THINK IT WOULD DEPEND UPON
THE SPECIFIC LANGUAGE OF THE
AMENDMENT AND --
>> WELL, AGAIN, IT HAS
PARAMETERS, IT HAS JUST THE
PARAMETERS ON THE IT.
>> WELL THE COURT HAS APPROVED
MEASURES THAT HAVE PARAMETERS
IN THERE.
BUT I THINK THAT IF YOU GO BACK
AND LOOK AT THE, AT THE CASES
THAT THE COURT, WHERE THE COURT
HAS DONE SO, SUCH AS IN THE
CASINO CASES, FOR EXAMPLE, OR
THE CLASS SIZE REDUCTION CASES,
THE PARAMETERS DO NOT SEEM TO
BE OF THE SORT THAT WOULD
PROVOKE AN ORDINARY VOTER TO
FAVOR OR DISFAVOR ONE
PARTICULAR STANDARD OVER
ANOTHER AND THEREBY FORCING ON
THAT VOTER, MAKING AN ALL OR
NOTHING CHOICE.
TO --
>> AND SO THAT'S THE KEY HERE,
IN YOUR VIEW, IS THAT THIS
REQUIRES THE VOTER TO GO ALL OR
NOTHING WITH REGARD TO BOTH
PARTISANSHIP OR, OR
DISCRIMINATION AND LANGUAGING,
MINORITY, THAT KIND OF THICK.
>> THAT IS OUR PROBLEM WITH

THIS AMENDMENT, YOUR HONOR, AND
I THINK THAT POSITION IS
CONSISTENT WITH THE LAWS
RELATED TO DISCRIMINATION CASE
IN THE EVERGLADES CASE TO NAME
BUT A FEW AND THE SAME LANGUAGE
HAS POPPED UP IN CASES WHERE
THE COURT HAS APPROVED
DIFFERENT, WHERE THERE HAVE
BEEN SOME PARTS TO IT SUCH AS
IN THE VOLUNTARY PRE-HAD K CASE
AS WELL.
>> SO YOU ARE REALLY ARGUING
THAT YOU WOULD HAVE TO SEPARATE
THIS AMENDMENT INTO A COUPLE OF
DIFFERENT SECTIONS IN ORDER FOR
-- SO THE VOTERS WILL HAVE AN
OPPORTUNITY TO DECIDE WHETHER
OR NOT THEY WANT A PARTISAN
PART OF IT, WHETHER THEY, ALL
OF THAT?
>> THAT WOULD BE CORRECT, YOUR
HONOR.
>> I JUST HAVE ONE HOUSEKEEPING
QUESTION HERE TO ASK, THAT,
MR.^MILLS, ARE YOU ARGUING A
DIFFERENT PORTION OF THIS CASE?
WHICH PART IS THAT?
>> [INAUDIBLE]
>> OH, -- AND YOU ARE GOING TO
DISCUSS THAT AS A PART OF YOUR
ARGUMENT HERE NOW?
>> WE DID NOT COME TO DISCUSS
THAT.
>> ALL RIGHT.
>> TO ADDRESS THE TITLE AND
SUMMARY ISSUES BRIEFLY,
MR.^RICHARD MADE THE ARGUMENT
THAT THE, THE TITLE OR THE
SUMMARY IS DRAWN -- IS WRITTEN
IN SUCH A WAY THAT SOMEHOW THIS
WORD TO VASTLY EXPANDS THE
MEANING OF THE SENTENCE AND
EMBRACES INTENT.
I'VE DEALT WITH THAT IN THE
BRIEF.
I HATE TO BE THE LANGUAGE
POLICE BUT THAT SORT OF
INTERPRETATION IS NOT
CONSISTENT GRAMMATICALLY SO I
THINK THAT IT'S PRETTY CLEAR

WHEN YOU JUST READ THE WORDS AS THEY ARE WRITTEN IN THE SUMMARY, AND THE COURT WILL READ THEM, AND DECIDE, I THINK YOU'LL SEE THAT THEY, THE EFFECT IS TO LEAD THE ORDINARY VOTER TO BELIEVE THAT HE'S VOTING ON A MEASURE THAT WOULD PROHIBIT THE EFFECT OF, OF, OF NOT FAVOR NOTHINGCUMBENT OR POLITICAL PARTY ON THE ISSUE OF POLITICAL BOUNDARIES, THAT'S A MATERIALLY SIGNIFICANT DIFFERENCE BETWEEN THE TEXT IN THE SUMMARY, THE TEXT OF THE -- SAYS POLITICAL BOUNDARIES, THAT'S A VERY BROAD AND RATHER VAGUE TERM WHICH EVEN THE PLAINTIFFS HAVE, OR EXCUSE ME THE SPONSORS DON'T EVEN UNDERSTAND REALLY EITHER.
AND YET THEY USE IN THE SUMMARY A CITY AND COUNTY BOUNDARIES.
THAT'S A SIGNIFICANT MATERIAL DIFFERENCE I THINK INVALIDATES THIS PARTICULAR INITIATIVE.
TO ADDRESS JUSTICE CANADY'S REFERENCE TO THE ROMER DECISION, WE DIDN'T REALLY CITE THAT CASE FOR THE EFFECT PART OF IT.
WHAT I SAW SIGNIFICANT IN THAT CASE HAS TO DO WITH THIS AND/OR ARGUMENT THAT WE MADE, THE DIFFERENCE BETWEEN THE AND AND THE OR AND THE SUMMARY IN THE TEXT.
THAT PARTICULAR LANGUAGE TEXT AND THE IN THE SUMMARY IS DRAWN ALMOST VERBATIM THERE ARE SLIGHT DIFFERENCES ALMOST VERBATIM FROM THE PROVISION OF THE VOTING RIGHTS ACT WHERE AND IS USED IN THE TEXT OF THE VOLTING RIGHTS ACT TO LINK TWO ELEMENTS OF A CAUSE OF ACTION.
>> BUT DOESN'T THAT MAKE A DIFFERENCE.
I WAS LOOKING AT THAT WITH REGARD BECAUSE THAT'S A --

THAT'S BECOME A BIG ISSUE, THIS
AND/OR ISSUE IS IN ALL KINDS OF
WAYS, BUT HERE DOES IT, DOES IT
NOT, THE LANGUAGE, DOESN'T
REQUIRE A CONJUNKATIVE
VIOLATION OF BOTH THAT EITHER
ONE OF THEM ARE VIOLATIONS.
I MEAN ISN'T THAT THE
DIFFERENCE?
>> IT HAS TO DO WITH THE FACT
THAT THE SUMMARY IS A
MATERIALLY DIFFERENT FROM THE
TEXT AND ROMER POINTS OUT THAT
THE REPLACEMENT OF THE AND WITH
THE OR IS A SIGNIFICANT
DIFFERENCE.
IN THE VOTING RIGHTS ACT YOU
HAVE AN AND AND SO WHAT THE
COURTS SAID IN ROMER IS WHAT
CONGRESS DID WHEN IT ENACTED THAT
PARTICULAR PASSAGE WAS CREATE
ONE RIGHT WITH TWO ELEMENTS,
BOTH OF WHICH WOULD HAVE TO BE
PROVEN BUT IF YOU HAVE
SUBSTITUTED AN OR THERE YOU
WOULD HAVE TWO RIGHTS EACH WITH
A SINGLE EM.
ONE OR THE OTHER WOULD HAVE TO
BE PROVEN SO IT SUBSTANTIALLY
CHANGES A PLAINTIFF'S BURDEN OF
PROOF AND THAT WE THINK IS A
MATERIAL DIFFERENCE.
>> IS IT WORDED IN THE NEGATIVE
AS THIS PARTICULAR?
IS THE LANGUAGE MATCH
IDENTICALLY?
IS THE WORDED IN THE NEGATIVE
BECAUSE IF IT'S IN THE
AFFIRMATIVE IT CHANGES THE USE
SO DO YOU UNDERSTAND MY
QUESTION?
IS THAT, WHEN, WHEN BOTH THINGS
ARE PROHIBITED, IT'S ONE THING,
BUT IF YOU'RE REQUIRING IN THE
AFFIRMATIVE THAT BOTH THINGS
ARE REQUIRED THEN THE AND
AND OR MAKE A DIFFERENCE.
OR MAY MAKE A DIFFERENCE.
DO YOU UNDERSTAND MY QUESTION?
>> I'M NOT QUITE SURE BUT I'M
LOOKING AT MY COPY OF THE

VOTING RIGHTS ACT AND I'M
TRYING TO SEE IN MY READING OF
THEM THEY ARE THE SAME.
>> IDENTICAL?
>> THEY APPEAR TO ME TO BE.
AND UNLESS THE COURT HAS ANY
OTHER QUESTIONS, I AM
CONCLUDING.
>> THANK YOU VERY MUCH FOR YOUR
ARGUMENT.
MR.^RICHARD, YOU ARE GOING TO
REBUT THIS BEFORE THEY -- THE
IMPACT STATEMENT.
>> WELL, FIRST, LET ME, IN
FACT, I DID FORGET TO RETURN TO
THE SECOND HALF OF YOUR
QUESTION, JUSTICE LEWIS, WHICH
WAS THIS, THIS ISSUE OF
POLITICAL BOUNDARIES AND WHAT
HAPPENS HERE IS THAT THE
AMENDMENT ITSELF REFERS TO
POLITICAL BOUNTRIES, --
BOUNDARIES, WHEREAS THE SUMMARY
REFERS TO CITY COUNCIL AND
GEOGRAPHICAL AREAS AND THE
LEGISLATURE TAKES THE POSITION
THAT THAT'S A MATERIAL
DISCREPANCY.
WE -- OUR POSITION IS IT IS NOT
A MATERIAL DISCREPANCY.
THE QUESTION YOU HAVE TO ASK IS
WHAT ELSE WOULD THERE BE THAT
WOULD MISLEAD THE VOTER.
TAXING DISTRICT HISTORICALLY
THE PROBLEM HAS BEEN THE
FAILURE TO FOLLOW CITY AND
COUNTY BOUNDARIES.
WE DON'T HAVE ANY HISTORIC OR
ANY CASE LAW SUGGESTING THERE
ARE ANY OTHER GEOGRAPHICAL
AREAS THAT HAVE EVER BEEN AN
ISSUE NOR CAN ONE THINK OF ONE
THAT MIGHT BE USED POLITICALLY
TO MAKE A DIFFERENCE.
SO WHILE THERE IS A DIFFERENCE
IN THE LANGUAGE, I WOULD URGE
THE COURT THAT THE DIFFERENCE
IS NOT MATERIAL NOR MISLEADING.
AND THAT --
>> GO AHEAD.
>> AND THAT NOTE VOER IS LIKELY

TO VOTE FOR OR AGAINST IT
BECAUSE THEY LEARNED THAT THE
LANGUAGE IN THE AMENDMENT WAS
POLITICAL BOUNDARIES AND THAT
WE USE CITY AND COUNTY.
>> WOULD YOU ADDRESS THE LAST
COMMENT, THAT THIS AND/OR
ISSUE.
IS OF GREAT SIGNIFICANCE IN
THIS CASE.
>> WELL, I AGREE WITH WHAT YOUR
HONOR SAID, IT MAKES A
DIFFERENCE WHETHER IT IS
AFFIRMATIVE, WHICH SAYS THAT
YOU MUST, THE BURDEN THEN IS
UPON YOU TO PROVE BOTH THINGS
AND THAT WAS WHAT WAS BEING
DONE IN THE VOTING RIGHTS ACT.
>> I JUST WANT -- SO IT IS NOT
THE SAME.
>> IT IS NOT THE SAME BECAUSE
IN OUR CASE BY SAYING EITHER/OR
YOU ARE SAYING
EXACTLY WHAT THE AMENDMENT SAYS
OR EXACTLY WHAT, WHAT IS
SUGGESTED.
THE ONLY OTHER THING I WANTED
TO COMMENT ON AND, AND SEVERAL
MEMBERS OF THE COURT SAID IT
BETTER THAN I DID, WHEN I SAID
THAT THE PURPOSE OF THIS WAS TO
REQUIRE THAT THE DRAWING OF
LINES BE BASED SOLEY ON
PROPORTIONAL REPRESENTATION,
THE MORE PRACTICAL WAY TO SAY
THE SAME THING IS TO AVOID
POLITICAL GERRYMANDERING AND
THE COMMENT I WANTED TO MAKE IS
THAT HAPPILY WE ARE BEYOND THE
TIME WHEN THE SPONSORS HAD TO
BE CONCERNED ABOUT BIGOTRY.
THE SPONSORS DO NOT BELIEVE NOR
DO I THINK ANY OF US BELIEVE
THAT THE LEGISLATURE
GERRYMANDERS RACIAL OR ETHNIC
GROUPS BECAUSE OF SOME BIGOTRY
AGAINST THAT GROUP, BUT WHAT WE
DO HAVE CONCERN ABOUT IS THAT
THEY USE THOSE GROUPS TO
ACCOMPLISH A POLITICAL
GERRYMANDERING, SO THE

SINGULAR PURPOSE OF THIS, AND
THAT'S THE REASON WHEN COUNSEL
SAID WE ARE NOT DOING ANYTHING
DIFFERENT THAN WHAT THE LAW
REQUIRES NOW THAT'S NOT TRUE.
THE LAW REQUIRES DISCRIMINATING
AGAINST RACIAL OR LANGUAGE
MINORITIES FOR THE PURPOSE OF
BIGOTRY BUT IT DOES NOT
PROHIBIT USING THOSE GROUPS TO
ACHIEVE A POLITICAL END AND
THAT'S WHAT THIS SEEKS TO STOP
AND THAT'S A SINGULAR UNIFIED
PURPOSE.
THANK YOU.
>> THANK YOU VERY MUCH.
>> MR.^MILLS?
>> MAY IT PLEASE THE COURT.
MY NAME IS JON MILLS,
CO-COUNSEL
TO THE PROPONENTS.
THERE'S ONE OTHER IMPORTANT
FAIR NOTICE ISSUE THAT THIS
COURT MUST ADDRESS, AND THAT IS
THE PHYSICAL IMPACT STATEMENT.
>> WELL, LET ME ASK YOU,
THIS:^WHAT IS THIS COURT'S ROLE
AS GIVEN BY THE LEGISLATURE IN,
IN CONSTRUING THESE IMPACT
STATEMENTS?
>> THE LEGISLATURE HAS IN
FOLLOWING UP THE CONSTITUTIONAL
REQUIREMENT THAT YOU, THAT THEY
PRESENT THE PROBABLY IMPACT,
THAT THE SPECIFICALLY IN, IN
FLORIDA STATUTE 100 THEY HAVE
LAID OUT THAT THEY WILL DELIVER
YOU A PHYSICAL IMPACT STATEMENT
THAT IS PROBABLE, NOT
INACCURATE AND AS A MATTER OF
FACT YOU HAVE JUST RECENTLY IN
REFERENDUM ON LAND USE
CONSIDERED THAT ISSUE.
>> DID THE LANGUAGE --, I MEAN,
THE WAY THIS, I MEAN, HISTORY
OF THIS WAS THAT THIS COURT
HELD THAT THERE WAS, COULD BE
NO FINANCIAL IMPACT STATEMENT.

THEN THERE WAS A CONSTITUTIONAL
AMENDMENT.

THE CONSTITUTIONAL AMENDMENT
SET UP THAT BY GENERAL LAW THE
LEGISLATURE SHOULD SET OUT THE
REQUIREMENTS OF A FINANCIAL
IMPACT STATEMENT.
AND THE LEGISLATURE SET IT OUT
AND SAID THAT THERE SHOULD BE A
CLEAR AND UNAMBIGUOUS STATEMENT
IN 75 WORDS.
AND ISN'T THAT DRAWING FROM OUR
JURISPRUDENCE ON 1 OR 01.161,
THAT WOULD MEAN THAT THIS COURT
WOULD LIMIT ITSELF TO A
DETERMINATION AS TO WHETHER
WHAT WAS IN THAT FINANCIAL
IMPACT STATEMENT WAS CLEAR AND
UNAMBIGUOUS.
>> THAT'S EXACTLY RIGHT.
ALL OTHERS EXCEPT SPECIFIC
STATUTE.
YOUR SPECIFIC DUTY IS TO
DETERMINE IF IT IS MISLEADING
AND IF IT IS SPECULATIVE.
THAT IS THE PRECISE WORD YOU
USED IN THE LAND USE PLANNING
CASE F. IT'S SPECULATIVE.
IN THIS CASE, WHAT YOU HAVE --
>> WHAT I AM GETTING TO,
MR.^MILLS S WHERE IS THAT IN
THE STATUTE THAT WE DEAL WITH
WHETHER THE DECISION IS
SPECULATIVE?
I MEAN, THAT --
>> THAT IS PRECISELY WHAT YOU
DID IN THE VERY RECENT CASE ON
REFERENDUM ON LAND USE
PLANNING.
YOU READ WHAT WAS DELIVERED AND
YOU DETERMINED IT WAS
SPECULATIVE IN THIS CASE WHAT
HAS BEEN SENT TO YOU IS,
DESCRIBES POTENTIAL
MILLION-DOLLAR IMPACTS.
AND COSTS OF LITIGATION PURSUIT
TO THE PASSAGE OF THIS.
AND REFERRING AGAIN TO THE
REFERENDUM CASE WHICH YOU
SHOULD LOOK TO SPECIFICALLY,
YOU DETERMINED THAT THAT WAS
SPECULATIVE.
YOU COULD NOT KNOW, AND IN THIS

CASE, THE FACTS ARE WE WANT THE
PUBLIC TO UNDERSTAND IF THIS
BALLOT PROVISION COMES BEFORE
THEM BOTH WHAT THEY'RE
CONSIDERING IN A FAIR WAY AND
CONSTITUTIONALLY NOW THAT
THERE, THEY ARE TO SEE THE
PROBABLY PHYSICAL IMPACT.
IN THIS CASE, THE PROBABLY
PHYSICAL IMPACT OF THE PASSAGE
OF THIS IS, IS HIGHLY
SPECULATIVE, VERY UNKNOWN, AND
IN FACT, IF YOU LOOK AT WHAT
THE --
>> LEGISLATIVE CONFERENCE, HOW
CAN, HOW CAN THE PROBABLE
PHYSICAL IMPACT BE DETERMINED
IN THIS INSTANCE?
IN YOUR JUDGEMENT?
>> WELL, I DON'T THINK IT CAN.
THIS COURT HAS SAID BEFORE THAT
IT'S PERFECTLY ACCEPTABLE TO
SAY THAT IT IS UNKNOWN OR
INDETERMINATE.
THAT'S A PERFECTLY
CONSTITUTIONAL AND LEGALLY
ACCEPTABLE DETERMINATION.
IF YOU DON'T KNOW WHAT'S GOING
TO HAPPEN AND IN THIS CASE, THE
ISSUE COULD BE, AND AS THE
SPECULATION OF THE PHYSICAL
IMPACT STATEMENT WAS THAT THERE
MAY BE LITIGATION BUT THERE,
WHETHER THERE'S LITIGATION OR
NOT, IT HAS TO BE IN EXCESS.
>> ALL THOSE THINGS, THOSE ARE
KIND OF FACTUAL QUESTIONS?
AND IT SEEMS TO ME TO BE YOU
ARE ESTIMATING THE PHYSICAL
IMPACT OF SOMETHING IT'S ALWAYS
GOING TO BE AN ELEMENT OF
SPECULATION.
INVOLVED BECAUSE WE CANNOT,
WITH CERTAINLY, PREDICT THE
FUTURE.
AND THAT'S THE HUMAN CONDITION.

BUT FOR, BUT FOR US TO REVIEW
THIS IN A CERTAIN WAY, THE WAY
YOU'RE SUGGESTING, IT REALLY
REQUIRES THAT WE KIND OF SECOND

GUESS THE, THE FACTUAL JUDGMENT
THAT'S BEEN MADE BY THE PEOPLE
THAT HAVE STATUTORY AUTHORITY
TO DO THIS, DOESN'T IT?
>> WELL, ACTUALLY, YOUR HONOR,
I THINK YOU JUST HAVE TO READ
THEIR SUPPORT FOR THEIR OWN
CONCLUSION WHERES THEY SAID
STATEMENTS SUCH AS THIS MAY
EXPAND THE SCOPE AND
COMPLEXITY, THIS MAY SPAWN
CHALLENGES, THIS MAY INCUR
COST.
IT IS ASSUMED.
IT IS UNKNOWN.
THAT'S THEIR BACKUP.
THERE ARE CERTAINLY SITUATIONS
WHERE YOU ARE GOING TO REQUIRE
A NEW AGENCY AND THIS COURT HAS
SUPPORTED PHYSICAL IMPACT
STATEMENTS BEFORE.
BUT AGAIN, THIS IS FOR THE
PUBLIC TO GET A FAIR STATEMENT
JUST AS YOU WANT THE PUBLIC TO
HAVE A FAIR STATEMENT ON A
DESCRIPTION OF THE IMPACT.
YOU WANT THE PUBLIC TO HAVE A
FAIR STATEMENT ON THE PHYSICAL
IMPACT.
>> WHAT WOULD YOU THINK OUR
SCOPE OF REVIEW?
>> I THINK THE SCOPE OF REVIEW
IS TO COMPLY WITH WHETHER IT'S
PROBABLY.
YOU DON'T HAVE A STATEMENT AS
YOU DO IN THE OTHER TWO REVIEW
STANDARDS OF CLEAR, CLEARLY
DEFECTIVE, SO I THINK YOU LOOK
AT THE ACTUAL STATEMENT REVIEW
IT, AND IS IT PROBABLE?
>> BUT DO WE GIVE DEFERENCE.
>> YOU HAVE STATED IN YOUR
PREVIOUS CASES.
>> I TAKE IT THAT YOU ACCEPT
OUR EXPLANATION IN THE CASES TO
DATE AS FAR AS WHAT STANDARDS
WERE --
[INAUDIBLE]
>> YES.
>> HAVE YOU MADE THE ARGUMENT
OR HAS ANYONE MADE THE ARGUMENT

HERE -- THAT THE LEGISLATURE
ALREADY DOES REAPPORTIONMENT ON
A REGULAR BASIS AND THEY HAVE
TO GET ALL OF THE DETAILED
INFORMATION ABOUT POPULATION
SHIFTS, POLITICAL BOUNDARIES,
AND ALL THAT THAT THERE
WOULDN'T BE ANY PHYSICAL IMPACT
BEYOND WHAT THERE ALREADY IS.
IN TERMS OF THE, THE COSTS TO
THE LEGISLATURE OF BEING SURE
THEY HAVE THE INFORMATION --
RIGHT INFORMATION THAN THERE
WOULD UNDER THIS SET OF
STANDARDS THAT THEY EMPLOY
NOW.
>> I THINK THAT'S A WONDERFUL
ARGUMENT.
>> IS THIS A UNDER DISCUSSION
THIS MORNING.
>> THIS IS A REQUEST --
>> I UNDERSTAND THAT.
>> TO MAKE JUSTICE ANSTEAD'S
POINT, THE WHOLE IMPACT OF THIS
PROPOSAL IS RELATIVELY NARROW.
I MEAN, TO CHARACTERIZE THIS AS
SOMETHING THE LEGISLATURE DOES
ANYWAY EVERY TEN YEARS AND IT
SEMPLY GIVES THEM THE STANDARDS
TO ACCOMPLISH THAT REALLY ALSO
RESPONDS TO THE SINGLE SUBJECT
AND THE CLARITY OF THE ISSUE.
>> YOU ARE TAKING ISSUE WITH
EVERYTHING EXCEPT MAYBE THE
FIRST OR LAST SENTENCE OF THIS
SINGLE SUBJECT STATEMENT OR ARE
YOU TAKING ISSUE WITH THE
PARENTHETICAL MILLIONS OF
DOLLARS.
BECAUSE THAT'S REALLY WHAT THE
VOTER IS GOING TO SEE, OH, THIS
IS GOING TO COST US MILLIONS OF
DOLLARS, SO IS THAT WHAT YOU
ARE TAKING ISSUE WITH?
ALL OF THE OTHER SENTENCES
BETWEEN THE FIRST AND THE LAST
SENTENCE?
>> WELL, AND THE
CHARACTERIZATION OF ENHANCED
COSTS.
AGAIN, THIS IS PRECISELY THE

REVIEW YOU UNDERTOOK IN THE
REFERENDUM ON LAND USE
PLANNING.
THAT IF IT'S A SPECULATION YOU
SHOULDN'T PUT THAT IN FRONT OF
MILLIONS OF FLORIDA VOTERS THAT
MIGHT AFFECT THEIR VOTE.
THANK YOU, YOUR HONOR.
>> I THANK ALL OF YOU FOR OUR
ARGUMENTS -- YOUR ARGUMENTS
HERE TODAY.
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Supreme Court of Florida

No. SC08-986

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES.

No. SC08-1149

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING.

[January 29, 2009]
CORRECTED OPINION

LEWIS, J.

The Attorney General of Florida has requested an opinion from this Court with regard to the validity of two initiative petitions sponsored by FairDistrictsFlorida.org, a political committee. We have jurisdiction. See art. IV, § 10, art. V, § 3(b)(10), Fla. Const. We conclude that the proposed amendments comply with the single-subject requirement of article XI, section 3 of the Florida Constitution, and that the ballot titles and summaries comply with section 101.161(1), Florida Statutes (2008).

I. THE PROPOSED AMENDMENTS

The two amendments and their respective ballot titles and summaries are nearly identical except for references to legislative versus congressional boundaries. The full text of the proposed amendment that governs legislative-district boundaries states:

> Section 21. Add a new Section 21 to Article III
>
> STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES
>
> In establishing Legislative district boundaries:
>
> (1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
>
> (2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
>
> (3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

The ballot title for this proposed initiative is:

> STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE REDISTRICTING.

The ballot summary provides:

Legislative districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

The full text of the proposed amendment that governs congressional-district boundaries states:

Add a new Section 20 to Article III

Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES

In establishing Congressional district boundaries:

(1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

(2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

(3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

The ballot title for this proposal is:

STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING.

The ballot summary provides:

> Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

II. ANALYSIS

A. Single-Subject Requirement

Article XI, section 3 of the Florida Constitution provides: "The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that, any such revision or amendment, except for those limiting the power of government to raise revenue, shall embrace but one subject and matter directly connected therewith." (Emphasis supplied.) This Court has previously explained the rationale behind the single-subject requirement:

> The single-subject limitation exists because the initiative process does not provide the opportunity for public hearing and debate that accompanies the other methods of proposing amendments. Consequently, "[the] single-subject provision is a rule of restraint designed to insulate Florida's organic law from precipitous and cataclysmic change." This Court requires "strict compliance with the single-subject rule in the initiative process for constitutional change because our constitution is the basic document that controls our governmental functions, including the adoption of any laws by the legislature." The single-subject requirement also prevents logrolling, a practice that combines separate issues into a single proposal to secure passage of an unpopular issue. Thus, voters are protected by the single-subject requirement because they are not forced to "accept

part of an initiative proposal which they oppose in order to obtain a change in the constitution which they support."

Advisory Op. to Att'y Gen. re Amendment to Bar Gov't From Treating People Differently Based on Race in Pub. Educ., 778 So. 2d 888, 891 (Fla. 2000) (citations omitted) (quoting In re Advisory Op. to Att'y Gen.—Save Our Everglades, 636 So. 2d 1336, 1339 (Fla. 1994); Fine v. Firestone, 448 So. 2d 984, 988-89 (Fla. 1984)). To determine whether a proposed amendment addresses a single subject, this Court must evaluate whether the proposal "may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme." Advisory Op. to Att'y Gen. re Patients' Right to Know About Adverse Med. Incidents, 880 So. 2d 617, 620 (Fla. 2004) (quoting Fine v. Firestone, 448 So. 2d 984, 990 (Fla. 1984)).

A proposed amendment is not invalid merely because it affects more than one branch of government or may interact with other provisions of the Florida Constitution. See Advisory Op. to Att'y Gen. re Limited Casinos, 644 So. 2d 71, 74 (Fla. 1994) ("[W]e find it difficult to conceive of a constitutional amendment that would not affect other aspects of government to some extent."). We have further explained that "the fact that [a] branch of government is required to comply with a provision of the Florida Constitution does not necessarily constitute the usurpation of the branch's function within the meaning of the single-subject rule." Advisory Op. to Att'y Gen. re Protect People, Especially Youth, From Addiction,

Disease, & Other Health Hazards of Using Tobacco, 926 So. 2d 1186, 1192 (Fla. 2006). Rather, "it is when a proposal substantially alters or performs the functions of multiple branches that it violates the single-subject test." Patients' Right to Know, 880 So. 2d at 620. Finally, speculation about possible impacts of a proposed amendment on other branches of government is premature when determining whether a proposed amendment, on its face, meets the single-subject requirement. See In re Advisory Op. to Att'y Gen. re English—The Official Language of Fla., 520 So. 2d 11, 13 (Fla. 1988) (approving placement of proposed amendment on the ballot even where "the amendment could have broad ramifications" because, "on its face[,] it deals with only one subject").

With regard to reapportionment, article III, section 16(a) of the Florida Constitution currently provides, in relevant part:

> (a) SENATORIAL AND REPRESENTATIVE DISTRICTS. The legislature at its regular session in the second year following each decennial census, by joint resolution, shall apportion the state in accordance with the constitution of the state and of the United States into not less than thirty nor more than forty consecutively numbered senatorial districts of either contiguous, overlapping or identical territory, and into not less than eighty nor more than one hundred twenty consecutively numbered representative districts of either contiguous, overlapping or identical territory.

We conclude that the proposed amendments (1) encompass a single subject, (2) do not engage in logrolling, and (3) do not substantially alter the functions of multiple branches of government. The proposed amendments address a single function of a

single branch of government—establishing additional guidelines for the Legislature to apply when it redistricts legislative and congressional boundaries. This Court has previously stated that under the state and federal Constitutions, the only requirements for a redistricting plan are: (1) compliance with the equal protection standard of one-person, one-vote—i.e., that "legislatures be apportioned in such a way that each person's vote carries the same weight"; and (2) that districts consist of contiguous, overlapping, or identical territory. In re Constitutionality of House Joint Resolution 1987, 817 So. 2d 819, 824-25 (Fla. 2002) (quoting In re Constitutionality of Senate Joint Resolution 2G, 597 So. 2d 276, 278 (Fla. 1992)).

Logrolling- Although the Legislature contends that the proposals violate the single-subject rule because they implement multiple reapportionment standards, such an interpretation of the rule is far too narrow. The overall goal of the proposed amendments is to require the Legislature to redistrict in a manner that prohibits favoritism or discrimination, while respecting geographic considerations. Although the proposed amendments delineate a number of guidelines, we conclude that these components possess "a natural relation and connection as component parts or aspects of a single dominant plan or scheme." Patients' Right to Know, 880 So. 2d at 620 (quoting Fine, 448 So. 2d at 990).

The instant case is distinguishable from others in which this Court has determined that proposals have violated the single-subject requirement. For example, in In re Advisory Opinion to Attorney General—Restricts Laws Related to Discrimination, 632 So. 2d 1018, 1019 (Fla. 1994) (Discrimination), the proposed amendment sought to prohibit discrimination based on ten separate classifications—race, color, religion, sex, national origin, age, handicap, ethnic background, marital status, and familial status. While the sponsor contended that the amendment addressed the single subject of discrimination, we rejected this contention and instead concluded that the proposal "enfold[ed] disparate subjects within the cloak of a broad generality" in violation of the single-subject requirement. Id. at 1020 (quoting Evans v. Firestone, 457 So. 2d 1351, 1353 (Fla. 1984)). We explained:

> The voter is essentially being asked to give one "yes" or "no" answer to a proposal that actually asks ten questions. For example, a voter may want to support protection from discrimination for people based on race and religion, but oppose protection based on marital status and familial status. Requiring voters to choose which classifications they feel most strongly about, and then requiring them to cast an all or nothing vote on the classifications listed in the amendment, defies the purpose of the single-subject limitation.

Id. at 1020. Unlike the provision in Discrimination, the proposals in the instant cases do not group multiple subjects under the cloak of "redistricting." Rather, they address solely the guidelines to be applied in legislative and congressional reapportionment. Thus, the instant proposals are also distinguishable from the

proposed amendment in Advisory Opinion to Attorney General re Independent Nonpartisan Commission to Apportion Legislative & Congressional Districts Which Replaces Apportionment by Legislature, 926 So. 2d 1218 (Fla. 2006) (Nonpartisan), which we determined to be in violation of the single-subject requirement. The proposal in Nonpartisan sought not only to implement redistricting standards, but to also create an entirely new commission to replace the Legislature as the entity responsible for reapportionment in Florida. See id. at 1225. The proposed amendments here do not encompass two such disparate functions.

The proposed amendments here are more similar to proposals we have previously approved because they encompassed a single plan and merely enumerated various elements necessary to accomplish that plan. In Health Hazards of Using Tobacco, 926 So. 2d at 1189, this Court approved for placement on the ballot a proposed amendment that would create a comprehensive statewide tobacco education and prevention program. The program was designed to encompass an advertising campaign, the creation of programs to educate youth about tobacco, enforcement of laws against the sale of tobacco to minors, and annual evaluations of the effectiveness of the program. See id. Further, the proposal included a provision which required that the Legislature appropriate fifteen percent of the gross funds collected from a tobacco settlement to the program. See id. This

Court held that despite the various components, the proposal did not engage in logrolling:

> It addresses a single comprehensive plan for the education of youth about the health hazards related to tobacco. Although this plan includes a list of components such as advertising, school curricula, and law enforcement, all of these components are related to the single unifying purpose. It does not "combine subjects in such a manner as to force voters to accept one proposition they might not support in order to vote for one they favor." Advisory Op. to Att'y Gen. re Fla.'s Amendment to Reduce Class Size, 816 So. 2d 580, 583 (Fla. 2002). In other words, the proposed amendment does not combine unrelated provisions, some of which are popular and others that may be disfavored.

Id. at 1191-92. Similarly, here, the various components within the proposed amendments are directed to the single unified purpose of establishing standards by which legislative and congressional districts are to be drawn. Accordingly, we hold that the proposed amendments address a single subject.

Multiple Government Functions- The Legislature next asserts that the proposals will essentially shift the duty of reapportionment to the judiciary and, therefore, the proposals impact multiple branches of government in violation of the single-subject rule. This contention is without merit. Under the Florida Constitution, after the Legislature drafts a reapportionment plan, the attorney general files a request with this Court for a "declaratory judgment" with regard to the validity of the plan. Art. III, § 16(c), Fla. Const. If this Court rejects the plan, the Governor must reconvene the Legislature for an "extraordinary apportionment

session," during which the Legislature must adopt a joint resolution that conforms to this Court's judgment. Id. § 16(d). If the extraordinary session fails to produce a resolution of apportionment, or if this Court holds that the subsequent apportionment is invalid, the Court "shall, not later than sixty days after receiving the petition of the attorney general, file with the custodian of state records an order making such apportionment." Id. § 16(f).

As noted by FairDistrictsFlorida.org, the Florida Constitution currently contains no guidelines for congressional districting. However, article I, section 2 of the United States Constitution provides: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ." The Fourteenth Amendment of the United States Constitution provides that "[r]epresentatives shall be apportioned among the several states according to their respective numbers." The United States Supreme Court has held that the federal Constitution "leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." Growe v. Emison, 507 U.S. 25, 34 (1993). In Wesberry v. Sanders, 376 U.S. 1, 4 (1964), the Supreme Court held that a one-person, one-vote constitutional challenge to congressional reapportionment by a state legislature is a justiciable issue.

The proposed amendments do not alter the functions of the judiciary. They merely change the standard of review to be applied when either the attorney

general seeks a "declaratory judgment" with regard to the validity of a legislative apportionment, or a redistricting plan is challenged. This effect of the proposed amendments does not constitute a substantial alteration of the functions of the judicial branch. See Health Hazards of Using Tobacco, 926 So. 2d at 1192 ("[T]he fact that [a] branch of government is required to comply with a provision of the Florida Constitution does not necessarily constitute the usurpation of the branch's function within the meaning of the single-subject rule.").

The contention of the Legislature that a redistricting plan can never comply with the amendment guidelines and, therefore, the role of reapportionment will always fall upon the courts—thereby substantially changing a function of the courts—is speculative argument. There is no basis that the judiciary will reject any redistricting plan that the Legislature adopts for failure to comply with the guidelines. We must assume the Legislature will comply with the law at the time an apportionment plan is adopted. Moreover, such speculation with regard to a possible impact of the proposals on the judicial branch is premature because we need only determine at this time whether the proposed amendments, on their face, satisfy the single-subject requirement. See English—The Official Language, 520 So. 2d at 13.

In light of the foregoing, we hold that the proposed amendments comply with article XI, section 3 of the Florida Constitution.

B. Ballot Title and Summary

The requirement that a ballot title and summary comply with section 101.161(1), Florida Statutes (2008), was recently explained by this Court as follows:

> [A]ny proposed constitutional amendment must be "accurately represented on the ballot; otherwise, voter approval would be a nullity." Armstrong v. Harris, 773 So. 2d 7, 12 (Fla. 2000). Section 101.161(1), Florida Statutes (2007), codifies this principle:
>
> > Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot . . . . Except for amendments and ballot language proposed by joint resolution, the substance of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure . . . . The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.
>
> (Emphasis supplied.) See also Askew v. Firestone, 421 So. 2d 151, 155 (Fla. 1982) ("[T]he voter should not be misled . . . . All that the Constitution requires or that the law compels or ought to compel is that the voter have notice of that which he must decide . . . . What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot." (alteration in original) (quoting Hill v. Milander, 72 So. 2d 796, 798 (Fla. 1954))) . . . . To determine whether the ballot title and summary of [the proposed amendment] satisfy the requirements of section 101.161, Florida Statutes (2007), the Court must consider two questions: "(1) whether the ballot title and summary, in clear and unambiguous language, fairly inform the voter of the chief purpose of the amendment; and (2) whether the language of the title and summary, as written, misleads the public." Advisory Opinion to Attorney Gen. re Prohibiting State

> Spending for Experimentation that Involves the Destruction of a Live Human Embryo, 959 So. 2d 210, 213-14 (Fla. 2007) (quoting Advisory Opinion to Attorney Gen. re Fla. Marriage Prot. Amendment, 926 So. 2d 1229, 1236 (Fla. 2006)). We do not consider, nor do we address, the substantive merit of the proposed amendment.
>
> . . . This Court has recognized that it must exercise extreme caution and restraint before removing a constitutional amendment from Florida voters. See Advisory Opinion to Attorney Gen. re Fla. Marriage Prot. Amendment, 926 So. 2d 1229, 1233 (Fla. 2006). We have further noted that we have no authority to inject this Court into the process, unless the laws governing the process have been "clearly and conclusively" violated. Advisory Opinion to the Attorney Gen. re Right to Treatment & Rehab. for Non-Violent Drug Offenses, 818 So. 2d 491, 498-99 (Fla. 2002).

Fla. Dep't of Rev. v. Slough, 992 So. 2d 142, 146-47 (Fla. 2008). Despite these various requirements, we have also noted that even though a ballot summary could have better explained the text of the amendment, that fact alone does not require a proposal to be struck:

> There is no requirement that the referendum question set forth the [text] verbatim nor explain its complete terms at great and undue length. Such [requirements] would hamper instead of aiding the intelligent exercise of the privilege of voting. Under our system of free elections, the voter must acquaint himself with the details of a proposed ordinance on a referendum together with the pros and cons thereon before he enters the voting booth. If he does not, it is no function of the ballot question to provide him with that needed education. What the law very simply requires is that the ballot give the voter fair notice of the question he must decide so that he may intelligently cast his vote.

Advisory Op. to Att'y Gen. re Right to Treatment & Rehab. for Non-Violent Drug Offenses, 818 So. 2d 491, 498 (Fla. 2002) (quoting Metro. Dade County v. Shiver, 365 So. 2d 210, 213 (Fla. 3d DCA 1978), aff'd sub nom. Miami Dolphins v.

Metro. Dade County, 394 So. 2d 981 (Fla. 1981)). Moreover, inadvertent use of different but clearly synonymous terms in the proposed amendment and the summary will not render a ballot summary fatally defective where "[t]he differing use of terminology could not reasonably mislead the voters." English—The Official Language, 520 So. 2d at 13 (use of the phrase "to implement this article" in the ballot summary not misleading where the text of the proposed amendment actually provided "to enforce this section" (alteration in original)).

The Legislature presents multiple claims that the ballot titles and summaries for the proposed amendments are misleading. We address each of those arguments.

Ballot title-The Legislature first asserts that the titles are misleading because they indicate that only the Legislature must comply with the new redistricting standards where, in fact, the judiciary will be similarly obligated to apply these standards when a legislative attempt at reapportionment fails and the courts are required to redraw the districts. We conclude that this challenge is without merit.

As previously discussed, the proposed amendments have one chief purpose: to provide the Legislature with guidelines to follow when it draws legislative and congressional boundaries. Thus, it is logical that the titles would only reference the Legislature. Although the Legislature might ultimately fail to comply with these standards, this contingency does not translate into a need for the ballot titles

to indicate that the standards apply to the judiciary. Rather, it can logically be presumed that if the Legislature fails to comply with the Constitution and follow the applicable standards, the entity responsible for redrawing the boundaries must also comply with these standards. The failure to mention the judiciary in the ballot titles does not render them misleading.

"Drawn to favor" vs. "Drawn with the intent to favor"- The amendment summaries provide that redistricting plans "shall not be drawn to favor or disfavor an incumbent or political party"; however, the body of the proposals provide that districting plans "shall not be drawn with the intent to favor or disfavor an incumbent or political party." (Emphasis supplied.) According to the Legislature, the summaries indicate that the effect of a reapportionment plan cannot be to favor or disfavor anyone or any party; however, under the proposed amendments, proof of intent to favor an incumbent or party must be demonstrated before a reapportionment plan will be rejected for noncompliance. The Legislature contends that the summaries are misleading because voters will believe that the proposals prohibit reapportionment plans whose effect is to favor a party or incumbent, while the amendments actually permit districts that favor a party or incumbent, provided that the district lines were drawn without intending that result.

We reject this assertion. The ballot summaries are currently seventy-four words in length. Hence, to add the words "with the intent" to the ballot summaries

would exceed the statutory word limit. Thus, at issue in this case is whether the omission of these three words from the summaries (likely in an attempt to comply with the statutory word limit) causes them to be fatally misleading. As previously noted, a ballot summary need not (and because of the statutory word limit, often cannot) explain "at great and undue length" the complete details of a proposed amendment, and some onus falls upon voters to educate themselves about the substance of the proposed amendment. Right to Treatment & Rehabilitation, 818 So. 2d at 498 (voters must acquaint themselves with the details of a proposed amendment together with the pros and cons thereon before they enter the voting booth and if they do not, it is no function of the ballot to provide that needed education). Here, the proposed amendments are relatively short and straightforward. The text clearly highlights that for a redistricting plan to run afoul of the proposals, the conduct by the Legislature must be intentional.

Additionally, such an intent requirement has been historically applied with regard to allegations of gerrymandering in reapportionment. For example, this Court has held that a discriminatory effect is not sufficient to prove racial discrimination in redistricting; rather, a discriminatory intent must be demonstrated:

> This invidious intent or purpose of racial discrimination, the Supreme Court explained, cannot be proved by merely showing that the group discriminated against has not elected representatives in proportion to its numbers. Disproportionate effects alone will not establish a claim

> of unconstitutional racial vote dilution. Rather, "[a] plaintiff must prove that the disputed plan was conceived or operated as a purposeful device to further racial discrimination." Proof of a discriminatory effect is not sufficient.

Milton v. Smathers, 389 So. 2d 978, 981-82 (Fla. 1980) (quoting City of Mobile v. Bolden, 446 U.S. 55, 66 (1980)). Thus, when implementing additional constitutional apportionment standards—here, that district boundaries not be drawn to favor a party or incumbent—it is logical to presume (and the text of the amendments require) that the intent of the entity that draws the districts must similarly be considered when determining whether those standards have been violated.

Moreover, to add the "with the intent" language to the proposed summaries would require removal of at least two other words for the summaries to comply with the seventy-five-word statutory limit. The Legislature fails to indicate which of the current seventy-four words could be removed without creating another claim that the summaries are vague or misleading. Indeed, it is likely impossible to draft summaries that explain all of the details sought by the Legislature within the statutory-word limit. While ideal summaries for these amendments might have included the words "with the intent," we conclude that—given the strict word limits—the failure of the summaries to include these three words does not render them so misleading as to clearly and conclusively violate section 101.161, Florida Statutes. See Right to Treatment & Rehabilitation, 818 So. 2d at 498 (holding that

failure of ballot summary to explain that proposed amendment is self-effectuating did not render the summary misleading and noting that "imperfection is not necessarily fatal given the seventy-five word statutory maximum").

Shift of Authority- The Legislature next contends that the summaries are misleading because they fail to mention that the proposed amendments divest the Legislature of its responsibility to draw legislative and congressional districts and transfer this role to the judiciary. However, we have already concluded that the proposed amendments do not substantially alter the functions of multiple branches of government. Rather, under the proposals, the judiciary maintains the same role as it has always possessed—to only review apportionment plans for compliance with state and federal constitutional requirements and to adjudicate challenges to redistricting plans. The proposed amendments do not shift in any way the authority of the Legislature to draw legislative and congressional districts to the judicial branch. Accordingly, the summaries are not misleading for the failure to mention this purported "effect" of the proposals.

"City/County" boundaries vs. "Political" Boundaries- The ballot summaries state that district boundaries shall, where feasible, utilize existing "city, county and geographical boundaries"; however, the body of the amendments provide that districts must use "existing political and geographical boundaries." (Emphasis supplied.) The Legislature asserts that the term "political boundaries"

encompasses more than city or county boundaries, and under the Florida Statutes, this State has many special districts—such as voting precincts and water-management districts—the borders of which would constitute "political boundaries." Thus, to the extent that the summaries use language inconsistent with that of the proposed amendments, the Legislature contends that they are misleading.

Although the phrase "political and geographical boundaries" used in the proposed amendments may be technically broader than the "city, county, and geographical boundaries" phrase used in the summaries, we conclude that this differing use of terminology could not reasonably mislead voters. The sponsor asserts that the terms "city" and "county" are utilized in the summaries because they are more understandable to the average citizen than the legal concept of "political" boundaries. We agree that most voters clearly understand the concept of a city or county boundary, but may be perplexed to define exactly what a "political boundary" may encompass. See Askew v. Firestone, 421 So. 2d 151, 155 (Fla. 1982) (noting that voters "must be able to comprehend the sweep of each proposal" (quoting Smathers v. Smith, 338 So. 2d 825, 829 (Fla. 1976)). The purpose of the standards in section (2) of the proposals is to require legislative and congressional districts to follow existing community lines so that districts are logically drawn, and bizarrely shaped districts—such as one senate district that was

challenged in Resolution 1987, 817 So. 2d at 824-25—are avoided.[1] Since the "city" and "county" terminology honors this community-based standard for drawing legislative and congressional boundaries, and further describes the standards in terms that are readily understandable to the average voter, we conclude that the use of different terminology does not render the summaries misleading.

The And/Or Distinction- Under this challenge, the Legislature contends that the summaries are misleading because while they provide that "[d]istricts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice," the proposed amendments provide that "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice." (Emphasis supplied.) According to the Legislature, the "or" in the proposals demonstrates that an apportionment plan need satisfy only one of the two conditions to comply with the amendment—either districts must not be drawn to deny racial or language minorities the equal

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1. That senate district connected a region of Lee County with a region of Palm Beach County across the waters of Lake Okeechobee without any connecting territory on either the northern or southern shores of the lake. See id. at 828. Thus, the only way to travel from one end of the district to the other without passing through another district was by boat.

opportunity to participate in the political process or districts must not be drawn to diminish the ability of racial or language minorities to elect representatives of their choice. According to the Legislature, both standards need not be accomplished. Conversely, the Legislature posits that use of the word "and" in the summary indicates that both standards must be satisfied to comply with the amendments—thus, the summaries are misleading because they promise more than is required under the proposed amendments.

We conclude that the logic of the Legislature is faulty. In support of its assertion, the Legislature relies upon the case Armstrong v. Harris, 773 So. 2d 7, 16 (Fla. 2000), in which this Court held that a ballot title which read "United States Supreme Court Interpretation of Cruel and Unusual Punishment" and a summary which provided that the proposed amendment "[r]equires construction of the prohibition against cruel and/or unusual punishment to conform to United States Supreme Court interpretation of the Eighth Amendment" were affirmatively misleading. See 773 So. 2d at 16-17. This Court explained that although the title offered the impression that "the amendment will promote the rights of Florida citizens through the rulings of the United States Supreme Court," the amendment actually restricted the rights of Floridians because the United States Constitution ban against "cruel and unusual" punishment provided fewer protections than the Florida Constitution ban on "cruel or unusual punishment." Id. at 17. Thus, the

"or" carried special significance because it prohibited punishment that is either cruel or unusual, whereas under the United States Constitution, the punishment is prohibited only if it is both cruel and unusual.

However, the proposal in Armstrong is distinguishable from the proposed amendments that we review today. While the word "or" in the Armstrong proposal was used in conjunction with two adjectives, here the word "or" separates two clauses of a sentence which share the same negative verb; i.e., "shall not be drawn." This verb modifies both clauses, thereby indicating that both clauses impose a restrictive imperative, each of which must be satisfied. For example, if a statute provides that "one person shall not kill another or cause him/her grievous bodily harm," it is illogical to suggest that the statute prohibits one action but not the other. Rather, the "shall not" unquestionably applies to both actions—both killing and causing grievous bodily harm are prohibited. Similarly, the negative verb "shall not be drawn" in the proposed amendments modifies both clauses "with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process" and "to diminish their ability to elect representatives of their choice." Under this sentence, both effects are prohibited.[2] Thus, use of the word "or" in the proposals is synonymous with

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2. One legal dictionary has explained:

"[O]r" has an inclusive sense as well as an exclusive sense. Hence:

the word "and" in the summaries. Because the use of synonymous terms is not misleading, this challenge by the Legislature fails. See English—The Official Language, 520 So. 2d at 13 (use of synonymous terms will not render summary fatally defective where the use of different terms could not reasonably mislead voters).

Language Minorities- The Legislature's claim that this term is vague or ambiguous is not persuasive. The term "language minorities" is both legally and commonly understood to refer to any language other than English. See, e.g., 42 U.S.C. § 1973b(f)(1) ("The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English." (emphasis supplied)); Briscoe v. Bell, 432 U.S. 404, 405 (1977) ("[A]s part of the 1975 amendments to the Voting Rights Act . . . Congress extended the Act's strong protections to cover language minorities; that is, citizens living in environments where the dominant language is not English." (emphasis supplied)); Biddulph v. Mortham, 89 F.3d 1491, 1498 (11th Cir. 1996) ("The plaintiffs argued that the proposal's sponsors failed to comply with a provision of the Voting Rights

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- The "inclusive or": A or B, or both
- The "exclusive or": A or B, but not both.

Bryan A. Garner, A Dictionary of Modern Legal Usage 624 (2d ed. 1995).

Act requiring that certain jurisdictions subject to rules prohibiting discrimination against language minorities provide 'materials or information relating to the electoral process' in the minority group's language as well as English." (emphasis supplied)). The Legislature's contention that voters may be confused by the term "language minorities" is even more dubious in light of the fact that the Florida Constitution contains a provision providing that English is the official language of Florida. See art. II, § 9, Fla. Const. Use of this term does not render the summaries misleading.

Elimination of Multi-Member Districts- Lastly, the Legislature contends that the summary of the legislative-boundary proposal is misleading because it fails to inform voters that it changes the Florida Constitution to no longer permit multi-member legislative districts and to mandate single-member legislative districts.[3] The Florida Constitution currently mandates that legislative districts consist of either "contiguous, overlapping or identical territory." Art. III, § 16(a), Fla. Const. In 1972, we held that this language permits multi-member legislative districts:

> [T]he Constitution requires that there be one senator elected from each Senatorial district and one member of the House of Representatives elected from each representative district. This, standing alone, would

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3. In Branch v. Smith, 538 U.S. 254, 273 (2003), the Supreme Court determined that "that in enacting 2 U.S.C. § 2c, Congress mandated that States are to provide for the election of their Representatives from single-member districts." Thus, even if the congressional-boundary amendment were interpreted to mandate single-member districts, this proposal would be consistent with federal law.

> require single-member districts. However, the Constitution further provides that districts may be "identical territory." This means that multi-members of the Senate or the House of Representatives may be elected from the identical territory if such territory were designated as constituting several districts. To require single-member districts would void the provision of Fla. Const., art. III, § 16(a) . . . authorizing the creation of districts in "identical territory."
>
> . . . .
>
> Under the provisions of Fla. Const., art. III, § 1 and 16 . . . multi-member districts are permissible and such multi-member districts may coexist with single-member districts in the same plan.

In re Apportionment Law Senate Joint Resolution No. 1305, 263 So. 2d 797, 806-07 (Fla. 1972).

The Legislature contends that adoption of the proposed legislative-boundary amendment—which includes a "contiguous" requirement but does not mention overlapping or identical districts—operates to repeal article III, section 16(a) of the Florida Constitution. Under this rationale the Legislature argues that because identical districts are no longer permitted, the proposal amends the Florida Constitution to implement a single-member district requirement, and the ballot summary fails to inform voters of this significant change. See Nonpartisan, 926 So. 2d at 1226 (noting that the "identical territory" provision in article III, section 16(a) permits the creation of multi-member districts).

We disagree that adoption of the legislative-boundary proposal will have the asserted effect. This Court has explained:

> A new constitutional provision prevails over prior provisions of the Constitution (a) if it specifically repeals them or (b) if it cannot be

> harmonized with them. Nevertheless, it is settled that implied repeal of one constitutional provision by another is not favored, and every reasonable effort will be made to give effect to both provisions. Unless the later amendment expressly repeals or purports to modify an existing provision, the old and new should stand and operate together unless the clear intent of the later provision is thereby defeated.

Jackson v. City of Jacksonville, 225 So. 2d 497, 500-501 (Fla. 1969) (emphasis supplied). Since the legislative-boundary proposal does not expressly repeal section 16(a), this constitutional provision will be considered repealed by implication only if it cannot be harmonized with the proposal.

We conclude that harmonization of these two provisions is possible and, therefore, "identical" multi-member districts in Florida will still be constitutionally permissible even if the legislative-boundary proposal is adopted. In 1982, this Court clarified that the word "contiguous" in article III, section 16(a) "means only that each district must be contiguous within itself" and does not refer "to the relationship of the districts to each other." In re Apportionment Law Appearing as Senate Joint Resolution No. 1E, 414 So. 2d 1040, 1045, 1050 (Fla. 1982) (emphasis supplied). Thus, under this Court's prior case law, the reference to "contiguous" in the proposed legislative-boundary amendment solely addresses the characteristics of an individual district—not its relationship with any other district. Accordingly, a constitutional contiguity requirement for each individual district may exist, but—at the same time—an individual district may still overlap with, or be identical to, another individual district. Because these two provisions can be

harmonized in such a manner, the proposed legislative-boundary proposal would not operate to repeal article III, section 16(a).[4]

Since the legislative-boundary proposal does not have the effect of prohibiting multi-member districts, the ballot summary is not misleading for the failure to mention this purported "effect."

III. CONCLUSION

In conclusion, we hold that the proposed amendments meet the legal requirements of article XI, section 3 of the Florida Constitution, and the ballot titles and summaries comply with section 101.161(1), Florida Statutes (2008). Accordingly, we approve the amendments for placement on the ballot.

It is so ordered.

QUINCE, C.J., and ANSTEAD, Senior Justice, concur.
WELLS, CANADY, and POLSTON, JJ., concur in result only.
PARIENTE, J., recused.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

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4. The proposals here are decidedly different from the proposed amendment that this Court struck from the ballot in Nonpartisan. In Nonpartisan, the proposal deleted article III, section 16(a) in its entirety and inserted a new section 16(a), which would have required "single-member" districts of "convenient contiguous territory." See 926 So. 2d at 1221. Thus, in Nonpartisan, there was an express repeal of the constitutional provision that allowed districts to be overlapping and identical.

Two Cases:

Original Proceeding – Advisory Opinion – Attorney General

Bill McCollum, Attorney General, Louis F. Hubener, Solicitor General, Tallahassee, Florida,

for Petitioner

Barry Richard and M. Hope Keating of Greenberg Traurig, P.A., Tallahassee, Florida, Jon L. Mills of Boies, Schiller and Flexner, LLP, Miami, Florida, and Timothy McLendon, Gainesville, Florida, Mark Herron of Messer, Caparello and Self, P.A., Tallahassee, Florida, and E. Thom Rumberger of Rumberger, Kirk and Caldwell, P.A., Tallahassee, Florida,

for FairDistrictsFlorida.org, Sponsor

Jason Vail, General Counsel, Florida Senate, and Jeremiah M. Hawkes, General Counsel, Florida House of Representatives, Tallahassee, Florida, on behalf of The Florida Legislature,

as Opponents

SUPREME COURT OF FLORIDA

Case No. SC08-1149

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING

Consolidated for oral argument with
Case Nos. SC08-986, SC08-1163, and SC08-1165

DOCKET

SHEET

Florida Supreme Court Case Docket

Case Number: SC08-1149 - Closed

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR vs. LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING

03/10/2011 05:02

Date Docketed	Description	Filed By	Notes
06/18/2008	REQUEST-ADVISORY OPINION (ATTY GEN)	PT Advisory Opinion To The Attorney General ADVOP BY: PT Hon. Bill Mccollum 112233	O&7
06/18/2008	No Fee Required		
06/18/2008	ORDER-HIGH PROFILE		
06/25/2008	ORDER-OA&BRIEF SCHED (AG ADVISORY OPIN)		IT IS, THEREFORE, the order of the Court that the above cases are hereby consolidated for the purpose of oral argument. Interested parties shall file their briefs on or before July 15, and serve a copy thereof on the Attorney General. Answer briefs shall be filed on or before August 4, 2008. Please file an original and eight copies of all briefs. In addition to paper briefs, per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all briefs in an electronic format as required by the provisions of that order. Briefs submitted on diskette will be placed on the Court's Internet site (http://www.floridasupremecourt.org). Oral argument is scheduled for 9:00 a.m., Wednesday, November 5, 2008. A maximum of twenty minutes to the side as consolidated is allowed for the argument.
07/15/2008	INITIAL BRIEF-	SPR Fair Districts Florida.Org BY:	(FOR SPONSOR,

	MERITS	SPR Mark Herron 199737	FAIRDISTRICTSFLORIDA.ORG) O&8 & E-MAIL
07/15/2008	INITIAL BRIEF-MERITS	OP The Florida Legislature BY: OP Jason Vail 298824	(OF THE FLORIDA LEGISLATURE) (O&8 & E-MAIL)
07/18/2008	MOTION-EXT OF TIME (ANSWER BRIEF-MERITS)	OP The Florida Legislature BY: OP Jason Vail 298824	O&8 & E-MAIL(FILED AS "MOTION FOR EXTENSION OF TIME TO FILE REPLY/ANSWER BRIEFS")
07/21/2008	RESPONSE	SPR Fair Districts Florida.Org BY: SPR Barry Scott Richard 105599	OF SPONSOR FAIRDISTRICTSFLORIDA.ORG TO MOTION OF LEGISLATURE FOR EXTENSION OF TIME TO FILE BRIEFS (E-MAIL)
07/31/2008	ORDER-EXT OF TIME GR (ANSWER BRIEF-MERITS)		TO VIEW ORDER SEE SC08-986.
08/01/2008	ANSWER BRIEF-MERITS	SPR Fair Districts Florida.Org BY: SPR Mark Herron 199737	O&8 & E-MAIL ***STRICKEN-SEE ORDER DATED 08/19/2008***
08/04/2008	MOTION-BRIEF AMENDMENT	SPR Fair Districts Florida.Org BY: SPR Mark Herron 199737	O&1 & E-MAIL
08/04/2008	ANSWER AMD BRIEF-MERITS	SPR Fair Districts Florida.Org BY: SPR Mark Herron 199737	O&8 & E-MAIL
08/19/2008	ORDER-BRIEF AMENDMENT GR		FairDistrictsFlorida.org's Motion to Permit Filing of Amended Answer Brief of Sponsor is granted and said amended brief was filed with this Court on August 4, 2008. FairDistrictsFlorida.org's answer brief of sponsor filed with this Court on August 1, 2008, is hereby stricken.
08/20/2008	ANSWER BRIEF-MERITS	OP The Florida Legislature BY: OP Jason Vail 298824	O&8 & E-MAIL (DID NOT SERVE ATTY. JON MILLS) (REQ'D AMD CERT OF SERVICE)
08/20/2008	REQUEST-ORAL ARGUMENT	OP The Florida Legislature BY: OP Jason Vail 298824	O&9 & E-MAIL
08/21/2008	CERTIFICATE OF SERVICE (AMD)		(O&7) FOR FLORIDA LEGISLATURE'S ANSWER BRIEF OP The Florida Legislature BY: OP Jason Vail 298824
08/22/2008	ORAL ARGUMENT CALENDAR		
08/22/2008	ORDER-ORAL ARGUMENT RESCHEDULE		TO VIEW ORDER SEE SC08-986.
09/03/2008	MOTION-OTHER SUBSTANTIVE	SPR Fair Districts Florida.Org BY: SPR Mark Herron 199737	(O&9) FILED AS "MOTION TO EXPAND TIME FOR ORAL ARGUMENT"
09/15/2008	ORDER-OTHER SUBSTANTIVE GR		TO VIEW ORDER SEE SC08-986.
10/21/2008	NOTICE-SUPPLEMENTAL AUTHORITY	OP The Florida Legislature BY: OP Jason Vail 298824	O&8 & E-MAIL (DOES NOT CONTAIN COPY OF CITED AUTHORITY) ***STRICKEN. SEE ORDER DATED 10/21/2008)***
10/21/2008	ORDER-SUPP AUTHORITY STRICKEN		The Florida Legislature's Notice of Supplemental Authority does not comply with Florida Rule of Appellate Procedure 9.225 and is hereby stricken as it does not contain a copy of the cited authority. ***TO VIEW ORDER SEE SC08-986***

10/24/2008	NOTICE-SUPPLEMENTAL AUTHORITY	OP The Florida Legislature BY: OP Jason Vail 298824	O&8 & E-MAIL ***STRICKEN. SEE ORDER DATED 10/24/2008
10/24/2008	ORDER-SUPP AUTHORITY STRICKEN		The Florida Legislature's Notice of Supplemental Authority does not comply with Florida Rule of Appellate Procedure 9.225 and is hereby stricken as it contains argument. ***TO VIEW ORDER SEE SC08-986***
10/28/2008	NOTICE-SUPPLEMENTAL AUTHORITY	OP The Florida Legislature BY: OP Jason Vail 298824	O&8 & E-MAIL
11/06/2008	ORAL ARGUMENT HELD		
01/29/2009	DISP-APPROVED		In conclusion, we hold that the proposed amendments meet the legal requirements of article XI, section 3 of the Florida Constitution, and the ballot titles and summaries comply with section 101.161(1), Florida Statutes (2008). Accordingly, we approve the amendments for placement on the ballot.
02/12/2009	WEST CORRESPONDENCE		CORRECTED OPINION - On page 29, added law firm affiliation of Jon L. Mills.
04/15/2009	ARCHIVES		

June 18, 2008

The Honorable R. Fred Lewis
Chief Justice, and Justices of
The Supreme Court of Florida
The Supreme Court Building
Tallahassee, Florida 32399-1925

Dear Chief Justice Lewis and Justices:

In accordance with the provisions of Article IV, section 10, Florida Constitution, and section 16.061, Florida Statutes, it is the responsibility of the Attorney General to petition this Honorable Court for a written opinion as to the validity of an initiative petition circulated pursuant to Article XI, section 3, Florida Constitution.

On May 22, 2008, this office received a letter from the Secretary of State advising this office that the initiative petition seeking to amend the Florida Constitution to establish standards for the Legislature to follow in congressional redistricting had met the registration, submission, and signature criteria set forth in section 15.21, Florida Statutes. Pursuant to Rule 9.510(b), Florida Rules of Appellate Procedure, a petition by this office must contain, in addition to the language of the initiative, the following information:

1. The name of the sponsor and address: The sponsor of the initiative is FairDistrictsFlorida.org, whose address is 704 West Madison Street, Tallahassee, Florida 32304.

2. The name and address of the sponsor's attorney, if the sponsor is represented: Mr. Mark Herron is the sponsor's attorney; his address is 704 West Madison Street, Tallahassee, Florida 32304.

3. A statement as to whether the sponsor has obtained the requisite number of signatures to have the initiative placed on the ballot: As of May 19, 2008, the sponsor had not obtained the necessary number of signatures to place the initiative on the ballot.

4. The current status of the signature collection process: The Secretary of State in his

May 19, 2008, letter states that as of that date the Supervisors of Elections have certified a total of 63,847 valid petition signatures to the Division of Elections in the Department of State.

5. The date of the election during which the sponsor is planning to submit the proposed amendment: The date is unknown; this office has been advised by the Department of State that the sponsor did not collect the requisite number of signatures by February 1, 2008, to place the initiative on the 2008 general election ballot. *See* Article XI, section 5(b), Florida Constitution.

6. The last possible date that the ballot for the target election can be printed in order to be ready for the election: Since the date of the election in which the sponsor is planning to submit the proposed amendment is unknown, this date is also unknown.

7. A statement identifying the date by which the Financial Impact Statement will be filed, if the Financial Impact Statement is not filed concurrently with the request: The Secretary of State has advised this office that a letter was sent to the Financial Impact Estimating Conference on May 19, 2008.

8. The names and complete mailing addresses of all of the parties who are to be served: Section 16.061(2), Florida Statutes, requires that a copy of the petition be provided to the Secretary of State and to the principal officer of the sponsor:

Mr. Thom Rumberger
Chair, FairDistrictsFlorida.org
704 West Madison Street
Tallahassee, Florida 32304-4324

Mr. Kurt S. Browning
Florida Department of State
R. A. Gray Building, Room 316
500 South Bronough Street
Tallahassee, Florida 32399-0250

As noted above, the name and address for the sponsor's attorney is:

Mr. Mark Herron
704 West Madison Street
Tallahassee, Florida 32304

While not required by law, this office provides copies of the petition to:

The Honorable Charlie Crist
Governor, State of Florida
The Capitol
400 South Monroe Street
Tallahassee, Florida 32399-0001

The Honorable Ken Pruitt
President, Florida Senate
Senate Office Building, Room 312
404 South Monroe Street
Tallahassee, Florida 32399-1100

The Honorable Marco Rubio
Speaker, Florida House of Representatives
420 The Capitol
402 South Monroe Street
Tallahassee, Florida 32399-1300

No other parties are known at this time.

The full text of the proposed amendment states:

Add a new section 20 to Article III

Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES

In establishing Congressional district boundaries:
(1) No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
(2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
(3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

The ballot title for the proposed amendment is "Standards For Legislature to Follow in Congressional Redistricting." The ballot summary for the proposed amendment states:

> Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

Single Subject

Article XI, section 3, Florida Constitution, requires that a constitutional amendment proposed by citizens' initiative "embrace but one subject and matter directly connected therewith." As this Court stated in *Fine v. Firestone*, 448 So. 2d 984, 993 (Fla. 1984), this limitation protects the State Constitution from "precipitous" and "spasmodic" changes by preventing logrolling. Logrolling is "a practice whereby an amendment is proposed which contains unrelated provisions, some of which electors might wish to support, in order to get an otherwise disfavored provision passed." *Advisory Opinion to the Attorney General--Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans,* 902 So. 2d 763, 766 (Fla. 2005), quoting *Advisory Opinion to the Attorney General--Florida Transportation Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation System,* 769 So. 2d 367, 369 (Fla. 2000).

In addition, the single-subject rule "prevent[s] a single constitutional amendment from substantially altering or performing the functions of multiple aspects of government." *Advisory Opinion to the Attorney General--Florida Transportation Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation System, supra.* Thus, the single-subject rule ensures that the impact of a constitutional amendment proposed by a citizen's initiative is limited and accurately disclosed.

To comply with the single-subject requirement, an initiative must manifest a "logical and natural oneness of purpose." *Fine v. Firestone, supra.* This Court stated in *Advisory Opinion to the Attorney General--Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1020 (Fla. 1994), that "[t]o ascertain whether the necessary 'oneness of purpose' exists, we must consider whether the proposal affects separate functions of government and how the proposal affects other provisions of the constitution."

This Court in *Advisory Opinion to the Attorney General Re: Independent Nonpartisan Commission to Apportion Legislative and Congressional Districts Which Replaces Apportionment by Legislature*, 926 So. 2d 1218 (Fla. 2006), concluded that an initiative petition to amend the Constitution to create an apportionment and redistricting commission violated the single subject requirement by changing the standards applicable to creation of legislative districts and by creating a new commission to perform redistricting. The Court noted the language of the proposed amendment would have required the commission to divide the state into "single-member . . . districts of convenient contiguous territory." *Id.*, at 1226. The current Florida constitutional provision provides that legislative districts may be "of either contiguous, overlapping, or identical territory." Art. III, s. 16(a), Fla. Const. This "identical territory" provision allows

Apportionment Law Senate Joint Resolution No. 1305, 1972 Regular Session, 263 So. 2d 797, 806-807 (Fla. 1972) which rejected challenges to multi-member districts in the legislative apportionment plan and citing the proceedings of the Florida Constitutional Revision Commission of 1966 which defeated a proposed amendment to change this language in Article III, Section 16, and require single-member districts.

The proposed amendment appears to deal only with the standards to be used by the Legislature in congressional redistricting. However, the language of the proposed amendment does require that "districts shall consist of contiguous territory." As discussed by this court in *Advisory Opinion to the Attorney General Re: Independent Nonpartisan Commission to Apportion Legislative and Congressional Districts Which Replaces Apportionment by Legislature*, 926 So. 2d 1218 (Fla. 2006), this language would effect a change in the current legislative reapportionment scheme under Article III, section 16(a), Florida Constitution, by allowing challenges to multi-member districts as such districts would not comply with the standards established by the proposed amendment that all districts "shall consist of contiguous territory." No mention of how this proposal affects Article III, section 16(a), Florida Constitution, is made in the proposed amendment.

Therefore, I respectfully request this Honorable Court's opinion as to whether the constitutional amendment, proposed by initiative petition, complies with Article XI, section 3, Florida Constitution.

Ballot Title and Summary

Section 101.161(1), Florida Statutes, sets forth substantive and technical requirements for the ballot title and summary, stating in pertinent part:

> Whenever a constitutional amendment . . . is submitted to the vote of the people, the substance of such amendment . . . shall be printed in clear and unambiguous language on the ballot . . . . The wording of the substance of the amendment . . . shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. . . . The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.

This Court has stated that section 101.161(1), Florida Statutes, "requires that the ballot title and summary for a proposed constitutional amendment state in clear and unambiguous language the chief purpose of the measure. This is so that the voter will have notice of the issue contained in the amendment, will not be misled as to its

Attorney General re Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans, 902 So. 2d at 770, quoting *In re Advisory Opinion to the Attorney General–Save Our Everglades*, 636 So. 2d 1336, 1341 (Fla. 1994). Thus, "the ballot [must] be fair and advise the voter sufficiently to enable him intelligently to cast his ballot." *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982), quoting, *Hill v. Milander*, 72 So. 2d 796, 798 (Fla. 1954). While the ballot title and summary must state in clear and unambiguous language the chief purpose of the measure, they need not explain every detail or ramification of the proposed amendment. *Carroll v. Firestone*, 497 So. 2d 1204, 1206 (Fla. 1986). The ballot, however, must give the voter fair notice of the decision he must make. *Askew v. Firestone, supra* at 155.

The initiative petition now under consideration establishes standards for the Florida Legislature to follow in congressional redistricting. The summary consists of 74 words and the ballot title does not exceed 15 words. The ballot title appears to advise the voter of the purpose of the amendment in clear and unambiguous language. However, nothing in the ballot summary for this proposed constitutional amendment advises the voters of the effect of a change from the current constitutional redistricting language for "either contiguous, overlapping, or identical territory" as provided in Article III, section 16(a), Florida Constitution, and the standard of the proposed amendment that all districts "consist of contiguous territory." A constitutional amendment requiring single-member districts as the standard for congressional redistricting or apportionment would appear to be a significant change to the Constitution of which Florida voters should be advised pursuant to section 101.161(1), Florida Statutes, and the ballot summary for "Standards for Legislature to Follow in Congressional Redistricting" fails to do so.

Therefore, I respectfully request this Honorable Court's opinion as to whether the constitutional amendment's ballot title and summary comply with section 101.161, Florida Statutes.

Sincerely,

Bill McCollum
Attorney General

BM/tgh

Supreme Court of Florida

WEDNESDAY, JUNE 18, 2008

CASE NO.: SC08-1149

ADVISORY OPINION TO THE ATTORNEY GENERAL RE:
STANDARDS FOR LEGISLATURE TO FOLLOW IN
CONGRESSIONAL REDISTRICTING

Because of significant public and media interest in this matter, counsel for the parties are directed to hereafter file an original and eight copies of all pleadings filed with this Court. Per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all documents, including any attachments and appendices, in an electronic format as required by the provisions of that order. FOR GENERAL FILING INFORMATION AND ADMINISTRATIVE ORDER NO. AOSC04-84, PLEASE VISIT THE CLERK'S OFFICE WEBSITE AT http://www.floridasupremecourt.org/clerk/index.shtml.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

vm
Served:

EDWIN THOM RUMBERGER
HON. CHARLES J. CRIST, JR.
MARK HERRON
HON. KURT S. BROWNING
HON. MARCO ANTONIO RUBIO
HON. KEN PRUITT
HON. BILL MCCOLLUM

Supreme Court of Florida

WEDNESDAY, JUNE 25, 2008

CASE NOS.: SC08-1149; SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING (FIS)

Bill McCollum, pursuant to the provisions of Article IV, section 10, Florida Constitution, and section 16.061, Florida Statutes, has requested this Court's opinion as to whether the text of the proposed amendment seeking to amend the Florida Constitution to establish standards for the Legislature to follow in congressional redistricting had met the registration complies with Article XI, section 3, Florida Constitution, and whether the proposed ballot title and substance comply with section 101.161, Florida Statutes. The petition provides:

> Add a new section 20 to Article III
>
> Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES
>
> In establishing Congressional district boundaries:
> (1) No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
> (2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts

> shall, where feasible, utilize existing political and geographical boundaries. (3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

The ballot title and summary for the proposed amendment provides:

> Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

Section 16.061, Florida Statutes, requires the Attorney General, within thirty days after receipt of the proposed amendment or revision to the State Constitution by initiative petition, to petition this Honorable Court for an advisory opinion regarding compliance of the text of the proposed amendment with Article XI, section 3, Florida Constitution, and compliance of the proposed ballot title and substance with section 101.161, Florida Statutes.

On June 18, 2008, the Financial Impact Estimating Conference, in accordance with the provisions of Chapter 04-33, Laws of Florida, forwarded to the Office of the Attorney General a financial impact statement on the initiative petition. Chapter 04-33 provides for this Honorable Court to review the financial impact statement to determine whether it is in accordance with 100.371, Florida Statutes.

The full text of the Attorney General's letter is attached hereto as an exhibit and made a part thereof.

IT IS, THEREFORE, the order of the Court that the above cases are hereby consolidated for the purpose of oral argument. Interested parties shall file their briefs on or before July 15, and serve a copy thereof on the Attorney General. Answer briefs shall be filed on or before August 4, 2008. Please file an original and eight copies of all briefs. In addition to paper briefs, per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all briefs in an electronic format as required by the provisions of that order. Briefs submitted on diskette will be placed on the Court's Internet site **(http://www.floridasupremecourt.org)**. Oral argument is scheduled for 9:00 a.m., Wednesday, November 5, 2008. A maximum of twenty minutes to the side as consolidated is allowed for the argument. All parties who have filed a brief and have asked to be heard may, in the Court's discretion, be permitted to participate in oral argument.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

vm
Served:

EDWIN THOM RUMBERGER
HON. CHARLES J. CRIST, JR.
HON. KURT S. BROWNING
FINANCIAL IMPACT
ESTIMATING CONFERENCE
HON. BILL MCCOLLUM
MARK HERRON
HON. KEN PRUITT
HON. MARCO ANTONIO RUBIO

IN THE SUPREME COURT OF FLORIDA

Case No.: SC08-1149

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES

INITIAL BRIEF OF SPONSOR FairDistrictsFlorida.org

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Counsel for Sponsor, FairDistrictsFlorida.org

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STATEMENT OF THE CASE

On May 19, 2008, the Division of Elections submitted to the Attorney General an amendment to the Florida Constitution proposed by initiative petition sponsored by FairDistrictsFlorida.org ("the Redistricting Amendment"). The Attorney General sent the Redistricting Amendment to this Court on June 18, 2008. The substance of the proposed Redistricting Amendment reads as follows:

> Add a new Section 21 to Article III
>
> > Section 21. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES
> >
> > In establishing Congressional district boundaries:
> > (1) No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
> > (2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries. (3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish

any priority of one standard over the other within this subsection.

The title and summary of the Amendment read as follows:

STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING

Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

SUMMARY OF THE ARGUMENT

This proposal presents a clear and unified issue to the electorate: whether to establish standards to be followed by the Legislature in defining congressional districts after each decennial census, or when otherwise required. The proposed Redistricting Amendment thus complies with the single subject requirement of Article XI, Section 3, Florida Constitution. It affects a function of only the legislative branch of state government and has a single purpose accomplished by a single plan. Because it does nothing more than establish standards, the proposed amendment is distinguishable from the initiative rejected by this Court in *Advisory Opinion to the Attorney General re: Independent Nonpartisan Comm'n to Apportion Legislative and Congressional Districts which Replaces Apportionment by the Legislature*, 926 So. 2d 1218 (2006), where the unsuccessful amendment not only established standards for reapportionment, but a created an independent commission to perform the function of drawing district lines.

The ballot title and summary for the Redistricting Amendment meet the requirements of Florida law by stating in clear and unambiguous language the chief purpose of the amendment to create redistricting standards for congressional districts, and by making reference to each of such standards. Nothing in the title or summary is misleading. The

Attorney General's letter suggests that the summary may be misleading because the proposal may require single member districts. The proposal does not do this, and such a result is not intended. However, more importantly, the argument is irrelevant because federal law prohibits the creation of multi-member congressional districts. There is no ambiguity in the title and summary because the proposed initiative provides state standards for congressional districts that will be drawn to also comply with federal law as they have been in the past.

ARGUMENT

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.

The parameters of the single subject requirement embodied in Article XI, Section 3 of the Florida Constitution, are now well settled. A proposed amendment must not engage in logrolling or substantially alter or perform the functions of multiple branches of government. *See, e.g., Advisory Opinion to the Attorney Gen. re Extending Existing Sales Tax to Non-Taxed Servs. where Exclusion Fails to Serve Public Purpose*, 953 So. 2d 471, 477-78 (Fla. 2007). The logrolling prohibition is intended to prevent combining

separate issues into a single proposal to secure passage of an unpopular issue. A proposed amendment meets the logrolling test when it manifests "a logical and natural oneness of purpose." *Advisory Opinion to the Attorney Gen. re Florida Marriage Protection Amendment*, 926 So. 2d 1229, 1233 (Fla. 2006) (quoting *Fine v. Firestone*, 448 So. 2d 984, 990 (Fla. 1984)). Otherwise stated, the single subject requirement mandates that a proposed initiative "may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme." *Extending Existing Sales Tax*, 953 So. 2d at 481 (quoting *Advisory Opinion to the Attorney Gen. re Fairness Initiative Requiring Legis. Determination that Sales Tax Exemptions & Exclusions Serve a Publ. Purpose*, 880 So. 2d 630, 634 (Fla. 2004)).

The proposed Redistricting Amendment easily meets the single subject requirements. It affects a function of only the legislative branch of state government and has a single purpose accomplished by a single plan. It creates standards for the drawing of congressional districts and nothing more. The Attorney General cites *Independent Nonpartisan Comm'n*, 926 So. 2d at 1218, a case in which the Court found that a proposed amendment violated the single subject requirement. The amendment reviewed in that case is patently distinguishable from the Redistricting Amendment now

under review. The 2006 decision found a logrolling violation because the proposal would not only have established standards, but would also have created an independent commission to perform the redistricting function instead of the Legislature. As this Court explained:

> A voter who advocates apportionment by a redistricting commission may not necessarily agree with the change in the standards for drawing the legislative and congressional districts. Conversely, a voter who approves the change in district standards may not want to change from the legislative apportionment process currently in place. Thus, a voter would be forced to vote in the "all or nothing" fashion that the single subject requirement safeguards against.

926 So. 2d at 1226.

The current Redistricting Amendment suffers from no such infirmity. A voter will either approve or disapprove the imposition of these standards for redistricting and is not compelled to accept or reject any other governmental function in order to record his or her preference.

II. THE BALLOT TITLE AND SUMMARY ARE CLEAR, ACCURATE AND UNAMBIGUOUS.

This Court's analysis of the ballot title and summary focuses on two questions: (1) whether the title and summary, in clear and unambiguous language, fairly inform the voter of the chief purpose of the amendment; and (2) whether the language of the title and summary, as written, is likely to

mislead the public. *See, e.g., Florida Marriage Protection Amend.*, 926 So. 2d at 1236; *but see Advisory Opinion to the Attorney Gen. Re Protect People from the Hazards of Second-Hand Smoke by Prohibiting Workplace Smoking*, 814 So. 2d 415, 419 (Fla. 2002) (because of the statutory word limits, the summary and title cannot detail every aspect of a proposed initiative). The title and summary for the proposed Redistricting Amendment accomplish the fundamental purpose of explaining the "true meaning and ramifications" of the amendment. *Advisory Opinion to the Attorney Gen. re Tax Limitation*, 644 So. 2d 486, 490 (Fla. 1994). The title and summary tell voters the chief purpose of the amendment – to establish standards for congressional redistricting – and the summary explains each of the standards included in the amendment. There is nothing either expressed or implicit in the amendment that would mislead a voter. Nor do the title and summary include emotional language or political rhetoric that might be seen as editorial in nature. *Cf. Advisory Opinion to the Attorney Gen. re Additional Homestead Tax Exemption*, 880 So. 2d 646, 653 (Fla. 2004) (citing *In re Advisory Opinion to the Attorney Gen. – Save Our Everglades*, 636 So. 2d 1336, 1341-42 (Fla. 1994)).

In his letter referring the initiative to this Court, the Attorney General suggests that the inclusion of a standard requiring that districts be

"contiguous" would prohibit multi-member districts, currently permitted by Article III, Section 16(a), allowing districts to consist of "either contiguous, overlapping or identical territory," and that the summary is misleading because it fails to inform the voter of this purported change. The Attorney General again cites *Independent Nonpartisan Comm'n*, 926 So. 2d at 1218. In fact, federal law prohibits multi-member congressional districts:

> In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of section 2a(a) of this title, ***there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled***, and Representatives shall be elected only from districts so established, ***no district to elect more than one Representative*** (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress).

2 U.S.C. § 2c (emphasis added).

The Redistricting Amendment cannot abridge a legislative power that does not exist. Unlike the amendment at issue in *Independent Nonpartisan Comm'n*, which expressly prohibited multi-member districts in both congressional and legislative redistricting plans, the instant Redistricting Amendment only addresses congressional districts. The Redistricting

Amendment establishes standards for congressional redistricting and does not change the legislature's powers under Article III, Section 16(a). This purpose is made abundantly clear through the ballot title and summary. Voters thus "have fair notice of the decision [they] must make." *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982).

CONCLUSION

This Court is respectfully urged to approve the Redistricting Amendment for placement on the ballot.

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.

_____
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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) of the Florida Rules of Appellate Procedure.

_____
Attorney

IN THE SUPREME COURT OF FLORIDA

Case No. SC08-1149, SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING

_____/

BRIEF

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STATEMENT OF THE CASE AND FACTS

The Attorney General seeks review of a constitutional amendment brought by citizens' initiative, pursuant to Article 4, s. 10, Fla.Const.

The ballot title and summary read:

> STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING
>
> Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographic boundaries.

The text of the petitions reads:

> Add a new section 20 to Article III
>
> Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES
>
> In establishing Congressional district boundaries:
>
> (1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

(2) Unless compliance with the standards in this subsection, conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; districts shall, where feasible, utilize political and geographic boundaries.

(3) The order in which the standards within subsections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within the subsection.

The amendment's first paragraph would establish these independent, freestanding standards:

1. No plan or district shall be drawn with the intent to favor or disfavor a political party.

2. No plan or district shall be drawn with the intent to favor or disfavor an incumbent.

3. No plan or district shall be drawn with the intent or result of denying or abridging the equal opportunity of racial minorities to participate in the political process or to diminish their ability to elect representatives of their choice.

4. No plan or district shall be drawn with the intent or result of denying or abridging the equal opportunity of language minorities to participate in the political process or to diminish their ability to elect representatives of their choice.

5. Districts shall consist of contiguous territory.

The second paragraph would establish these independent, freestanding standards, which are to be met unless doing so conflicts with a requirement in paragraph 1 or with federal law:

6. Districts shall be as nearly equal in population as is practicable.

7. Districts shall be compact.

8. Districts shall, where feasible, utilize political and geographic boundaries.

Thus the proposed amendment creates a list of eight independent redistricting objectives to be achieved by any entity drafting an apportionment plan or drawing any individual district.

The use of the passive voice in paragraph 1 — "No apportionment plan or district *shall be drawn*" — indicates that any entity drafting an apportionment plan or creating a district must comply with these criteria, including the courts.

SUMMARY OF THE ARGUMENT

The language of the proposed amendment in this matter is virtually identical to that in SC08-986. The only difference is that this petition involves an amendment addressing congressional reapportionment. SC08-986 addresses state

legislative reapportionment. Consequently, both petitions share largely the same defects. For this reason, with one significant exception, the arguments made here repeat those made in the Legislature's brief in opposition in SC08-986. We reiterate them for the Court's convenience so that it does not have to refer to another paper.

The one exception, which we highlight here, is the fact that the amendment will devolve to the courts the ultimate responsibility to conduct reapportionment. This will violate Article 1, s. 4, U.S. Constitution, which authorizes only state legislatures to reapportion congressional districts.

The proposed amendment violates the single subject rule.

The proposed amendment violates both facets of the Constitution's single subject rule. First, the amendment establishes eight independent objectives to be achieved in redistricting, depriving it of sufficient "oneness" to comply with the Constitution. These objectives, embodied in the amendment's standards, are disparate, unconnected goals so that the proposal constitutes impermissible logrolling.

Second, the amendment will substantially alter the constitutional roles of the Legislature and the judiciary. The amendment's vague standards ensure that no legislatively drafted redistricting plan will escape judicial challenge. Furthermore,

one goal of the amendment — to eliminate politics from legislative redistricting decisions — is humanly impossible to achieve. The combined force of these standards will inevitably compel the judiciary to make the ultimate decision — a result which is contrary to Article 1, s. 4, U.S. Const., and which potentially threatens the courts' independence.

In short, the amendment constitutes the kind of precipitous, spasmodic, cataclysmic governmental change that the single subject rule is intended to prevent.

The ballot summary is vague and misleading.

The ballot title is misleading because it says the amendment addresses standards the Legislature must follow in redistricting. However, the text of the amendment requires the Court, when imposing a redistricting plan pursuant to its constitutional authority, to obey those same standards as well.

The ballot summary is misleading because it misrepresents the amendment's goal and purposes. For instance, the summary clearly implies that the *effect* of districts or reapportionment plans cannot be to favor or disfavor anyone or any party. But under the amendment, proof of *intent* alone must be shown. In addition, the summary uses words inconsistent with those in the amendment, words that have very different meanings. For instance, the summary states districts should be drawn to respect city or county boundaries; the amendment's text instead refers to

"political boundaries," a far broader term. Some terms used in the summary are vague and misleading. Finally, the summary fails to identify constitutional provisions that are substantially affected.

STANDARD OF REVIEW

> The overall standard of review for the proposed amendment and the ballot title and summary are the same. In Advisory Opinion to the Attorney General re Amendment to Bar Government from Treating People Differently Based on Race in Public Education, 778 So.2d 888 (Fla. 2000), this Court summarized its standard of review in initiative petition cases as follows:
>
> > The Court's inquiry, when determining the validity of initiative petitions, is limited to two legal issues: whether the petition satisfies the single-subject requirement of article XI, section 3, Florida Constitution, and whether the ballot titles and summaries are printed in clear and unambiguous language pursuant to section 101.161, Florida Statutes (1999). In order for the Court to invalidate a proposed amendment, the record must show that the proposal is clearly and conclusively defective on either ground. In determining the propriety of the initiative petitions, the Court does not review the merits of the proposed amendments.

Advisory Opinion to the Atty. Gen. re: Protect People, Especially Youth, from Addiction, Disease, and Other Health Hazards of Using Tobacco, 926 So.2d 1186, 1190-1191 (Fla. 2006).

Article 11, s. 3, Fla.Const. states than an amendment proposed by citizen initiative can only "embrace but one subject and matter directly connected therewith."

Article 1, s. 4, U.S. Const., states: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature* thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Emphasis added.

ARGUMENT

I. The proposed amendment violates the single subject rule.

The proposed amendment violates both facets of the Constitution's single subject rule. First, the amendment establishes eight independent objectives to be achieved in redistricting, depriving it of sufficient "oneness" to comply with the Constitution. These objectives, embodied in the amendment's standards, are disparate, unconnected goals so that the proposal constitutes impermissible logrolling.

Second, the amendment will substantially alter the constitutional roles of the Legislature and the judiciary. The amendment's vague standards ensure that no legislatively drafted redistricting plan will escape judicial challenge. Furthermore, one goal of the amendment — to eliminate politics from legislative redistricting decisions — is humanly impossible to achieve. The combined force of these standards will inevitably compel the judiciary to make the ultimate decision — a result which is contrary to Article 1, s. 4, U.S. Const., and which potentially threatens the courts' independence.

In short, the amendment constitutes the kind of precipitous, spasmodic, cataclysmic governmental change that the single subject rule is intended to prevent. Advisory Opinion to the Atty. Gen. Re: Protect People, Especially Youth,

from Addiction, Disease, and Other Health Hazards of Using Tobacco, 926 So.2d 1186 (Fla. 2006); Advisory Opinion to the Attorney General Re: Independent Nonpartisan Commission to Apportion Legislature and Congressional Districts Which Replaces Apportionment by Legislature, 926 So.2d 1218, 1224 (Fla. 2006).

A. The amendment addresses separate purposes and constitutes logrolling.

"Logrolling is 'a practice whereby an amendment is proposed which contains unrelated provisions, some of which electors might wish to support, in order to get an otherwise disfavored provision passed.'" Hazards of Using Tobacco, 926 So.2d at 1190. The single subject rule prohibits initiative amendments that contain such unrelated provisions. Id.; Apportionment by Legislature, 926 So.2d at 1224-1225; In re Advisory Opinion to the Attorney General — Save Our Everglades, 636 So.2d 1336, 1339-1340 (Fla. 1994).

To determine if a measure constitutes impermissible logrolling, the court examines the text for whether it exhibits "oneness of purpose." Save our Everglades, 636 So.2d 1340; In re Advisory Opinion to the Attorney General — Restricts Laws Related to Discrimination, 632 So.2d 1018, 1020 (Fla. 1994) ("to comply with the single-subject requirement, the proposed amendment must manifest a 'logical and natural oneness of purpose.'"). The proposal must be

complete within itself relating to one subject. Adams v. Gunter, 238 So.2d 824, 831 (Fla. 1970). "'[U]nity of object and plan is the universal test' . . . A proposed amendment meets this test when it 'may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme. [internal citations omitted].'" 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, 480-481 (Fla. 2007). An amendment's parts must be functionally and facially unified, so that any one aspect is a necessary component of a single dominant plan, and is logically related to the amendment's purpose. Advisory Opinion to the Attorney General re Local Trustees, 819 So.2d 725, 730 (Fla. 2002); Advisory Opinion to the Attorney General re Funding of Embryonic Stem Cell Research, 959 So.2d 195, 197 (Fla. 2007).

Proposals that force voters to choose "in the 'all or nothing' fashion" when they might disagree with unrelated parts of an amendment violate the one subject rule. Independent Nonpartisan Commission to Apportion Legislative and Congressional Districts, 926 So.2d at 1226. Save Our Everglades, 636 So.2d at 1341.[1]

---

[1] "One objective — to restore the Everglades — is politically fashionable, while the other — to compel the sugar industry to fund the restoration — is more problematic. Many voters sympathetic to restoring the Everglades might be

The proposal at issue today fails these fundamental tests. The various standards in the proposal are independent and freestanding. They have nothing to do with one another and do not work together toward a common goal. In fact, each standard establishes an independent goal by itself. By their nature, these elements are not functionally and facially unified so that each aspect is a necessary component of a single dominant plan. In reality, they are not unified in any meaningful sense; they are just a list of unrelated standards aiming toward unrelated targets. A voter easily could favor one standard and reject another. But because they are wrapped in a single package, the voter must make the classic "all or nothing" judgment which this Court has repeatedly condemned.

These disparate elements are:

- No plan or district shall be drawn with the intent to favor or disfavor a political party.
- No plan or district shall be drawn with the intent to favor or disfavor an incumbent.
- No plan or district shall be drawn with the intent or result of denying or abridging the equal opportunity of racial minorities to participate in

---

antithetical to forcing the sugar industry to pay for the cleanup by itself, and yet those voters would be compelled to choose all or nothing."

the political process or to diminish their ability to elect representatives of their choice.

- No plan or district shall be drawn with the intent or result of denying or abridging the equal opportunity of language minorities to participate in the political process or to diminish their ability to elect representatives of their choice.
- Districts shall consist of contiguous territory.

A district also must meet another set of standards unless compliance with them conflicts with the requirements listed above. This second set says a district:

- shall be as nearly equal in population as is practicable.
- shall be compact.
- shall, where feasible, utilize political and geographic boundaries.

The most obvious defect is that the proposal does not have the necessary oneness of purpose. The fact that the amendment's drafters are willing to sacrifice the second set of standards to satisfy the first set shows that even they realized that the amendment's standards were in conflict. That one set has to be subordinated to the other set demonstrates on its face that there are separate and conflicting goals set out by the different standards.

In fact, the proposal has eight unrelated purposes, because each standard establishes its own goal. Even if one struggles to find commonality among the standards, five separate objectives are apparent. First, the amendment strives for political neutrality or balance when it prohibits districts favoring any party or an incumbent. Second, it aims to eliminate two types of discrimination. Third, it seeks to dictate districts' geography by requiring contiguity, compactness and conformity with political and geographic boundaries. Fourth, it hopes to ensure equal populations among districts. Fifth, the contiguity requirement in paragraph 1 also apparently would require single-member districts.[2]

No matter how one parses the objectives, whether by eight parts or five, each stands alone and none works together with, nor buttresses another, as is to be expected in a proposal whose elements have "a natural relation and connection as component parts or aspects of a single dominant plan or scheme." 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, 478 (Fla. 2007); Advisory Opinion to the Attorney General re Independent Nonpartisan

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[2] The Attorney General appears to agree with this view. See Attorney General's letter to the Chief Justice dated June 18, 2008.

As it happens, federal law already requires single member congressional districts. See 2 U.S.C. s. 2(c); Larios v. Perdue, 306 F.Supp.2d 1190, 1207 (N.D. Ga.. 2003).

Commission to Apportion Legislative and Congressional Districts Which Replaces Apportionment by Legislature, 926 So.2d 1218 (Fla. 2006) (proposal invalid because it had two purposes, creation of an apportionment commission and establishment of apportionment standards); In re Advisory Opinion to the Attorney General — Save Our Everglades, 636 So.2d 1336, 1341 (Fla. 1994) (duality of purposes in requiring restoration of the Everglades at the expense of the sugar industry).

Because the amendment is merely a list of standards or classifications (each with a separate goal or objective), it is more like the amendment at issue in In re Advisory Opinion to the Attorney General — Restricts Laws Related to Discrimination, 632 So.2d 1018 (Fla. 1994), than any other proposal to come before this Court. In Laws Related to Discrimination, the proposed amendment would have altered Article 1, s. 10, Fla.Const., to prohibit the state and any other units of Florida government from enacting or adopting any law, ordinance or rule

> regarding discrimination against persons which creates, establishes or recognizes any right, privilege or protection for any person based upon any characteristic, trait, status, or condition other than race, color, religion, sex, national origin, age, handicap, ethnic background, marital status, or familial status.

Id. at 1019. This Court concluded that the amendment constituted impermissible logrolling, in violation of the single subject rule, "because it enumerates ten

classifications of people that would be entitled to protection from discrimination if the amendment were passed. The voter is essentially being asked to give one 'yes' or 'no' answer to a proposal that actually asks ten questions. . . . Requiring voters to choose which classifications they feel most strongly about, and then requiring them to cast an all or nothing vote on the classifications listed in the amendment, defies the purpose of the single-subject limitation." Id. at 1020.

The current proposal is defective for the same reason. It presents the voter with eight independent standards for what is desirable in writing a redistricting plan, none of which has any more to do with the others than the 10 standards for public employment listed in Laws Related to Discrimination. For instance, whether a redistricting plan or district is politically neutral has nothing to do with whether the plan discriminates against minorities or provides for contiguous districts. Thus, the proposal requires voters "to choose which classifications they feel most strongly about," but also compels them to vote all-or-nothing for the whole package of standards, even if they agree with some and disagree with others. For instance, a voter may believe strongly about prohibiting racial discrimination in redistricting, but could have reservations about the vague category "language minority." Similarly, a voter may like the notion that districts should be drawn so as not to favor a particular party, but be less enthusiastic about a prohibition

against favoring incumbents. Yet either way, the voter must accept the bitter with the sweet. See also Advisory Opinion to the Attorney General re Independent Nonpartisan Commission to Apportion Legislative and Congressional Districts Which Replaces Apportionment by Legislature, 926 So.2d 1218, 1226 (Fla. 2006) (where the court regarded a standard requiring the creation of single-member districts, which this amendment again attempts to require, as a stand alone goal).

The Court addressed the permissibility of multiple classifications or standards again in Advisory Opinion to the Attorney General re Amendment to Bar Government from Treating People Differently Based on Race in Public Education, 778 So.2d 888, 892-893 (Fla. 2000), where it held an initiative petition violated the single subject rule because it contained three separate classifications.[3] See also Fine v. Firestone, 448 So.2d 984, 991 (Fla. 1984) (taxes and user fees created separate classifications or subjects).

Furthermore, the amendment subordinates some goals to others. A voter very well could disagree with that setting of priorities.

Because of these deficiencies, the amendment involves impermissible logrolling. This Court should bar the amendment from the ballot.

B. The amendment substantially alters the functions of multiple branches of government.

[3] Education, employment and contracting. Id. at 893.

A proposal that substantially alters the functions of more than one branch or level of government violates the one subject rule. 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, 478 (Fla. 2007); Advisory Opinion to the Attorney General re Requirement for Adequate Public Education Funding, 703 So.2d 446, 449 (Fla. 1997); In re Advisory Opinion to the Attorney General — Save Our Everglades, 636 So.2d 1336, 1340 (Fla. 1994). A proposal that substantially affects more than one constitutional provision is also impermissible. Adequate Public Education Funding, 703 So.2d at 449-450. Furthermore, a proposal that substantially affects a constitutional provision must advise voters of this fact to avoid single subject problems. Race in Public Education, 778 So.2d at 894-895.[4]

It cannot be disputed that the proposal substantially alters the Legislature's power to establish appropriate legislative districts: it substantially constrains the Legislature's broad discretion under Article 1, s. 4, U.S. Const.

What is not so obvious to the casual reader is how clearly the proposal's practical effect divests the Legislature of its constitutional responsibilities to

[4] Although one would think this point goes to the adequacy of the summary, the court in Race in Public Education saw the failing as both a single subject violation and a summary defect. Id. at 894-895, 898.

regulate congressional elections pursuant to Article 1, s. 4, U.S. Const., and transfers them to the judiciary. The most troublesome provisions are those requiring the intent behind a plan or district to be politically neutral, neither favoring nor disfavoring any party or incumbent. This objective is humanly impossible to achieve. As the U.S. Supreme Court has observed, political neutrality simply cannot be achieved in any practical way because politics and political considerations inevitably play major roles in redistricting decisions:

> Indeed, quite aside from the anecdotal evidence, the shape of the House and Senate Districts, and the alleged disregard for political boundaries, we think it most likely that whenever a legislature redistricts, those responsible for the legislation will know the likely political composition of the new districts and will have a prediction as to whether a particular district is a safe one for a Democratic or Republican candidate or is a competitive district that either candidate might win. . . '*it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another*. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. *District lines are rarely neutral phenomena.* They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. *The reality is that districting inevitably has and is intended to have substantial political consequences*.'
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> * * *
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> '*The key concept to grasp is that there are no neutral lines for legislative districts ... every line drawn aligns partisans and interest blocs in a particular way different from the alignment that would result from putting the line in some other place*." Dixon, Fair Criteria

> and Procedures for Establishing Legislative Districts 7-8, in Representation and Redistricting Issues (B. Grofman, A. Lijphart, R. McKay, & H. Scarrow eds. 1982).
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> *As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.*

Davis v. Bandemer, 478 U.S. 109, 128-129 (1986) (emphasis added). See also Vieth v. Jubelirer, 541 U.S. 267, 281 , 285-286 (2004).[5]

Because — by its very nature — legislative redistricting cannot be politically neutral or devoid of political intentions, any plan propounded by the Legislature necessarily will be subject to judicial challenge. See Vieth v. Jubelirer,

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[5] Quoting Bandemer; and also making the point that: "The Constitution clearly contemplates districting by political entities, see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics. See Miller, supra, at 914, 115 S.Ct. 2475 ('[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition ...'); Shaw, supra, at 662, 113 S.Ct. 2816 (White, J., dissenting) ('[D]istricting inevitably is the expression of interest group politics ...'); Gaffney v. Cummings, 412 U.S. 735, 753, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973) ('The reality is that districting inevitably has and is intended to have substantial political consequences')."

541 U.S. at 286.[6] See also, Nadler v. Schwarzenegger, 137 Cal.App.4th 1327, 41 Cal.Rptr.3d 92, 99 (Cal.App. 3 Dist. 2006).[7]

Likewise, any plan or district adopted pursuant to the proposal *necessarily will be subject to judicial nullification.* Because the Legislature will be unable to draft a plan or create all districts in compliance with paragraph 1 of the proposed amendment, the courts will step in and impose their own plan.[8] See e.g., In re Constitutionality of Senate Joint Resolution 2G, 601 So.2d 543 (Fla. 1992) (Supreme Court had jurisdiction to impose its own state legislative districting plan to conform to federal law where Legislature failed to act); Brown v. Butterworth,

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[6] "Moreover, the fact that partisan districting is a lawful and common practice means that there is almost *always* room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation . . ." Emphasis the court's.

[7] "So, too, has the United States Supreme Court recognized that the difficulty of reapportionment requires that state legislatures be allowed the discretion necessary to balance competing interests. (Miller v. Johnson, supra, 515 U.S. at p. 915, 115 S.Ct. at p. 2487, 132 L.Ed.2d at p. 779.) Courts should not be 'second-guessing *what has consistently been referred to as a political task for the legislature*, a task that should not be monitored too closely [by the courts].' (Davis v. Bandemer, supra, 478 U.S. at p. 133, 106 S.Ct. at p. 2810, 92 L.Ed.2d at p. 106.)." Emphasis added.

[8] Some of the standards in the proposal call for intensive fact-finding (such as gerrymandering and protecting racial and language minorities) which this Court has said properly belong in the circuit court in the first instance. See In re Constitutionality of House Joint Resolution 1987, 817 So.2d 819, 829 (Fla.2002). Nonetheless, the courts, and more particularly this Court, will be the final decision-maker in apportionment matters if the proposal passes.

831 So.2d 683 (Fla. 4th DCA 2002) (circuit court had jurisdiction re congressional districting plan). This effect is certain, not speculative. See e.g., In re Advisory Opinion to Atty. Gen. English--The Official Language, 520 So.2d 11, 13 (Fla. 1988) (speculative impact not enough by itself to create a single subject problem).

This Court will find the task of eliminating political considerations as impossible as it is for the Legislature. See Vieth v. Jubelier, where a plurality of justices held that gerrymandering cases are nonjusticiable because of the lack of any meaningful standards. Courts attempting politics-free plans have been unable to avoid them. In fact, judges find themselves facing the fact that no substantive standards exist for such an effort, and the resulting districts end up favoring one party or individual over another anyway. Even when judges attempt to avoid political considerations, the question arises whether it is humanly possible to do so. See e.g., Henderson v. Perry, 399 F.Supp.2d 756, 768 (E.D.Tex. 2005)[9]. Because

[9] "The map drawn by this court in 2001 perpetuated much of this gerrymander. It did so because this court was persuaded that it could not achieve 'fairness' to political parties without some substantive measure of what is 'fair.' Simply undoing the work of one political party for the benefit of another would have forced this court to make decisions that could not be defended against charges of partisan decision-making — again, for the lack of a substantive standard. As the panel explained, it would follow only 'neutral' redistricting standards. Once the panel had left majority-minority districts in place and followed neutral principles traditionally used in Texas — such as placing the two gained seats in the areas of growth that produced them, following county lines, avoiding the pairing of incumbents and the splitting of voting precincts, and undoing transparent offsetting

of this inherent problem, the courts will be subject to accusations that they are partisan rather than neutral bodies, putting their credibility and independence at risk.

The dramatic shift of responsibility to the courts upsets the scheme established in Article 1, s. 4, U.S. Const., authorizing only state legislatures to impose districting plans. See e.g., Davis v. Hildebrant, 241 U.S. 565 (1916); Smiley v. Holmes, 285 U.S. 355 (1932). Both cases, the only to define the Founders' use of the word "legislature" in Article 1, s. 4, stand for the proposition that the U.S. Constitution empowers only state legislatures to adopt congressional redistricting plans, and that "legislature" means the "legislative process," so that any actor with a role to play in a state's legislative process can participate in congressional redistricting. Thus, an Ohio constitutional provision enabling voters to nullify general legislation by popular referendum permitted popular nullification of a congressional apportionment plan. Davis v. Hildebrant. And a governor could veto a redistricting plan because the veto power was part of the state's legislative

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movements of the same number of residents between districts — the drawing ceased, leaving the map free of further change except to conform it to one-person, one-vote. Make no mistake, this undertaking, while shorn of partisan motive, had political impact in the placement of every line. The results of this court's plan did ameliorate the gerrymander and placed the two districts gained by Texas in the census count; however, doing more necessarily would have taken the court into

process. Smiley. However, the courts do not play a part in Florida's legislative process. The power to set fundamental public policy, which necessarily includes the power to establish congressional districts, belongs exclusively to the Legislature. See Florida House of Representatives v. Crist, --- So.2d ----, 2008 WL 2669767 (Fla. July 3, 2008); Art. 3, s. 7, Fla.Const. Besides the Legislature, only the governor plays a role in the legislative process because of the veto power. Art. 3, s. 8, Fla.Const.[10] Thus, the practical effect of the amendment, shifting real responsibility for adopting a redistricting plan to the judiciary, removes the matter from the legislative process in contravention of Article 1, s. 4, U.S. Const. Yet the amendment does not advise voters of this substantial change.

Thus, the amendment in fact substantially affects two branches of government, which initiative amendments cannot do, 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, 478 (Fla. 2007), because not only does the amendment throw to the courts final redistricting decisions but

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each judge's own notion of fairness. The practical effect of this effort was to leave the 1991 Democratic Party gerrymander largely in place as a 'legal' plan."

[10] Hawthorne v. Wiseheart, 28 So.2d 589, 601 (Fla. 1946): "The bill providing for such increase had passed both Houses of the legislature, but the legislative process had not ended on June 3, 1943, because the Governor, under the constitution, had ten days after the adjournment of the legislature in which to approve or to veto the bill, or to permit it to become a law without his approval."

substantially broadens the courts' scope of review, which presently is limited. In re Constitutionality of House Joint Resolution 25E, 863 So.2d 1176, 1178 (Fla. 2003).

In addition, an amendment may not substantially affect more than one constitutional provision. Adequate Public Education Funding, 703 So.2d at 449-450. Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers, 705 So.2d 563, 566 n. 1 (Fla. 1998) (violation of single subject rule when amendment affected rights of privacy and collective bargaining). For instance, as already pointed out, the amendment substantially affects the Legislature's authority under Article 1, s. 4, U.S. Const. In addition, the equal protection clause in Article 1, s. 2, Fla.Const., is substantially affected as is the Fourteenth Amendment to the U.S. Constitution. Martinez v. Bush, 234 F.Supp.2d 1275, 1281 (S.D. Fla. 2002). The amendment permits gerrymandering claims, which seem to be foreclosed now under the equal protection clause. Vieth v. Jubelirer, 541 U.S. 267 (2004) (plurality opinion). Thus, the proposal substantially alters the constitutional test so that the standards under the equal protection clause no longer would apply.

Finally, nothing in the proposal announces the intention to radically circumscribe the Legislature's discretion. As Race in Public Education, 778 So.2d

at 894-895, points out, the failure to identify substantially affected constitutional provisions is a single subject violation. In addition, constant litigation and the uncertainty it brings would disrupt both the electoral and legislative processes so that Article 3, ss. 2, 3, 4 and 7, Fla.Const., would be substantially adversely affected. See e.g., Dean v. Leake, --- F.Supp.2d ----, 2008 WL 728543 *9 (E.D.N.C. 2008). Yet the proposal does not identify Article 1, s. 2; and Article 3, ss. 2, 3, 4 and 7 — or Article 1, s. 4, U.S. Const.

For these reasons, the proposal violates the single subject provision of Article 11, s. 3, Fla.Const., and the proposed amendment presents the precipitous, cataclysmic change this Court has rejected in the past. Consequently, the Court should deny it a place on the ballot.

II. The ballot title and summary are defective.

The ballot title is misleading because it says the amendment addresses standards the Legislature must follow in redistricting. However, the text of the amendment requires the Court, when imposing a redistricting plan pursuant to its constitutional authority, to obey those same standards as well.

The ballot summary is misleading because it misrepresents the amendment's goal and purposes. For instance, the summary clearly implies that the *effect* of

districts or reapportionment plans cannot be to favor or disfavor anyone or any party. But under the amendment, proof of *intent* alone must be shown. In addition, the summary uses words inconsistent to those in the amendment, words that have very different meanings. Some terms used in the summary are vague and misleading. Finally, the summary fails to identify constitutional provisions that are substantially affected.

The Court reviews the title and ballot summary of initiative petitions for compliance with s. 101.161(1), Fla.Stat., which requires "the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot."

This Court has said that the "clear and unambiguous" command in s. 101.161(1) requires two things. First, the ballot title and summary must describe the amendment's chief purpose, which is the specific thing the amendment does or is intended to do — or more to the point, the legal effect of the amendment. Advisory Opinion to the Attorney General re Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans, 902 So.2d 763, 771 (Fla. 2005). The summary should not contain editorial comment, but rather should be a dispassionate, informative and accurate synopsis. Id. In short, the summary should be a fully informative analysis of the

amendment's meaning and effect and should not "fly under false colors" or "hide the ball." In re Advisory Opinion to the Attorney General — Save Our Everglades, 636 So.2d 1336, 1342 (Fla. 1994); Advisory Opinion to the Attorney General re Additional Homestead Tax Exemption, 880 So.2d 646, 653 (Fla. 2004); Armstrong v. Harris, 773 So.2d 7, 17-18 (Fla. 2000). However, the summary need not detail every ramification of an amendment. Advisory Opinion to the Atty. Gen. Re: Protect People, Especially Youth, from Addiction, Disease, and Other Health Hazards of Using Tobacco, 926 So.2d 1186 (Fla. 2006).

As part of this requirement, the Court has held that an amendment summary must identify substantially affected constitutional provisions in order for the public to fully comprehend the proposed changes. Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers, 705 So.2d 563, 565-566 (Fla. 1998) ("it is imperative that an initiative identify the provisions of the constitution substantially affected by the proposed amendment in order for the public to fully comprehend the contemplated changes and to ensure that the initiative's effect on other unnamed provisions is not left unresolved and open to various interpretations."). Identification is unnecessary if the impact is potential. Advisory Opinion to the Attorney General re Local Trustees, 819 So.2d 725, 731 (Fla. 2002).

Second, the title and summary should not be vague, ambiguous or misleading. Right of Citizens to Choose Health Care Providers, 705 So.2d at 566; Advisory Opinion to the Attorney General re Amend to Bar Government from Treating People Differently Based on Race in Public Education, 778 So.2d 888, 899 (Fla. 2001) ("ballot summaries which do not adequately define terms, use inconsistent terminology, fail to mention constitutional provisions that are affected, and do not adequately describe the general operation of the proposed amendment must be invalidated.").

The Ballot Title

The ballot title is misleading because it describes the amendment as "STANDARDS FOR *LEGISLATURE* TO FOLLOW IN CONGRESSIONAL REDISTRICTING." (Emphasis added.) But the amendment's text does not say this. Certainly it would require the Legislature to follow its standards — but its plain language would also require this Court to comply with them. The text of the amendment says "Congressional districts or districting plans may not *be drawn* . . ." (Emphasis added.) The use of the passive voice leaves unclear the identity of the actor doing the drawing (the main literary crime of the passive voice). The obvious intent of this language, then, is that anyone drafting and imposing a redistricting plan must comply with the proposed amendment. Because this Court has the

authority to impose a redistricting plan, it defies common sense to suppose that the Legislature must comply with the amendment but the courts can ignore it.

The amendment's title (as distinguished from the ballot summary title) supports the notion that the amendment is intended to apply to this Court as well. The title in the text identifies the amendment as "STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES." There is no limitation to the Legislature here.

Thus it is clear that the amendment is drafted to apply both to the Court and to the Legislature. Consequently, the title is grossly misleading.

The Ballot Summary

The ballot summary is misleading in several places. First, the summary says, "Congressional districts or districting plans shall not be drawn to favor or disfavor an incumbent or political party." The amendment's text is significantly different: it says "shall not be drawn with the *intent* to favor or disfavor." The summary clearly implies that the *effect* of districts or reapportionment plans cannot be to favor or disfavor anyone or any party. But under the amendment, proof of *intent* alone must be shown. The two are not the same. Relying on the summary, the voter will undoubtedly think he or she is voting to prohibit redistricting plans *whose effect* is to favor a party or incumbent. However, the amendment itself theoretically would

allow districts that favor a party or incumbent so long as the lines were drawn without intending that result. Such misleading discrepancies between the summary and the amendment's text warrant exclusion from the ballot. Right of Citizens to Choose Health Care Providers, 705 So.2d at 566; Race in Public Education, 778 So.2d at 897; Save Our Everglades, 636 So.2d at 1341.

Misleading as to the effect of the change is also impermissible. Advisory Opinion to the Attorney General re Independent Nonpartisan Commission to Apportion Legislative and Congressional Districts Which Replaces Apportionment by Legislature, 926 So.2d 1218, 1228-1229 (Fla. 2006) (amendment suggested nonpartisan selection of apportionment commission when appointment was in fact highly partisan); Save Our Everglades, 636 So.2d at 1341 (claiming that Everglades needed to be saved in the summary where the text addressed restoring the Everglades); Advisory Opinion to the Attorney General re People's Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects, 699 So.2d 1304, 1311 (Fla. 1997) (misleading because text eliminated 10 millage property tax cap; summary silent). Here, the summary is misleading because one purpose of the amendment is to eliminate political partisanship from the redistricting process, an effort we have already seen is humanly impossible, and which will result in the courts writing the plans rather than

the Legislature. The summary does not inform the voters of this significant, inevitable effect.

Nor does it inform the voter that the amendment substantially diminishes the Legislature's constitutional redistricting powers. The Legislature has considerable discretion in establishing district boundaries that can take political concerns into consideration. Vieth v. Jubelirer.

Second, the summary fails to inform voters of the massive transfer or authority from the Legislature to the judiciary that will occur under the amendment in contravention to Article 1, s. 4 U.S. Const.

Third, the ballot summary misleads as to the substance of the proposed amendment because terms in the summary are different from those used in the text of the amendment. For example, the summary says that district boundaries "where feasible must make use of existing city, county and geographical boundaries." The amendment, however, does not say this. Rather, it says districts must use "existing *political* and geographical boundaries." "Political boundaries" is a broader term than "city/county" boundaries. For instance, a similar term in the Florida Statutes, "political subdivision," is defined to "include counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all

other districts in this state." Sec. 1.01(8), Fla.Stat. Likewise, Florida courts have viewed "political boundary" to mean more than a city/county boundary:

> Political boundaries are artificial divisions that may and sometimes should be transcended when planning for the most beneficial use of our state's water resources. The borders of water management districts are also artificial divisions, and the area on either side of the boundaries of neighboring districts are in the same geographical region.

Osceola County v. St. Johns River Water Management Dist., 486 So.2d 616, 619 (Fla. 5th DCA 1986) (concerning the boundaries of a water management district); *approved* Osceola County v. St. Johns River Water Management Dist., 504 So.2d 385 (Fla. 1987). Courts in other states also have viewed "political boundary" as meaning more than city/county boundaries. Springfield Utility Bd. v. Emerald People's Utility Dist., 125 P.3d 740 (Or. 2005) ("people's utility district," an entity charged with the provision of electricity, had political boundaries); Bexar Metropolitan Water Dist. v. City of Bulverde, 234 S.W.3d 126 (Tex. App. 2007) (water management district). Florida has many special districts whose borders would constitute "political boundaries": voting precincts, water management districts, fire control districts, children's services districts, community development districts, independent special districts, regional special districts, neighborhood preservation and enhancement districts, health care districts, and so on. See ss. 101.001, 125.901, 163.524, 189.404, 190.004, 191.014, 373.069, Fla.Stat. It follows

that the summary's use of "city/county" boundaries rather than "political boundaries" is inaccurate and therefore misleading.

The use of inconsistent terms which have different meanings is inherently misleading. See People's Property Rights Amendments , 699 So.2d at 1308 (summary used the word "owner," text used the word "people"); Race in Public Education, 778 So.2d at 897; Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers, 705 So.2d 563, 566 (Fla. 1998) (summary said "citizens" while text said "natural person").

Here, a voter reading the summary will certainly believe that he is voting for a requirement that legislative districts track city or county lines. But that is a bait-and-switch because the term "political boundary" also encompasses lines of a very different nature.

Fourth, the summary is misleading because it relies on vague, ambiguous terms. "Language minority" is one such term. It may have a legal definition well known to some specialty lawyers, but it is unlikely to be readily understood by the lay voter. See Polish American Congress v. City of Chicago, 211 F.Supp.2d 1098, 1107 (N.D. Ill. 2002), where the plaintiffs reasonably thought that they constituted a language minority only to find that they fell outside the very narrow statutory definition of "language minority" in 42 U.S.C. s. 1973l(c)(3). In such

circumstances, the failure to define the term is a substantial, fatal defect. See e.g., Race in Public Education, 778 So.2d at 899 (failure to define legal term "bona fide qualification based on sex," voters "not informed of its legal significance. . . . voters would undoubtedly rely on their own conceptions of what constitutes a bona fide qualification," which rendered the summary fatally vague); People's Property Rights Amendments , 699 So.2d at 1311 ("the absence of a more complete definition of the term 'exemption' is misleading because the voting public would not readily understand the distinction between an exemption and immunity from taxation").

Fifth, the summary is misleading because it gives the impression that no law exists addressing discrimination in voting and requiring equality of population among districts. Such negative implications in ballot summaries render the summary defective. See Advisory Opinion to the Attorney General, re Amendment to Bar Government from Treating People Differently Based on Race in Public Education, 778 So.2d 888, 898 (Fla.. 2000) (ballot title "defective because of the misleading negative implication that no such constitutional provision addressing differential treatment currently exists, and for the negative implication that the government is presently practicing discrimination"). Here, the summary implies there is no law preventing discrimination against racial or language minorities.

However, there is, Article 1, s. 2, Fla.Const. Furthermore, federal law implementing the Fifteenth Amendment and the equal protection clause protects these classes as well. See In re Constitutionality of Senate Joint Resolution 2G, 597 So.2d 276, 280-282 (Fla. 1992) (explaining the purpose and impact of s. 2 of the federal Voting Rights Act); Riley v. Kennedy, 128 S.Ct. 1970 (2008) (discussing s. 5 of the Voting Rights Act); 42 U.S.C. s. 1973b(f)(2), addressing language minorities and voting.[11] In addition, federal law already requires equality among congressional district populations to the extent practicable. See Karcher v. Daggett, 462 U.S. 725, 730 (1983). Yet the summary says nothing about any of this, thus clearly implying that these standards are new.

Sixth, the summary is misleading because it varies in a material way from the text of the amendment. The summary says, "Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process ***and*** elect representatives of their choice." The amendment's text is slightly, but significantly, different: "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process ***or*** to diminish their ability to elect representatives

[11] "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny

of their choice." The summary tracks the language of 42 U.S.C. s. 1973(b), which gives the impression that the drafters may intend to import the standards of that statute into the Florida Constitution. The effect of that language is well known. See e.g., Thornburg v. Gingles, 478 U.S. 30 (1986). So the average voter might think that he is simply voting to conform the state Constitution with federal law. However, the amendment's text varies in a way that appears intended to do something broader, as was the case in Armstrong v. Harris, 773 So.2d 7, 17-18 (Fla. 2000), where the use of "or" in the state constitutional phrase "cruel or unusual punishment" was found to confer broader rights than the contemplated change, which read "cruel and unusual." Here however, the voter is not told in the summary of any intention either to conform the state Constitution to federal law — or to confer even broader rights than already exist. This failure to inform the voter of such a crucial purpose is a significant defect in the summary.

Seventh, the summary fails to identify the constitutional provisions substantially and certainly affected by this amendment. As pointed about above, the amendment substantially and certainly affects the equal protection clause in Article 1, s. 2 and Article 3, ss. 2, 3, 4, and 7, Fla.Const., as well as the Legislature's authority under Article 1, s. 4, U.S. Const. But the summary fails to point this out.

---

or abridge the right of any citizen of the United States to vote because he is a

For these reasons, the ballot summary is vague and misleading and fails adequately to inform voters of the chief purpose of the amendment.

CONCLUSION

The petition fails the one-subject requirement and contains a defective ballot title and summary. Consequently, the court should order it stricken from the ballot.

RESPECTFULLY SUBMITTED,

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member of a language minority group."

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by hand delivery on, on Attorney General Bill McCollum and Scott Makar, Solicitor General, PL-01, The Capitol, Tallahassee, FL 32399; on July 15, 2008.

_____
Jason Vail

CERTIFICATE OF TYPE SIZE AND STYLE

The brief is printed in 14 point Times New Roman.

_____
Jason Vail

IN THE SUPREME COURT OF FLORIDA

Case No. SC08-986
SC08-1149

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING CONGRESSIONAL BOUNDARIES

_____/

MOTION FOR EXTENSION OF TIME TO FILE REPLY/ANSWER BRIEFS

The Florida Legislature, which opposes the petitions, moves for an extension of time to file reply/answer briefs to the proponent's main arguments in these two different, but related, cases.

The Court's scheduling orders in these two matters require "interested parties" to file their initial briefs by July 1 in the legislative districting petition case and July 15 in congressional districting case. The Court set deadlines for the filing of answer briefs of August 1 for the legislative districting case and August 4 for the congressional districting case.

Because the term "interested parties" could embrace an opponent to these amendment schemes, the Legislature filed its initial briefs in compliance with the July 1 and 15 deadlines. The proponent met those deadlines as well.

However, the briefs of the two parties are markedly different. The Legislature's briefs are more than 35 pages long and contain detailed criticisms of the proposed amendments and complex legal analysis. The proponent's briefs are only nine and 10 pages long respectively, including required certificates. These latter briefs are cursory and provide no meaningful legal analysis of the proposed amendments.

The scheduling orders do not appear to permit a party to file a reply to an answer brief.

Consequently, the Legislature is deprived of any meaningful ability to respond to the proponent's substantive arguments, which undoubtedly will appear in their answer brief. Without the opponents' ability to file a reply, the Court is deprived of full briefing on the issues.

For this reason, the Legislature requests enlargements of time to file reply briefs to the proponent's answer briefs. Specifically, the Legislature requests 20 days from service of the proponent's answer briefs or, in the alternative, August 20 in the legislative districting case and August 24 in the congressional districting case, whichever is earlier.

Counsel for the Legislature has contacted the attorneys for the proponent about the motion. The proponent opposes the motion.

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I hereby certify that a copy of the foregoing has been served by U.S. mail, on Attorney General Bill McCollum and Scott Makar, Solicitor General, PL-01, The Capitol, Tallahassee, FL 32399; and Barry Richard and Hope Keating, 101 East College Ave., Tallahassee, FL 32301; and Mark Herron, 2618 Centennial Place, Tallahassee, FL 32308, on July 18, 2008.

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IN THE SUPREME COURT OF FLORIDA

Case No. SC08-986
Case No. SCO08-1149

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

RESPONSE OF SPONSOR FAIRDISTRICTSFLORIDA.ORG TO MOTION OF LEGISLATURE FOR EXTENSION OF TIME TO FILE BRIEFS

The Sponsor, FairDistrictsFlorida.org, does not object to the motion of the Legislature for leave to file a reply brief 20 days after service of the Sponsor's answer brief, provided that such reply brief complies with Rule 9.210(d) in that it is limited to containing argument in response and rebuttal to argument presented in the answer brief.

The undersigned has conferred with counsel for the Legislature, Jason Vail, and he agrees with the above proviso.

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this 21st day of July, 2008 to the following:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document is in compliance with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure. This document is submitted in Times New Roman 14-point font.

BARRY RICHARD

TAL 451,478,480v1 7-21-08

Supreme Court of Florida

THURSDAY, JULY 31, 2008

CASE NOS.: SC08-986; SC08-1163
SC08-1149; SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES & (FIS)

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING & (FIS)

The Florida Legislature's motion for extension of time is granted and The Florida Legislature is allowed to and including August 20, 2008, in which to serve the answer brief on the merits. NO FURTHER EXTENSIONS OF TIME WILL BE GRANTED FOR THE FILING OF THE ANSWER BRIEF ON THE MERITS. Per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all briefs in an electronic format as required by the provisions of that order.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

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MARK HERRON

Supreme Court of Florida

THURSDAY, JULY 31, 2008

CASE NOS.: SC08-986; SC08-1163;
SC08-1149; SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES & (FIS)

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING & (FIS)

The Sponsor's motion to consolidate oral argument is hereby granted. The above cases are hereby consolidated for the purpose of oral argument and are scheduled for oral argument at 9:00 a.m., Wednesday, November 5, 2008. A maximum of twenty minutes to the side as consolidated is allowed for the argument, but counsel is expected to use only so much of that time as is necessary.

NO CONTINUANCES WILL BE GRANTED EXCEPT UPON A SHOWING OF EXTREME HARDSHIP.

A True Copy
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Clerk, Supreme Court

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MARK HERRON

IN THE SUPREME COURT OF FLORIDA

Case No.: SC08-1149

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES

ANSWER BRIEF OF SPONSOR FairDistrictsFlorida.org

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SUMMARY OF ARGUMENT

The proposed Congressional Redistricting Amendment presents a unified and coherent plan for establishing standards for Congressional redistricting. The Legislature argues that the presence of eight standards for drawing districts presents the voters with a series of choices and thus constitutes logrolling. That argument is contrary to this Court's consistent findings that the inclusion of various criteria as part of a dominant theme does not violate the single subject requirement of Article XI, Section 3, Florida Constitution.

For example, different criteria in the class size amendment properly defined different sizes for different class levels. *See Advisory Opinion to the Atty. Gen'l re Florida's Amendment to Reduce Class Size*, 816 So. 2d 580, 581-82 (Fla. 2002). Those criteria provided "the details of how the ballot initiative will be implemented." *Id.* Similarly, the indoor smoking amendment had a series of exemptions that were held to define the scope of the proposal. *See Advisory Opinion to the Atty. Gen'l re Protect People From the Hazards of Second-Hand Smoke*, 814 So. 2d 415, 419 (Fla. 2002).

The proposed Congressional Redistricting Amendment establishes standards for the drawing of district lines as a means of accomplishing its single purpose - creation of rational districts. The standards are meant to

work together as a whole to define the parameters of one task that the Legislature is already required to perform. Consequently, this proposal is narrow, specific and has a relatively insubstantial effect on a task assigned to the legislative branch of state government.

The Legislature also argues that the amendment violates the single subject rule because it affects the judicial branch as well as the legislative branch. This argument ignores the basic fact that presently, the judiciary can and does interpret all constitutional provisions. The instant proposal, if enacted, would be no different in impact than any other amendment to the constitution. The court's exercise of its traditional role of interpreting and applying a new constitutional provision does not amount to a substantial impact on the judicial branch.

The ballot title and summary for the proposal give voters fair notice of the chief purpose of the amendment and the decision they must make. The "chief purpose" of the amendment is to provide a cohesive set of standards for Congressional redistricting. The Legislature complains that the summary fails to advise voters about possible impacts on the judiciary; that the summary substitutes the word "to" for "with intent to"; and that the title advises that the standards are for the Legislature to follow while the amendment does not mention the Legislature. These arguments are all

unfounded. The title and summary need not state every possible speculative ramification, or incorporate the text of the amendment. It is enough if they state clearly and accurately what the proposed amendment will do. The ballot title and summary for the Congressional Redistricting Amendment do just that, and should be approved by this Court.

ARGUMENT

As the Sponsor argued in its initial brief, the proposed Congressional Redistricting Amendment provides a limited, unified, prioritized and interdependent set of criteria to be employed when congressional districts are drawn following each decennial census, or when otherwise required. The criteria work together in combination with each other and are prioritized in an attempt to eliminate political Gerrymandering without interfering with rights of language and racial minorities. That is its single and dominant purpose. It is a proportioned and careful response to this Court's invalidation in 2006 of another initiative that sought to establish a redistricting commission while at the same time in the same amendment providing standards for reapportionment and redistricting. *See Advisory Opinion to the Atty. Gen'l re: Independent Nonpartisan Comm'n to Apportion Legislative and Congressional Districts which Replaces Apportionment by the Legislature*, 926 So. 2d 1218 (2006).

The only opponent to the proposed Congressional Redistricting Amendment, the Florida Legislature, argues in its initial brief that the initiative constitutes impermissible logrolling and has substantial effects on multiple branches of government. Br. at 9-19. This argument is unsupported by this Court's precedents. The ballot title and summary are not misleading to voters in any way. Rather, they carefully and fairly set out the chief purpose of the proposed amendment as required by the law.

I. THE INTERDEPENDENT CRITERIA PROPOSED BY THE CONGRESSIONAL DISTRICTING AMENDMENT DEFINE THE UNIFIED PURPOSE OF CREATING FAIR AND LOGICAL DISTRICT BOUNDARIES.

Article XI, Section 3, Florida Constitution, specifies that any amendment to the Constitution, except for those limiting the power of government to raise revenue, "shall embrace but one subject and matter directly connected therewith." The single subject requirement is intended to prevent multiple "precipitous" and "cataclysmic" changes in the Constitution. *See Advisory Opinion to the Atty. Gen'l re Authorization for County Voters to Approve or Disapprove Slot Machines Within Existing Pari-Mutuel Facilities*, 813 So. 2d 98, 100 (Fla. 2002); *Advisory Opinion to the Atty. Gen'l - Save Our Everglades*, 636 So.2d 1336, 1139 (Fla. 1994). The rule was placed in the Constitution because initiative proposals do not

afford the same opportunity for public hearing and debate that occurs for those amendments that arise in the Legislature. *See Advisory Opinion to the Atty. Gen'l re Fish & Wildlife Conservation Comm'n*, 705 So. 2d 1351, 1353 (Fla. 1998) (citing *Fine v. Firestone*, 448 So.2d 984, 988 (Fla 1984)).

Another reason for the single subject limitation is to prevent "logrolling," which occurs when different issues are combined into one initiative so that voters are forced to accept something they do not want in order to gain something else that they do want. *See Advisory Opinion to the Atty. Gen'l re Fla. Transportation Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation Sys.*, 769 So.2d 367, 369 (Fla. 2000) (quoting *Advisory Opinion to the Atty. Gen'l re Limited Casinos*, 644 So. 2d 71, 73 (Fla. 1994)).

This Court has used three major tests to determine whether a proposed amendment violates the single subject limitation:

- whether the initiative performs multiple functions or substantially affects multiple functions and levels of government;
- whether the initiative substantially impacts or changes multiple sections of the Constitution; and
- whether the proposed initiative has a "logical oneness of purpose" to prevent "logrolling" of disparate and distinct proposals within one initiative.

The proposed Congressional Redistricting Amendment passes all three of these tests.

A. The proposed Congressional Redistricting Amendment is limited to setting standards for redistricting.

The current proposal is in many ways a response to the earlier initiative rejected by this Court in *Advisory Opinion to the Attorney General re: Independent Nonpartisan Comm'n to Apportion Legislative and Congressional Districts which Replaces Apportionment by the Legislature*, 926 So. 2d 1218 (2006). That initiative would have created an independent commission to perform congressional redistricting and legislative reapportionment and districting, while also requiring single-member districts, and also imposing a limitation on commission members later seeking election to the Legislature. *Id.* at 1225. This Court found that the combination of establishing the commission and the imposition of standards encompassed multiple subjects and constituted logrolling. *Id.* at 1225-26 ("A voter who advocates apportionment by a redistricting commission may not necessarily agree with the change in the standards for drawing the legislative and congressional districts."). Importantly, the Court did not find that logrolling occurred within the standards created by the Independent Nonpartisan Commission initiative, but rather it occurred when these standards were combined with establishment of the new commission to perform the reapportionment and redistricting. *Id.*

The amendment in this case is a limited proposal, instantly and easily distinguishable from those amendments this Court has rejected. Unlike the Independent Nonpartisan Commission amendment or the failed Save Our Everglades amendment, for example, the instant initiative does not establish an implementing body, but restricts itself to the exercise of a single legislative function – the establishment of congressional redistricting standards. *Cf. Save Our Everglades*, 636 So. 2d at 1340. The Congressional Redistricting Amendment leaves untouched the existing legislative function of performing the actual redistricting. It only establishes standards for the legislature to follow when drawing the district lines. It does not impact the executive branch, and just as importantly, changes no judicial functions whatsoever. *Id.*

B. Inclusion of a number of standards in the Congressional Redistricting Amendment does not constitute logrolling because the standards work together to present a single, interdependent, unified package of criteria for redistricting.

Opponents misunderstand both the purpose and the nature of the single subject requirement's prohibition of logrolling. The Legislature argues that the logrolling prohibition means that a successful initiative must never, under any circumstances, present multiple standards or criteria to the voters. *See* Br. at 11-13. Their reasoning is that, inevitably, some voters will prefer certain criteria, while rejecting others. This position illogically

suggests that no proposal may contain more than one criterion or standard – a position continually rejected by this Court as even the most cursory examination of recent initiative cases will reveal.

Indeed, this Court has repeatedly approved initiative proposals that included multiple standards or criteria, or involved some presentation of multiple issues within a single initiative package. *See, e.g., Advisory Opinion to the Atty. Gen'l re Florida's Amendment to Reduce Class Size*, 816 So. 2d 580 (Fla. 2002); *Advisory Opinion to the Att'y Gen'l re: Voluntary Universal Pre-Kindergarten Educ.*, 824 So. 2d 161, 164 (Fla. 2002); *Advisory Opinion to the Atty. Gen'l re Protect People From the Hazards of Second-Hand Smoke*, 814 So. 2d 415, 419 (Fla. 2002); *Advisory Opinion to the Atty. Gen'l re: Protect People, Especially Youth, from Addiction, Disease, and other Health Hazards of Using Tobacco*, 926 So. 2d 1186 (Fla. 2006); *Slot Machines in Parimutuel Facilities*, 813 So. 2d 98 (Fla. 2002).

Thus, in *Reduce Class Size*, this Court upheld an initiative which set different required class sizes for public school children in grades 1-3, 4-8, and 9-12, with the class sizes phased in from 2003 through 2010. 816 So. 2d at 581-82. The Court found that the initiative dealt with a single subject of reducing class size, noting that it did not constitute logrolling, "but rather

provides the details of how the ballot initiative will be implemented." *Id.* at 583. So also, in *Voluntary Universal Pre-Kindergarten Education*, there was no suggestion by the Court that inclusion of multiple standards for free pre-kindergarten education constituted logrolling by forcing those who might favor the funding of some of these standards to approve all or none of them. 824 So. 2d at 165-66.

Similarly, in *Protect People From the Hazards of Second-Hand Smoke*, this Court upheld an initiative which abolished most indoor, workplace smoking, but contained numerous separate exceptions for retail tobacco shops, stand-alone bars and designated smoking rooms in hotels, as well as limiting smoking in private residences if used for child or health care purposes. 814 So. 2d at 416-17. This Court found the entire initiative valid under the general single subject of "second-hand smoke in enclosed indoor workplaces." *Id.* at 422. In *Health Hazards of Using Tobacco*, likewise, this Court upheld, as presenting "a single comprehensive plan for the education of youth about the health hazards related to tobacco," an initiative which included "a list of components such as advertising, school curricula, and law enforcement" the particulars of which were spelled out in great detail. 926 So. 2d at 1191. The Court found all of the criteria to be "related to the single unifying purpose." *Id.*

Each of the slot machines or casino amendments approved by this Court all included within its single unified purpose an amendment that itself prescribed the locations, both geographic and specific, where the gambling could occur. Thus, in *Slot Machines in Parimutuel Facilities*, voters were asked to approve a package deal of slot machines in existing pari-mutuel facilities only in Miami-Dade or Broward Counties, upon referendum. 880 So. 2d at 522. The Court had previously approved initiatives which offered casino riverboats in all counties with more than 200,000 inhabitants and hotel casinos in counties with more than 500,000 inhabitants. *Advisory Opinion to the Atty. Gen'l re Florida Locally Approved Gaming*, 656 So. 2d 1259, 1261 (Fla. 1995). An earlier approved initiative would have allowed casinos in Broward, Dade, Duval, Escambia, Hillsborough, Lee, Orange, Palm Beach and Pinellas Counties in pari-mutuel facilities and riverboats. *Advisory Opinion to the Atty. Gen'l re Limited Casinos*, 644 So. 2d 71, 72-73 (Fla. 1994). In both cases, opponents challenged as logrolling the geographic choices, as well as the type of locations permitted to offer gaming. The Court held:

> We disagree. The sole subject of the proposed amendment is to authorize privately-owned casinos in Florida. The proposal does not combine subjects which are dissimilar so as to require voters to accept one proposition they might not support in order to vote for one they favor. Although the petition contains details pertaining to the number, size, location, and type of

> facilities, we find that such details only serve to provide the scope and implementation of the initiative proposal. These features properly constitute matters directly and logically connected to the subject of the amendment.

Limited Casinos, 644 So. 2d at 73.

The point is that each of these initiatives contained criteria that were coherent and directly related to the policy proposal, as is the case with the instant proposal. This Court found that all of these proposals had the requisite "oneness of purpose" necessary to comply with the single subject requirement.[1] *Advisory Opinion to the Atty. Gen'l re Local Trustees & Statewide Governing Board to Manage Florida's University System*, 819 So.2d 725, 729 (Fla. 2002) (quoting *Fine*, 448 So. 2d at 990). Like these other successful amendments, the proposed Congressional Redistricting Amendment has "a natural relation and connection as component parts of a single dominant plan or scheme. Unity of object and plan is the universal test ..." *Floridians Against Casino Takeover v. Let's Help Florida*, 363 So.

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[1] As this Court has often noted, canons of statutory construction require a reviewing court to reject an interpretation of a constitutional or statutory provision that would render it meaningless or lead to an absurd result. *See, e.g., Warner v. City of Boca Raton*, 887 So. 2d 1023, 1033 n.9 (Fla. 2004) (citing *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1286 (Fla. 2000)); *Unruh v. State* 669 So. 2d 242, 245 (Fla. 1996). An interpretation such as that offered by Opponents, which would construe Article XI, Section 3 to prohibit an initiative from containing more than one standard or criterion in a single initiative, would lead to just such an absurd result, and frustrate the intention that the initiative function allows the people to propose limited, but real amendments to their Constitution.

2d 337, 339 (Fla. 1978) (quoting *City of Coral Gables v. Gray*, 19 So. 2d 318, 320 (Fla. 1944)).

The Congressional Redistricting Amendment evidences a similar oneness of purpose, presenting standards for redistricting which are fashioned to work together. Thus, the standards in the first paragraph of the proposal take priority over those in the second paragraph although the third paragraph instructs that the order of standards within a paragraph are not to be considered as signifying higher or lower priority. This internal organization and combination is important to the because standards of compactness or utilization of existing geographic or political boundaries, while important, may conflict with even more fundamental adherence to voting rights principles.

In short, the standards of the proposed Congressional Redistricting Amendment are intended to work together as a package, with all parts directly related to its purpose of providing explicit standards for redistricting. This Court should recognize this oneness of purpose and approve the initiative for the ballot.

C. Earlier failed initiatives cited by the Legislature which would have prohibited discrimination or affirmative action were much broader in scope and application than the instant limited proposal.

In opposition, the Legislature relies heavily on two cases in arguing that the proposed Congressional Redistricting Amendment violates the single subject requirement of Article XI, Section 3. In *In re Advisory Opinion to the Attorney General – Restricts Laws Related to Discrimination*, 632 So. 2d 1018 (Fla. 1994), this Court invalidated an initiative that would have listed classifications to be protected from discrimination. That amendment would have applied to all levels and all branches of government. *Id.* at 1020. This broad application is at the heart of this Court's concern that the voters were being asked multiple questions about which classes should enjoy extra protections from all levels and branches of state government. With the instant proposal, however, only congressional redistricting is affected. Voters are posed the single question as to what standards should be followed when the Legislature draws congressional districts.

Later, in *Advisory Opinion to the Attorney General, re Amendment to Bar Government from Treating People Differently Based on Race in Public Education*, 778 So. 2d 888 (Fla. 2000), this Court considered a package of four initiatives which would have barred differential treatment based on race in the areas of public education, employment, contracting. The Court found

that the fourth proposal, which applied equally to education, employment and contracting, constituted logrolling. 778 So. 2d at 893. All of the proposals, however, applied broadly to multiple levels and branches of state government, and had significant effects on multiple parts of the Constitution. *Id.* at 894-96. The proposed Congressional Redistricting Amendment, by contrast, operates only on the pre-existing legislative duty of drawing congressional districts. It is a limited, single proposal. It does not create a new function, but merely provides standards for one established function of the Legislature.

II. THAT FLORIDA COURTS MAY BE CALLED UPON TO INTERPRET THE CONSTITUTIONAL AMENDMENT ON CONGRESSIONAL DISTRICTING IS NOT A SUBSTANTIAL IMPACT ON THE JUDICIARY.

The proposed Congressional Redistricting Amendment makes no changes to the judicial functions or structure of this State. Nor does the amendment undertake to perform a judicial function. Likewise, the proposal does not modify any portions of the Constitution that apply specifically to the court system.

The Legislature complains that the proposal affects judicial functions because it might be interpreted and applied by the courts. This argument is unsupported by the precedents of this Court, and if accepted would have the

radical effect of preventing any amendment by initiative other than those which target the judiciary. The fact is that every part of the Constitution, and indeed every law, is subject to judicial interpretation and enforcement. This proposal is no different.

The proposed Congressional Redistricting amendment affects a single pre-existing legislative function in one limited area: it provides criteria for the Legislature to apply when redistricting congressional seats. This Court has noted that "[a] proposal that **affects** several branches of government will not fail; rather, it is when a proposal substantially alters or performs the functions of multiple branches that it violates the single-subject test." *Fish & Wildlife Conservation Conservation Comm'n*, 705 So. 2d at 1353-54 (emphasis added); *see also High Speed Monorail*, 769 So.2d at 369-70 ("[W]e find it difficult to conceive of a constitutional amendment that would not affect other aspects of government to some extent. However, this Court has held that a proposed amendment can meet the single-subject requirement even though it affects multiple branches of government."). This proposal does not create any new duties or jurisdiction for any court. Whatever incidental effects there may be on the judiciary (if called upon to interpret or apply the Constitution), the proposed amendment does not "substantially alter or perform" the functions of Florida's courts.

III. THE BALLOT TITLE AND SUMMARY FOR THE PROPOSED AMENDMENT ACCURATELY AND COMPLETELY STATE THE CHIEF PURPOSE OF THE AMENDMENT, AND DO NOT MISLEAD VOTERS.

In opposition, the Legislature makes numerous claims as to the insufficiency of the ballot title and summary. Here again, Opponents misinterpret and misapply the standards with regard to the ballot title and summary. Describing all possibilities and likelihoods is not a requirement in the ballot title and summary statutes. The statute requires only the description of the "chief purpose" of the initiative. § 101.161, Fla. Stat. This Court, mindful of the statutory word limits, does not require the ballot summary and title to detail every possible aspect of the proposed initiative. *See Protect People From the Hazards of Second-Hand Smoke*, 814 So. 2d at 419; *Grose v. Firestone*, 422 So. 2d 303, 305 (Fla. 1982). Rather, the ballot title and summary must describe only the major purpose of the initiative. "[I]t is not necessary to explain every ramification of a proposed amendment, only the chief purpose." *Advisory Opinion to the Atty. Gen'l re Right to Treatment & Rehabilitation for Non-Violent Drug Offenses*, 818 So. 2d 491, 497 (Fla. 2002) (quoting *Save Our Everglades*, 636 So. 2d at 1341); *Limited Casinos*, 644 So. 2d at 74.

A. The ballot title and summary clearly show the intent to establish clear standards and eliminate overt political favoritism in the redistricting process.

Redistricting congressional seats is a function performed by the Legislature. *See* 2 U.S.C. § 2c; ch. 8, Fla. Stat. Furthermore, unlike the system established for legislative reapportionment under Article III, Section 16, Florida Constitution, there is no automatic process under which this Court reviews every plan and is required to impose a redistricting plan under certain circumstances. Rather, congressional redistricting plans will come to courts only when they are challenged. Although the Legislature decries the failure of the summary to make clear its effects on judicial functions (Br. at 31), the Sponsors deny that there are any substantial effects on judicial functions. *See* Part II, *supra.* The mere possibility that a court may be called upon to apply or interpret the Constitution is not a substantial effect. This Court does not invalidate an amendment because there is some "possibility that an amendment might interact with other parts of the Florida Constitution." *Advisory Opinion to the Atty. Gen'l re Term Limits Pledge,* 718 So. 2d 798, 802 (Fla. 1998). Rather, the test is whether there are multiple parts of the Constitution which are substantially affected by the proposed initiative amendment, in order both to inform the public of the proposed changes and to avoid ambiguity as to the effects. *See Advisory*

Opinion to the Atty. Gen'l re Tax Limitation, 644 So. 2d 486, 490 (Fla. 1994); *Fine v. Firestone*, 448 So. 2d at 989. As is shown, *supra*, no such effect exists, and there is no need to make such a statement in a ballot summary.

Nor is the ballot summary invalid because the amendment attempts to minimize intentional and overt political favoritism in the redistricting process. The Legislature argues that the ballot summary is defective because, rather than repeating the full prohibition of drawing districts "*with intent* to favor or disfavor a political party or incumbent," the summary simply and concisely states that "districts may not be drawn to favor or disfavor an incumbent or political party." *See* Br. at 29. In other words, opponents argue that the summary is defective because it does not explain in detail that legislators are prohibited from acting *with intent* to favor or disfavor a party or an incumbent and it substitutes the word "to" for the phrase "with intent to". The Legislature might have a valid objection if the summary said something like "districts cannot favor and incumbent or a political party." However, the word "to" encompasses intent and purpose, and the language of the summary is broad enough to include intent. Here the word "to" modifies the verb "drawn" and the natural meaning of "to" in this context is consistent with the phrase "with intent to". In any event, there

will be no discernable difference to the voters as they make their decisions on how to vote. There will be no confusion for voters having "a certain amount of common understanding and knowledge." *Local Trustees & Statewide Governing Bd. to Manage Florida's Univ. Sys.*, 819 So. 2d at 732 (citing *Protect People from the Hazards of Second-Hand Smoke*, 814 So. 2d at 419).

B. The ballot title and summary clearly and accurately convey the chief purpose of the amendment, and do not omit necessary information.

A ballot summary is defective "if it omits material facts necessary to make the summary not misleading." *Term Limits Pledge*, 718 So. 2d at 803 (quoting *Advisory Opinion to the Atty. Gen'l - Limited Political Terms in Certain Elected Offices*, 592 So. 2d 225, 228 (Fla. 1991)). This Court has held, "We are most concerned with relationships and impact on other areas of law when we consider whether the ballot summary and title mislead the voter with regard to effects and impact on other constitutional provisions." *Protect People from the Hazards of Second-Hand Smoke*, 814 So. 2d at 419 (citing *Treating People Differently Based on Race*, 778 So. 2d at 899-900).

There are no significant impacts on other areas of the law from the proposed Congressional Redistricting amendment. If adopted, the effect of the proposal will be to supplement current law in a particular, limited area.

This limited legal effect is disclosed to voters. This ballot title and summary accurately reflect the purpose and major effect of the proposed amendment. The amendment is neither more nor less than it appears to be from the ballot title and summary.

The Legislature claims that the ballot title and summary do not make clear that the standards provided by the Congressional Redistricting Amendment would also apply to a court which found itself reviewing a redistricting plan or implementing one in the event of a challenge. Accepting this argument would amount to imposing a new requirement for all initiatives to include a statement in their ballot summary to the effect that the courts may have to interpret it. Considering the 75 word limit, this would be absurd. Here again, The Legislature misinterprets and misapplies the statutory requirement which is to state the "chief purpose" of the initiative. § 101.161(1), Fla. Stat.

The Legislature also claims that the summary is misleading because the text of the amendment uses the term "political boundaries" and the summary explains that districts, where feasible, "must make use of existing city, county ... boundaries." *See* Br. at 31. This claim is specious. The fact that the term "political boundaries" is broader than cities and counties makes no legal difference here, where the challenge is to tell the voter the gist of

the amendment – not every detail or possible contingency. As this Court has noted:

> It is true . . . that certain of the details of the [text] as well as some of its ramifications were either omitted from the ballot question or could have been better explained therein. That, however, is not the test.
>
> There is no requirement that the referendum question set forth the [text] verbatim nor explain its complete terms at great and undue length. Such would hamper instead of aiding the intelligent exercise of the privilege of voting.

Right to Treatment & Rehabilitation for Non-Violent Drug Offenses, 818 So.2d at 498 (quoting *Metropolitan Dade County v. Shiver*, 365 So. 2d 210, 213 (Fla. 3d DCA 1978)). The statute does not require that the operative text appear in the ballot title and summary; it requires only that "the substance of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the **chief purpose of the measure**." § 101.161(1), Fla Stat. (emphasis added). Here the mention of city and county boundaries will help the voter to understand the requirements of the amendment. Use of the term "political boundaries" in the summary would likely be confusing to voters, and at any rate is not required.

Nor is there validity in the Legislature's argument that the summary gives a misleading impression that no law currently exists regarding voting rights law. *See* Br. at 34. This is incorrect – the summary gives no such

impression. The case cited by the Legislature, *Treating People Differently Based Upon Race*, 778 So. 2d at 898, did give this impression, and indeed the very title of the failed initiative suggested strongly that differential treatment and discrimination were not addressed by current law. In contrast, the instant summary is silent on this matter – implying neither one thing nor the other. This Court has stated that voters can be expected to understand the current state of the law. There is no place within the scope of a 75-word summary for a substantive review of voting rights law. The summary needs only to state what this amendment does.

The Legislature also complains that the ballot title mentions that the standards are for the Legislature to use in redistricting but the amendment itself does not specify which body is to use the standards. *See* Br. at 28-29. Immediately thereafter the Legislature argues that the ballot summary does not fairly notify voters as to what body is to follow the standards. *See* Br. at 31. These arguments are inconsistent and make no sense. Federal law requires the legislature to draw the district lines. *See* 2 U.S.C. § 2c. This is beyond dispute. The ballot title informs the voter about what body will be bound to follow the standards. The ballot title and summary must be considered together to determine whether they clearly state the chief purpose of the proposed amendment. *See Voluntary Universal Pre-Kindergarten*

Educ., 824 So.2d at 166. There is no need to include this in the amendment because it is already the law.[2]

C. Minor differences in wording between the summary and text are not misleading.

Significant divergent terminology between the text of a proposed amendment and its ballot summary has been a ground for invalidation of a ballot summary. Thus, in *Treating People Differently Based on Race*, the Court invalidated a summary which used the term "people," while the text of the amendment referred to "persons," terms which the Court found legally distinct. 778 So. 2d at 896-97. Similarly, this Court, in *Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers*, found invalid a summary which used the term "citizens" in the summary, when the amendment used the legally significant term "natural persons." 705 So. 2d 563, 566 (Fla. 1998) (uncertain as to whether the terms and coverage were intended to be synonymous). There can be no such uncertainty about the minor differences between the amendment text and the ballot title and summary here.

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[2] As to the Legislature's argument that the summary does not reference portions of the Constitution affected (Br. at 36), the proposed Congressional Redistricting Amendment makes no substantial changes to other parts of the Florida Constitution, and thus there is no need for any such reference.

One difference between the text of the proposed amendment and the ballot summary identified by the Legislature (Br. at 35-36) is that the summary states, "Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process **and** elect representatives of their choice." The text of the proposed amendment reads, "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process **or** to diminish their ability to elect representatives of their choice." Citing *Armstrong v. Harris*, 773 So. 2d 7, 17-18 (Fla. 2000), the Legislature claims to find a major and significant discrepancy between the use of "and" in the summary and the use of "or" in the text. *See* Br. at 36.

However, the minor discrepancy between "and" and "or" in the context of this initiative petition is a distinction without a difference. "Or" is not used in a disjunctive sense in the text of the amendment. The phrase presented by the summary and the amendment has the same essential meaning, and the application of the terms would lead to identical results, i.e. to allow political participation of minorities and allow them to elect their chosen representatives. The summary does not use the term "diminish" as the text does, but focuses instead on the desired result, namely allow them

"to elect" their chosen representatives. Thus, any "and/or" distinction is not one that will mislead voters as to the result because there is no difference as to ultimate effect. The language of the summary fairly and accurately conveys the chief purpose in a way that voters will understand. In the case relied on by the Legislature, *Armstrong v. Harris*, the "and/or" distinction was at the heart of an amendment that proposed as its chief purpose to conform the wording of the Florida Constitution to the similar provision in the U.S. Constitution. 778 So. 2d at 17-18. Here, by contrast, the *de minimis* use of slightly different language will not mislead, but rather aid the average citizen in understanding the amendment.

The summary and title for the Congressional Redistricting Amendment most resembles the one approved by this Court in *Local Trustees & Statewide Governing Board to Manage Florida's University System*, where this Court found that even inconsistent use of such terms as "local," "accountable operation," and "procedures for selection," were found to be commonly understood and not likely to mislead voters. 819 So. 2d at 732. *See also Advisory Opinion to the Atty. Gen'l re Florida Marriage Protection Amendment*, 926 So. 2d 1229, 1236-37 (Fla. 2006) (upholding an initiative with minor inconsistencies in terms between the text and summary where these would not confuse or mislead voters).

Because the purpose and effect of this proposed amendment are clear and straightforward, and there are no such hidden meanings, any minor wording differences between ballot title and summary and the text of the proposed amendment are not misleading. In short, the ballot title and summary meet the requirements of Section 101.161, Florida Statutes, that they accurately and carefully convey to voters the chief purpose and "legal effect" of the proposed Congressional Redistricting amendment. *Advisory Opinion to the Atty. Gen'l re Additional Homestead Tax Limitation*, 880 So. 2d 646 (Fla. 2004). Voters have "fair notice of the decision [they] must make." *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982).

CONCLUSION

In opposing the initiative, the Legislature has not established clearly and conclusively that the proposed amendment violates the single subject requirement of Article XI, Section 3. The presentation of criteria for the Legislature to follow when drawing congressional seats is a single and unified purpose, working a limited change in the Constitution and substantially affecting only one branch of government. The ballot title and summary carefully, neutrally, and accurately explain this purpose. Accordingly, the sponsor of the amendment, FairDistrictsFlorida.org,

respectfully urges this Court to approve the proposed Congressional Redistricting Amendment for placement on the ballot.

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 August, 2008 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.

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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.

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IN THE SUPREME COURT OF FLORIDA

Case No.: SC08-1149

ADVISORY OPINION TO THE ATTORNEY GENERAL
RE: STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES

MOTION TO PERMIT FILING OF AMENDED ANSWER BRIEF
FairDistrictsFlorida.org

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Counsel for FairDistrictsFlorida.org move this Court for an order permitting it to file an amended answer brief in this cause and, in support thereof, states:

1. On Friday, August 1, 2008, undersigned counsel filed with this court the incorrect draft of the answer brief in this cause, which was due on August 4, 2008.
2. Simultaneously with filing of this motion, undersigned counsel has submitted an Amended Answer Brief in this cause.
3. The filing of the amended answer brief is within the deadlines established by this Court for filing of the answer brief.
4. Undersigned counsel has spoken with counsel for Legislature as to whether it opposed this motion to file an amended answer brief, Jerimiah Hawkes indicated that he had no opposition to the request.

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SUMMARY OF ARGUMENT

The proposed Congressional Redistricting Amendment presents a unified and coherent plan which establishes standards for Congressional redistricting. The Legislature argues that the presence of eight standards for drawing districts presents the voters with a series of choices and thus constitutes logrolling. That argument is contrary to this Court's consistent findings that the inclusion of various criteria as part of a dominant theme does not violate the single subject requirement of Article XI, Section 3, Florida Constitution.

For example, different criteria in the class size amendment properly defined different sizes for different class levels. *See Advisory Opinion to the Atty. Gen'l re Florida's Amendment to Reduce Class Size*, 816 So. 2d 580, 581-82 (Fla. 2002). Those criteria provided "the details of how the ballot initiative will be implemented." *Id.* at 583. Similarly, the indoor smoking amendment had a series of exemptions that were held to define the scope of the proposal. *See Advisory Opinion to the Atty. Gen'l re Protect People From the Hazards of Second-Hand Smoke*, 814 So. 2d 415, 422 (Fla. 2002).

The ballot title of the proposed Congressional Redistricting Amendment gives notice to the voter that it will establish "STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL

REDISTRICTING." The single purpose of the amendment is to provide the Legislature with a unified set of criteria to follow in the creation of congressional districts. The standards are meant to work together as a whole to define the parameters of one task that the Legislature is already required to perform. Consequently, this proposal is narrow, specific and affects only one task assigned to the legislative branch of state government.

The Legislature argues that the amendment also violates the single subject rule by substantially impacting the judicial branch as well as the legislative branch. This argument ignores the basic fact that presently, the judiciary can and does interpret all constitutional provisions. The instant proposal, if enacted, would affect the judiciary no differently than any other amendment to the constitution. The court's exercise of its traditional role of interpreting and applying a new constitutional provision does not amount to a substantial impact on the functions of the judicial branch.

The ballot title and summary for the proposal give voters fair notice of the chief purpose of the amendment and the decision they must make. The "chief purpose" of the amendment is to provide a cohesive set of standards for Congressional redistricting. The Legislature complains – among other things - that the summary fails to advise voters about a possible impact on the judiciary; that the summary substitutes the word "to" for "with intent to";

and that the title advises that the standards are for the Legislature to follow while the amendment does not mention the Legislature. These arguments (and the others on this point) are all unfounded. The title and summary need not (and cannot because of the 75 word limit) state every possible speculative ramification, incorporate the text of the amendment or define every term. The law only requires that they state clearly what the proposed amendment will do and do not mislead the voter as to the effect of the amendment. The ballot title and summary for the Congressional Redistricting Amendment are clear and they are not misleading. They should be approved by this Court.

ARGUMENT

The Florida Legislature, opposing the proposed amendment, argues in its initial brief that the initiative constitutes impermissible logrolling, has substantial effects on multiple branches of government, and has a defective ballot title and ballot summary. These arguments are unsupported by this Court's precedents. There is no violation of the single subject rule and the ballot title and summary are not misleading to voters in any way.

I. THE PROPOSED CONGRESSIONAL REDISTRICTING AMENDMENT DOES NOT VIOLATE THE SINGLE SUBJECT RULE.

The proposed Congressional Redistricting Amendment provides a limited, unified, prioritized and interdependent set of criteria to be employed when congressional districts are drawn. The criteria work together in combination with each other and are prioritized in an attempt to create fair, community-based and logical district boundaries without interfering with rights of language and racial minorities. That is its single and dominant purpose.

Article XI, Section 3, Florida Constitution, specifies that any amendment to the Constitution, except for those limiting the power of government to raise revenue, "shall embrace but one subject and matter directly connected therewith." The single subject requirement is intended to prevent multiple "precipitous" and "cataclysmic" changes in the Constitution. *See Advisory Opinion to the Atty. Gen'l re Authorization for County Voters to Approve or Disapprove Slot Machines Within Existing Pari-Mutuel Facilities*, 813 So. 2d 98, 100 (Fla. 2002); *Advisory Opinion to the Atty. Gen'l - Save Our Everglades*, 636 So.2d 1336, 1139 (Fla. 1994). The rule was placed in the Constitution because initiative proposals do not afford the same opportunity for public hearing and debate that occurs for

those amendments that arise in the Legislature. *See Advisory Opinion to the Atty. Gen'l re Fish & Wildlife Conservation Comm'n*, 705 So. 2d 1351, 1353 (Fla. 1998) (citing *Fine v. Firestone*, 448 So.2d 984, 988 (Fla 1984)).

An outgrowth of the single subject limitation is the prohibition of "logrolling." Logrolling occurs when different issues are combined into one initiative so that voters are forced to accept change they do not want in order to gain something else that they do want. *See Advisory Opinion to the Atty. Gen'l re Fla. Transportation Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation Sys.*, 769 So.2d 367, 369 (Fla. 2000) (quoting *Advisory Opinion to the Atty. Gen'l re Limited Casinos*, 644 So. 2d 71, 73 (Fla. 1994)).

Another rule applied to citizen initiative petitions is that the initiative must not perform or substantially impact multiple functions of government. *Advisory Opinion to the Atty. Gen'l re: Right to Treatment & Rehabilitation for Non-Violent Drug Offenses*, 818 So. 2d 491, 496 (Fla. 2002); *Save Our Everglades*, 636 So. 2d at 1340. This Court has also invalidated initiatives when they substantially impact or change multiple sections of the Constitution. *See Advisory Opinion to the Atty. Gen'l re the Medical Liability Claimant's Compensation Amend.*, 880 So.2d 675, 677-78 (Fla. 2004); *Advisory Opinion to the Atty. Gen'l re Tax Limitation*, 644 So. 2d

486, 490 (Fla. 1994); *In re Advisory Opinion to the Atty. Gen'l – Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1019 (Fla. 1994). The proposed Congressional Redistricting Amendment does not violate any of these prohibitions.

A. There is no logrolling.

The current proposal is in many ways a response to the earlier initiative rejected by this Court in *Advisory Opinion to the Attorney General re: Independent Nonpartisan Comm'n to Apportion Legislative and Congressional Districts which Replaces Apportionment by the Legislature*, 926 So. 2d 1218 (2006). That initiative would have created an independent commission to perform congressional redistricting and legislative reapportionment and districting, while also requiring single-member districts and imposing a limitation on commission members later seeking election to the Legislature. *Id.* at 1225. This Court found that the combination of establishing the commission and the imposition of standards encompassed multiple subjects and constituted logrolling. *Id.* at 1225-26 ("A voter who advocates apportionment by a redistricting commission may not necessarily agree with the change in the standards for drawing the legislative and congressional districts."). Importantly, the Court did not find that logrolling occurred within the standards created by the Independent Nonpartisan

Commission initiative, but rather it occurred when these standards were combined with establishment of the new commission to perform the reapportionment and redistricting. *Id.*

The amendment in this case is a limited proposal, instantly and easily distinguishable from its predecessor and other amendments this Court has rejected. Unlike the Independent Nonpartisan Commission amendment or the failed Save Our Everglades amendment, for example, the instant initiative does not establish an implementing body, but restricts itself to the exercise of a single legislative function – the establishment of congressional redistricting standards. *Cf. Save Our Everglades*, 636 So. 2d at 1340. The Congressional Redistricting Amendment leaves untouched the existing legislative function of performing the actual redistricting. It only establishes standards for the legislature to follow when drawing the district lines. It does not impact the executive branch, and just as importantly, changes no judicial functions whatsoever. *Id*

Opponents misunderstand both the purpose and the nature of the single subject requirement's prohibition of logrolling. The Legislature argues that the logrolling prohibition means that a successful initiative must never, under any circumstances, present multiple standards or criteria to the voters. *See* Br. at 11-13. Their reasoning is that, inevitably, some voters

will prefer certain criteria, while rejecting others. This position illogically suggests that no proposal may contain more than one criterion or standard – a position continually rejected by this Court as even the most cursory examination of recent initiative cases will reveal.

Indeed, this Court has repeatedly approved initiative proposals that included multiple standards or criteria, or involved some presentation of multiple issues within a single initiative package. *See, e.g.*, *Advisory Opinion to the Atty. Gen'l re Florida's Amendment to Reduce Class Size*, 816 So. 2d 580 (Fla. 2002); *Advisory Opinion to the Att'y Gen'l re: Voluntary Universal Pre-Kindergarten Educ.*, 824 So. 2d 161, 164 (Fla. 2002); *Advisory Opinion to the Atty. Gen'l re Protect People From the Hazards of Second-Hand Smoke*, 814 So. 2d 415, 419 (Fla. 2002); *Advisory Opinion to the Atty. Gen'l re: Protect People, Especially Youth, from Addiction, Disease, and other Health Hazards of Using Tobacco*, 926 So. 2d 1186 (Fla. 2006); *Slot Machines in Parimutuel Facilities*, 813 So. 2d 98 (Fla. 2002).

In *Reduce Class Size*, this Court upheld an initiative which set different required class sizes for public school children in grades 1-3, 4-8, and 9-12, with the class sizes phased in from 2003 through 2010. 816 So. 2d at 581-82. The Court found that the initiative dealt with a single subject of

reducing class size, noting that it did not constitute logrolling, "but rather provides the details of how the ballot initiative will be implemented." *Id.* at 583. So also, in *Voluntary Universal Pre-Kindergarten Education*, there was no suggestion by the Court that inclusion of multiple standards for free pre-kindergarten education constituted logrolling by forcing those who might favor the funding of some of these standards to approve all or none of them. 824 So. 2d at 165-66.

Similarly, in *Protect People From the Hazards of Second-Hand Smoke*, this Court upheld an initiative which abolished most indoor, workplace smoking, but contained numerous separate exceptions for retail tobacco shops, stand-alone bars and designated smoking rooms in hotels, as well as limiting smoking in private residences if used for child or health care purposes. 814 So. 2d at 416-17. This Court found the entire initiative valid under the general single subject of "second-hand smoke in enclosed indoor workplaces." *Id.* at 422. In *Health Hazards of Using Tobacco*, likewise, this Court upheld, as presenting "a single comprehensive plan for the education of youth about the health hazards related to tobacco," an initiative which included "a list of components such as advertising, school curricula, and law enforcement" the particulars of which were spelled out in great

detail. 926 So. 2d at 1191. The Court found all of the criteria to be "related to the single unifying purpose." *Id.*

Each of the slot machines or casino amendments approved by this Court all included within its single unified purpose an amendment that itself prescribed the locations, both geographic and specific, where the gambling could occur. Thus, in *Slot Machines in Parimutuel Facilities*, voters were asked to approve a package deal of slot machines in existing pari-mutuel facilities only in Miami-Dade or Broward Counties, upon referendum. 880 So. 2d at 522. The Court had previously approved initiatives which offered casino riverboats in all counties with more than 200,000 inhabitants and hotel casinos in counties with more than 500,000 inhabitants. *Advisory Opinion to the Atty. Gen'l re Florida Locally Approved Gaming*, 656 So. 2d 1259, 1261 (Fla. 1995). An earlier approved initiative would have allowed casinos in Broward, Dade, Duval, Escambia, Hillsborough, Lee, Orange, Palm Beach and Pinellas Counties in pari-mutuel facilities and riverboats. *Advisory Opinion to the Atty. Gen'l re Limited Casinos*, 644 So. 2d 71, 72-73 (Fla. 1994). In both cases, opponents challenged as logrolling the geographic choices, as well as the type of locations permitted to offer gaming. The Court held:

> We disagree. The sole subject of the proposed amendment is to authorize privately-owned casinos in Florida. The proposal

> does not combine subjects which are dissimilar so as to require voters to accept one proposition they might not support in order to vote for one they favor. Although the petition contains details pertaining to the number, size, location, and type of facilities, we find that such details only serve to provide the scope and implementation of the initiative proposal. These features properly constitute matters directly and logically connected to the subject of the amendment.

Limited Casinos, 644 So. 2d at 73.

The point is that each of these initiatives contained multiple criteria, some of which voters might want and others they might reject. This court held that since the various criteria were coherent and directly related to the policy proposal, as is the case with the instant proposal, they did not violate the single subject requirement. All of these proposals had the requisite "oneness of purpose" necessary to comply with the law.[1] *Advisory Opinion to the Atty. Gen'l re Local Trustees & Statewide Governing Board to*

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[1] As this Court has often noted, canons of statutory construction require a reviewing court to reject an interpretation of a constitutional or statutory provision that would render it meaningless or lead to an absurd result. *See, e.g., Warner v. City of Boca Raton*, 887 So. 2d 1023, 1033 n.9 (Fla. 2004) (citing *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1286 (Fla. 2000)); *Unruh v. State* 669 So. 2d 242, 245 (Fla. 1996). An interpretation such as that offered by the Legislature, which would construe Article XI, Section 3 to prohibit an initiative from containing more than one standard or criterion in a single initiative, would lead to just such an absurd result, require eight separate amendments, and frustrate the intention of the initiative process that allows the people to propose limited, but meaningful amendments to their Constitution.

Manage Florida's University System, 819 So.2d 725, 729 (Fla. 2002) (quoting *Fine*, 448 So. 2d at 990).

Like these other successful amendments, the proposed Congressional Redistricting Amendment has "a natural relation and connection as component parts of a single dominant plan or scheme. Unity of object and plan is the universal test ..." *Floridians Against Casino Takeover v. Let's Help Florida*, 363 So. 2d 337, 339 (Fla. 1978) (quoting *City of Coral Gables v. Gray*, 19 So. 2d 318, 320 (Fla. 1944)). It presents logical, interdependent and cohesive standards for redistricting which are fashioned to work together. Thus, the standards in the first paragraph of the proposal take priority over those in the second paragraph although the third paragraph instructs that the order of standards within a paragraph are not to be considered as signifying higher or lower priority. **This internal organization and combination is important because without express prioritization, standards of compactness or utilization of existing geographic or political boundaries, while important, may conflict with even more fundamental adherence to voting rights principles.**

In short, the standards of the proposed Congressional Redistricting Amendment are intended to work together as a package, with all parts directly related to its purpose of providing explicit standards for

redistricting. There is no logrolling here. This Court should recognize this oneness of purpose and approve the initiative for the ballot.

In opposition, the Legislature relies heavily on two cases in arguing that the proposed Congressional Redistricting Amendment violates the single subject requirement of Article XI, Section 3. In *In re Advisory Opinion to the Attorney General – Restricts Laws Related to Discrimination*, 632 So. 2d 1018 (Fla. 1994), this Court invalidated an initiative that would have listed multiple classifications to be protected from discrimination. That amendment would have applied to all levels and all branches of government. *Id.* at 1020. This broad application is at the heart of this Court's concern that the voters were being asked multiple questions about which classes should enjoy extra protections from which separate levels and branches of state government.

Later, in *Advisory Opinion to the Attorney General, re Amendment to Bar Government from Treating People Differently Based on Race in Public Education*, 778 So. 2d 888 (Fla. 2000), this Court considered a package of four initiatives which would have barred differential treatment based on race in multiple governmental functions (public education, employment, and contracting). The Court found that the fourth proposal, which applied equally to three separate governmental functions of education, employment

and contracting, constituted logrolling. 778 So. 2d at 893. It also rejected all of the proposals because they applied broadly to multiple levels and branches of state government, and had significant effects on multiple parts of the Constitution. *Id.* at 894-96. The proposed Congressional Redistricting Amendment, by contrast, operates only on the single pre-existing legislative duty of drawing congressional districts. It is a limited, single proposal. It does not create a new function, but merely provides standards for one established function of the Legislature.

B. There is no substantial impact on or alteration of multiple functions or branches of government.

The Legislature further complains that the proposal affects both legislative and judicial functions and thus violates the single subject rule. It argues that courts may be called upon to interpret and apply the standards and that this would create an impact on the judicial branch. This argument is unsupported by the precedents of this Court, and if accepted would have the radical effect of preventing any amendment by initiative other than those which target the judiciary. The fact is that every part of the Constitution, and indeed every law, is subject to judicial interpretation and enforcement. This proposal is no different. Interpreting constitutional provisions is the

business of the courts. If this Court accepts this argument, then no citizen initiative petition could ever succeed.[2]

The proposed Congressional Redistricting Amendment makes no changes to the judicial functions or structure of this State. Nor does the amendment undertake to perform a judicial function. Likewise, the proposal does not modify any portions of the Constitution that apply specifically to the court system.

The proposed Congressional Redistricting amendment affects a single pre-existing legislative function in one limited area: it provides criteria for the Legislature to apply when redistricting congressional seats. This Court has noted that "[a] proposal that **affects** several branches of government will not fail; rather, it is when a proposal substantially alters or performs the functions of multiple branches that it violates the single-subject test." *Fish & Wildlife Conservation Conservation Comm'n*, 705 So. 2d at 1353-54 (emphasis added); *see also High Speed Monorail*, 769 So.2d at 369-70 ("[W]e find it difficult to conceive of a constitutional amendment that would

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[2] Unlike the system established for legislative reapportionment under Article III, Section 16, Florida Constitution, there is no automatic process under which this Court reviews every plan and is required to impose a redistricting plan under certain circumstances. Rather, congressional redistricting plans will come to courts only when they are challenged. There are no effects on judicial functions and the proposed amendment makes no change in the operation or application of Article V, Florida Constitution.

not affect other aspects of government to some extent. However, this Court has held that a proposed amendment can meet the single-subject requirement even though it affects multiple branches of government.").

This proposal does not create any new duties or jurisdiction for any court. Whatever incidental effects there may be on the judiciary (if called upon to interpret or apply the Constitution), the proposed amendment does not "substantially alter or perform" the functions of Florida's courts.

C. There is no change to any existing part of the Constitution.

There is no reference to congressional redistricting in any part of the Florida Constitution. Therefore, there can be no change or impact to any existing section of the Constitution or, for that matter, multiple sections of the Constitution.[3]

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[3] The mere possibility that a court may be called upon to apply or interpret the Constitution is not a substantial effect. This Court does not invalidate an amendment because there is some "possibility that an amendment might interact with other parts of the Florida Constitution." *Advisory Opinion to the Atty. Gen'l re Term Limits Pledge*, 718 So. 2d 798, 802 (Fla. 1998). Rather, the test is whether there are multiple parts of the Constitution which are substantially affected by the proposed initiative amendment, in order both to inform the public of the proposed changes and to avoid ambiguity as to the effects. *See Medical Liability Claimant's Compensation*, 880 So. 2d at 678; *Tax Limitation*, 644 So. 2d at 490; *Fine v. Firestone*, 448 So. 2d 984, 989 (Fla. 1984).

II. THE BALLOT TITLE AND SUMMARY ACCURATELY AND COMPLETELY STATE THE CHIEF PURPOSE OF THE AMENDMENT AND DO NOT MISLEAD VOTERS.

In a shotgun approach, the Legislature makes a myriad of claims as to why the ballot title and summary are insufficient. However, the Legislature misinterprets and misapplies the standards with regard to the ballot title and summary. Describing all possibilities and likelihoods is not a requirement in the ballot title and summary statutes. The statute requires only the description of the "chief purpose" of the initiative. § 101.161, Fla. Stat. This Court, mindful of the statutory word limits, does not require the ballot summary and title to detail every possible aspect of the proposed initiative. *See Protect People From the Hazards of Second-Hand Smoke*, 814 So. 2d at 419; *Grose v. Firestone*, 422 So. 2d 303, 305 (Fla. 1982). Rather, the ballot title and summary must describe only the major purpose of the initiative. "[I]t is not necessary to explain every ramification of a proposed amendment, only the chief purpose." *Advisory Opinion to the Atty. Gen'l re Right to Treatment & Rehabilitation for Non-Violent Drug Offenses*, 818 So. 2d 491, 497 (Fla. 2002) (quoting *Save Our Everglades*, 636 So. 2d at 1341); *Limited Casinos*, 644 So. 2d at 74.

A. The ballot title and summary together explain that the standards are provided to guide the Legislature in redistricting congressional seats.

The Legislature makes two inconsistent attacks on the title and summary. First, the Legislature claims that the title mentions the Legislature specifically, thereby deceiving voters because a reviewing court would also follow the new constitutional standards. Br. at 28-29. Immediately thereafter the Legislature argues that the ballot summary does not fairly notify voters as to what body is to follow the standards. *See* Br. at 31. These arguments are inconsistent and make no sense. The redistricting of congressional seats is a function performed by the Legislature. *See* 2 U.S.C. § 2c; ch. 8, Fla. Stat. The ballot title informs the voter about what body will be bound to follow the standards. There is no need to mention the Legislature's role in the summary because the ballot title and summary must be considered together and here they advise the voter as to the Legislature's role. *See Voluntary Universal Pre-Kindergarten Educ.*, 824 So.2d at 166. More importantly, there is no need to include or detail the Legislature's role in the redistricting process affected by the amendment because it is already in the law.

B. The title and summary clearly inform the voters that one purpose of the initiative is to eliminate *intentional* political favoritism in the redistricting process.

The ballot summary properly informs the voters about how it will minimize political favoritism in the redistricting process. The Legislature argues that the ballot summary is defective because, rather than repeating the full prohibition of drawing districts "*with intent* to favor or disfavor a political party or incumbent," the summary simply and concisely states that "districts may not be drawn to favor or disfavor an incumbent or political party." *See* Br. at 29. In other words, opponents argue that the summary is defective because it does not explain in detail that legislators are prohibited from acting *with intent* to favor or disfavor a party or an incumbent and it substitutes the word "to" for the phrase "with intent to".

The Legislature might have a valid objection if the summary said something like "districts shall never favor an incumbent or a political party." However, the word "to" as used in the summary encompasses intent and purpose, and the language of the summary is broad enough to include intent. Here the word "to" modifies the verb "drawn" and the natural meaning of "to" in this context is consistent with the phrase "with intent to". In any event, there will be no confusion for voters having "a certain amount of common understanding and knowledge" as they read the summary and make

their decisions on how to vote. *Local Trustees & Statewide Governing Bd. to Manage Florida's Univ. Sys.*, 819 So. 2d at 732 (citing *Protect People from the Hazards of Second-Hand Smoke*, 814 So. 2d at 419).

A ballot summary is defective "if it omits material facts necessary to make the summary not misleading." *Term Limits Pledge*, 718 So. 2d at 803 (quoting *Advisory Opinion to the Atty. Gen'l - Limited Political Terms in Certain Elected Offices*, 592 So. 2d 225, 228 (Fla. 1991)). This Court has held, "We are most concerned with relationships and impact on other areas of law when we consider whether the ballot summary and title mislead the voter with regard to effects and impact on other constitutional provisions." *Protect People from the Hazards of Second-Hand Smoke*, 814 So. 2d at 419 (citing *Treating People Differently Based on Race*, 778 So. 2d at 899-900).

The Legislature also claims that the summary is defective because it creates the impression that districts will not have the *effect* of favoring or disfavoring and incumbent or political party. Br. at 29. The sponsor of this amendment recognizes that any district – no matter how neutral the drafter – will favor or disfavor someone. Knowing that it is impossible to remove political favoritism from the redistricting process, the sponsor included a prohibition of **intentional** political gerrymandering. The summary makes no promises that it cannot keep. The Congressional Redistricting

Amendment does not omit any necessary information required for voters to make a decision on the proposal.

C. The terms used in the summary are clear and not misleading.

The Legislature claims that the summary is misleading because the text of the amendment uses the term "political boundaries" and the summary explains that districts, where feasible, "must make use of existing city, county ... boundaries." *See* Br. at 31. This claim ignores the basic purpose of the ballot title and summary. The amendment and the summary both notify the voters that under the new standards, there will be an attempt to make districts community-based – not spread out to multiple counties and for many miles as many are now. The fact that the term "political boundaries" is broader than cities and counties makes no legal difference here, where the challenge is to tell the voter the **gist** of the amendment – not every detail or possible contingency. As this Court has noted:

> It is true . . . that certain of the details of the [text] as well as some of its ramifications were either omitted from the ballot question or could have been better explained therein. That, however, is not the test.
>
> There is no requirement that the referendum question set forth the [text] verbatim nor explain its complete terms at great and undue length. Such would hamper instead of aiding the intelligent exercise of the privilege of voting.

Right to Treatment & Rehabilitation for Non-Violent Drug Offenses, 818 So.2d at 498 (quoting *Metropolitan Dade County v. Shiver*, 365 So. 2d 210, 213 (Fla. 3d DCA 1978)). The statute does not require that the exact operative text appear in the ballot title and summary; it requires only that "the **substance** of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the **chief purpose of the measure**." § 101.161(1), Fla Stat. (emphasis added). Here the mention of city and county boundaries will help the voter to understand that there will have to be an effort to make districts community based. The term "political boundaries" in the summary would likely be confusing to voters, and at any rate is not required.

The Legislature points to another difference between the text of the proposed amendment and the ballot summary and complains that because of it, the summary is misleading. (Br. at 35-36) The summary states, "Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process **and** elect representatives of their choice." The text of the proposed amendment reads, "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process **or** to diminish their ability to elect representatives of their choice."

Because the sentence is phrased in the negative, the word "or" in this context does not provide a choice between one right and the other. It clearly provides that the abridgement of either right or both rights is prohibited.

Here the summary and the amendment have the exact same meaning. The text of the amendment makes it clear that minority voters are protected from denial of two discrete rights: (1) the opportunity to participate in the political process; and (2) the ability to elect representatives of their choice. The summary clearly reflects the obvious meaning of the text -- that the same two rights will exist in the Constitution. Thus, any "and/or" distinction is not one that will mislead voters as to the result because there is no difference as to ultimate effect. The language of the summary fairly and accurately conveys the chief purpose in a way that voters will understand.

The Legislature's cite of *Armstrong v. Harris*, 773 So. 2d 7, 17-18 (Fla. 2000), to support its argument is inapposite. *See* Br. at 36. In *Armstrong*, the "and/or" distinction was at the heart of an amendment that proposed as its chief purpose to conform the wording of the Florida Constitution to the similar provision in the U.S. Constitution. 778 So. 2d at 17-18. Where the difference in summary terminology would lead a reader to a different understanding of the substance of the amendment, there may be grounds for invalidation. *See, e.g., Treating People Differently Based on*

Race, 778 So. 2d at 896-97 (invalidating an initiative because the word "people" in the summary meant live human beings while the word "persons" in the text would include corporations); *Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 566 (Fla. 1998) (finding that the word "citizens" in the summary, when the amendment used the legally significant term "natural persons" presented entirely different meanings). Here, by contrast, the use of different words that in context have the exact same meaning will not mislead, but rather aid the average citizen in understanding the amendment

The summary and title for the Congressional Redistricting Amendment most resembles the one approved by this Court in *Local Trustees & Statewide Governing Board to Manage Florida's University System*, where this Court found that even inconsistent use of such terms as "local," "accountable operation," and "procedures for selection," were found to be commonly understood and not likely to mislead voters. 819 So. 2d at 732. *See also Advisory Opinion to the Atty. Gen'l re Florida Marriage Protection Amendment*, 926 So. 2d 1229, 1236-37 (Fla. 2006) (upholding an initiative with minor inconsistencies in terms between the text and summary where these would not confuse or mislead voters). Because the purpose and effect of this proposed amendment are clear and straightforward, and

because there are no hidden meanings, any minor wording differences between ballot title and summary and the text of the proposed amendment are not misleading.

The term "language minorities" in the summary is not misleading. This is a term that will be easily and accurately understood by the average voter in context to explain the effect of the proposal. There is no need for the summary to contain a full legal explanation of all the possible ramifications of the term.

D. There is no need for the summary to point to nonexistent impacts on the courts or other laws.

As to the failure of the summary to make clear its effects on the courts, there are no such effects, as is discussed in Part I, *supra*. Because no substantial effect on the judiciary exists, there is no need to make such a statement in a ballot summary. This argument disregards the fact that it is the established duty of Florida courts to interpret and apply all Constitutional provisions – including those added by citizen initiative. Accepting the Legislature's argument would amount to imposing a new requirement for all initiatives to include a statement in their ballot summaries to the effect that the courts may have to interpret them. Citizens must be assumed to understand that courts will interpret and apply all amendments. Considering the 75 word limit, requiring all proposed amendments to include such a

statement would be absurd. Voters with average knowledge and ability will understand that this initiative, while targeted at the Legislature, would not be ignored by a reviewing court.

There is no validity in the Legislature's argument that "the summary [misleadingly] implies that there is no law preventing discrimination against racial or language minorities." *See* Br. at 34. **First of all, there is no such implication in the language of the summary. Secondly, there is no Florida law which provides the protections written into the instant amendment.** So if there were such an implication, it would be true. Florida law does not require a ballot summary to mention all similar laws. It only precludes misleading language and there is no such language here. The case cited by the Legislature on this issue, *Treating People Differently Based Upon Race*, 778 So. 2d at 898, is not on point. The very titles of the failed initiatives in that case suggested strongly that their purpose was to remedy differential treatment and discrimination not addressed by current law. In fact the Court found that there were existing provisions in the Florida Constitution which addressed the same subjects.

In contrast, there are no provisions in our constitution that address Congressional redistricting in general or the specific rights of language and racial minorities in the area of congressional redistricting. There is no

reason for the instant summary to address any change to existing law because there is none.

E. On the face of the title and summary, it is obvious that this amendment will restrict the Legislature's discretion in redistricting, and there is no need to state this.

This amendment on its face restricts legislative discretion. Yet the Legislature complains that the summary does not sufficiently advise voters "that the amendment substantially diminishes the Legislature's constitutional redistricting powers." Br. at 31. However, that is the obvious purpose of providing explicit criteria.[4] It is thus illogical to complain that the ballot title and summary do not explain this point further.

In short, the ballot title and summary meet the requirements of Section 101.161, Florida Statutes, that they accurately and carefully convey to voters the chief purpose and "legal effect" of the proposed Congressional Redistricting amendment. *Advisory Opinion to the Atty. Gen'l re Additional*

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[4] It can come as no surprise to the Legislature that the Constitution operates as a restriction on the discretion of the government, and not as a donation of authority. *See, e.g., Crist v. Florida Ass'n of Criminal Defense Lawyers, Inc.*, 978 So. 2d 134, 141 (Fla. 2006) (quoting *Chiles v. Phelps*, 714 So. 2d 453, 458 (Fla. 1998)) (the Florida Constitution is a "limitation only upon legislative power"); *Cawthon v. Town of De Funiak Springs*, 88 Fla. 324, 326, 102 So. 250, 251 (1924) ("the Constitution affords limitations upon the powers of the Legislature as well as upon the executive and judicial departments."). Thus almost every constitutional amendment works to restrict legislative discretion. To require all summaries to make this point within the statutory word limit would be an undue and unnecessary burden.

Homestead Tax Limitation, 880 So. 2d 646 (Fla. 2004). Voters have "fair notice of the decision [they] must make." *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982).

CONCLUSION

In opposing the initiative, the Legislature has not established clearly and conclusively that the proposed amendment violates the single subject requirement of Article XI, Section 3. The presentation of criteria for the Legislature to follow when drawing congressional seats is a single and unified purpose, working a limited change in the Constitution and substantially affecting only one branch of government. The ballot title and summary carefully, neutrally, and accurately explain this purpose. Accordingly, the sponsor of the amendment, FairDistrictsFlorida.org, respectfully urges this Court to approve the proposed Congressional Redistricting Amendment for placement on the ballot.

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 August, 2008 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.

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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) of the Florida Rules of Appellate Procedure.

_____
Attorney

Supreme Court of Florida

TUESDAY, AUGUST 19, 2008

CASE NO.: SC08-1149

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING

FairDistrictsFlorida.org's Motion to Permit Filing of Amended Answer Brief of Sponsor is granted and said amended brief was filed with this Court on August 4, 2008.

FairDistrictsFlorida.org's answer brief of sponsor filed with this Court on August 1, 2008, is hereby stricken.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

ab
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HON. BILL MCCOLLUM

IN THE SUPREME COURT OF FLORIDA

Case No. SC08-1149

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES

_____/

ANSWER BRIEF

OF THE FLORIDA LEGISLATURE

IN OPPOSITION TO THE PETITION

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Harbrace College Handbook (12 ed.) (Harcourt Brace 1994) 15, 16

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SUMMARY OF THE ARGUMENT

Nothing the sponsors have said undermines the fact that the proposed amendment easily falls within the reach of In re Advisory Opinion to the Attorney General — Restricts Laws Related to Discrimination, 632 So.2d 1018 (Fla. 1994). A close analysis of the proposal demonstrates that it is more like that in Laws Related to Discrimination than any of the cases cited by the sponsors — and just as flawed.

The amendment proposes a "broad generality" as a chief purpose, then enumerates eight standards for redistricting, five of which provide anti-discrimination protections to distinct classes in the same way as the amendment in Laws Related to Discrimination. Voters must accept or reject the entire package, although they may agree with one classification but strongly disagree with another.

Moreover, the proposal in fact has two chief purposes grouped within a single "broad generality": anti-discrimination and geographic integrity, objectives that aim at two different targets, forcing voters to make yet another choice among disparate issues.

It is impossible to create a redistricting plan that does not favor or disfavor parties or incumbents. Even the sponsors admit this is true. Sponsors' answer brief, p. 20: "The sponsor of this amendment recognizes that any district — no matter now neutral the drafter — will favor or disfavor someone." The sponsors go on to say they "[know] that it is impossible to remove political favoritism from the redistricting process . . ." The practical effect of the amendment shifts to the courts the burden of redistricting, a purely legislative duty under the U.S. Constitution.

The amendment substantially affects several existing constitutional provisions, as well as the Legislature's role under the U.S. Constitution (subject to Congress' authority and the U.S. Constitution) to regulate elections to the House of Representatives. Consequently, the proposed amendment plainly and materially affects existing constitutional provisions without giving voters notice of its substantial changes to the state's constitutional fabric.

The sponsors make a false grammatical argument that the phrase "drawn to favor" is the functional equivalent of the actual language of the amendment, "drawn *with the intent* to favor . . ." According to the sponsor, "to" in "drawn to" is "consistent" with the phrase "with intent to."[1] The crux of their position is that "to" modifies "drawn." This is grammatically absurd. In fact, the "to" is part of the

[1] Sponsor's answer brief p. 19.

infinitives "to favor" and "to disfavor." Since the verb "be drawn" in the summary lacks the critical modifier present in the text — "with the intent" — it necessary means "be drawn" with the *effect* to favor or to disfavor incumbents or parties. Consequently the summary is vague and misleading on its face.

The sponsors' contention that there is no significant difference between the summary's use of the words "city and county boundaries" and the amendment text's reliance on "political boundaries" is without foundation. The two terms are not synonymous. "Political boundaries" includes city and county boundaries, but those of other political subdivisions as well. Moreover, the term "political boundaries" as used in this context is vague and misleading, a point even the sponsors admit.

The sponsors also treat the words "and" and "or" as though they mean the same thing, when they do not. Because the summary uses the word "and" to connect to unrelated elements, it implies that both conditions must be satisfied to make for an acceptable plan. The text's use of "or," however, means that only one of two conditions must be satisfied to render an acceptable plan.

The sponsors offer no argument that the term "language minorities" is a legal term of art that requires definition, and is vague and misleading.

The sponsors mischaracterize our argument about the amendment's effect on the courts. The point is not that the courts will be required to interpret the Constitution in any post-redistricting lawsuit. Rather, it is that the amendment effectively shifts the power and duty to conduct redistricting onto the courts.

The summary gives two misleading negative implications: 1) that there are no constitutional provisions addressing unequal treatment, and 2) that the Legislature is presently discriminating against classes of voters. Summaries that create such negative implications are routinely stricken.

The summary fails to advise voters that the amendment substantially curtains the Legislature's authority under Article 1, s. 4, U.S. Constitution, to regulate elections to Congress, subject only to Congress' power to regulate such elections.

ARGUMENT

I. The proposed amendment violates the one subject rule.

A. Logrolling.

Nothing the sponsors have said undermines the fact that the proposed amendment easily falls within the reach of In re Advisory Opinion to the Attorney General — Restricts Laws Related to Discrimination, 632 So.2d 1018 (Fla. 1994). A close analysis of the proposal demonstrates that it is more like that in Laws Related to Discrimination than any of the cases cited by the sponsors — and just as flawed.

It is worth remembering that the amendment requires the following:

1. No plan or district shall be drawn with the intent to favor or disfavor a political party.
2. No plan or district shall be drawn with the intent to favor or disfavor an incumbent.
3. No plan or district shall be drawn with the intent or result of denying or abridging the equal opportunity of racial minorities to participate in the political process or to diminish their ability to elect representatives of their choice.
4. No plan or district shall be drawn with the intent or result of denying or abridging the equal opportunity of language minorities to participate in the political process or to diminish their ability to elect representatives of their choice.
5. Districts shall consist of contiguous territory.

The second paragraph would establish these independent, freestanding standards, which are to be met unless doing so conflicts with a requirement in paragraph 1 or with federal law:

6. Districts shall be as nearly equal in population as is practicable.
7. Districts shall be compact.
8. Districts shall, where feasible, utilize political and geographic boundaries.

Thus, the amendment establishes eight independent requirements for any apportionment plan.

But if one looks at these requirements more closely, we see that they address two discrete, but broad, subjects: anti-discrimination (1, 2, 3, 4, 6) and geographic integrity (5, 7, 8).[2]

The anti-discrimination requirements provide protection for five different classes:

- Political parties.
- Non-incumbents.
- Racial minorities.
- Language minorities.

[2] Although the Legislature suggested in its initial brief that one might see five broad general purposes, if one is generous perhaps as few as two are apparent.

- All voters, who apparently are to be entitled to the most stringent interpretations of the "one person/one vote" requirement of the equal protection clause. (However, the one/person, one/vote standard is already strictly applied in congressional redistricting.[3])

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[3] Karcher v. Daggett, 462 U.S. 725, 730 (1983):

> Article I, § 2 establishes a "high standard of justice and common sense" for the apportionment of congressional districts: "equal representation for equal numbers of people." Wesberry v. Sanders, 376 U.S. 1, 18, 84 S.Ct. 526, 535, 11 L.Ed.2d 481 (1964). Precise mathematical equality, however, may be impossible to achieve in an imperfect world; therefore the "equal representation" standard is enforced only to the extent of requiring that districts be apportioned to achieve population equality "as nearly as is practicable." See id., 376 U.S., at 7-8, 18, 84 S.Ct., at 530, 535. As we explained further in Kirkpatrick v. Preisler, supra:
>
> > "[T]he 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality. See Reynolds v. Sims, 377 U.S. 533, 577 [84 S.Ct. 1362, 1390, 12 L.Ed.2d 506] (1964). Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small." 394 U.S., at 530-531, 89 S.Ct., at 1228-1229.
>
> Article I, § 2, therefore, "permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." Id., 394 U.S., at 531, 89 S.Ct., at 1229. Accord, White v. Weiser, 412 U.S., at 790, 93 S.Ct., at 2352.

The proposal at issue in Laws Related to Discrimination prohibited all governmental entities from enacting "any law regarding discrimination against persons which creates, establishes or recognizes any right, privilege or protection for any person based upon any characteristic, trait, status, or condition other than race, color, religion, sex, national origin, age, handicap, ethnic background, marital status or familial status." Id. at 1019. The Court rejected the proponents' contention that the measure addressed the single subject of discrimination. In fact, the Court concluded that the label "discrimination" was merely an unacceptable "broad generality" which could not be relied on to sail past the one subject bar. Id. at 1020. The Court rejected the amendment for several reasons, but for our purposes, it is significant that the Court found that the amendment was an exercise in logrolling because "it enumerates ten classifications of people that would be entitled to protection from discrimination if the amendment were passed." Id. The enumeration of these classifications required "voters to choose which classifications they feel most strongly about, and then [required] them to cast an all or nothing vote on the classifications listed in the amendment." Id.

The amendment before us today forces voters to make the same sort of choice. It proposes a "broad generality" as a chief purpose, then enumerates eight standards for redistricting, five of which provide anti-discrimination protections to

distinct classes in the same way as the amendment in Laws Related to Discrimination. Voters must accept or reject the entire package, although they may agree with one classification but strongly disagree with another.

Moreover, the proposal in fact has two chief purposes grouped within a single "broad generality": anti-discrimination and geographic integrity, objectives that aim at two different targets, forcing voters to make yet another choice among disparate issues. See e.g., Advisory Opinion to the Attorney General re Amendment to Bar Government from Treating People Differently Based on Race in Public Education, 778 So.2d 888, 893 (Fla. 2000).

The sponsors' cases are distinguishable. In all but two cases, the question whether standards for implementation of the proposed amendment constituted logrolling was not an issue raised by any of the parties or discussed by the Court. And even the two cases that come close have different facts.

In Advisory Opinion to the Atty. Gen. re: Protect People, Especially Youth, from Addiction, Disease, and Other Health Hazards of Using Tobacco, 926 So.2d 1186 (Fla. 2006), the proposal aimed at regulating the use of money received under a settlement with tobacco companies. It established a program intended to discourage young people from smoking. The amendment required four components of this education and prevention education program: an anti-smoking advertising

campaign, an "evidence-based curricula" to educate young people about smoking hazards, programs involving community-based partnerships, and the enforcement of anti-smoking laws. Id. at 1189. The Court concluded that these program elements did not constitute logrolling. The Court found that the components were related to the single unifying purpose of the amendment and did not combine unrelated provisions, some of which are popular and some not. Id. at 1191. These four program components were not controversial; they provided general rather than specific directives; they did not deprive the Legislature or the executive branch of discretion on how to carry out the program; and they provided no protection for any group or classification. In short, the components are what any reasonable anti-smoking program would contain to fulfill its objectives and thus are reasonably related to the amendment's chief purpose. That is, they all aim in a single direction and have a single, unified goal.

In Advisory Opinion to the Attorney General re Limited Casinos, 644 So.2d 71 (Fla. 1994), the proposed amendment sought to allow privately-run casino gambling in nine counties. Id. at 73. The amendment dictated the size, number and type of casino permitted in each county as well. Id. The Court concluded that, despite this level of detail, the amendment addressed a single subject (private casino gambling) and "does not combine subjects which are dissimilar so as to

require voters to accept one proposition they might not support in order to vote for one they favor." The court went on to say the details addressing number, size, location and type of facility "only serve to provide the scope and implementation of the initiative proposal. These features properly constitute matters directly and logically connected to the subject of the amendment." Id.

Taking all these cases together, the Court clearly views anti-discrimination amendments aimed at providing protections to different classes to contain separate, independent subjects — one subject for each class. This makes sense, since they aim at different targets and require "voters to choose which classifications they feel most strongly about, and then [required] them to cast an all or nothing vote on the classifications listed in the amendment." Laws Related to Discrimination, 632 So.2d at 1019.

Ending discrimination or having voting standards thus is a broad generality that will not by itself constitute the chief objective of an amendment for one subject purposes. The Court has taught us in its one subject cases that the task is to look at the goal of each individual standard. Where all the standards serve the same purpose, they pass constitutional muster. But where each serves a separate purpose, has an independent target or are so controversial that voters may disagree with some standards but not others, they do not. Thus, where ending discrimination

against a defined class is the goal and each standard protects a distinct class, then each standard has a separate independent purpose.

That is the case here. Therefore, the current proposal violates the single subject requirement, as applied by this Court in Laws Related to Discrimination.

B. Shifting the burden of redistricting to the courts.

The sponsors raise a straw man argument that no one can reasonably disagree with: that the courts have an obligation to interpret the Constitution and the proposal does not require more than that. But this is not the point.

The point is that the practical effect of the amendment shifts to the courts the burden of redistricting, a purely legislative duty under the U.S. Constitution. The amendment also will substantially burden the courts because it will open every redistricting plan to challenge and judicial rewriting.

As we pointed out in detail in our initial brief, it is impossible to create a redistricting plan that does not favor or disfavor parties or incumbents. Even the sponsors admit this is true. Sponsors' answer brief, p. 20: "The sponsor of this amendment recognizes that any district — no matter now neutral the drafter — will

favor or disfavor someone." The sponsors go on to say they "[know] that it is impossible to remove political favoritism from the redistricting process . . ."[4]

Acts that have a discriminatory effect legally give rise to an inference that they were intentional. See e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Patterson v. McLean Credit Corp. 491 U.S. 164, 186-187 (1989) (discriminatory acts raise presumption of discriminatory intent).

Consequently *every* congressional redistricting plan can, and undoubtedly will, be challenged, vastly increasing judicial involvement in what the Founders intended to be a *purely legislative process* and in many, if not most cases, resulting in judicial redrafting of apportionment plans. It is acceptable under the U.S. Constitution that the courts must occasionally impose redistricting plans, but it will offend the Constitution if they are must routinely do so. League of United Latin American Citizens v. Perry, 548 U.S. 399, 415 (2006).

C. Affecting other constitutional provisions.

The Legislature's initial brief discussed at length how the proposed amendment disrupts established constitutional provisions, among them Article 1, s. 2; and Article 3, ss. 2, 3, 4 and 7, Fla.Const. — and Article 1, s. 4, U.S. Const.

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[4] This being so, the courts open themselves up to accusations of political favoritism if they become regular players in redistricting.

The sponsors' response is an insubstantial argument that because the Florida Constitution does not mention congressional redistricting, no harm to any other constitutional provisions can possibly occur.

This is a logical absurdity. The question is not whether a particular provision existed before. In fact, when amending the Constitution the point often is to add *new* provisions. The point is whether the amendment substantially affects an existing provision. As pointed out in the Legislature's initial brief, this amendment certainly substantially affects several existing constitutional provisions, as well as the Legislature's role under the U.S. Constitution (subject to Congress' authority and the U.S. Constitution) to regulate elections to the House of Representatives.

Consequently, the proposed amendment plainly and materially affects existing constitutional provisions without giving voters notice of its substantial changes to the state's constitutional fabric.

II. The ballot title and summary are defective.

The need for a fully informative, objective ballot summary is critical to the amendment processes. Without such a summary, voters cannot, and will not, make informed choices:

> The citizen initiative constitutional amendment process relies on an accurate, objective ballot summary for its legitimacy. Voters deciding

> whether to approve a proposed amendment to our constitution never see the actual text of the proposed amendment. They vote based only on the ballot title and the summary. Therefore, an accurate, objective, and neutral summary of the proposed amendment is the sine qua non of the citizen-driven process of amending our constitution.

Advisory Opinion of the Attorney General re Additional Homestead Tax Exemption, 880 So.2d 646, 653-654 (Fla. 2004).

A. "Drawn to favor" vs. "drawn with the intent to favor."

The sponsors make a faux grammatical argument that the phrase "drawn to favor" is the functional equivalent of the actual language of the amendment, "drawn *with the intent* to favor . . ." According to the sponsor, "to" in "drawn to" is "consistent" with the phrase "with intent to."[5]

The crux of their position is that "to" modifies "drawn." This is grammatically absurd. In fact, the "to" is part of the infinitives "to favor" and "to disfavor." The pertinent sentence in the summary unpacks this way:

[5] Sponsor's answer brief p. 19.

- Congressional districts and district plans [the subjects][6]
- may [modal auxiliary verb of permission][7]
- not [negative adverb]
- be drawn [past participle of "to draw"][8]
- *to* favor [infinitive verb][9]
- or [conjunction]
- *to* disfavor [infinitive verb][10]
- an incumbent or political party [objects].[11]

It should now be obvious that the critical verb is "be drawn," not "drawn to." However, the summary lacks the adverbial phrase[12] "with the intent," which in the amendment itself modifies "be drawn." The absence of this adverbial phrase significantly alters the meaning of the summary. Since "be drawn" in the summary

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[6] Harbrace College Handbook (12 ed.) (Harcourt Brace 1994), p. 5.

[7] Id., p. 77.

[8] Id., pp. 77-78, 83-84. Here "be" is a modal auxiliary verb modifying the past participle "draw" to render the passive voice.

[9] Id., p. 90.

[10] Id.

[11] Id. p. 6.

[12] Id., p. 20.

is not limited by "with the intent," it necessary means that districts cannot be drawn with the *effect* of favoring or disfavoring a party or incumbent.

Even if one shrinks from reading the summary this way, "be drawn" is at best ambiguous, since it can have more than two meanings. Since it reasonably can have more than two meanings, it is vague. Such vagueness misleads the voter.

B. Political boundaries.

The sponsors contend that the proposed amendment will merely require districts to be "community based." Since, they claim, this is the gist of the amendment, voters are not misled by the very different term used in the summary: "city and county boundaries" versus "political boundaries" in the actual amendment.

Here, the sponsors invite the Court to journey with them into the land of wishful thinking. In fact, they do not even understand their own amendment. As we already pointed out in our initial brief, "political boundaries" is not synonymous with the term "city or county boundaries." The first term embraces polities of a far different sort than the second, so that the use of "city/county boundaries" in the summary constitutes a materially misleading deviation from the language of the amendment. But even more significant, the sponsors admit that the term "political boundaries" is ambiguous and confusing: "The term 'political boundaries' in the

summary would likely be confusing to voters . . ."[13] Given the sponsors' concession that the term is ambiguous and confusing, their belief that the amendment requires "community based" districts lacks any foundation. Nothing in the term "political boundaries" necessarily requires an effort to draw "community based" districts. Thus, the gist supposedly given by the summary is an illusion.

Just as important, the concession points out that even the sponsors understand that "political boundaries" and "city/county boundaries" are materially different terms that cannot be substituted for each other. In fact, the sponsors apparently do not have any idea what the term "political boundaries" really means.

To sum up, although the summary makes the promise that districts will adhere to city and county boundaries, the amendment imposes no such restriction.

The difference is material, and the summary works a classic bait-and-switch.

C. And/or.

The sponsors make another false grammatical argument that a critical "or" in the amendment actually means "and," as stated in the summary. But "or" in everyday English does not mean "and." It means something altogether different. By using "and" instead of "or" in the summary, an important meaning is changed and voters are misled.

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[13] Sponsors' answer brief, p. 22.

The critical sentence of the summary is: "Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process *and* elect representatives of their choice." But in the amendment itself the italicized "and" is an "or."

The sponsors argue that the "not" in the amendment, which converts the verb to a negative command, means that there is no choice between the two final elements of the sentence: participating in the political process, electing representatives of their choice.

Unfortunately, the grammar police will not agree with this view. "And" and "or" do not mean the same thing, regardless of whether there is a "not" lurking about. "And" means "together with or along with; in addition to; as well as. Used to connect words, phrases or clauses having the same grammatical function in a construction."[14] On the other hand, "or" is "used to indicate an alternative, usually only before the last term in a series: hot or cold; this, that, or the other."[15] Consequently, "this and that" means both together; "this or that" means one but not the other.

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[14] The American Heritage Dictionary of the English Language (4th ed.) (Houghton Mifflin Co. 2000), p. 66.

[15] Id., p. 1236.

The Court in Armstrong v. Harris, 773 So.2d 7 (Fla. 2000), understood this simple grammatical difference very well, which is why the case came out the way it did — for whether a passage contains an "and" instead of an "or" will substantially change its meaning.

Here, the plain, ordinary sense of the summary is that both conditions must be satisfied: district lines must be drawn so that racial and language minorities have equal opportunities to participate in the political process *in addition to* being able to elect their choice of representative. That is to say, unless both conditions are met, a plan fails.

But the amendment requires only the satisfaction of one condition to make for a successful plan.

Therefore, replacing the "or" with an "and" substantially changes the description of the amendment and on its face misleads voters.

As the sponsors point out, "Where the difference in summary terminology would lead a reader to a different understanding of the substance of the amendment, there may be grounds for invalidation."[16]

There are more than enough such grounds on this point, and on others.

D. Language minorities.

---

[16] Sponsors' answer brief, p. 23.

The sponsors offer no meaningful rebuttal to our contention that the term "language minorities" in the summary is a technical term of art that should be defined for the voter, but is not, and is vague and misleading on its face.

E. Failure to describe the impact on the courts.

The sponsors mischaracterize our argument about the amendment's effect on the courts. The point is not that the courts will be required to interpret the Constitution in any post-redistricting lawsuit. Rather, it is that the amendment effectively shifts the power and duty to conduct redistricting onto the courts. The sponsors have no rebuttal for that point.

In fact, Laws Related to Discrimination, 632 So.2d at 1023 , Justice Kogan concurring, should control the outcome: "Our case law has established that serious undisclosed collateral effects of an initiative can be reason enough to remove it from the ballot. Florida League of Cities v. Smith, 607 So.3d 397, 399 (Fla. 1992)."

F. Failure to identify affected existing laws and constitutional provisions.

This point is controlled by Advisory Opinion to the Attorney General, re Amendment to Bar Government from Treating People Differently Based on Race in Public Education, 778 So.2d 888, 898 (Fla. 2000). There, the Court invalidated a proposed amendment because its summary gave two misleading negative implications:

1. That no constitutional provision addressing differential treatment existed.

2. That "the government is presently practicing discrimination."

The proposal before use raises both negative implications.

First, the state and federal equal protection clauses apply to any redistricting plan. The proposal implies that they do not. Moreover, as applicable to the states through the U.S. Constitution's Supremacy Clause, the federal Voting Rights Act regulates redistricting relating to racial and "language minorities."[17] But the proposed amendment implies that no similar limitations on legislative discretion exist — when they unmistakably do. This is the same sort of negative implication that justified striking the amendment in Race in Public Education.

Second, the summary clearly creates a negative implication that the Legislature is discriminating against racial and language minorities when it is not.

G. Failing to advise voters of limitations on the Legislature's discretion.

The proposed amendment substantially diminishes the Legislature's authority granted by Article 1, s. 4, U.S. Constitution. That federal constitutional provision grants the Legislature plenary authority, subject only to congressional restrictions, to arrange for elections to the House of Representatives. The voters must be

[17] Legislature's initial brief, p. 35.

advised that a vote for this amendment substantially curtails the Legislature's fundamental authority under the founding document of the country. The failure to advise voters of this fact is misleading.

In fact, in Laws Related to Discrimination, 632 So.2d at 1021, the court invalided an initiation proposal in part because the "summary also fails to state that the proposed amendment would curtail the authority of government entities."

CONCLUSION

For these reasons, the petition fails the one-subject requirement and contains a defective ballot title and summary. Consequently, the court should order it stricken from the ballot.

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, on August 20, 2008.

_____
Jason Vail

CERTIFICATE OF TYPE SIZE AND STYLE

The brief is printed in 14 point Times New Roman.

_____
Jason Vail

IN THE SUPREME COURT OF FLORIDA

Case No. SC08-986
SC08-1149

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING CONGRESSIONAL BOUNDARIES

_____/

REQUEST FOR ORAL ARGUMENT

The Legislature requests to be heard in SC08-986 and SC08-1149.

RESPECTFULLY SUBMITTED,

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_____
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IN THE SUPREME COURT OF FLORIDA

Case No. SC08-1149

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING CONGRESSIONAL BOUNDARIES

_____/

AMENDED CERTIFICATE OF SERVICE

I hereby certify that a copy of the Legislature's answer brief in this matter was served by U.S. mail on John Mills and Timothy McLendon, PO Box 2099, Gainesville, FL 32602-2099, on August 21, 2008. They were omitted from the initial certificate by mistake.

RESPECTFULLY SUBMITTED,

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_____
Jason Vail

Supreme Court of Florida

FRIDAY, AUGUST 22, 2008

CASE NOS.: SC08-986; SC08-1163;
SC08-1149; SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES & (FIS)

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING & (FIS)

At the direction of the Court, the above cases which were scheduled for oral argument on November 5, 2008, have been rescheduled for oral argument at 9:00 a.m., Thursday, November 6, 2008. A maximum of twenty minutes to the side as consolidated is allowed for the argument, but counsel is expected to use only so much of that time as is necessary.

A True Copy
Test:

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Clerk, Supreme Court

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HON. KURT S. BROWNING
HON. MARCO ANTONIO RUBIO
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JON L. MILLS
MARK HERRON

IN THE SUPREME COURT OF FLORIDA
Case Nos. SC08-986; SC08-1163; SC08-1149; SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL
RE: STANDARDS FOR ESTABLISHING
LEGISLATIVE DISTRICT BOUNDARIES & (FIS)

ADVISORY OPINION TO THE ATTORNEY GENERAL
RE: STANDARDS LEGISLATURE TO FOLLOW IN
CONGRESSIONAL REDISTRICTING & (FIS)

_____/

MOTION TO EXPAND TIME FOR ORAL ARGUMENT
FairDistrictFlorida.org

FairDistrictFlorida.org, as an Interested Party and Proponent of these initiative petitions, pursuant to Rules 9.300 and 9.320, Florida Rules of Appellate Procedure, respectfully moves this Court for an expansion of time, seeking an additional ten (10) minutes of oral argument for each side on November 6, 2008.

1. In the original order of June 25, 2008, this Court set oral argument for the Congressional Redistricting initiative (Case SC08-1149) and its accompanying Financial Impact Statement (Case SC08-1163). At that time, this Court also set the same oral argument for purposes of the Legislative Districts initiative Financial Impact Statement (Case SC08-11-65). No provision was made at that time for oral argument for the Legislative Districts initiative.

2. On July 31, 2008, this Court granted FairDistrictFlorida.org's motion to consolidate all four of these cases for purposes of oral argument, granting twenty minutes of time for each side, and setting oral argument for November 5, 2008.

3. On August 22, 2008, this Court rescheduled the oral argument for these consolidated cases to November 6, 2008.

4. The Florida Legislature has filed briefs in opposition to both the Congressional Redistricting and the Legislative Districts initiatives, and has asked to participate in oral argument.

5. FairDistrictsFlorida.org filed briefs supporting both initiatives, and also filed briefs challenging the financial impact statements.

6. This Court has allotted a total of only twenty minutes of oral argument for each of the initiatives and their accompanying financial impact statements.

7. Because the time allotted for all four cases may not be sufficient to address both the initiative petitions and their accompanying financial impact statements, FairDistrictsFlorida.org asks this Court to expand oral argument from twenty (20) to thirty (30) minutes per side.

8. The undersigned counsel has conferred with counsel for the Florida Legislature regarding this motion to expand the time for oral argument and represents that counsel for the Legislature does not object to this request.

WHEREFORE, FairDistrictsFlorida.org, as an interested party in this case, respectfully requests that oral argument on November 6, 2008 be expanded to thirty (30) minutes for each side.

Respectfully submitted by:

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Counsel for Sponsor, FairDistrictsFlorida.org

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail this, _____ day of September, 2008 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.

_____
Attorney

Supreme Court of Florida

MONDAY, SEPTEMBER 15, 2008

CASE NOS.: SC08-986; SC08-1163
SC08-1149; SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES & (FIS)

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING & (FIS)

FairDistrictFlorida.org's motion to expand time for oral argument is hereby granted. A maximum of thirty minutes to the side is allowed for the argument, but counsel is expected to use only so much of that time as is necessary.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

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EDWIN THOM RUMBERGER
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JEREMIAH M. HAWKES

IN THE SUPREME COURT OF FLORIDA

Case No. SC08-986, SC08-1149

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING CONGRESSIONAL BOUNDARIES

_____/

NOTICE OF SUPPLEMENTAL AUTHORITY

The opponents to the amendments provide the following supplemental authority, pursuant to Fla.R.App.P. 9.225. Chisom v. Roemer, 501 U.S. 380 (1991), is relevant to the discussion of the use of "and" in the ballot summaries rather than the "or," which appears in the text. The amendments' text reads in part, "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process **or** to diminish their ability to elect representative of their choice." This language is virtually identical to that in the federal Voting Rights Act, 42 U.S.C. s. 1973(b). On the significance of and/or distinction in the act, the Supreme Court said:

> Any abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence

the outcome of an election. As the statute is written, however, the inability to elect representatives of their choice is not sufficient to establish a violation unless, under the totality of the circumstances, it can also be said that the members of the protected class have less opportunity to participate in the political process. The statute does not create two separate and distinct rights. Subsection (a) covers every application of a qualification, standard, practice, or procedure that results in a denial or abridgment of " the right " to vote. The singular form is also used in subsection (b) when referring to an injury to members of the protected class who have less "opportunity" than others "to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973 (emphasis added). It would distort the plain meaning of the sentence to substitute the word "or" for the word "and." Such radical surgery would be required to separate the opportunity to participate from the opportunity to elect.

Chisom v. Roemer, at 397.

RESPECTFULLY SUBMITTED,

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_____

Jason Vail

Supreme Court of Florida

TUESDAY, OCTOBER 21, 2008

CASE NOS.: SC08-986

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES

CASE NOS.: SC08-1149

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING

The Florida Legislature's Notice of Supplemental Authority does not comply with Florida Rule of Appellate Procedure 9.225 and is hereby stricken as it does not contain a copy of the cited authority.

A True Copy
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Thomas D. Hall
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BARRY S. RICHARD

Supreme Court of Florida

FRIDAY, OCTOBER 24, 2008

CASE NOS.: SC08-986

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES

CASE NOS.: SC08-1149

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING

The Florida Legislature's Notice of Supplemental Authority does not comply with Florida Rule of Appellate Procedure 9.225 and is hereby stricken as it contains argument.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

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HON. MARCO ANTONIO RUBIO
HON. KEN PRUITT
M. HOPE KEATING
HON. BILL MCCOLLUM
BARRY S. RICHARD

Supreme Court of Florida

No. SC08-986

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES.

No. SC08-1149

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING.

[January 29, 2009]
CORRECTED OPINION

LEWIS, J.

The Attorney General of Florida has requested an opinion from this Court with regard to the validity of two initiative petitions sponsored by FairDistrictsFlorida.org, a political committee. We have jurisdiction. See art. IV, § 10, art. V, § 3(b)(10), Fla. Const. We conclude that the proposed amendments comply with the single-subject requirement of article XI, section 3 of the Florida Constitution, and that the ballot titles and summaries comply with section 101.161(1), Florida Statutes (2008).

I. THE PROPOSED AMENDMENTS

The two amendments and their respective ballot titles and summaries are nearly identical except for references to legislative versus congressional boundaries. The full text of the proposed amendment that governs legislative-district boundaries states:

> Section 21. Add a new Section 21 to Article III
>
> STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES
>
> In establishing Legislative district boundaries:
>
> (1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
>
> (2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
>
> (3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

The ballot title for this proposed initiative is:

> STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE REDISTRICTING.

The ballot summary provides:

Legislative districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

The full text of the proposed amendment that governs congressional-district boundaries states:

Add a new Section 20 to Article III

Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES

In establishing Congressional district boundaries:

(1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

(2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

(3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

The ballot title for this proposal is:

STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING.

The ballot summary provides:

> Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

II. ANALYSIS

A. Single-Subject Requirement

Article XI, section 3 of the Florida Constitution provides: "The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that, any such revision or amendment, except for those limiting the power of government to raise revenue, shall embrace but one subject and matter directly connected therewith." (Emphasis supplied.) This Court has previously explained the rationale behind the single-subject requirement:

> The single-subject limitation exists because the initiative process does not provide the opportunity for public hearing and debate that accompanies the other methods of proposing amendments. Consequently, "[the] single-subject provision is a rule of restraint designed to insulate Florida's organic law from precipitous and cataclysmic change." This Court requires "strict compliance with the single-subject rule in the initiative process for constitutional change because our constitution is the basic document that controls our governmental functions, including the adoption of any laws by the legislature." The single-subject requirement also prevents logrolling, a practice that combines separate issues into a single proposal to secure passage of an unpopular issue. Thus, voters are protected by the single-subject requirement because they are not forced to "accept

> part of an initiative proposal which they oppose in order to obtain a change in the constitution which they support."

Advisory Op. to Att'y Gen. re Amendment to Bar Gov't From Treating People Differently Based on Race in Pub. Educ., 778 So. 2d 888, 891 (Fla. 2000) (citations omitted) (quoting In re Advisory Op. to Att'y Gen.—Save Our Everglades, 636 So. 2d 1336, 1339 (Fla. 1994); Fine v. Firestone, 448 So. 2d 984, 988-89 (Fla. 1984)). To determine whether a proposed amendment addresses a single subject, this Court must evaluate whether the proposal "may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme." Advisory Op. to Att'y Gen. re Patients' Right to Know About Adverse Med. Incidents, 880 So. 2d 617, 620 (Fla. 2004) (quoting Fine v. Firestone, 448 So. 2d 984, 990 (Fla. 1984)).

A proposed amendment is not invalid merely because it affects more than one branch of government or may interact with other provisions of the Florida Constitution. See Advisory Op. to Att'y Gen. re Limited Casinos, 644 So. 2d 71, 74 (Fla. 1994) ("[W]e find it difficult to conceive of a constitutional amendment that would not affect other aspects of government to some extent."). We have further explained that "the fact that [a] branch of government is required to comply with a provision of the Florida Constitution does not necessarily constitute the usurpation of the branch's function within the meaning of the single-subject rule." Advisory Op. to Att'y Gen. re Protect People, Especially Youth, From Addiction,

Disease, & Other Health Hazards of Using Tobacco, 926 So. 2d 1186, 1192 (Fla. 2006). Rather, "it is when a proposal substantially alters or performs the functions of multiple branches that it violates the single-subject test." Patients' Right to Know, 880 So. 2d at 620. Finally, speculation about possible impacts of a proposed amendment on other branches of government is premature when determining whether a proposed amendment, on its face, meets the single-subject requirement. See In re Advisory Op. to Att'y Gen. re English—The Official Language of Fla., 520 So. 2d 11, 13 (Fla. 1988) (approving placement of proposed amendment on the ballot even where "the amendment could have broad ramifications" because, "on its face[,] it deals with only one subject").

With regard to reapportionment, article III, section 16(a) of the Florida Constitution currently provides, in relevant part:

> (a) SENATORIAL AND REPRESENTATIVE DISTRICTS. The legislature at its regular session in the second year following each decennial census, by joint resolution, shall apportion the state in accordance with the constitution of the state and of the United States into not less than thirty nor more than forty consecutively numbered senatorial districts of either contiguous, overlapping or identical territory, and into not less than eighty nor more than one hundred twenty consecutively numbered representative districts of either contiguous, overlapping or identical territory.

We conclude that the proposed amendments (1) encompass a single subject, (2) do not engage in logrolling, and (3) do not substantially alter the functions of multiple branches of government. The proposed amendments address a single function of a

single branch of government—establishing additional guidelines for the Legislature to apply when it redistricts legislative and congressional boundaries. This Court has previously stated that under the state and federal Constitutions, the only requirements for a redistricting plan are: (1) compliance with the equal protection standard of one-person, one-vote—i.e., that "legislatures be apportioned in such a way that each person's vote carries the same weight"; and (2) that districts consist of contiguous, overlapping, or identical territory. In re Constitutionality of House Joint Resolution 1987, 817 So. 2d 819, 824-25 (Fla. 2002) (quoting In re Constitutionality of Senate Joint Resolution 2G, 597 So. 2d 276, 278 (Fla. 1992)).

Logrolling- Although the Legislature contends that the proposals violate the single-subject rule because they implement multiple reapportionment standards, such an interpretation of the rule is far too narrow. The overall goal of the proposed amendments is to require the Legislature to redistrict in a manner that prohibits favoritism or discrimination, while respecting geographic considerations. Although the proposed amendments delineate a number of guidelines, we conclude that these components possess "a natural relation and connection as component parts or aspects of a single dominant plan or scheme." Patients' Right to Know, 880 So. 2d at 620 (quoting Fine, 448 So. 2d at 990).

The instant case is distinguishable from others in which this Court has determined that proposals have violated the single-subject requirement. For example, in In re Advisory Opinion to Attorney General—Restricts Laws Related to Discrimination, 632 So. 2d 1018, 1019 (Fla. 1994) (Discrimination), the proposed amendment sought to prohibit discrimination based on ten separate classifications—race, color, religion, sex, national origin, age, handicap, ethnic background, marital status, and familial status. While the sponsor contended that the amendment addressed the single subject of discrimination, we rejected this contention and instead concluded that the proposal "enfold[ed] disparate subjects within the cloak of a broad generality" in violation of the single-subject requirement. Id. at 1020 (quoting Evans v. Firestone, 457 So. 2d 1351, 1353 (Fla. 1984)). We explained:

> The voter is essentially being asked to give one "yes" or "no" answer to a proposal that actually asks ten questions. For example, a voter may want to support protection from discrimination for people based on race and religion, but oppose protection based on marital status and familial status. Requiring voters to choose which classifications they feel most strongly about, and then requiring them to cast an all or nothing vote on the classifications listed in the amendment, defies the purpose of the single-subject limitation.

Id. at 1020. Unlike the provision in Discrimination, the proposals in the instant cases do not group multiple subjects under the cloak of "redistricting." Rather, they address solely the guidelines to be applied in legislative and congressional reapportionment. Thus, the instant proposals are also distinguishable from the

proposed amendment in Advisory Opinion to Attorney General re Independent Nonpartisan Commission to Apportion Legislative & Congressional Districts Which Replaces Apportionment by Legislature, 926 So. 2d 1218 (Fla. 2006) (Nonpartisan), which we determined to be in violation of the single-subject requirement. The proposal in Nonpartisan sought not only to implement redistricting standards, but to also create an entirely new commission to replace the Legislature as the entity responsible for reapportionment in Florida. See id. at 1225. The proposed amendments here do not encompass two such disparate functions.

The proposed amendments here are more similar to proposals we have previously approved because they encompassed a single plan and merely enumerated various elements necessary to accomplish that plan. In Health Hazards of Using Tobacco, 926 So. 2d at 1189, this Court approved for placement on the ballot a proposed amendment that would create a comprehensive statewide tobacco education and prevention program. The program was designed to encompass an advertising campaign, the creation of programs to educate youth about tobacco, enforcement of laws against the sale of tobacco to minors, and annual evaluations of the effectiveness of the program. See id. Further, the proposal included a provision which required that the Legislature appropriate fifteen percent of the gross funds collected from a tobacco settlement to the program. See id. This

Court held that despite the various components, the proposal did not engage in logrolling:

> It addresses a single comprehensive plan for the education of youth about the health hazards related to tobacco. Although this plan includes a list of components such as advertising, school curricula, and law enforcement, all of these components are related to the single unifying purpose. It does not "combine subjects in such a manner as to force voters to accept one proposition they might not support in order to vote for one they favor." Advisory Op. to Att'y Gen. re Fla.'s Amendment to Reduce Class Size, 816 So. 2d 580, 583 (Fla. 2002). In other words, the proposed amendment does not combine unrelated provisions, some of which are popular and others that may be disfavored.

Id. at 1191-92. Similarly, here, the various components within the proposed amendments are directed to the single unified purpose of establishing standards by which legislative and congressional districts are to be drawn. Accordingly, we hold that the proposed amendments address a single subject.

Multiple Government Functions- The Legislature next asserts that the proposals will essentially shift the duty of reapportionment to the judiciary and, therefore, the proposals impact multiple branches of government in violation of the single-subject rule. This contention is without merit. Under the Florida Constitution, after the Legislature drafts a reapportionment plan, the attorney general files a request with this Court for a "declaratory judgment" with regard to the validity of the plan. Art. III, § 16(c), Fla. Const. If this Court rejects the plan, the Governor must reconvene the Legislature for an "extraordinary apportionment

session," during which the Legislature must adopt a joint resolution that conforms to this Court's judgment. Id. § 16(d). If the extraordinary session fails to produce a resolution of apportionment, or if this Court holds that the subsequent apportionment is invalid, the Court "shall, not later than sixty days after receiving the petition of the attorney general, file with the custodian of state records an order making such apportionment." Id. § 16(f).

As noted by FairDistrictsFlorida.org, the Florida Constitution currently contains no guidelines for congressional districting. However, article I, section 2 of the United States Constitution provides: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ." The Fourteenth Amendment of the United States Constitution provides that "[r]epresentatives shall be apportioned among the several states according to their respective numbers." The United States Supreme Court has held that the federal Constitution "leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." Growe v. Emison, 507 U.S. 25, 34 (1993). In Wesberry v. Sanders, 376 U.S. 1, 4 (1964), the Supreme Court held that a one-person, one-vote constitutional challenge to congressional reapportionment by a state legislature is a justiciable issue.

The proposed amendments do not alter the functions of the judiciary. They merely change the standard of review to be applied when either the attorney

general seeks a "declaratory judgment" with regard to the validity of a legislative apportionment, or a redistricting plan is challenged. This effect of the proposed amendments does not constitute a substantial alteration of the functions of the judicial branch. See Health Hazards of Using Tobacco, 926 So. 2d at 1192 ("[T]he fact that [a] branch of government is required to comply with a provision of the Florida Constitution does not necessarily constitute the usurpation of the branch's function within the meaning of the single-subject rule.").

The contention of the Legislature that a redistricting plan can never comply with the amendment guidelines and, therefore, the role of reapportionment will always fall upon the courts—thereby substantially changing a function of the courts—is speculative argument. There is no basis that the judiciary will reject any redistricting plan that the Legislature adopts for failure to comply with the guidelines. We must assume the Legislature will comply with the law at the time an apportionment plan is adopted. Moreover, such speculation with regard to a possible impact of the proposals on the judicial branch is premature because we need only determine at this time whether the proposed amendments, on their face, satisfy the single-subject requirement. See English—The Official Language, 520 So. 2d at 13.

In light of the foregoing, we hold that the proposed amendments comply with article XI, section 3 of the Florida Constitution.

B. Ballot Title and Summary

The requirement that a ballot title and summary comply with section 101.161(1), Florida Statutes (2008), was recently explained by this Court as follows:

> [A]ny proposed constitutional amendment must be "accurately represented on the ballot; otherwise, voter approval would be a nullity." Armstrong v. Harris, 773 So. 2d 7, 12 (Fla. 2000). Section 101.161(1), Florida Statutes (2007), codifies this principle:
>
> > Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot . . . . Except for amendments and ballot language proposed by joint resolution, the substance of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure . . . . The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.
>
> (Emphasis supplied.) See also Askew v. Firestone, 421 So. 2d 151, 155 (Fla. 1982) ("[T]he voter should not be misled . . . . All that the Constitution requires or that the law compels or ought to compel is that the voter have notice of that which he must decide . . . . What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot." (alteration in original) (quoting Hill v. Milander, 72 So. 2d 796, 798 (Fla. 1954))) . . . . To determine whether the ballot title and summary of [the proposed amendment] satisfy the requirements of section 101.161, Florida Statutes (2007), the Court must consider two questions: "(1) whether the ballot title and summary, in clear and unambiguous language, fairly inform the voter of the chief purpose of the amendment; and (2) whether the language of the title and summary, as written, misleads the public." Advisory Opinion to Attorney Gen. re Prohibiting State

> Spending for Experimentation that Involves the Destruction of a Live Human Embryo, 959 So. 2d 210, 213-14 (Fla. 2007) (quoting Advisory Opinion to Attorney Gen. re Fla. Marriage Prot. Amendment, 926 So. 2d 1229, 1236 (Fla. 2006)). We do not consider, nor do we address, the substantive merit of the proposed amendment.
>
> . . . This Court has recognized that it must exercise extreme caution and restraint before removing a constitutional amendment from Florida voters. See Advisory Opinion to Attorney Gen. re Fla. Marriage Prot. Amendment, 926 So. 2d 1229, 1233 (Fla. 2006). We have further noted that we have no authority to inject this Court into the process, unless the laws governing the process have been "clearly and conclusively" violated. Advisory Opinion to the Attorney Gen. re Right to Treatment & Rehab. for Non-Violent Drug Offenses, 818 So. 2d 491, 498-99 (Fla. 2002).

Fla. Dep't of Rev. v. Slough, 992 So. 2d 142, 146-47 (Fla. 2008). Despite these various requirements, we have also noted that even though a ballot summary could have better explained the text of the amendment, that fact alone does not require a proposal to be struck:

> There is no requirement that the referendum question set forth the [text] verbatim nor explain its complete terms at great and undue length. Such [requirements] would hamper instead of aiding the intelligent exercise of the privilege of voting. Under our system of free elections, the voter must acquaint himself with the details of a proposed ordinance on a referendum together with the pros and cons thereon before he enters the voting booth. If he does not, it is no function of the ballot question to provide him with that needed education. What the law very simply requires is that the ballot give the voter fair notice of the question he must decide so that he may intelligently cast his vote.

Advisory Op. to Att'y Gen. re Right to Treatment & Rehab. for Non-Violent Drug Offenses, 818 So. 2d 491, 498 (Fla. 2002) (quoting Metro. Dade County v. Shiver, 365 So. 2d 210, 213 (Fla. 3d DCA 1978), aff'd sub nom. Miami Dolphins v.

Metro. Dade County, 394 So. 2d 981 (Fla. 1981)). Moreover, inadvertent use of different but clearly synonymous terms in the proposed amendment and the summary will not render a ballot summary fatally defective where "[t]he differing use of terminology could not reasonably mislead the voters." English—The Official Language, 520 So. 2d at 13 (use of the phrase "to implement this article" in the ballot summary not misleading where the text of the proposed amendment actually provided "to enforce this section" (alteration in original)).

The Legislature presents multiple claims that the ballot titles and summaries for the proposed amendments are misleading. We address each of those arguments.

Ballot title-The Legislature first asserts that the titles are misleading because they indicate that only the Legislature must comply with the new redistricting standards where, in fact, the judiciary will be similarly obligated to apply these standards when a legislative attempt at reapportionment fails and the courts are required to redraw the districts. We conclude that this challenge is without merit.

As previously discussed, the proposed amendments have one chief purpose: to provide the Legislature with guidelines to follow when it draws legislative and congressional boundaries. Thus, it is logical that the titles would only reference the Legislature. Although the Legislature might ultimately fail to comply with these standards, this contingency does not translate into a need for the ballot titles

to indicate that the standards apply to the judiciary. Rather, it can logically be presumed that if the Legislature fails to comply with the Constitution and follow the applicable standards, the entity responsible for redrawing the boundaries must also comply with these standards. The failure to mention the judiciary in the ballot titles does not render them misleading.

"Drawn to favor" vs. "Drawn with the intent to favor"- The amendment summaries provide that redistricting plans "shall not be drawn to favor or disfavor an incumbent or political party"; however, the body of the proposals provide that districting plans "shall not be drawn with the intent to favor or disfavor an incumbent or political party." (Emphasis supplied.) According to the Legislature, the summaries indicate that the effect of a reapportionment plan cannot be to favor or disfavor anyone or any party; however, under the proposed amendments, proof of intent to favor an incumbent or party must be demonstrated before a reapportionment plan will be rejected for noncompliance. The Legislature contends that the summaries are misleading because voters will believe that the proposals prohibit reapportionment plans whose effect is to favor a party or incumbent, while the amendments actually permit districts that favor a party or incumbent, provided that the district lines were drawn without intending that result.

We reject this assertion. The ballot summaries are currently seventy-four words in length. Hence, to add the words "with the intent" to the ballot summaries

would exceed the statutory word limit. Thus, at issue in this case is whether the omission of these three words from the summaries (likely in an attempt to comply with the statutory word limit) causes them to be fatally misleading. As previously noted, a ballot summary need not (and because of the statutory word limit, often cannot) explain "at great and undue length" the complete details of a proposed amendment, and some onus falls upon voters to educate themselves about the substance of the proposed amendment. Right to Treatment & Rehabilitation, 818 So. 2d at 498 (voters must acquaint themselves with the details of a proposed amendment together with the pros and cons thereon before they enter the voting booth and if they do not, it is no function of the ballot to provide that needed education). Here, the proposed amendments are relatively short and straightforward. The text clearly highlights that for a redistricting plan to run afoul of the proposals, the conduct by the Legislature must be intentional.

Additionally, such an intent requirement has been historically applied with regard to allegations of gerrymandering in reapportionment. For example, this Court has held that a discriminatory effect is not sufficient to prove racial discrimination in redistricting; rather, a discriminatory intent must be demonstrated:

> This invidious intent or purpose of racial discrimination, the Supreme Court explained, cannot be proved by merely showing that the group discriminated against has not elected representatives in proportion to its numbers. Disproportionate effects alone will not establish a claim

> of unconstitutional racial vote dilution. Rather, "[a] plaintiff must prove that the disputed plan was conceived or operated as a purposeful device to further racial discrimination." Proof of a discriminatory effect is not sufficient.

Milton v. Smathers, 389 So. 2d 978, 981-82 (Fla. 1980) (quoting City of Mobile v. Bolden, 446 U.S. 55, 66 (1980)). Thus, when implementing additional constitutional apportionment standards—here, that district boundaries not be drawn to favor a party or incumbent—it is logical to presume (and the text of the amendments require) that the intent of the entity that draws the districts must similarly be considered when determining whether those standards have been violated.

Moreover, to add the "with the intent" language to the proposed summaries would require removal of at least two other words for the summaries to comply with the seventy-five-word statutory limit. The Legislature fails to indicate which of the current seventy-four words could be removed without creating another claim that the summaries are vague or misleading. Indeed, it is likely impossible to draft summaries that explain all of the details sought by the Legislature within the statutory-word limit. While ideal summaries for these amendments might have included the words "with the intent," we conclude that—given the strict word limits—the failure of the summaries to include these three words does not render them so misleading as to clearly and conclusively violate section 101.161, Florida Statutes. See Right to Treatment & Rehabilitation, 818 So. 2d at 498 (holding that

failure of ballot summary to explain that proposed amendment is self-effectuating did not render the summary misleading and noting that "imperfection is not necessarily fatal given the seventy-five word statutory maximum").

Shift of Authority- The Legislature next contends that the summaries are misleading because they fail to mention that the proposed amendments divest the Legislature of its responsibility to draw legislative and congressional districts and transfer this role to the judiciary. However, we have already concluded that the proposed amendments do not substantially alter the functions of multiple branches of government. Rather, under the proposals, the judiciary maintains the same role as it has always possessed—to only review apportionment plans for compliance with state and federal constitutional requirements and to adjudicate challenges to redistricting plans. The proposed amendments do not shift in any way the authority of the Legislature to draw legislative and congressional districts to the judicial branch. Accordingly, the summaries are not misleading for the failure to mention this purported "effect" of the proposals.

"City/County" boundaries vs. "Political" Boundaries- The ballot summaries state that district boundaries shall, where feasible, utilize existing "city, county and geographical boundaries"; however, the body of the amendments provide that districts must use "existing political and geographical boundaries." (Emphasis supplied.) The Legislature asserts that the term "political boundaries"

encompasses more than city or county boundaries, and under the Florida Statutes, this State has many special districts—such as voting precincts and water-management districts—the borders of which would constitute "political boundaries." Thus, to the extent that the summaries use language inconsistent with that of the proposed amendments, the Legislature contends that they are misleading.

Although the phrase "political and geographical boundaries" used in the proposed amendments may be technically broader than the "city, county, and geographical boundaries" phrase used in the summaries, we conclude that this differing use of terminology could not reasonably mislead voters. The sponsor asserts that the terms "city" and "county" are utilized in the summaries because they are more understandable to the average citizen than the legal concept of "political" boundaries. We agree that most voters clearly understand the concept of a city or county boundary, but may be perplexed to define exactly what a "political boundary" may encompass. See Askew v. Firestone, 421 So. 2d 151, 155 (Fla. 1982) (noting that voters "must be able to comprehend the sweep of each proposal" (quoting Smathers v. Smith, 338 So. 2d 825, 829 (Fla. 1976)). The purpose of the standards in section (2) of the proposals is to require legislative and congressional districts to follow existing community lines so that districts are logically drawn, and bizarrely shaped districts—such as one senate district that was

challenged in Resolution 1987, 817 So. 2d at 824-25—are avoided.[1] Since the "city" and "county" terminology honors this community-based standard for drawing legislative and congressional boundaries, and further describes the standards in terms that are readily understandable to the average voter, we conclude that the use of different terminology does not render the summaries misleading.

The And/Or Distinction- Under this challenge, the Legislature contends that the summaries are misleading because while they provide that "[d]istricts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice," the proposed amendments provide that "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice." (Emphasis supplied.) According to the Legislature, the "or" in the proposals demonstrates that an apportionment plan need satisfy only one of the two conditions to comply with the amendment—either districts must not be drawn to deny racial or language minorities the equal

1. That senate district connected a region of Lee County with a region of Palm Beach County across the waters of Lake Okeechobee without any connecting territory on either the northern or southern shores of the lake. See id. at 828. Thus, the only way to travel from one end of the district to the other without passing through another district was by boat.

opportunity to participate in the political process or districts must not be drawn to diminish the ability of racial or language minorities to elect representatives of their choice. According to the Legislature, both standards need not be accomplished. Conversely, the Legislature posits that use of the word "and" in the summary indicates that both standards must be satisfied to comply with the amendments—thus, the summaries are misleading because they promise more than is required under the proposed amendments.

We conclude that the logic of the Legislature is faulty. In support of its assertion, the Legislature relies upon the case Armstrong v. Harris, 773 So. 2d 7, 16 (Fla. 2000), in which this Court held that a ballot title which read "United States Supreme Court Interpretation of Cruel and Unusual Punishment" and a summary which provided that the proposed amendment "[r]equires construction of the prohibition against cruel and/or unusual punishment to conform to United States Supreme Court interpretation of the Eighth Amendment" were affirmatively misleading. See 773 So. 2d at 16-17. This Court explained that although the title offered the impression that "the amendment will promote the rights of Florida citizens through the rulings of the United States Supreme Court," the amendment actually restricted the rights of Floridians because the United States Constitution ban against "cruel and unusual" punishment provided fewer protections than the Florida Constitution ban on "cruel or unusual punishment." Id. at 17. Thus, the

"or" carried special significance because it prohibited punishment that is either cruel or unusual, whereas under the United States Constitution, the punishment is prohibited only if it is both cruel and unusual.

However, the proposal in Armstrong is distinguishable from the proposed amendments that we review today. While the word "or" in the Armstrong proposal was used in conjunction with two adjectives, here the word "or" separates two clauses of a sentence which share the same negative verb; i.e., "shall not be drawn." This verb modifies both clauses, thereby indicating that both clauses impose a restrictive imperative, each of which must be satisfied. For example, if a statute provides that "one person shall not kill another or cause him/her grievous bodily harm," it is illogical to suggest that the statute prohibits one action but not the other. Rather, the "shall not" unquestionably applies to both actions—both killing and causing grievous bodily harm are prohibited. Similarly, the negative verb "shall not be drawn" in the proposed amendments modifies both clauses "with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process" and "to diminish their ability to elect representatives of their choice." Under this sentence, both effects are prohibited.[2] Thus, use of the word "or" in the proposals is synonymous with

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2. One legal dictionary has explained:

"[O]r" has an inclusive sense as well as an exclusive sense. Hence:

the word "and" in the summaries. Because the use of synonymous terms is not misleading, this challenge by the Legislature fails. See English—The Official Language, 520 So. 2d at 13 (use of synonymous terms will not render summary fatally defective where the use of different terms could not reasonably mislead voters).

Language Minorities- The Legislature's claim that this term is vague or ambiguous is not persuasive. The term "language minorities" is both legally and commonly understood to refer to any language other than English. See, e.g., 42 U.S.C. § 1973b(f)(1) ("The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English." (emphasis supplied)); Briscoe v. Bell, 432 U.S. 404, 405 (1977) ("[A]s part of the 1975 amendments to the Voting Rights Act . . . Congress extended the Act's strong protections to cover language minorities; that is, citizens living in environments where the dominant language is not English." (emphasis supplied)); Biddulph v. Mortham, 89 F.3d 1491, 1498 (11th Cir. 1996) ("The plaintiffs argued that the proposal's sponsors failed to comply with a provision of the Voting Rights

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. . . .

- The "inclusive or": A or B, or both
- The "exclusive or": A or B, but not both.

Bryan A. Garner, A Dictionary of Modern Legal Usage 624 (2d ed. 1995).

Act requiring that certain jurisdictions subject to rules prohibiting discrimination against language minorities provide 'materials or information relating to the electoral process' in the minority group's language as well as English." (emphasis supplied)). The Legislature's contention that voters may be confused by the term "language minorities" is even more dubious in light of the fact that the Florida Constitution contains a provision providing that English is the official language of Florida. See art. II, § 9, Fla. Const. Use of this term does not render the summaries misleading.

Elimination of Multi-Member Districts- Lastly, the Legislature contends that the summary of the legislative-boundary proposal is misleading because it fails to inform voters that it changes the Florida Constitution to no longer permit multi-member legislative districts and to mandate single-member legislative districts.[3] The Florida Constitution currently mandates that legislative districts consist of either "contiguous, overlapping or identical territory." Art. III, § 16(a), Fla. Const. In 1972, we held that this language permits multi-member legislative districts:

> [T]he Constitution requires that there be one senator elected from each Senatorial district and one member of the House of Representatives elected from each representative district. This, standing alone, would

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3. In Branch v. Smith, 538 U.S. 254, 273 (2003), the Supreme Court determined that "that in enacting 2 U.S.C. § 2c, Congress mandated that States are to provide for the election of their Representatives from single-member districts." Thus, even if the congressional-boundary amendment were interpreted to mandate single-member districts, this proposal would be consistent with federal law.

> require single-member districts. However, the Constitution further provides that districts may be "identical territory." This means that multi-members of the Senate or the House of Representatives may be elected from the identical territory if such territory were designated as constituting several districts. To require single-member districts would void the provision of Fla. Const., art. III, § 16(a) . . . authorizing the creation of districts in "identical territory."
>
> . . . .
>
> Under the provisions of Fla. Const., art. III, § 1 and 16 . . . multi-member districts are permissible and such multi-member districts may coexist with single-member districts in the same plan.

In re Apportionment Law Senate Joint Resolution No. 1305, 263 So. 2d 797, 806-07 (Fla. 1972).

The Legislature contends that adoption of the proposed legislative-boundary amendment—which includes a "contiguous" requirement but does not mention overlapping or identical districts—operates to repeal article III, section 16(a) of the Florida Constitution. Under this rationale the Legislature argues that because identical districts are no longer permitted, the proposal amends the Florida Constitution to implement a single-member district requirement, and the ballot summary fails to inform voters of this significant change. See Nonpartisan, 926 So. 2d at 1226 (noting that the "identical territory" provision in article III, section 16(a) permits the creation of multi-member districts).

We disagree that adoption of the legislative-boundary proposal will have the asserted effect. This Court has explained:

> A new constitutional provision prevails over prior provisions of the Constitution (a) if it specifically repeals them or (b) if it cannot be

> harmonized with them. Nevertheless, it is settled that implied repeal of one constitutional provision by another is not favored, and every reasonable effort will be made to give effect to both provisions. Unless the later amendment expressly repeals or purports to modify an existing provision, the old and new should stand and operate together unless the clear intent of the later provision is thereby defeated.

Jackson v. City of Jacksonville, 225 So. 2d 497, 500-501 (Fla. 1969) (emphasis supplied). Since the legislative-boundary proposal does not expressly repeal section 16(a), this constitutional provision will be considered repealed by implication only if it cannot be harmonized with the proposal.

We conclude that harmonization of these two provisions is possible and, therefore, "identical" multi-member districts in Florida will still be constitutionally permissible even if the legislative-boundary proposal is adopted. In 1982, this Court clarified that the word "contiguous" in article III, section 16(a) "means only that each district must be contiguous within itself" and does not refer "to the relationship of the districts to each other." In re Apportionment Law Appearing as Senate Joint Resolution No. 1E, 414 So. 2d 1040, 1045, 1050 (Fla. 1982) (emphasis supplied). Thus, under this Court's prior case law, the reference to "contiguous" in the proposed legislative-boundary amendment solely addresses the characteristics of an individual district—not its relationship with any other district. Accordingly, a constitutional contiguity requirement for each individual district may exist, but—at the same time—an individual district may still overlap with, or be identical to, another individual district. Because these two provisions can be

harmonized in such a manner, the proposed legislative-boundary proposal would not operate to repeal article III, section 16(a).[4]

Since the legislative-boundary proposal does not have the effect of prohibiting multi-member districts, the ballot summary is not misleading for the failure to mention this purported "effect."

III. CONCLUSION

In conclusion, we hold that the proposed amendments meet the legal requirements of article XI, section 3 of the Florida Constitution, and the ballot titles and summaries comply with section 101.161(1), Florida Statutes (2008). Accordingly, we approve the amendments for placement on the ballot.

It is so ordered.

QUINCE, C.J., and ANSTEAD, Senior Justice, concur.
WELLS, CANADY, and POLSTON, JJ., concur in result only.
PARIENTE, J., recused.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

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4. The proposals here are decidedly different from the proposed amendment that this Court struck from the ballot in Nonpartisan. In Nonpartisan, the proposal deleted article III, section 16(a) in its entirety and inserted a new section 16(a), which would have required "single-member" districts of "convenient contiguous territory." See 926 So. 2d at 1221. Thus, in Nonpartisan, there was an express repeal of the constitutional provision that allowed districts to be overlapping and identical.

Two Cases:

Original Proceeding – Advisory Opinion – Attorney General

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Jason Vail, General Counsel, Florida Senate, and Jeremiah M. Hawkes, General Counsel, Florida House of Representatives, Tallahassee, Florida, on behalf of The Florida Legislature,

as Opponents

SUPREME COURT OF FLORIDA

Case No. SC08-1163

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES

(Review of Financial Impact Statement)

Consolidated for oral argument with
Case Nos. SC08-986, SC08-1149, and SC08-1165

DOCKET

SHEET

Florida Supreme Court Case Docket

Case Number: SC08-1163 - Closed

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES (FIS) vs.

03/11/2011 09:34

Date Docketed	Description	Filed By	Notes
06/20/2008	REQUEST-ADVISORY OPINION (ATTY GEN)	PT Advisory Opinion To The Attorney General ADVOP BY: PT Hon. Bill Mccollum 112233	O&7 & E-MAIL
06/20/2008	No Fee Required		
06/20/2008	ORDER-HIGH PROFILE		
06/25/2008	ORDER-BRIEF SCHED (AG ADVISORY OPIN)		IT IS, THEREFORE, the order of the Court that interested parties shall file their briefs on or before July 15, 2008, and serve a copy thereof on the Attorney General. Answer briefs shall be filed on or before August 4, 2008. Briefs are limited to ten pages and the parties shall address the duties and responsibilities of the Court in this process and review and the application of these duties to this specific case. Please file an original and eight copies of all briefs.
07/15/2008	INITIAL BRIEF-MERITS	PT Fair Districts Florida.Org BY: PT Mark Herron 199737	(OF SPONSOR - FAIRDISTRICTFLORIDA.ORG) (O&8 & E-MAIL)
07/31/2008	ORDER-OA SCHED		TO VIEW ORDER SEE SC08-986.
07/31/2008	ORDER-EXT OF TIME GR (ANSWER BRIEF-MERITS)		TO VIEW ORDER SEE SC08-986.
08/22/2008	ORAL ARGUMENT CALENDAR		
08/22/2008	ORDER-ORAL ARGUMENT RESCHEDULE		TO VIEW ORDER SEE SC08-986.

09/03/2008	MOTION-OTHER SUBSTANTIVE	PT Fair Districts Florida.Org BY: PT Mark Herron 199737	(O&9) FILED AS "MOTION TO EXPAND TIME FOR ORAL ARGUMENT"
09/15/2008	ORDER-OTHER SUBSTANTIVE GR		TO VIEW ORDER SEE SC08-986.
11/06/2008	ORAL ARGUMENT HELD		
01/29/2009	DISP-REMANDED		For these reasons, we hold that the financial impact statements prepared by the Conference are fatally misleading and do not comply with section 100.371(5), Florida Statutes (2008). Thus, in accordance with our constitutional duty to ensure that Florida voters receive a fair and accurate ballot, see Askew, 421 So. 2d at 155, we are compelled to reject the statements as drafted. We remand the statements to the Financial Impact Estimating Conference for redrafting. See § 100.371(5)(e)(1), Fla. Stat. (2008).
02/12/2009	WEST CORRESPONDENCE		CORRECTED OPINION - On page 11, added law firm affiliation of Jon L. Mills.
02/18/2009	PETITION-AMENDMENT/SUPPLEMENT	PT Advisory Opinion To The Attorney General ADVOP BY: PT Hon. Bill Mccollum 112233	FILED AS LETTER DATED FEBRUARY 18, 2009, W/ATTACHED REDRAFTED STATEMENT AFTER REMAND (O&7 & E-MAIL)
02/25/2009	ORDER-BRIEF SCHED (AG ADVISORY OPIN)		Pursuant to the provisions of Article IV, section 10, Florida Constitution, and section 16.061, Florida Statutes, the Attorney General of Florida has requested this Court's opinion on the initiative petition seeking to amend the Florida Constitution to establish standards for the Legislature to follow in legislative redistricting. On February 13, 2009, the Financial Impact Estimating Conference, in accordance with the provisions of Chapter 04-33, Laws of Florida, forwarded to the Office of the Attorney General a redraft of the a financial impact statement on the initiative petition. Chapter 04-33 provides for this Honorable Court to review the redrafted financial impact statement to determine whether it is in accordance with 100.371, Florida Statutes. The full text of the Attorney General's letter is attached hereto as an exhibit and made a part thereof. IT IS, THEREFORE, the order of the Court that interested parties shall file their briefs on or before March 17, 2009, and serve a copy thereof on the Attorney General. Answer briefs shall be filed on or before April 6, 2009. Briefs are limited to ten pages and the parties shall address the duties and responsibilities of the Court in this process and review and the application of these duties to this specific case. Please file an original and eight

			copies of all briefs.
03/17/2009	MOTION-BRIEF PAGE ENLARGEMENT	PT Florida Senate SENATE BY: PT Jason Vail 298824	O&8 & E-MAIL
03/17/2009	MOTION-WAIVER OF ELECTRONIC FILING	PT Florida Senate SENATE BY: PT Jason Vail 298824	O&8 (& E-MAIL) WITH CD OF EXHIBITS 3
03/17/2009	INITIAL BRIEF-MERITS	PT Florida Senate SENATE BY: PT Jason Vail 298824	W/EXHIBITS (O&7 & E-MAIL) (EXCEEDS PAGE LIMIT)
03/17/2009	INITIAL BRIEF-MERITS	PT Fair Districts Florida.Org BY: PT Mark Herron 199737	O&8 & E-MAIL (EXCEEDS PAGE LIMIT)
03/18/2009	MOTION-BRIEF PAGE ENLARGEMENT	PT Fair Districts Florida.Org BY: PT Mark Herron 199737	O&8 & E-MAIL
04/06/2009	ANSWER BRIEF-MERITS	PT Florida Senate SENATE BY: PT Jason Vail 298824	(OF THE FLORIDA SENATE IN SUPPORT OF THE FINANCIAL IMPACT STATEMENTS) (0&8 & E-MAIL)
04/06/2009	REQUEST-ORAL ARGUMENT	PT Florida Senate SENATE BY: PT Jason Vail 298824	O&8 & E-MAIL
04/06/2009	ANSWER BRIEF-MERITS	PT Fair Districts Florida.Org BY: PT Mark Herron 199737	(OF SPONSOR - FAIRDISTRICTFLORIDA.ORG) (O&8 & E-MAIL)
04/09/2009	ORDER-BRIEF PAGE ENLARGEMENT DY/STRICKEN		The Senate's Motion to File a Brief Longer that the Page Limit is hereby denied and said brief filed with this Court on March 17, 2009, is hereby stricken. The Senate is allowed to and including April 20, 2009, to serve an amended initial brief which does not exceed ten pages in length. Please file an original and eight copies of all briefs. In addition to paper briefs, per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all briefs in an electronic format as required by the provisions of that order. Briefs submitted will be placed on the Court's Internet site (http://www.floridasupremecourt.org).
04/09/2009	ORDER-BRIEF PAGE ENLARGEMENT DY/STRICKEN		The Sponsor's Motion to File Brief in Excess of Ten Page Limit is hereby denied and said brief filed with this Court on March 17, 2009, is hereby stricken. The Sponsor is allowed to and including April 20, 2009, to serve an amended initial brief which does not exceed ten pages in length. Please file an original and eight copies of all briefs. In addition to paper briefs, per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all briefs in an electronic format as required by the provisions of that order. Briefs submitted will be placed on the Court's Internet site (http://www.floridasupremecourt.org).

04/09/2009	ORDER-OTHER SUBSTANTIVE GR		The Senate's Motion for Waiver of Electronic Filing is hereby granted.
04/20/2009	INITIAL AMD BRIEF-MERITS	PT Fair Districts Florida.Org BY: PT Mark Herron 199737	O&8 & E-MAIL
04/20/2009	INITIAL AMD BRIEF-MERITS	PT Florida Senate SENATE BY: PT Jason Vail 298824	O&8 & E-MAIL
05/07/2009	ORDER-NO REQ SCHED (MISC)		The above cases have been submitted to the Court without oral argument. Per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, if you have not already done so, counsel are directed to transmit a copy of all briefs in an electronic format as required by the provisions of that order.
05/15/2009	MAIL RETURNED		PT Florida Senate SENATE BY: PT Jason Vail 298824 ORDER DATED MAY 7, 2009 ORDER RESENT 07/23/09
12/17/2009	DISP-APPROVED		Based upon prior precedent from this Court, we hold that the financial impact statements comply with section 100.371, Florida Statutes (2008), and may be placed on the ballot.
03/01/2010	ARCHIVES		File

June 20, 2008

The Honorable R. Fred Lewis
Chief Justice, and Justices of
The Supreme Court of Florida
The Supreme Court Building
Tallahassee, Florida 32399-1925

RE: Standards for Establishing Congressional District Boundaries

Dear Chief Justice Lewis and Justices:

On June 18, 2008, in accordance with the provisions of Article IV, section 10, Florida Constitution, and section 16.061, Florida Statutes, I petitioned this Honorable Court for an advisory opinion on the initiative petition seeking to amend the Florida Constitution to provide standards for establishing congressional district boundaries.

On June 18, 2008, the Financial Impact Estimating Conference, in accordance with the provisions of section 100.371(5)(a), Florida Statutes, forwarded to this office a financial impact statement on the initiative petition.

Therefore, I respectfully request this Honorable Court's opinion as to whether the financial impact statement prepared by the Financial Impact Estimating Conference on the constitutional amendment, proposed by initiative petition, entitled "Standards For Establishing Congressional District Boundaries" (a copy of which is attached) is in accordance with section 100.371, Florida Statutes.

Sincerely,

Bill McCollum
Attorney General

cc: Mr. Kurt S. Browning
Florida Department of State
R. A. Gray Building, Room 316
500 South Bronough Street
Tallahassee, Florida 32399-0250

The Honorable Charlie Crist
Governor, State of Florida
The Capitol
400 South Monroe Street
Tallahassee, Florida 32399-0001

The Honorable Ken Pruitt
President, Florida Senate
Senate Office Building, Room 312
404 South Monroe Street
Tallahassee, Florida 32399-1100

The Honorable Marco Rubio
Speaker, Florida House of Representatives
420 The Capitol
402 South Monroe Street
Tallahassee, Florida 32399-1300

Mr. Thom Rumberger
Chair, FairDistrictsFlorida.org
704 West Madison Street
Tallahassee, Florida 32304-4324

Mr. Mark Herron
704 West Madison Street
Tallahassee, Florida 32304

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail delivery this 20th day of June, 2008, to the following:

Mr. Thom Rumberger
Chair, FairDistrictsFlorida.org
704 West Madison Street
Tallahassee, Florida 32304-4324

Mr. Mark Herron
704 West Madison Street
Tallahassee, Florida 32304

I hereby certify that a true and correct copy of the foregoing has been furnished via interoffice mail delivery this 20th day of June, 2008, to the following:

Mr. Kurt S. Browning
Secretary, Florida Department of State
attn: General Counsel

The Honorable Charlie Crist, Governor, State of Florida
attn: General Counsel

The Honorable Ken Pruitt, President, Florida Senate
attn: General Counsel

The Honorable Marco Rubio, Speaker, Florida House of Representatives
attn: General Counsel

Director, Division of Elections
Florida Department of State

_____
Gerry Hammond
Senior Assistant Attorney General
Florida Bar No. 273155

Supreme Court of Florida

FRIDAY, JUNE 20, 2008

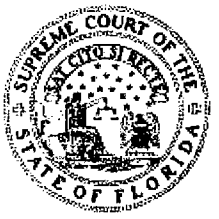
CASE NO.: SC08-1163

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES (FIS)

Because of significant public and media interest in this matter, counsel for the parties are directed to hereafter file an original and eight copies of all pleadings filed with this Court. Per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all documents, including any attachments and appendices, in an electronic format as required by the provisions of that order. FOR GENERAL FILING INFORMATION AND ADMINISTRATIVE ORDER NO. AOSC04-84, PLEASE VISIT THE CLERK'S OFFICE WEBSITE AT http://www.floridasupremecourt.org/clerk/index.shtml.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court



vm
Served:

CHARLES J. CRIST, JR.
FINANCIAL IMPACT ESTIMATING CONFERENCE
HON. KURT S. BROWNING
HON. MARCO ANTONIO RUBIO
HON. KEN PRUITT
HON. BILL MCCOLLUM
MARK HERRON
EDWIN THOM RUMBERGER

Supreme Court of Florida

WEDNESDAY, JUNE 25, 2008

CASE NO.: SC08-1163

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES (FIS)

Pursuant to the provisions of Article IV, section 10, Florida Constitution, and section 16.061, Florida Statutes, the Attorney General of Florida has requested this Court's opinion on the initiative petition seeking to amend the Florida Constitution to provide standards for establishing legislative district boundaries.

On June 18, 2008, the Financial Impact Estimating Conference, in accordance with the provisions of Chapter 04-33, Laws of Florida, forwarded to the Office of the Attorney General a financial impact statement on the initiative petition. Chapter 04-33 provides for this Honorable Court to review the financial impact statement to determine whether it is in accordance with 100.371, Florida Statutes. The full text of the Attorney General's letter is attached hereto as an exhibit and made a part thereof.

IT IS, THEREFORE, the order of the Court that interested parties shall file their briefs on or before July 15, 2008, and serve a copy thereof on the Attorney General. Answer briefs shall be filed on or before August 4, 2008. Briefs are limited to ten pages and the parties shall address the duties and responsibilities of the Court in this process and review and the application of these duties to this specific case. Please file an original and eight copies of all briefs. In addition to paper briefs, per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all briefs in an electronic format as required by the provisions of that order. Briefs submitted will be placed on the Court's Internet site (http://www.floridasupremecourt.org).

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

vm
Served:

CHARLES J. CRIST, JR.
FINANCIAL IMPACT ESTIMATING CONFERENCE
HON. KURT S. BROWNING
HON. MARCO ANTONIO RUBIO
HON. KEN PRUITT
HON. BILL MCCOLLUM
MARK HERRON
EDWIN THOM RUMBERGER

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
FairDistrictsFlorida.org

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Counsel for Sponsor, FairDistrictsFlorida.org

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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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2618 Centennial Place
Tallahassee, FL 32308
Telephone: (850) 222-0720
Facsimile: (850) 224-4359

Counsel for Sponsor, FairDistrictsFlorida.org

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

Supreme Court of Florida

THURSDAY, JULY 31, 2008

CASE NOS.: SC08-986; SC08-1163;
SC08-1149; SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES & (FIS)

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING & (FIS)

The Sponsor's motion to consolidate oral argument is hereby granted. The above cases are hereby consolidated for the purpose of oral argument and are scheduled for oral argument at 9:00 a.m., Wednesday, November 5, 2008. A maximum of twenty minutes to the side as consolidated is allowed for the argument, but counsel is expected to use only so much of that time as is necessary.

NO CONTINUANCES WILL BE GRANTED EXCEPT UPON A SHOWING OF EXTREME HARDSHIP.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

vm
Served:
HON. CHARLES J. CRIST, JR.
EDWIN THOM RUMBERGER
HON. KURT S. BROWNING
HON. MARCO ANTONIO RUBIO
HON. BILL MCCOLLUM
TIMOTHY MCLENDON
FINANCIAL IMPACT ESTIMATING CONFERENCE
M. HOPE KEATING
HON. KEN PRUITT
BARRY S. RICHARD
JASON VAIL
JEREMIAH M. HAWKES
JON L. MILLS
MARK HERRON

Supreme Court of Florida

THURSDAY, JULY 31, 2008

CASE NOS.: SC08-986; SC08-1163
SC08-1149; SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES & (FIS)

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING & (FIS)

The Florida Legislature's motion for extension of time is granted and The Florida Legislature is allowed to and including August 20, 2008, in which to serve the answer brief on the merits. NO FURTHER EXTENSIONS OF TIME WILL BE GRANTED FOR THE FILING OF THE ANSWER BRIEF ON THE MERITS. Per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all briefs in an electronic format as required by the provisions of that order.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

vm
Served:

HON. CHARLES J. CRIST, JR.
EDWIN THOM RUMBERGER
HON. KURT S. BROWNING
HON. MARCO ANTONIO RUBIO
HON. BILL MCCOLLUM
TIMOTHY MCLENDON
FINANCIAL IMPACT ESTIMATING
M. HOPE KEATING
HON. KEN PRUITT
BARRY S. RICHARD
JASON VAIL
JEREMIAH M. HAWKES
JON L. MILLS
MARK HERRON

Supreme Court of Florida

FRIDAY, AUGUST 22, 2008

CASE NOS.: SC08-986; SC08-1163;
SC08-1149; SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES & (FIS)

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING & (FIS)

At the direction of the Court, the above cases which were scheduled for oral argument on November 5, 2008, have been rescheduled for oral argument at 9:00 a.m., Thursday, November 6, 2008. A maximum of twenty minutes to the side as consolidated is allowed for the argument, but counsel is expected to use only so much of that time as is necessary.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

vm
Served:

HON. CHARLES J. CRIST, JR.
EDWIN THOM RUMBERGER
HON. KURT S. BROWNING
HON. MARCO ANTONIO RUBIO
HON. BILL MCCOLLUM
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JON L. MILLS
MARK HERRON

The Honorable Peggy A. Quince
Chief Justice, and Justices of
The Supreme Court of Florida
The Supreme Court Building
Tallahassee, Florida 32399-1925

RE: Standards for Legislature to Follow in Legislative Redistricting

Dear Chief Justice Quince and Justices:

On May 29, 2008, in accordance with the provisions of Article IV, section 10, Florida Constitution, and section 16.061, Florida Statutes, I petitioned this Honorable Court for an advisory opinion on the initiative petition seeking to amend the Florida Constitution to establish standards for the Legislature to follow in legislative redistricting. On June 20, 2008, this office respectfully requested this Honorable Court's opinion as to whether the financial impact statement prepared by the Financial Impact Estimating Conference is in accordance with section 100.371, Florida Statutes.

On January 29, 2009, this Honorable Court rejected the financial impact statement for the proposed amendment stating that it did not comply with section 100.371, Florida Statutes. In re Advisory Opinion to the Attorney General – Standards for Establishing Legislative District Boundaries, Case No. SC08-986 (Fla. January 29, 2009).

On February 13, 2009, the Financial Impact Estimating Conference, in accordance with the provisions of section 100.371(6)(a), Florida Statutes, forwarded to this office a revised financial impact statement on the initiative petition. I respectfully request this Honorable Court's opinion as to whether the revised financial impact statement prepared by the Financial Impact Estimating Conference on the constitutional amendment, proposed by initiative petition entitled *"Standards for Legislature to Follow*

in Legislative Redistricting" (a copy of which is attached) is in accordance with section 100.371, Florida Statutes.

Sincerely,

Bill McCollum
Attorney General

cc: Mr. Kurt S. Browning
Secretary of State

The Honorable Charlie Crist
Governor, State of Florida

The Honorable Jeff Atwater
President, Florida Senate

The Honorable Larry Cretul
Speaker pro tempore, Florida House of Representatives

Mr. Thom Rumberger
Chair, FairDistrictsFlorida.org
704 West Madison Street
Tallahassee, Florida 32304-4324

Mr. Mark Herron
704 West Madison Street
Tallahassee, Florida 32304-4324

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail delivery this _____ day of February, 2009, to the following:

Mr. Thom Rumberger
Chair, FairDistrictsFlorida.org
704 West Madison Street
Tallahassee, Florida 32304-4324

Mr. Mark Herron
704 West Madison Street
Tallahassee, Florida 32304-4324

I hereby certify that a true and correct copy of the foregoing has been furnished via interoffice mail delivery this _____ day of February, 2009, to the following:

Mr. Kurt Browning
Secretary of State
attn: General Counsel

The Honorable Charlie Crist
Governor, State of Florida
attn: General Counsel

The Honorable Jeff Atwater
President, Florida Senate
attn: General Counsel

The Honorable Larry Cretul
Speaker pro tempore, Florida House of Representatives
attn: General Counsel

Director, Division of Elections

_____
Joslyn Wilson
Assistant Attorney General
Fla. Bar. No. 0233781

FINANCIAL IMPACT ESTIMATING CONFERENCE

FINANCIAL IMPACT STATEMENT

STANDARDS FOR THE LEGISLATURE TO FOLLOW IN LEGISLATIVE REDISTRICTING, #07-16

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.

INITIATIVE FINANCIAL INFORMATION STATEMENT
STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE REDISTRICTING

SUMMARY OF INITIATIVE FINANCIAL INFORMATION STATEMENT

Article III, Section 16 of the Florida Constitution provides for legislative redistricting of the state into legislative districts in the second year following each decennial census. The proposed constitutional amendment adds Section 21 to Article III of the Florida Constitution setting standards for establishing legislative districts or districting plans: legislative districts or districting plans may not be drawn with the intent to favor or disfavor an incumbent or political party; districts shall not be drawn with the intent or result of denying racial or language minorities the equal opportunity to participate in the political process or to diminish their ability to elect representatives of their choice; districts must be contiguous; and, unless otherwise required, districts must be as equal in population as practicable, must be compact, and must make use of existing political and geographical boundaries.

Given information provided through public workshops and collected through staff research, the Financial Impact Estimating Conference expects that the proposed amendment may result in increased costs based on the following:

- The State may incur additional legal costs to litigate the redistricting plans developed under the proposed constitutional standards. Since the amendment increases the number of factors that could be litigated, the districting initiative may expand the scope and complexity of litigation to determine the validity of each new apportionment plan. For example, the requirement that every district be drawn so as not to favor or disfavor any incumbent or political party may spawn challenges. Such costs are more likely during the first reapportionment after the amendment's passage as judicial clarification of the new standards is sought and the related legal doctrine developed. These legal costs are indeterminate.
- The Department of Legal Affairs concurs that there may be increased litigation costs, and that they may experience increased costs if they are asked to litigate these actions.
- The Office of the State Courts Administrator believes there will be an impact at the trial court and appellate level. They assume that litigation will increase. The amount of increased litigation is unknown and the estimated impact on the trial court, the judicial workload, and the appellate workload is indeterminate.
- The amendment does not substantially alter the current responsibilities or costs of the Department of State, the supervisors of elections, or local governments.
- Any additional cost to the Legislature to develop the plans is indeterminate.
- The amendment does not directly impact government revenues.

FINANCIAL IMPACT STATEMENT

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.

I. SUBSTANTIVE ANALYSIS

A. Proposed Amendment

Ballot Title:

STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE REDISTRICTING

Ballot Summary:

Legislative districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect repr esentatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

1) Statement and Purpose:

The purpose of this amendment is to set standards for the Legislature to follow when establishing legislative district boundaries.

2) Amendment of Florida Constitution:

The amendment proposes to add Section 21 to Article III as follows:

Section 21. Standards for Establishing Legislative District Boundaries. --.

In establishing Legislative district boundaries:

(1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal oppor tunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

(2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

(3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

3) Effective Date and Severability:

Pursuant to Article XI, Section 5, this amendment will be effective on January 4, 2011.

B. Effect of Proposed Amendment

Background

Sponsor of the proposed amendment

The FairDistrictsFlorida.org is the official sponsor of this proposed constitutional amendment. FairDistrictsFlorida.org is a registered political committee "working to reform the way the state draws Legislative and Congressional district lines by establishing constitutionally mandated fairness standards."[1]

The sponsor proposes that the amendment will establish fairness standards for use in creating legislative district boundaries; protecting minority voting rights; prohibiting district lines that favor or disfavor any incumbent or political party; requiring that districts are compact; and requiring that existing political and geographical boundaries be used.[2]

Apportionment and Redistricting In Florida

Article III, Section 16 of the Florida Constitution provides for legislative apportionment and redistricting of the state.

In its regular session in the second year after the decennial census, the legislature must redistrict the into not less than thirty nor more that forty consecutively numbered senatorial districts and not less than eighty nor more than one hundred twenty consecutively numbered representative districts. Districts must be contiguous, overlapping or identical territory. The legislature must follow the state constitution, the federal constitution, and federal laws.

If the session adjourns without a redistricting plan, the governor must within thirty days call a special redistricting session which shall not exceed thirty consecutive days. If the legislature adjourns and fails to redistrict the state, then the attorney general shall, within five days, petition the Supreme Court of the state to make the redistricting. No later than sixty days after the filing of the petition, the Supreme Court shall issue an order making the redistricting.

When the legislature adopts a redistricting plan, within fifteen days the attorney general shall petition the Supreme Court of the state to review the plan. The Supreme Court must issue its judgment on the plan within thirty days of the filing of the petition for review. If the Supreme Court determines the plan is valid, then the plan is binding on all citizens of the state. If the Supreme Court rules the plan invalid, then the governor shall reconvene the legislature within five days for an extraordinary redistricting session not to exceed fifteen days.

Within fifteen days after the extraordinary redistricting session, the attorney general shall petition the Supreme Court to review the plan or to inform the court that no plan was adopted. If the legislature fails to adopt a plan or if Supreme Court finds the plan invalid, the court shall, not later than sixty days after receiving the petition, make the redistricting plan for the state.

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[1] http://www.fairdistrictsflorida.org/about.asp, "About us," June 4, 2008.
[2] http://www.fairdistrictsflorida.org/about.asp, "Mission statement," June 4, 2008.

Historically, the legislature has fulfilled its responsibility for redistricting with support from staff from the House, Senate and Office of Economic and Demographic Research as well as outside consultants and attorneys. During the 2002 redistricting, significant time was required by legal, professional and technical staff to perform the many tasks associated with analyzing data, working with the Census Bureau, building data sets and databases, generating reports and maps, writing briefs, developing defense arguments and providing legal advice.

Historical Costs

The total costs to the state for each of the last two redistricting cycles averaged $13.4 million. These costs included technology and staffing costs as well as the costs of legal representation during the redistricting process and in defense of the redistricting plans.

The following chart displays state costs by entity:

10-year cycle	Period of Disbursements	Senate Costs (in millions)			House Costs (in millions)			EDR Costs (in millions)	Joint Legislative Costs (in millions)
		Operations	Legal	Total	Operations	Legal	Total	Operations	Reimburse Plaintiffs for Legal Costs
1990	1989 -- 1998	$ 2.8	$ 1.6	$ 4.4	$ 5.5	$ 2.6	$ 8.1	$ 0.9	$ 1.6
2000	1998 -- 2005	$ 1.3	$ 2.6	$ 3.9	$ 1.4	$ 5.5	$ 6.9	$ 0.9	$ -

The following chart provides a summary of the state costs:

10-year cycle	Period of Disbursements	Total State Costs (in millions)			
		Operations	Legal	Reimburse Plaintiffs for Legal Costs	Total
1990	1989 -- 1998	$ 9.2	$ 4.2	$ 1.6	$ 15.0
2000	1998 -- 2005	$ 3.6	$ 8.1	$ -	$ 11.7
Average Cost		$ 6.4	$ 6.2	$ 0.8	$ 13.4

During previous redistricting cycles, each house of the legislature drew plans for the Florida Senate, the Florida House of Representatives, and Florida's congressional seats using computer equipment, software, staff, and other resources.

There is no available breakdown of any costs between legislative redistricting and congressional redistricting.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

Section 100.371, Florida Statutes, requires that the Financial Impact Estimating Conference (FIEC) "...complete an analysis and financial impact statement to be placed on the ballot of the estimated increase or decrease in any revenue or costs to state or local governments resulting from the proposed initiative."

As part of determining the fiscal impact of this proposed amendment, the FIEC principals held three public meetings during May and June 2008 to develop the initial impact

statement, and three additional meetings in February 2009 to address the remanded statement.

A. FISCAL ANALYSIS

The fiscal impact summary for this proposed amendment is based on independent research; testimony before the FIEC in public workshop; written statements from the proponents and opponents of the initiative; and discussions among the FIEC principals and other professional staff. Based on all of this material, the FIEC expects that the proposed amendment may result in increased costs.

This expectation is based on the following:

- **The State may incur additional legal costs to litigate the redistricting plans developed under the proposed constitutional standards.**

  Since the amendment increases the number of factors that could be litigated, the districting initiative may expand the scope and complexity of litigation to determine the validity of each new apportionment plan. For example, the requirement that every district be drawn so as not to favor or disfavor any incumbent or political party may spawn challenges. At least initially, complex individual challenges to specific districts are likely. In addition, any given ruling on the interpretation and application of the standards in one case may spawn new challenges and issues in surrounding districts affected by the first ruling, leading to a ripple effect of litigation or serial claims.

  Public testimony on May 23, 2008, indicated that the proposed amendment will increase litigation costs to levels at least seven to ten times those experienced in the most recent apportionments. Comments were also submitted in a written report.[3] Using the historical cost average of $6.2 million (see the Historical Costs portion of this analysis), a 7-fold increase totals $43.4 million and a 10-fold increase totals $62 million. Testimony by the opponents of the amendment indicated that some issues may simply expand the scope of existing litigation, rather than leading to new cases. If the increased cost of litigation only doubled the average-historical amount, the result would be multi-million dollar cost to the state. No assumption was made as to how this estimated cost would breakdown between legislative redistricting and congressional redistricting.

  The Department of Legal Affairs concurs that there may be increased litigation costs, and that they may experience increased costs if they are asked to litigate these actions.

  Typically, a plaintiff challenging a redistricting plan will list numerous state defendants.[4] While the Attorney General may provide representation for the defendants, individual defendants may wish to have their own representation.

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[3] *Analysis of Financial Impact*, Legislative and Congressional Districting Initiatives, by George Meros, Gray Robinson, P.A., document #133905V1.

[4] See e.g.; MIGUEL DE GRANDY, MARIO DIAZ-BALART, ANDY IRELAND, CASIMER SMERICKI, VAN B. POOLE, TERRY KETCHEL, ROBERTO CASAS, RODOLFO GARCIA, JR., LUIS ROJAS, LINCOLN DIAZ-BALART, JAVIER

All of these legal costs are indeterminate.

- **The state court system may incur costs to hear cases that allege violations of the proposed constitutional standards.**

  The Office of the State Courts Administrator believes there will be an impact at the trial court and appellate level. The numbers of lawsuits filed related to the current redistricting standards following the 1990 and 2000 census were 13 and 5, respectively. They assume that the number of litigations will increase. For example, the requirement that every district be drawn so as not to favor or disfavor any incumbent or political party may spawn challenges. At least initially, complex Individual challenges to specific districts are likely. The amount of increased litigation is unknown; therefore, the estimated impact on the trial court, the judicial workload, and the appellate workload is indeterminate.

- **The amendment does not substantially alter the current responsibilities or costs of the Department of State, the supervisors of elections, or local governments.**

  The FIEC found no evidence that the amendment would substantially alter the responsibilities of these entities.

- **Any additional cost to the Legislature to develop the plans is indeterminate.**

- **The amendment does not directly impact government revenues.**

SOUTO, JUSTO LUIS POSO, ALBERTO CARDENAS, REY VELAZQUEZ, LUIS MORSE, ALBERTO GUTMAN, KAREN E. BUTLER, SGT. AUGUSTA CARTER, JEAN VAN METER, ANNA M. PINELLAS, ROBERT WOODY, GINA HAHN, BILL PETERSEN, TERRY KESTER, MARGIE KINCAID, and BROOKS WHITE, Plaintiffs, v. T.K. WETHERELL, in his official capacity as Speaker of the Florida House of Representatives, GWEN MARGOLIS, in her official capacity as President of the Florida Senate, LAWTON CHILES, in his official capacity as Governor of the State of Florida, JACK GORDON, in his official capacity as Chairman of the Senate Reapportionment Committee, PETER R. WALLACE, in his official capacity as Chairman of the House Reapportionment Committee, JIM SMITH, in his official capacity as Secretary of State of Florida, ROBERT BUTTERWORTH, in his official capacity as Attorney General of Florida, Defendants. FLORIDA STATE CONFERENCE OF NAACP BRANCHES, T. H. POOLE, SR., WHITFIELD JENKINS, LEON W. RUSSELL, WILLYE DENNIS, TURNER CLAYTON, RUFUS BROOKS, VICTOR HART, KERNA ILES, ROOSEVELT WALTERS, JOHNNIE MCMILLIAN, PHYLLIS BERRY, MARY A. PEARSON, MABLE BUTLER, IRIS WILSON, JEFF WHIGHAM, AL DAVIS, PEGGY DEMON, CARLTON MOORE, RICHARD POWELL, NEIL ADAMS, LESLIE MCDERMOTT, ROBERT SAUNDERS, SR., IRV MINNEY, ADA MOORE, ANITA DAVIS, and CALVIN BARNES, Plaintiffs, v. LAWTON CHILES, in his official capacity as Governor of Florida, JIM SMITH, in his official capacity as Secretary of State of Florida, ROBERT BUTTERWORTH, in his official capacity as Attorney General of Florida, GWEN MARGOLIS, in her official capacity as President of the Florida Senate, T. K. WETHERELL, in his official capacity as Speaker of the Florida House of Representatives, JACK GORDON, in his official capacity as Chairperson of the House Reapportionment Committee, and PETER R. WALLACE, in his official capacity as Chairman of the House Reapportionment Committee, Defendants, 794 F. Supp. 1076 (N.D.Fla. 1992)

B. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS:

1. Revenues:

   There will be no direct financial impact on the revenues of state or local government.

2. Expenditures:

   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.

Supreme Court of Florida

WEDNESDAY, FEBRUARY 25, 2009

CASE NO.: SC08-1163

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES (FIS)

Pursuant to the provisions of Article IV, section 10, Florida Constitution, and section 16.061, Florida Statutes, the Attorney General of Florida has requested this Court's opinion on the initiative petition seeking to amend the Florida Constitution to establish standards for the Legislature to follow in legislative redistricting.

On February 13, 2009, the Financial Impact Estimating Conference, in accordance with the provisions of Chapter 04-33, Laws of Florida, forwarded to the Office of the Attorney General a redraft of the a financial impact statement on the initiative petition. Chapter 04-33 provides for this Honorable Court to review the redrafted financial impact statement to determine whether it is in accordance with 100.371, Florida Statutes. The full text of the Attorney General's letter is attached hereto as an exhibit and made a part thereof.

IT IS, THEREFORE, the order of the Court that interested parties shall file their briefs on or before March 17, 2009, and serve a copy thereof on the Attorney General. Answer briefs shall be filed on or before April 6, 2009. Briefs are limited to ten pages and the parties shall address the duties and responsibilities of the Court in this process and review and the application of these duties to this specific case. Please file an original and eight copies of all briefs. In addition to paper briefs, per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all briefs in an electronic format as required by

the provisions of that order. Briefs submitted will be placed on the Court's Internet site (http://www.floridasupremecourt.org).

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

vm
Served:

FINANCIAL IMPACT ESTIMATING CONFERENCE
HON. LARRY CRETUL
CHARLES J. CRIST, JR.
HON. KURT S. BROWNING
HON. JEFFREY H. ATWATER
HON. BILL MCCOLLUM
BARRY S. RICHARD
M. HOPE KEATING
MARK HERRON
JON L. MILLS
EDWIN THOM RUMBERGER
TIMOTHY MCLENDON

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

MOTION TO FILE A BRIEF LONGER THAN THE PAGE LIMITS

The Senate moves to file a brief which is longer than the 10-page limit required by the court's order of February 25, 2009. The Senate seeks to file a brief in support of the financial impact statements in these two cases. The Senate intends to argue for a different standard of review than has been used by the court in measuring past impact statements, and to show how the present statements satisfy that standard. Such arguments naturally are somewhat complex. Ten pages is insufficient for the task. Knowing the court's interest in brevity in matters such as these, the Senate has kept its brief to 18 pages including the certificate of service and certificate of type size and style.

Therefore, the Senate asks the court to accept its brief, although it exceeds the established page limit.

RESPECTFULLY SUBMITTED,

JASON VAIL
General Counsel
Florida Senate
Florida Bar no. 298824

R. 402, Senate Office Building
404 S. Monroe St.
Tallahassee, FL 32399-1100
(850)487-5173

Counsel for The Florida Senate

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.

_____
Jason Vail

CERTIFICATE OF TYPE SIZE AND STYLE

The motion is printed in 14 point Times New Roman.

_____
Jason Vail

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

MOTION FOR WAIVER OF ELECTRONIC FILING

For purposes of one exhibit, the Senate moves for a waiver of the court's order requiring the electronic filing of exhibits. The exhibit is a video of a workshop conducted by the Fiscal Impact Estimating Conference. Statements at the workshop form part of the factual basis for the matters expressed in the fiscal impact statements under review. A review of this record is essential. The court cannot make an informed decision without it any more than it can review the decision of a trial court without resort to the record below. There is no transcript of this workshop; only the video is available.

The video file is more than two gigabytes in size. The Senate's email server will not send a file this large.

Therefore, the Senate asks the court to waive the electronic filing rule and allow the filing of a DVD containing the video instead.

RESPECTFULLY SUBMITTED,

JASON VAIL
General Counsel
Florida Senate
Florida Bar no. 298824

R. 402, Senate Office Building
404 S. Monroe St.
Tallahassee, FL 32399-1100
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Counsel for The Florida Senate

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Jason Vail

CERTIFICATE OF TYPE SIZE AND STYLE

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Jason Vail

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

JASON VAIL
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Sec. 216.135, Fla.Stat. 6

Sec. 216.136, Fla.Stat. 6

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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 complied 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 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 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 correctiveness.[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]

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[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.

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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.

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[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,

JASON VAIL
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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.

Jason Vail

CERTIFICATE OF TYPE SIZE AND STYLE

The brief is printed in 14 point Times New Roman.

_____

Jason Vail

George Meros
GrayRobinson, P.A.

Analysis of Financial Impact of
Legislative and Congressional Districting Initiatives

- 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.

- Article III, Section 16(c) of the Florida Constitution requires the Florida Supreme Court to determine the validity of any state legislative apportionment plan and directs the Court to "permit adversary interests to present their views."

- The Court's review traditionally has been "extremely limited." *See In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 824 (Fla. 2002). The Court has analyzed only the plan's compliance with constitutional requisites—specifically, the federal one-person, one-vote requirement and the state requirement that districts contain contiguous, overlapping, or identical territory. *Id.* It does not review compliance with federal or state statutes, including the federal Voting Rights Act, in part because such review would be too "fact-intensive" for the thirty-day review period. *Id.* at 825.

- Challenges to the validity of particular districts under Section 2 of the Voting Rights Act and, on a political gerrymandering claim, under the Equal Protection Clause, have not been entertained by the Supreme Court and have been resolved in local litigation involving only limited areas of the apportionment plan.

- 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 a 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 or their ability to elect representatives of 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.

Exhibit 1

- 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 which such 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.

BAKER.AMY

From: Leznoff, JoAnne [JoAnne.Leznoff@LASPBS.STATE.FL.US]
Sent: Friday, June 06, 2008 2:25 PM
To: BAKER.AMY; Weiss, Christian; Kelly, Cynthia
Cc: Belcher, Marsha
Subject: From the courts on redistricting amendment

Indeterminate statement from the state courts.

From: Lisa Goodner [mailto:goodnerl@flcourts.org]
Sent: Friday, June 06, 2008 2:01 PM
To: Leznoff, JoAnne
Subject: FW: FW:

JoAnne: I'm not sure this is of much help. I think that initially we thought we would have something to go by to estimate the increase in litigation but that did not prove to be the case. They tell me this is all we can tell you. Please let me know if you have any other questions.
Thanks
Lg

Due to the proposed constitutional amendments, the Office of the State Courts Administrator believes there will be an impact at the trial court 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 amendments. Unfortunately, the amount of increased litigation is unknown and the estimated impact on the trial court and judicial workload is indeterminate. In addition, the estimate impact on appellate workload is indeterminate.

Exhibit 2

6/12/2008

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

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STATEMENT OF THE CASE

On May 22, 2008, the Secretary of State sent to the Attorney General and to the Financial Impact Estimating Conference ("FIEC"), the petition for two constitutional initiatives, "Standards for Legislature to Follow in Congressional Redistricting" and "Standards for the Legislature to Follow in Legislative Redistricting." The Attorney General petitioned this Court for an advisory opinion as to the validity of the initiatives. (Case No. SC08-1149 and SC08-986). In an opinion dated January 29, 2009, this Court found that both initiative proposals complied with the constitutional one-subject requirement and the ballot title and summary requirements. *Advisory Opinion to the Att'y Gen. re: Standards for Establishing Legis. Dist. Boundaries*, 34 Fla. L. Weekly S64 (Fla. Jan. 29, 2009).

The FIEC offered both the sponsor and the public the opportunity to testify with regard to likely financial impact of the initiatives. On June 18, 2008, the Conference forwarded its prepared financial impact statements and financial information statements 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 FIEC's financial impact statements

comply with Section 100.371, Florida Statutes. In an opinion on January 29, 2009, this Court found that the original fiscal impact statements for the two initiatives were misleading and failed to comply with the standards of Section 100.371(5)(a), Florida Statutes. *See Advisory Opinion to the Att'y Gen. re: Standards for Establishing Legis. Dist. Boundaries – Fiscal Impact Statements*, 34 Fla. L. Weekly S62 (Fla. Jan. 29, 2009).

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]

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

> 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

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, just like the earlier versions, 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.

A Fiscal Impact Statement must be no more than 75 words in length, must be clearly and unambiguous, and must accurately address estimated increases or decreases in revenues or costs to the state or to local

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local government expenditures or government revenues.

governments caused by the proposed amendment. The purpose of the statements is to inform the public and accuracy is paramount. The Constitution requires that the impact statement must reflect "*probable* financial impact." FLA. CONST., art. XI, § 5(b) (emphasis added).

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 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 provided). The Court's review is further defined by Section 100.371(5)(b)3, Florida Statutes, which provides 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." *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).

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[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."

This Court has analogized the standards for fiscal impact statements to those for the ballot title and summary. *Id.* As this Court noted, given the need to ensure voters have access to accurate information, and given the similarity in terminology between the two relevant statutes, Section 100.371 (fiscal impact statements) and Section 101.161, Florida Statutes (ballot titles and summaries), it is logical to employ a similar scrutiny. *Id.* These standards include a basic neutrality and accuracy requirement. As this Court noted, "[i]t 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." *Id.*

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).

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. The revised statements do not speculate as to "probably increased costs (millions of dollars)" to state government as did the flawed earlier statements. Nor do the revised statements speculate as to "likely . . . additional costs" for a state court system that will be involved in whatever litigation occurs.

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." *Standards for Establishing Legis. Dist. Boundaries*, 34 Fla. L. Weekly at S63. Under the circumstances and under the holding of that case, there can be no *probable* financial impact as a matter of law. 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." 34 Fla. L. Weekly at S63. We 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.

Importantly, these fiscal impact statements are not legislative findings. The Legislature did not vote on this text. This Court has the role of

determining whether this language provides the public with an unambiguous statement of probable cost. The revised statements themselves base their tentative conclusions on possibilities and contingencies. The result of placing such statements on the ballot is ambiguity to the voting public. Such a result is exactly what the Court is asked to prevent by the Constitution and the relevant statute. Whether the proposed amendment will cause more litigation—and its related expenses—cannot be known.

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). There, this Court rejected a financial impact statement similar to the one at issue here, which would require local governments to submit desired changes to their master plans to the voters through referenda. The impact statement 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.).[3]

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. While it is possible that there will be additional litigation, the amendment is intended to provide the Legislature with clear standards for how districts are designed. 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." *Standards for Establishing Legis. Dist. Boundaries*, 34 Fla. L. Weekly at S63. The extent to which increased litigation over the new districts or plans occurs depends on how closely these standards are

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[3] The third attempt at a fiscal impact statement for the Required Referenda initiative is currently before this Court for review. The relevant sentence has been modified to read, "Local governments will incur additional costs due to the requirement to conduct referenda in order to adopt comprehensive plans or amendments thereto. The amount of such costs depends upon the frequency, timing and method of referenda, and includes the costs of ballot preparation, election administration, and associated expenses."

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. *See Standards for Establishing Legis. Dist. Boundaries*, 34 Fla. L. Weekly at S63; *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.

Frankly, the two proposed redistricting amendments at issue here simply do 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 *beyond* the substantial litigation that inevitably attends congressional and legislative redistricting, the likely costs of such additional litigation, and what the direct cause of the litigation might be.

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. *See Standards for Establishing Legis. Dist. Boundaries*, 34 Fla. L. Weekly at S63. 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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I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail this, 17th day of March, 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.

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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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Attorney

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

MOTION TO FILE BRIEF IN EXCESS OF TEN PAGE LIMIT

Sponsor, FairDistrictsFlorida.org, respectfully moves that this Court accept the brief filed on March 17, 2009, in excess of the ten page limit required by the Court's order of February 25, 2009.

Sponsor seeks this relief because of the significant issues raised by the continuing insistence of the Financial Impact Estimating Conference to find a financial impact with respect to these initiatve proposals. Sponsor believes that these issues require argument in excess of the ten page limit.

Therefore, Sponsor asks that this Court accept its brief, although it exceeds the ten page limit.

Respectfully submitted,

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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

ANSWER BRIEF

OF THE FLORIDA SENATE

IN SUPPORT OF THE FINANCIAL

IMPACT STATEMENTS

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Fogelin, Robert, Understanding Arguments (3d ed. 1987) 3, 5

SUMMARY OF THE ARGUMENT

The sponsor attacks the second sentence of the financial impact statement as vague and ambiguous, but in fact it does nothing more than state a truism: if you have more litigation than in the past, it will likely cost the state more money.

The sponsor also contends that the sentence says that there will be more litigation if the amendment passes, but the thing says nothing of the sort. It is an "if ... then" sentence that expresses the probability of one event occurring if another reasonably foreseeable event happens. This is neither confusing to voters nor objectionable.

The sponsors argue that no prediction about the likelihood of lawsuits arising from the proposed standards is permissible because the only possible cause of litigation is the Legislature's failure to follow the Constitution. This ignores the real world causes for lawsuits, which vary widely. Underlying most lawsuits challenging the constitutionality of a legislative act, however, is a plaintiff's *belief* the Legislature acted improperly. Southern Reporter is full of cases where legislative acts have unsuccessfully been challenged as unconstitutional.

The failure to mention that costs might instead go down if litigation declines from past levels is neither confusing nor prejudicial. The reasonable voter needs

no one's help to understand the obvious converse inference in the sentence that if litigation declines, so will costs.

ARGUMENT

The impact statements reach the unobjectionable conclusion that the "fiscal impact cannot be determined precisely." The Financial Impact Estimating Conference qualifies this determination with the equally unobjectionable observation that if litigation increases from historical levels, there may be an increased cost. As the Senate argued in its initial brief, the conference's conclusions — the concerns about the potential for increased litigation — are not crystal ball gazing but are supported by the record.

The amendments' supporter finds fault only with the impact statements' second sentence — "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 statement is not fatally speculative, as the sponsor supposes. The sentence merely states an unremarkable truism. No reasonable person could find it confusing, vague or ambiguous: more litigation, especially more complex litigation, results in more and higher costs; so if the amendments provoke more litigation, which may also be more complex, state government may end up paying more than it has in the past. Everybody

understands that litigation is expensive. Everybody understands that the more litigation you have, the more expensive things get. This is hardly the sort of confusing statement that this court has feared would lead voters to reject an amendment. See, e.g., Advisory Opinion to Atty. Gen. re Authorizes Miami-Dade and Broward County Voters to Approve Slot Machines in Parimutuel Facilities, 882 So.2d 966, 969 (Fla. 2004).

The sponsor's core complaint is that the conference "continues to speculate that the new districting standards *will* spawn more litigation." Initial Brief of Sponsor at 10 (emphasis added). But the sentence does not state a certainty or contain a firm prediction; it expresses a probability. "If ... then" statements are conditional statements that express probabilities, not truths or certainties. See Robert Fogelin, Understanding Arguments 31-32 (3d ed. 1987).[1]

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

[1] "The sentence that occurs between the 'if' and the 'then' is called the *antecedent* of the conditional; the sentence that occurs after the 'then' is called its *consequent*. In using an indicative conditional, we are not asserting the truth of its antecedent, and we are usually not asserting the truth of the consequent, either." (e.o.)

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)."). So, there is no reason why this impact statement is flawed, either.

The sponsor seems to think that, in its prior opinion in the matter, this court foreclosed any mention that the amendments might provoke more litigation than the state has seen in the past. Specifically, the sponsor points to the court's statement that "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." Initial Brief of Sponsor at 10. The court's view rests on the presumption that only legislative deviance from the Constitution sparks lawsuits. But what provokes lawsuits often is not so much a legislative failure to follow the Constitution as a plaintiff's *belief* the Legislature has failed to do so. Southern Reporter is full of cases in which litigants have unsuccessfully questioned the constitutionality of legislative acts. In fact, this court recently entertained such a case, Florida Association of Professional Lobbyists, Inc. v.

Division of Legislative Information Services, 34 Fla. L. Weekly S271 (March 19, 2009). The legislative action in that matter, enactment of lobbyist regulations, spawned two separate lawsuits, one of which ended up in federal court, rose to the 11th Circuit Court of Appeals, and landed here for a determination of state law issues. It is doubtful there is an ironclad cause-effect relationship between the Legislature's adherence to constitutional principles and the frequency of lawsuits that excludes other reasons for litigation. For a discussion of the logical principle involved, see Understanding Arguments, pp. 105-110.

This brings us back to the Senate's main position. As the Senate argued at length in its initial brief, the question whether the amendments will provoke, or the degree they are likely to provoke, litigation is not one the court can answer in a factual vacuum. To the extent they express concern about the prospect of increased litigation, the impact statements are conclusions resting on the resolution of fact questions. Consequently, the court cannot review the statements without examining the record before the conference. Only then is the court in a position to say whether the conference's conclusion lacks merit — or is unfounded speculation.

Last, the sponsor complains that because the impact statement mentioned the possibility of increases, it should also have mentioned the possibility of

decreases. Thus, in its view, without mentioning the down with the up, the statement is defective, apparently on the ground that it is overly negative. This argument treats voters as mindless robots, incapable of thinking for themselves. Obviously, if increases in litigation are likely to cost more, then it is reasonable to suppose the opposite is true: decreases in litigation result in fewer costs. This contrary inference about the effect of less litigation is clear and obvious. Voters are capable of understanding this. Thus, the second sentence is not unduly negative or prejudicial.

CONCLUSION

For these reasons, the court should approve the statements.

RESPECTFULLY SUBMITTED,

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Jason Vail

CERTIFICATE OF TYPE SIZE AND STYLE

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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

REQUEST FOR ORAL ARGUMENT

Pursuant to Fla.R.App.P. 9.320, the Senate requests oral argument.

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RE: STANDARDS FOR ESTABLISHING CONGRESSIONAL
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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*,

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[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

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[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

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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

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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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Supreme Court of Florida

THURSDAY, APRIL 9, 2009

CASE NO.: SC08-1163

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES (FIS)

CASE NO.: SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING (FIS)

The Senate's Motion to File a Brief Longer that the Page Limit is hereby denied and said brief filed with this Court on March 17, 2009, is hereby stricken. The Senate is allowed to and including April 20, 2009, to serve an amended initial brief which does not exceed ten pages in length.

Please file an original and eight copies of all briefs. In addition to paper briefs, per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all briefs in an electronic format as required by the provisions of that order. Briefs submitted will be placed on the Court's Internet site (http://www.floridasupremecourt.org).

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Supreme Court of Florida

THURSDAY, APRIL 9, 2009

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The Sponsor's Motion to File Brief in Excess of Ten Page Limit is hereby denied and said brief filed with this Court on March 17, 2009, is hereby stricken. The Sponsor is allowed to and including April 20, 2009, to serve an amended initial brief which does not exceed ten pages in length.

Please file an original and eight copies of all briefs. In addition to paper briefs, per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all briefs in an electronic format as required by the provisions of that order. Briefs submitted will be placed on the Court's Internet site (http://www.floridasupremecourt.org).

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The Senate's Motion for Waiver of Electronic Filing is hereby granted.

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TIMOTHY MCLENDON

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

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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]

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[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

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> 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 definded 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).

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[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.

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/s/ Mark Herron
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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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Crist v. Jaber, 908 So.2d 426 (Fla. 2005).....6

Florida East Coast Ry. Co. v. Department of Revenue, 620 So.2d 1051 (Fla. 1st DCA 1993).....6

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

Kainen v. Harris, 769 So.2d 1029 (Fla. 2000) 4

Other Authorities

Art. XI, s. 5 (c), Fla.Const. 3, 7

Art. XI, s. 5(a), Fla.Const. 4

Sec. 100.371, Fla.Stat. 2, 3

Sec. 216.135, Fla.Stat. 4

Sec. 216.136, Fla.Stat. 3

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

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[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

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[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.

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[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

CERTIFICATE OF TYPE SIZE AND STYLE

The brief is printed in 14 point Times New Roman.

_____
Jason Vail

Supreme Court of Florida

THURSDAY, MAY 7, 2009

CASE NOS.: SC08-1163; SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES (FIS)

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING (FIS)

The above cases have been submitted to the Court without oral argument.

Per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, if you have not already done so, counsel are directed to transmit a copy of all briefs in an electronic format as required by the provisions of that order.

A True Copy
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Clerk, Supreme Court

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HON. JEFFREY H. ATWATER
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MARK HERRON
M. HOPE KEATING
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JEREMIAH M. HAWKES
TIMOTHY MCLENDON
JASON VAIL
JON L. MILLS

Supreme Court of Florida

No. SC08-1163

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES (FIS).

No. SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING (FIS).

[December 17, 2009]

PER CURIAM.

On January 29, 2009, this Court approved for placement on the ballot two proposed amendments to the Florida Constitution detailing additional guidelines that the Florida Legislature must follow when it conducts legislative and congressional reapportionment. See Advisory Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries, 2 So. 3d 175, 191 (Fla. 2009). While this Court considered the validity of the petitions, the Attorney General also

requested that the Court review the corresponding financial impact statements to evaluate their compliance with section 100.371, Florida Statutes (2008). See Advisory Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries (FIS), 2 So. 3d 161, 162 (Fla. 2009). We remanded the statements to the Financial Impact Estimating Conference (FIEC) to be redrafted because the statements in their then-current form did not satisfy the statutory requirements. See id. at 166.

On February 18, 2009, the Attorney General filed revised financial impact statements with this Court and requested an opinion with regard to whether the statements comply with section 100.371, Florida Statutes (2008). As with the previous submissions, the revised statements are identical:

> 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.

We possess jurisdiction to consider the validity of financial impact statements pursuant to article IV, section 10, and article V, section 3(b)(10) of the Florida Constitution.

ANALYSIS

Applicable Law

Article XI, section 5 of the Florida Constitution addresses financial impact statements and provides in relevant part:

(c) 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 the initiative pursuant to section 3.

Section 100.371(5), Florida Statutes (2008), addresses financial impact statements and provides:

(5)(a) Within 45 days after receipt of a proposed revision or amendment to the State Constitution by initiative petition from the Secretary of State, the Financial Impact Estimating Conference shall complete an analysis and financial impact statement to be placed on the ballot of the estimated increase or decrease in any revenues or costs to state or local governments resulting from the proposed initiative. The Financial Impact Estimating Conference shall submit the financial impact statement to the Attorney General and Secretary of State.

. . . .

(c) . . . .

2. Principals of the Financial Impact Estimating Conference shall reach a consensus or majority concurrence on a clear and unambiguous financial impact statement, no more than 75 words in length, and immediately submit the statement to the Attorney General. Nothing in this subsection prohibits the Financial Impact Estimating Conference from setting forth a range of potential impacts in the financial impact statement. . . .

3. If the members of the Financial Impact Estimating Conference are unable to agree on the statement required by this subsection, or if the Supreme Court has rejected the initial submission by the Financial Impact Estimating Conference and no redraft has been approved by the Supreme Court by 5 p.m. on the 75th day before the election, the following statement shall appear on the ballot pursuant to s. 101.161(1): "The financial impact of this measure, if any, cannot be reasonably determined at this time."

. . . .

(e)1. Any financial impact statement that the Supreme Court finds not to be in accordance with this subsection shall be remanded solely to the Financial Impact Estimating Conference for redrafting,

> provided the court's advisory opinion is rendered at least 75 days before the election at which the question of ratifying the amendment will be presented. The Financial Impact Estimating Conference shall prepare and adopt a revised financial impact statement no later than 5 p.m. on the 15th day after the date of the court's opinion.

In our opinion that rejected the original financial impact statements, we explained our duty with regard to the review of such statements:

> [W]hen we review a financial impact statement for compliance with section 100.371, we address "whether the statement is clear, unambiguous, consists of no more than seventy-five words, and is limited to addressing the estimated increase or decrease in any revenues or costs to the state or local governments." Advisory Op. to Att'y Gen. re: Funding of Embryonic Stem Cell Research, 959 So. 2d 195, 202 (Fla. 2007). Because the financial impact statement will be printed on the ballot, the same due process concerns that inure to the title and summary of a proposed amendment are also applicable to the financial impact statement. See Askew v. Firestone, 421 So. 2d 151, 155 (Fla. 1982) ("[T]he voter should not be misled . . . . What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot." (alteration in original) (quoting Hill v. Milander, 72 So. 2d 796, 798 (Fla. 1954))). Accordingly, we have 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.
>
> . . . .The rationale behind such a review is both clear and logical. 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.

Legislative District Boundaries (FIS), 2 So. 3d at 164.

Application of Law

We conclude that the current statements satisfy the requirements of section 100.371. The statements consist of thirty-four words each, which falls well within the seventy-five word limit mandated by the statute. See § 100.371(5)(c)2., Fla. Stat. (2008). In addition, the current statements do not contain the vague and speculative reference to "millions of dollars" in increased costs that this Court rejected in the original financial impact statements. See Legislative District Boundaries (FIS), 2 So. 3d at 165 n.3; see also Advisory Op. to Att'y Gen. re Referenda Required for Adoption & Amendment of Local Gov't Comprehensive Land Use Plans, 992 So. 2d 190, 193 (Fla. 2008) (rejecting statement which provided a financial impact of "millions of dollars" because under this language, "the cost of implementation of the amendment could be anywhere from $2 million to $999 million," and concluding that such vague language may cause citizens to vote against the amendment "solely because of fear generated by the misleading statement concerning the potential economic consequences of the amendment").

Moreover, the statements do not include any nonmonetary impacts or financial impacts beyond the revenues or costs to state or local governments, the inclusion of which has led to the rejection of impact statements in the past. See, e.g., Advisory Op. to Att'y Gen. re Authorizes Miami-Dade & Broward County Voters to Approve Slot Machines in Parimutuel Facilities, 880 So. 2d 689 (Fla.

2004); Advisory Op. to Att'y Gen. re Public Protection from Repeated Medical Malpractice, 880 So. 2d 686 (Fla. 2004); Advisory Op. to Att'y Gen. re Repeal of High Speed Rail Amendment, 880 So. 2d 624 (Fla. 2004).

Instead, the statements commence with the conclusion that the impact of the amendments cannot be precisely determined, a conclusion which is clearly permitted under the statute. See § 100.371(5)(c)3., Fla. Stat. (2008) (allowing an FIS to provide that "[t]he financial impact of this measure, if any, cannot be reasonably determined at this time"). The statements then follow with a second, conditional sentence—if litigation increases beyond the number or complexity of cases which would have occurred in the amendment's absence, then additional costs may be incurred. FairDistrictsFlorida.org, the sponsor of the proposed constitutional amendments, contends that this conditional second sentence constitutes impermissible speculation which may not appear in an estimate of financial impact. It is true that we have previously condemned the use of speculation in prior financial impact statements. Indeed, we rejected the original financial impact statements in part because the FIEC's attempt to establish a litigation-cost baseline from which to measure any alleged increased cost of the proposed amendments was deemed to be "dubious and highly speculative." Legislative District Boundaries (FIS), 2 So. 3d at 165-66.

Despite this condemnation, this Court has nonetheless previously approved financial impact statements that contain conditional phrases. Most notably, in 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), we held that two financial impact statements complied with Florida law where the statements explained that the probable impact of two proposed amendments was dependent on future action by the Legislature and, therefore, could not be determined. As in the present case, the impact statements contained conditional language:

> Although state and local governments could potentially receive substantial revenue from non-taxed services subject to legislative review, the probable impact of the amendment is dependent upon future action of the legislature and cannot be determined. If the legislature exempts all services that are currently non-taxed, state and local government revenues will not be affected. If the legislature fails to exempt one or more services that are currently non-taxed, state and local revenues will increase.
>
> . . . .
>
> Although the value of sales tax exemptions subject to legislative review is substantial, the probable impact of the amendment on state and local government revenues is dependent upon future actions of the legislature and cannot be determined. If the legislature reenacts and continues all existing exemptions, state and local government revenues will not be affected. If the legislature does not reenact one or more exemptions, state and local government revenues will increase.

Id. at 485, 489. Thus, prior precedent compels a conclusion that the conditional phrase in the second sentence of the financial impact statements is not

impermissible and does not render the statements noncompliant with section 100.371.

Although we do not reject the statements as revised, it may become necessary to reconsider whether to allow financial impact statements that contain conditional phrases on the ballot in light of our constitutional duty to protect and preserve the integrity of the amendment process:

> [F]inancial 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. Scare tactics and vague, unsupported predictions of financial disaster have no place in this constitutional-amendment process, and any predictions of financial impact must be grounded in fact, not partisan ideology. Otherwise, the core purpose of financial impact statements (i.e., to inform voters so that an educated decision may be made with regard to a proposed amendment) would be completely defeated.

Legislative District Boundaries (FIS), 2 So. 3d at 165; see also Repeated Medical Malpractice, 880 So. 2d at 687 (Lewis, J., specially concurring) (expressing concern that broad interpretation of law governing financial impact could reduce statements into "a vehicle for any manner of content and language, including politicized statements designed as an attempt to sway the voters of this state, as long as those statements are clear and unambiguous").

CONCLUSION

Based upon prior precedent from this Court, we hold that the financial impact statements comply with section 100.371, Florida Statutes (2008), and may be placed on the ballot.

It is so ordered.

LEWIS, LABARGA, and PERRY, JJ., concur.
CANADY and POLSTON, JJ., concur in result only.
QUINCE, C.J., dissents with an opinion.
PARIENTE, J., recused.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

QUINCE, C.J., dissenting.

I dissent because I do not believe that this financial impact statement complies with the spirit and purpose of these statements. A financial impact statement is intended to give the voters a realistic, and I believe, unbiased statement of what the voter might expect the State or other political subdivision of the State to expend in order to implement the amendment if it should pass. The statement should be neutral and state both sides of the expenditure issue, if there is more than one possibility. The financial impact statement should not be used as a scare tactic to discourage the voter. This financial statement is not a neutral statement of the financial consequences. The other side in this instance is that there may be little or no financial impact beyond what is already experienced when legislative districts are being established. This possible impact could have also

been stated as the drafters only used thirty-four of the seventy-five words allowable for financial impact statements.

I would not allow this statement to be placed on the ballot.

Two Cases:

Original Proceeding – Advisory Opinion – Attorney General

Bill McCollum, Attorney General, Louis F. Hubener, Solicitor General, Tallahassee, Florida,

for Petitioner

Barry Richard and M. Hope Keating of Greenberg Traurig, P.A., Tallahassee, Florida, Jon L. Mills of Boies, Schiller and Flexner, LLP, Miami, Florida, and Timothy McLendon, Gainesville, Florida, Mark Herron of Messer, Caparello and Self, P.A., Tallahassee, Florida, and E. Thom Rumberger of Rumberger, Kirk and Caldwell, P.A., Tallahassee, Florida,

for FairDistrictsFlorida.org, Sponsor

Jason Vail, General Counsel, Florida Senate, and Jeremiah M. Hawkes, General Counsel, Florida House of Representatives, Tallahassee, Florida, on behalf of The Florida Legislature,

as Opponents

SUPREME COURT OF FLORIDA

Case No. SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING

(Review of Financial Impact Statement)

Consolidated for oral argument with Case Nos. SC08-986, SC08-1149, and SC08-1163

DOCKET

SHEET

Florida Supreme Court Case Docket

Case Number: SC08-1165 - Closed

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR vs. LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING (FIS)

03/11/2011 10:42

Date Docketed	Description	Filed By	Notes
06/20/2008	REQUEST-ADVISORY OPINION (ATTY GEN)	PT Advisory Opinion To The Attorney General ADVOP BY: PT Hon. Bill Mccollum 112233	O&7 & E-MAIL
06/20/2008	No Fee Required		
06/20/2008	ORDER-HIGH PROFILE		
06/25/2008	ORDER-OA&BRIEF SCHED (AG ADVISORY OPIN)		TO VIEW ORDER SEE SC08-1149.
07/15/2008	INITIAL BRIEF-MERITS	PT Fair Districts Florida.Org BY: PT Mark Herron 199737	(OF SPONSOR, FAIRDISTRICTFLORIDA.ORG) (0&8 & E-MAIL)
07/15/2008	INITIAL BRIEF-MERITS	PT Fair Districts Florida.Org BY: PT M. Hope Keating 981915	(OF THE FLORIDA LEGISLATURE) (0&8 & E-MAIL)
08/22/2008	ORAL ARGUMENT CALENDAR		
08/22/2008	ORDER-ORAL ARGUMENT RESCHEDULE		TO VIEW ORDER SEE SC08-986.
09/03/2008	MOTION-OTHER SUBSTANTIVE	PT Fair Districts Florida.Org BY: PT Mark Herron 199737	(O&9) FILED AS "MOTION TO EXPAND TIME FOR ORAL ARGUMENT"
09/15/2008	ORDER-ORAL ARGUMENT RESCHEDULE GR		TO VIEW ORDER SEE SC08-986.
11/06/2008	ORAL ARGUMENT HELD		
01/29/2009	DISP-REMANDED		For these reasons, we hold that the financial impact statements prepared by the Conference are fatally misleading and do not comply with section 100.371(5), Florida Statutes (2008). Thus, in

			accordance with our constitutional duty to ensure that Florida voters receive a fair and accurate ballot, see Askew, 421 So. 2d at 155, we are compelled to reject the statements as drafted. We remand the statements to the Financial Impact Estimating Conference for redrafting. See § 100.371(5)(e)(1), Fla. Stat. (2008).
02/12/2009	WEST CORRESPONDENCE		CORRECTED OPINION - On page 11, added law firm affiliation of Jon L. Mills.
02/18/2009	PETITION-AMENDMENT/SUPPLEMENT	PT Advisory Opinion To The Attorney General ADVOP BY: PT Hon. Bill Mccollum 112233	FILED AS LETTER DATED FEBRUARY 18, 2009, TREATED AS REVISED FINANCIAL IMPACT STATEMENT (O&7 & E-MAIL)
02/25/2009	ORDER-BRIEF SCHED (AG ADVISORY OPIN)		Pursuant to the provisions of Article IV, section 10, Florida Constitution, and section 16.061, Florida Statutes, the Attorney General of Florida has requested this Court's opinion on the initiative petition seeking to amend the Florida Constitution to establish standards for the Legislature to follow in congressional redistricting. On February 13, 2009, the Financial Impact Estimating Conference, in accordance with the provisions of Chapter 04-33, Laws of Florida, forwarded to the Office of the Attorney General a redraft of the a financial impact statement on the initiative petition. Chapter 04-33 provides for this Honorable Court to review the redrafted financial impact statement to determine whether it is in accordance with 100.371, Florida Statutes. The full text of the Attorney General's letter is attached hereto as an exhibit and made a part thereof. IT IS, THEREFORE, the order of the Court that interested parties shall file their briefs on or before March 17, 2009, and serve a copy thereof on the Attorney General. Answer briefs shall be filed on or before April 6, 2009. Briefs are limited to ten pages and the parties shall address the duties and responsibilities of the Court in this process and review and the application of these duties to this specific case. Please file an original and eight copies of all briefs.
03/17/2009	MOTION-BRIEF PAGE ENLARGEMENT	PT Florida Senate SENATE BY: PT Jason Vail 298824	O&8 & E-MAIL
03/17/2009	MOTION-WAIVER OF ELECTRONIC FILING	PT Florida Senate SENATE BY: PT Jason Vail 298824	O&8 & E-MAIL
03/17/2009	INITIAL BRIEF-MERITS	PT Florida Senate SENATE BY: PT Jason Vail 298824	O&7 W/EXHIBITS (& E-MAIL) (EXCEEDS PAGE LIMIT)
03/17/2009	INITIAL BRIEF-MERITS	PT Fair Districts Florida.Org BY: PT Mark Herron 199737	O&8 & E-MAIL (EXCEEDS PAGE LIMIT)
03/18/2009	MOTION-BRIEF PAGE ENLARGEMENT	PT Fair Districts Florida.Org BY: PT Mark Herron 199737	

04/06/2009	ANSWER BRIEF-MERITS	PT Florida Senate SENATE BY: PT Jason Vail 298824	(OF THE FLORIDA SENATE IN SUPPORT OF THE FINANCIAL IMPACT STATEMENTS) (O&8 & E-MAIL)
04/06/2009	ANSWER BRIEF-MERITS	PT Fair Districts Florida.Org BY: PT Mark Herron 199737	(OF SPONSOR - FAIRDISTRICTFLORIDA.ORG) (O&8 & E-MAIL)
04/06/2009	REQUEST-ORAL ARGUMENT	PT Florida Senate SENATE BY: PT Jason Vail 298824	O&8
04/09/2009	ORDER-BRIEF PAGE ENLARGEMENT DY/STRICKEN		The Senate's Motion to File a Brief Longer that the Page Limit is hereby denied and said brief filed with this Court on March 17, 2009, is hereby stricken. The Senate is allowed to and including April 20, 2009, to serve an amended initial brief which does not exceed ten pages in length. Please file an original and eight copies of all briefs. In addition to paper briefs, per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all briefs in an electronic format as required by the provisions of that order. Briefs submitted will be placed on the Court's Internet site (http://www.floridasupremecourt.org). (SEE SC08-1163 TO VIEW ORDER)
04/09/2009	ORDER-BRIEF PAGE ENLARGEMENT DY/STRICKEN		The Sponsor's Motion to File Brief in Excess of Ten Page Limit is hereby denied and said brief filed with this Court on March 17, 2009, is hereby stricken. The Sponsor is allowed to and including April 20, 2009, to serve an amended initial brief which does not exceed ten pages in length. Please file an original and eight copies of all briefs. In addition to paper briefs, per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all briefs in an electronic format as required by the provisions of that order. Briefs submitted will be placed on the Court's Internet site (http://www.floridasupremecourt.org). (SEE SC08-1163 TO VIEW ORDER)
04/09/2009	ORDER-OTHER SUBSTANTIVE GR		The Senate's Motion for Waiver of Electronic Filing is hereby granted. (SEE SC08-1163 TO VIEW ORDER)
04/20/2009	INITIAL AMD BRIEF-MERITS	PT Fair Districts Florida.Org BY: PT Mark Herron 199737	O&8 & E-MAIL
04/20/2009	INITIAL AMD BRIEF-MERITS	PT Florida Senate SENATE BY: PT Jason Vail 298824	O&8 & E-MAIL
05/07/2009	ORDER-NO REQ SCHED (MISC)		TO VIEW ORDER SEE SC08-1163.

12/17/2009	DISP-APPROVED		Based upon prior precedent from this Court, we hold that the financial impact statements comply with section 100.371, Florida Statutes (2008), and may be placed on the ballot.
03/01/2010	ARCHIVES		File

Supreme Court of Florida

FRIDAY, JUNE 20, 2008

CASE NO.: SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE:
STANDARDS FOR LEGISLATURE TO FOLLOW IN
CONGRESSIONAL REDISTRICTING (FIS)

Because of significant public and media interest in this matter, counsel for the parties are directed to hereafter file an original and eight copies of all pleadings filed with this Court. Per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all documents, including any attachments and appendices, in an electronic format as required by the provisions of that order. FOR GENERAL FILING INFORMATION AND ADMINISTRATIVE ORDER NO. AOSC04-84, PLEASE VISIT THE CLERK'S OFFICE WEBSITE AT http://www.floridasupremecourt.org/clerk/index.shtml.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

vm
Served:

HON. KEN PRUITT
HON. CHARLES J. CRIST, JR.
FINANCIAL IMPACT ESTIMATING CONFERENCE
HON. KURT S. BROWNING
HON. MARCO ANTONIO RUBIO
HON. BILL MCCOLLUM
MARK HERRON
EDWIN THOM RUMBERGER

Supreme Court of Florida

WEDNESDAY, JUNE 25, 2008

CASE NOS.: SC08-1149; SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING (FIS)

Bill McCollum, pursuant to the provisions of Article IV, section 10, Florida Constitution, and section 16.061, Florida Statutes, has requested this Court's opinion as to whether the text of the proposed amendment seeking to amend the Florida Constitution to establish standards for the Legislature to follow in congressional redistricting had met the registration complies with Article XI, section 3, Florida Constitution, and whether the proposed ballot title and substance comply with section 101.161, Florida Statutes. The petition provides:

> Add a new section 20 to Article III
>
> Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES
>
> In establishing Congressional district boundaries:
> (1) No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
> (2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts

> shall, where feasible, utilize existing political and geographical boundaries. (3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

The ballot title and summary for the proposed amendment provides:

> Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

Section 16.061, Florida Statutes, requires the Attorney General, within thirty days after receipt of the proposed amendment or revision to the State Constitution by initiative petition, to petition this Honorable Court for an advisory opinion regarding compliance of the text of the proposed amendment with Article XI, section 3, Florida Constitution, and compliance of the proposed ballot title and substance with section 101.161, Florida Statutes.

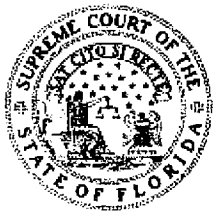
On June 18, 2008, the Financial Impact Estimating Conference, in accordance with the provisions of Chapter 04-33, Laws of Florida, forwarded to the Office of the Attorney General a financial impact statement on the initiative petition. Chapter 04-33 provides for this Honorable Court to review the financial impact statement to determine whether it is in accordance with 100.371, Florida Statutes.

The full text of the Attorney General's letter is attached hereto as an exhibit and made a part thereof.

IT IS, THEREFORE, the order of the Court that the above cases are hereby consolidated for the purpose of oral argument. Interested parties shall file their briefs on or before July 15, and serve a copy thereof on the Attorney General. Answer briefs shall be filed on or before August 4, 2008. Please file an original and eight copies of all briefs. In addition to paper briefs, per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all briefs in an electronic format as required by the provisions of that order. Briefs submitted on diskette will be placed on the Court's Internet site **(http://www.floridasupremecourt.org)**. Oral argument is scheduled for 9:00 a.m., Wednesday, November 5, 2008. A maximum of twenty minutes to the side as consolidated is allowed for the argument. All parties who have filed a brief and have asked to be heard may, in the Court's discretion, be permitted to participate in oral argument.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court



vm
Served:

EDWIN THOM RUMBERGER
HON. CHARLES J. CRIST, JR.
HON. KURT S. BROWNING
FINANCIAL IMPACT
ESTIMATING CONFERENCE
HON. BILL MCCOLLUM
MARK HERRON
HON. KEN PRUITT
HON. MARCO ANTONIO RUBIO

IN THE SUPREME COURT OF FLORIDA

Case No.: SC08-1165

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

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STATEMENT OF THE CASE

On April 23, 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 Legislative Redistricting." The Attorney General petitioned this Court for an advisory opinion as to the validity of the initiative. (Case No. SC08-986). 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 nearly every Congressional Redistricting effort 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 Congressional Redistricting effort 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 Congressional 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 Congressional 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 Congressional districts are drawn. Whether or not additional challenges to the Congressional District plan 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 redistricting 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 Congressional districting 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 Congressional Redistricting 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 Legislative Redistricting, which was attached to the petition of the Attorney General filed June 30, 2008, pp. 1, 5-7.

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

IN THE SUPREME COURT OF FLORIDA

Case No. SC08-1149, SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING

_____/

BRIEF

OF THE FLORIDA LEGISLATURE

IN OPPOSITION TO THE PETITION

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STATEMENT OF THE CASE AND FACTS

The Attorney General seeks review of a constitutional amendment brought by citizens' initiative, pursuant to Article 4, s. 10, Fla.Const.

The ballot title and summary read:

> STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING
>
> Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographic boundaries.

The text of the petitions reads:

> Add a new section 20 to Article III
>
> Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES
>
> In establishing Congressional district boundaries:
>
> (1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

(2) Unless compliance with the standards in this subsection, conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; districts shall, where feasible, utilize political and geographic boundaries.

(3) The order in which the standards within subsections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within the subsection.

The amendment's first paragraph would establish these independent, freestanding standards:

1. No plan or district shall be drawn with the intent to favor or disfavor a political party.

2. No plan or district shall be drawn with the intent to favor or disfavor an incumbent.

3. No plan or district shall be drawn with the intent or result of denying or abridging the equal opportunity of racial minorities to participate in the political process or to diminish their ability to elect representatives of their choice.

4. No plan or district shall be drawn with the intent or result of denying or abridging the equal opportunity of language minorities to participate in the political process or to diminish their ability to elect representatives of their choice.

5. Districts shall consist of contiguous territory.

The second paragraph would establish these independent, freestanding standards, which are to be met unless doing so conflicts with a requirement in paragraph 1 or with federal law:

6. Districts shall be as nearly equal in population as is practicable.

7. Districts shall be compact.

8. Districts shall, where feasible, utilize political and geographic boundaries.

Thus the proposed amendment creates a list of eight independent redistricting objectives to be achieved by any entity drafting an apportionment plan or drawing any individual district.

The use of the passive voice in paragraph 1 — "No apportionment plan or district *shall be drawn*" — indicates that any entity drafting an apportionment plan or creating a district must comply with these criteria, including the courts.

SUMMARY OF THE ARGUMENT

The language of the proposed amendment in this matter is virtually identical to that in SC08-986. The only difference is that this petition involves an amendment addressing congressional reapportionment. SC08-986 addresses state

legislative reapportionment. Consequently, both petitions share largely the same defects. For this reason, with one significant exception, the arguments made here repeat those made in the Legislature's brief in opposition in SC08-986. We reiterate them for the Court's convenience so that it does not have to refer to another paper.

The one exception, which we highlight here, is the fact that the amendment will devolve to the courts the ultimate responsibility to conduct reapportionment. This will violate Article 1, s. 4, U.S. Constitution, which authorizes only state legislatures to reapportion congressional districts.

The proposed amendment violates the single subject rule.

The proposed amendment violates both facets of the Constitution's single subject rule. First, the amendment establishes eight independent objectives to be achieved in redistricting, depriving it of sufficient "oneness" to comply with the Constitution. These objectives, embodied in the amendment's standards, are disparate, unconnected goals so that the proposal constitutes impermissible logrolling.

Second, the amendment will substantially alter the constitutional roles of the Legislature and the judiciary. The amendment's vague standards ensure that no legislatively drafted redistricting plan will escape judicial challenge. Furthermore,

one goal of the amendment — to eliminate politics from legislative redistricting decisions — is humanly impossible to achieve. The combined force of these standards will inevitably compel the judiciary to make the ultimate decision — a result which is contrary to Article 1, s. 4, U.S. Const., and which potentially threatens the courts' independence.

In short, the amendment constitutes the kind of precipitous, spasmodic, cataclysmic governmental change that the single subject rule is intended to prevent.

The ballot summary is vague and misleading.

The ballot title is misleading because it says the amendment addresses standards the Legislature must follow in redistricting. However, the text of the amendment requires the Court, when imposing a redistricting plan pursuant to its constitutional authority, to obey those same standards as well.

The ballot summary is misleading because it misrepresents the amendment's goal and purposes. For instance, the summary clearly implies that the *effect* of districts or reapportionment plans cannot be to favor or disfavor anyone or any party. But under the amendment, proof of *intent* alone must be shown. In addition, the summary uses words inconsistent with those in the amendment, words that have very different meanings. For instance, the summary states districts should be drawn to respect city or county boundaries; the amendment's text instead refers to

"political boundaries," a far broader term. Some terms used in the summary are vague and misleading. Finally, the summary fails to identify constitutional provisions that are substantially affected.

STANDARD OF REVIEW

> The overall standard of review for the proposed amendment and the ballot title and summary are the same. In Advisory Opinion to the Attorney General re Amendment to Bar Government from Treating People Differently Based on Race in Public Education, 778 So.2d 888 (Fla. 2000), this Court summarized its standard of review in initiative petition cases as follows:
>
> > The Court's inquiry, when determining the validity of initiative petitions, is limited to two legal issues: whether the petition satisfies the single-subject requirement of article XI, section 3, Florida Constitution, and whether the ballot titles and summaries are printed in clear and unambiguous language pursuant to section 101.161, Florida Statutes (1999). In order for the Court to invalidate a proposed amendment, the record must show that the proposal is clearly and conclusively defective on either ground. In determining the propriety of the initiative petitions, the Court does not review the merits of the proposed amendments.

Advisory Opinion to the Atty. Gen. re: Protect People, Especially Youth, from Addiction, Disease, and Other Health Hazards of Using Tobacco, 926 So.2d 1186, 1190-1191 (Fla. 2006).

Article 11, s. 3, Fla.Const. states than an amendment proposed by citizen initiative can only "embrace but one subject and matter directly connected therewith."

Article 1, s. 4, U.S. Const., states: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature* thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Emphasis added.

ARGUMENT

I. The proposed amendment violates the single subject rule.

The proposed amendment violates both facets of the Constitution's single subject rule. First, the amendment establishes eight independent objectives to be achieved in redistricting, depriving it of sufficient "oneness" to comply with the Constitution. These objectives, embodied in the amendment's standards, are disparate, unconnected goals so that the proposal constitutes impermissible logrolling.

Second, the amendment will substantially alter the constitutional roles of the Legislature and the judiciary. The amendment's vague standards ensure that no legislatively drafted redistricting plan will escape judicial challenge. Furthermore, one goal of the amendment — to eliminate politics from legislative redistricting decisions — is humanly impossible to achieve. The combined force of these standards will inevitably compel the judiciary to make the ultimate decision — a result which is contrary to Article 1, s. 4, U.S. Const., and which potentially threatens the courts' independence.

In short, the amendment constitutes the kind of precipitous, spasmodic, cataclysmic governmental change that the single subject rule is intended to prevent. Advisory Opinion to the Atty. Gen. Re: Protect People, Especially Youth, from

Addiction, Disease, and Other Health Hazards of Using Tobacco, 926 So.2d 1186 (Fla. 2006); Advisory Opinion to the Attorney General Re: Independent Nonpartisan Commission to Apportion Legislature and Congressional Districts Which Replaces Apportionment by Legislature, 926 So.2d 1218, 1224 (Fla. 2006).

A. The amendment addresses separate purposes and constitutes logrolling.

"Logrolling is 'a practice whereby an amendment is proposed which contains unrelated provisions, some of which electors might wish to support, in order to get an otherwise disfavored provision passed.'" Hazards of Using Tobacco, 926 So.2d at 1190. The single subject rule prohibits initiative amendments that contain such unrelated provisions. Id.; Apportionment by Legislature, 926 So.2d at 1224-1225; In re Advisory Opinion to the Attorney General — Save Our Everglades, 636 So.2d 1336, 1339-1340 (Fla. 1994).

To determine if a measure constitutes impermissible logrolling, the court examines the text for whether it exhibits "oneness of purpose." Save our Everglades, 636 So.2d 1340; In re Advisory Opinion to the Attorney General — Restricts Laws Related to Discrimination, 632 So.2d 1018, 1020 (Fla. 1994) ("to comply with the single-subject requirement, the proposed amendment must manifest a 'logical and natural oneness of purpose.'"). The proposal must be

complete within itself relating to one subject. Adams v. Gunter, 238 So.2d 824, 831 (Fla. 1970). "'[U]nity of object and plan is the universal test' . . . A proposed amendment meets this test when it 'may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme. [internal citations omitted].'" 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, 480-481 (Fla. 2007). An amendment's parts must be functionally and facially unified, so that any one aspect is a necessary component of a single dominant plan, and is logically related to the amendment's purpose. Advisory Opinion to the Attorney General re Local Trustees, 819 So.2d 725, 730 (Fla. 2002); Advisory Opinion to the Attorney General re Funding of Embryonic Stem Cell Research, 959 So.2d 195, 197 (Fla. 2007).

Proposals that force voters to choose "in the 'all or nothing' fashion" when they might disagree with unrelated parts of an amendment violate the one subject rule. Independent Nonpartisan Commission to Apportion Legislative and Congressional Districts, 926 So.2d at 1226. Save Our Everglades, 636 So.2d at 1341.[1]

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[1] "One objective — to restore the Everglades — is politically fashionable, while the other — to compel the sugar industry to fund the restoration — is more problematic. Many voters sympathetic to restoring the Everglades might be

The proposal at issue today fails these fundamental tests. The various standards in the proposal are independent and freestanding. They have nothing to do with one another and do not work together toward a common goal. In fact, each standard establishes an independent goal by itself. By their nature, these elements are not functionally and facially unified so that each aspect is a necessary component of a single dominant plan. In reality, they are not unified in any meaningful sense; they are just a list of unrelated standards aiming toward unrelated targets. A voter easily could favor one standard and reject another. But because they are wrapped in a single package, the voter must make the classic "all or nothing" judgment which this Court has repeatedly condemned.

These disparate elements are:

- No plan or district shall be drawn with the intent to favor or disfavor a political party.
- No plan or district shall be drawn with the intent to favor or disfavor an incumbent.
- No plan or district shall be drawn with the intent or result of denying or abridging the equal opportunity of racial minorities to participate in

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antithetical to forcing the sugar industry to pay for the cleanup by itself, and yet those voters would be compelled to choose all or nothing."

the political process or to diminish their ability to elect representatives of their choice.

- No plan or district shall be drawn with the intent or result of denying or abridging the equal opportunity of language minorities to participate in the political process or to diminish their ability to elect representatives of their choice.
- Districts shall consist of contiguous territory.

A district also must meet another set of standards unless compliance with them conflicts with the requirements listed above. This second set says a district:

- shall be as nearly equal in population as is practicable.
- shall be compact.
- shall, where feasible, utilize political and geographic boundaries.

The most obvious defect is that the proposal does not have the necessary oneness of purpose. The fact that the amendment's drafters are willing to sacrifice the second set of standards to satisfy the first set shows that even they realized that the amendment's standards were in conflict. That one set has to be subordinated to the other set demonstrates on its face that there are separate and conflicting goals set out by the different standards.

In fact, the proposal has eight unrelated purposes, because each standard establishes its own goal. Even if one struggles to find commonality among the standards, five separate objectives are apparent. First, the amendment strives for political neutrality or balance when it prohibits districts favoring any party or an incumbent. Second, it aims to eliminate two types of discrimination. Third, it seeks to dictate districts' geography by requiring contiguity, compactness and conformity with political and geographic boundaries. Fourth, it hopes to ensure equal populations among districts. Fifth, the contiguity requirement in paragraph 1 also apparently would require single-member districts.[2]

No matter how one parses the objectives, whether by eight parts or five, each stands alone and none works together with, nor buttresses another, as is to be expected in a proposal whose elements have "a natural relation and connection as component parts or aspects of a single dominant plan or scheme." 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, 478 (Fla. 2007); Advisory Opinion to the Attorney General re Independent Nonpartisan

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[2] The Attorney General appears to agree with this view. See Attorney General's letter to the Chief Justice dated June 18, 2008.

As it happens, federal law already requires single member congressional districts. See 2 U.S.C. s. 2(c); Larios v. Perdue, 306 F.Supp.2d 1190, 1207 (N.D. Ga.. 2003).

Commission to Apportion Legislative and Congressional Districts Which Replaces Apportionment by Legislature, 926 So.2d 1218 (Fla. 2006) (proposal invalid because it had two purposes, creation of an apportionment commission and establishment of apportionment standards); In re Advisory Opinion to the Attorney General — Save Our Everglades, 636 So.2d 1336, 1341 (Fla. 1994) (duality of purposes in requiring restoration of the Everglades at the expense of the sugar industry).

Because the amendment is merely a list of standards or classifications (each with a separate goal or objective), it is more like the amendment at issue in In re Advisory Opinion to the Attorney General — Restricts Laws Related to Discrimination, 632 So.2d 1018 (Fla. 1994), than any other proposal to come before this Court. In Laws Related to Discrimination, the proposed amendment would have altered Article 1, s. 10, Fla.Const., to prohibit the state and any other units of Florida government from enacting or adopting any law, ordinance or rule

> regarding discrimination against persons which creates, establishes or recognizes any right, privilege or protection for any person based upon any characteristic, trait, status, or condition other than race, color, religion, sex, national origin, age, handicap, ethnic background, marital status, or familial status.

Id. at 1019. This Court concluded that the amendment constituted impermissible logrolling, in violation of the single subject rule, "because it enumerates ten

classifications of people that would be entitled to protection from discrimination if the amendment were passed. The voter is essentially being asked to give one 'yes' or 'no' answer to a proposal that actually asks ten questions. . . . Requiring voters to choose which classifications they feel most strongly about, and then requiring them to cast an all or nothing vote on the classifications listed in the amendment, defies the purpose of the single-subject limitation." Id. at 1020.

The current proposal is defective for the same reason. It presents the voter with eight independent standards for what is desirable in writing a redistricting plan, none of which has any more to do with the others than the 10 standards for public employment listed in Laws Related to Discrimination. For instance, whether a redistricting plan or district is politically neutral has nothing to do with whether the plan discriminates against minorities or provides for contiguous districts. Thus, the proposal requires voters "to choose which classifications they feel most strongly about," but also compels them to vote all-or-nothing for the whole package of standards, even if they agree with some and disagree with others. For instance, a voter may believe strongly about prohibiting racial discrimination in redistricting, but could have reservations about the vague category "language minority." Similarly, a voter may like the notion that districts should be drawn so as not to favor a particular party, but be less enthusiastic about a prohibition

against favoring incumbents. Yet either way, the voter must accept the bitter with the sweet. See also Advisory Opinion to the Attorney General re Independent Nonpartisan Commission to Apportion Legislative and Congressional Districts Which Replaces Apportionment by Legislature, 926 So.2d 1218, 1226 (Fla. 2006) (where the court regarded a standard requiring the creation of single-member districts, which this amendment again attempts to require, as a stand alone goal).

The Court addressed the permissibility of multiple classifications or standards again in Advisory Opinion to the Attorney General re Amendment to Bar Government from Treating People Differently Based on Race in Public Education, 778 So.2d 888, 892-893 (Fla. 2000), where it held an initiative petition violated the single subject rule because it contained three separate classifications.[3] See also Fine v. Firestone, 448 So.2d 984, 991 (Fla. 1984) (taxes and user fees created separate classifications or subjects).

Furthermore, the amendment subordinates some goals to others. A voter very well could disagree with that setting of priorities.

Because of these deficiencies, the amendment involves impermissible logrolling. This Court should bar the amendment from the ballot.

B. The amendment substantially alters the functions of multiple branches of government.

[3] Education, employment and contracting. Id. at 893.

A proposal that substantially alters the functions of more than one branch or level of government violates the one subject rule. 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, 478 (Fla. 2007); Advisory Opinion to the Attorney General re Requirement for Adequate Public Education Funding, 703 So.2d 446, 449 (Fla. 1997); In re Advisory Opinion to the Attorney General — Save Our Everglades, 636 So.2d 1336, 1340 (Fla. 1994). A proposal that substantially affects more than one constitutional provision is also impermissible. Adequate Public Education Funding, 703 So.2d at 449-450. Furthermore, a proposal that substantially affects a constitutional provision must advise voters of this fact to avoid single subject problems. Race in Public Education, 778 So.2d at 894-895.[4]

It cannot be disputed that the proposal substantially alters the Legislature's power to establish appropriate legislative districts: it substantially constrains the Legislature's broad discretion under Article 1, s. 4, U.S. Const.

What is not so obvious to the casual reader is how clearly the proposal's practical effect divests the Legislature of its constitutional responsibilities to

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[4] Although one would think this point goes to the adequacy of the summary, the court in Race in Public Education saw the failing as both a single subject violation and a summary defect. Id. at 894-895, 898.

regulate congressional elections pursuant to Article 1, s. 4, U.S. Const., and transfers them to the judiciary. The most troublesome provisions are those requiring the intent behind a plan or district to be politically neutral, neither favoring nor disfavoring any party or incumbent. This objective is humanly impossible to achieve. As the U.S. Supreme Court has observed, political neutrality simply cannot be achieved in any practical way because politics and political considerations inevitably play major roles in redistricting decisions:

> Indeed, quite aside from the anecdotal evidence, the shape of the House and Senate Districts, and the alleged disregard for political boundaries, we think it most likely that whenever a legislature redistricts, those responsible for the legislation will know the likely political composition of the new districts and will have a prediction as to whether a particular district is a safe one for a Democratic or Republican candidate or is a competitive district that either candidate might win. . . '*it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another*. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. *District lines are rarely neutral phenomena.* They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. *The reality is that districting inevitably has and is intended to have substantial political consequences*.'
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> * * *
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> '*The key concept to grasp is that there are no neutral lines for legislative districts ... every line drawn aligns partisans and interest blocs in a particular way different from the alignment that would result from putting the line in some other place*." Dixon, Fair Criteria

and Procedures for Establishing Legislative Districts 7-8, in Representation and Redistricting Issues (B. Grofman, A. Lijphart, R. McKay, & H. Scarrow eds. 1982).

As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.

Davis v. Bandemer, 478 U.S. 109, 128-129 (1986) (emphasis added). See also Vieth v. Jubelirer, 541 U.S. 267, 281 , 285-286 (2004).[5]

Because — by its very nature — legislative redistricting cannot be politically neutral or devoid of political intentions, any plan propounded by the Legislature necessarily will be subject to judicial challenge. See Vieth v. Jubelirer,

[5] Quoting Bandemer; and also making the point that: "The Constitution clearly contemplates districting by political entities, see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics. See Miller, supra, at 914, 115 S.Ct. 2475 ('[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition ...'); Shaw, supra, at 662, 113 S.Ct. 2816 (White, J., dissenting) ('[D]istricting inevitably is the expression of interest group politics ...'); Gaffney v. Cummings, 412 U.S. 735, 753, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973) ('The reality is that districting inevitably has and is intended to have substantial political consequences')."

541 U.S. at 286.[6] See also, Nadler v. Schwarzenegger, 137 Cal.App.4th 1327, 41 Cal.Rptr.3d 92, 99 (Cal.App. 3 Dist. 2006).[7]

Likewise, any plan or district adopted pursuant to the proposal *necessarily will be subject to judicial nullification.* Because the Legislature will be unable to draft a plan or create all districts in compliance with paragraph 1 of the proposed amendment, the courts will step in and impose their own plan.[8] See e.g., In re Constitutionality of Senate Joint Resolution 2G, 601 So.2d 543 (Fla. 1992) (Supreme Court had jurisdiction to impose its own state legislative districting plan to conform to federal law where Legislature failed to act); Brown v. Butterworth,

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[6] "Moreover, the fact that partisan districting is a lawful and common practice means that there is almost *always* room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation . . ." Emphasis the court's.

[7] "So, too, has the United States Supreme Court recognized that the difficulty of reapportionment requires that state legislatures be allowed the discretion necessary to balance competing interests. (Miller v. Johnson, supra, 515 U.S. at p. 915, 115 S.Ct. at p. 2487, 132 L.Ed.2d at p. 779.) Courts should not be 'second-guessing *what has consistently been referred to as a political task for the legislature*, a task that should not be monitored too closely [by the courts].' (Davis v. Bandemer, supra, 478 U.S. at p. 133, 106 S.Ct. at p. 2810, 92 L.Ed.2d at p. 106.)." Emphasis added.

[8] Some of the standards in the proposal call for intensive fact-finding (such as gerrymandering and protecting racial and language minorities) which this Court has said properly belong in the circuit court in the first instance. See In re Constitutionality of House Joint Resolution 1987, 817 So.2d 819, 829 (Fla.2002). Nonetheless, the courts, and more particularly this Court, will be the final decision-maker in apportionment matters if the proposal passes.

831 So.2d 683 (Fla. 4th DCA 2002) (circuit court had jurisdiction re congressional districting plan). This effect is certain, not speculative. See e.g., In re Advisory Opinion to Atty. Gen. English--The Official Language, 520 So.2d 11, 13 (Fla. 1988) (speculative impact not enough by itself to create a single subject problem).

This Court will find the task of eliminating political considerations as impossible as it is for the Legislature. See Vieth v. Jubelier, where a plurality of justices held that gerrymandering cases are nonjusticiable because of the lack of any meaningful standards. Courts attempting politics-free plans have been unable to avoid them. In fact, judges find themselves facing the fact that no substantive standards exist for such an effort, and the resulting districts end up favoring one party or individual over another anyway. Even when judges attempt to avoid political considerations, the question arises whether it is humanly possible to do so. See e.g., Henderson v. Perry, 399 F.Supp.2d 756, 768 (E.D.Tex. 2005)[9]. Because

[9] "The map drawn by this court in 2001 perpetuated much of this gerrymander. It did so because this court was persuaded that it could not achieve 'fairness' to political parties without some substantive measure of what is 'fair.' Simply undoing the work of one political party for the benefit of another would have forced this court to make decisions that could not be defended against charges of partisan decision-making — again, for the lack of a substantive standard. As the panel explained, it would follow only 'neutral' redistricting standards. Once the panel had left majority-minority districts in place and followed neutral principles traditionally used in Texas — such as placing the two gained seats in the areas of growth that produced them, following county lines, avoiding the pairing of incumbents and the splitting of voting precincts, and undoing transparent offsetting

of this inherent problem, the courts will be subject to accusations that they are partisan rather than neutral bodies, putting their credibility and independence at risk.

The dramatic shift of responsibility to the courts upsets the scheme established in Article 1, s. 4, U.S. Const., authorizing only state legislatures to impose districting plans. See e.g., Davis v. Hildebrant, 241 U.S. 565 (1916); Smiley v. Holmes, 285 U.S. 355 (1932). Both cases, the only to define the Founders' use of the word "legislature" in Article 1, s. 4, stand for the proposition that the U.S. Constitution empowers only state legislatures to adopt congressional redistricting plans, and that "legislature" means the "legislative process," so that any actor with a role to play in a state's legislative process can participate in congressional redistricting. Thus, an Ohio constitutional provision enabling voters to nullify general legislation by popular referendum permitted popular nullification of a congressional apportionment plan. Davis v. Hildebrant. And a governor could veto a redistricting plan because the veto power was part of the state's legislative

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movements of the same number of residents between districts — the drawing ceased, leaving the map free of further change except to conform it to one-person, one-vote. Make no mistake, this undertaking, while shorn of partisan motive, had political impact in the placement of every line. The results of this court's plan did ameliorate the gerrymander and placed the two districts gained by Texas in the census count; however, doing more necessarily would have taken the court into

process. Smiley. However, the courts do not play a part in Florida's legislative process. The power to set fundamental public policy, which necessarily includes the power to establish congressional districts, belongs exclusively to the Legislature. See Florida House of Representatives v. Crist, --- So.2d ----, 2008 WL 2669767 (Fla. July 3, 2008); Art. 3, s. 7, Fla.Const. Besides the Legislature, only the governor plays a role in the legislative process because of the veto power. Art. 3, s. 8, Fla.Const.[10] Thus, the practical effect of the amendment, shifting real responsibility for adopting a redistricting plan to the judiciary, removes the matter from the legislative process in contravention of Article 1, s. 4, U.S. Const. Yet the amendment does not advise voters of this substantial change.

Thus, the amendment in fact substantially affects two branches of government, which initiative amendments cannot do, 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, 478 (Fla. 2007), because not only does the amendment throw to the courts final redistricting decisions but

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each judge's own notion of fairness. The practical effect of this effort was to leave the 1991 Democratic Party gerrymander largely in place as a 'legal' plan."

[10] Hawthorne v. Wiseheart, 28 So.2d 589, 601 (Fla. 1946): "The bill providing for such increase had passed both Houses of the legislature, but the legislative process had not ended on June 3, 1943, because the Governor, under the constitution, had ten days after the adjournment of the legislature in which to approve or to veto the bill, or to permit it to become a law without his approval."

substantially broadens the courts' scope of review, which presently is limited. In re Constitutionality of House Joint Resolution 25E, 863 So.2d 1176, 1178 (Fla. 2003).

In addition, an amendment may not substantially affect more than one constitutional provision. Adequate Public Education Funding, 703 So.2d at 449-450. Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers, 705 So.2d 563, 566 n. 1 (Fla. 1998) (violation of single subject rule when amendment affected rights of privacy and collective bargaining). For instance, as already pointed out, the amendment substantially affects the Legislature's authority under Article 1, s. 4, U.S. Const. In addition, the equal protection clause in Article 1, s. 2, Fla.Const., is substantially affected as is the Fourteenth Amendment to the U.S. Constitution. Martinez v. Bush, 234 F.Supp.2d 1275, 1281 (S.D. Fla. 2002). The amendment permits gerrymandering claims, which seem to be foreclosed now under the equal protection clause. Vieth v. Jubelirer, 541 U.S. 267 (2004) (plurality opinion). Thus, the proposal substantially alters the constitutional test so that the standards under the equal protection clause no longer would apply.

Finally, nothing in the proposal announces the intention to radically circumscribe the Legislature's discretion. As Race in Public Education, 778 So.2d

at 894-895, points out, the failure to identify substantially affected constitutional provisions is a single subject violation. In addition, constant litigation and the uncertainty it brings would disrupt both the electoral and legislative processes so that Article 3, ss. 2, 3, 4 and 7, Fla.Const., would be substantially adversely affected. See e.g., Dean v. Leake, --- F.Supp.2d ----, 2008 WL 728543 *9 (E.D.N.C. 2008). Yet the proposal does not identify Article 1, s. 2; and Article 3, ss. 2, 3, 4 and 7 — or Article 1, s. 4, U.S. Const.

For these reasons, the proposal violates the single subject provision of Article 11, s. 3, Fla.Const., and the proposed amendment presents the precipitous, cataclysmic change this Court has rejected in the past. Consequently, the Court should deny it a place on the ballot.

II. The ballot title and summary are defective.

The ballot title is misleading because it says the amendment addresses standards the Legislature must follow in redistricting. However, the text of the amendment requires the Court, when imposing a redistricting plan pursuant to its constitutional authority, to obey those same standards as well.

The ballot summary is misleading because it misrepresents the amendment's goal and purposes. For instance, the summary clearly implies that the *effect* of

districts or reapportionment plans cannot be to favor or disfavor anyone or any party. But under the amendment, proof of *intent* alone must be shown. In addition, the summary uses words inconsistent to those in the amendment, words that have very different meanings. Some terms used in the summary are vague and misleading. Finally, the summary fails to identify constitutional provisions that are substantially affected.

The Court reviews the title and ballot summary of initiative petitions for compliance with s. 101.161(1), Fla.Stat., which requires "the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot."

This Court has said that the "clear and unambiguous" command in s. 101.161(1) requires two things. First, the ballot title and summary must describe the amendment's chief purpose, which is the specific thing the amendment does or is intended to do — or more to the point, the legal effect of the amendment. Advisory Opinion to the Attorney General re Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans, 902 So.2d 763, 771 (Fla. 2005). The summary should not contain editorial comment, but rather should be a dispassionate, informative and accurate synopsis. Id. In short, the summary should be a fully informative analysis of the amendment's meaning and

effect and should not "fly under false colors" or "hide the ball." In re Advisory Opinion to the Attorney General — Save Our Everglades, 636 So.2d 1336, 1342 (Fla. 1994); Advisory Opinion to the Attorney General re Additional Homestead Tax Exemption, 880 So.2d 646, 653 (Fla. 2004); Armstrong v. Harris, 773 So.2d 7, 17-18 (Fla. 2000). However, the summary need not detail every ramification of an amendment. Advisory Opinion to the Atty. Gen. Re: Protect People, Especially Youth, from Addiction, Disease, and Other Health Hazards of Using Tobacco, 926 So.2d 1186 (Fla. 2006).

As part of this requirement, the Court has held that an amendment summary must identify substantially affected constitutional provisions in order for the public to fully comprehend the proposed changes. Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers, 705 So.2d 563, 565-566 (Fla. 1998) ("it is imperative that an initiative identify the provisions of the constitution substantially affected by the proposed amendment in order for the public to fully comprehend the contemplated changes and to ensure that the initiative's effect on other unnamed provisions is not left unresolved and open to various interpretations."). Identification is unnecessary if the impact is potential. Advisory Opinion to the Attorney General re Local Trustees, 819 So.2d 725, 731 (Fla. 2002).

Second, the title and summary should not be vague, ambiguous or misleading. Right of Citizens to Choose Health Care Providers, 705 So.2d at 566; Advisory Opinion to the Attorney General re Amend to Bar Government from Treating People Differently Based on Race in Public Education, 778 So.2d 888, 899 (Fla. 2001) ("ballot summaries which do not adequately define terms, use inconsistent terminology, fail to mention constitutional provisions that are affected, and do not adequately describe the general operation of the proposed amendment must be invalidated.").

The Ballot Title

The ballot title is misleading because it describes the amendment as "STANDARDS FOR *LEGISLATURE* TO FOLLOW IN CONGRESSIONAL REDISTRICTING." (Emphasis added.) But the amendment's text does not say this. Certainly it would require the Legislature to follow its standards — but its plain language would also require this Court to comply with them. The text of the amendment says "Congressional districts or districting plans may not *be drawn* . . ." (Emphasis added.) The use of the passive voice leaves unclear the identity of the actor doing the drawing (the main literary crime of the passive voice). The obvious intent of this language, then, is that anyone drafting and imposing a redistricting plan must comply with the proposed amendment. Because this Court has the

authority to impose a redistricting plan, it defies common sense to suppose that the Legislature must comply with the amendment but the courts can ignore it.

The amendment's title (as distinguished from the ballot summary title) supports the notion that the amendment is intended to apply to this Court as well. The title in the text identifies the amendment as "STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES." There is no limitation to the Legislature here.

Thus it is clear that the amendment is drafted to apply both to the Court and to the Legislature. Consequently, the title is grossly misleading.

The Ballot Summary

The ballot summary is misleading in several places. First, the summary says, "Congressional districts or districting plans shall not be drawn to favor or disfavor an incumbent or political party." The amendment's text is significantly different: it says "shall not be drawn with the *intent* to favor or disfavor." The summary clearly implies that the *effect* of districts or reapportionment plans cannot be to favor or disfavor anyone or any party. But under the amendment, proof of *intent* alone must be shown. The two are not the same. Relying on the summary, the voter will undoubtedly think he or she is voting to prohibit redistricting plans *whose effect* is to favor a party or incumbent. However, the amendment itself theoretically would

allow districts that favor a party or incumbent so long as the lines were drawn without intending that result. Such misleading discrepancies between the summary and the amendment's text warrant exclusion from the ballot. Right of Citizens to Choose Health Care Providers, 705 So.2d at 566; Race in Public Education, 778 So.2d at 897; Save Our Everglades, 636 So.2d at 1341.

Misleading as to the effect of the change is also impermissible. Advisory Opinion to the Attorney General re Independent Nonpartisan Commission to Apportion Legislative and Congressional Districts Which Replaces Apportionment by Legislature, 926 So.2d 1218, 1228-1229 (Fla. 2006) (amendment suggested nonpartisan selection of apportionment commission when appointment was in fact highly partisan); Save Our Everglades, 636 So.2d at 1341 (claiming that Everglades needed to be saved in the summary where the text addressed restoring the Everglades); Advisory Opinion to the Attorney General re People's Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects, 699 So.2d 1304, 1311 (Fla. 1997) (misleading because text eliminated 10 millage property tax cap; summary silent). Here, the summary is misleading because one purpose of the amendment is to eliminate political partisanship from the redistricting process, an effort we have already seen is humanly impossible, and which will result in the courts writing the plans rather than

the Legislature. The summary does not inform the voters of this significant, inevitable effect.

Nor does it inform the voter that the amendment substantially diminishes the Legislature's constitutional redistricting powers. The Legislature has considerable discretion in establishing district boundaries that can take political concerns into consideration. Vieth v. Jubelirer.

Second, the summary fails to inform voters of the massive transfer or authority from the Legislature to the judiciary that will occur under the amendment in contravention to Article 1, s. 4 U.S. Const.

Third, the ballot summary misleads as to the substance of the proposed amendment because terms in the summary are different from those used in the text of the amendment. For example, the summary says that district boundaries "where feasible must make use of existing city, county and geographical boundaries." The amendment, however, does not say this. Rather, it says districts must use "existing *political* and geographical boundaries." "Political boundaries" is a broader term than "city/county" boundaries. For instance, a similar term in the Florida Statutes, "political subdivision," is defined to "include counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all

other districts in this state." Sec. 1.01(8), Fla.Stat. Likewise, Florida courts have viewed "political boundary" to mean more than a city/county boundary:

> Political boundaries are artificial divisions that may and sometimes should be transcended when planning for the most beneficial use of our state's water resources. The borders of water management districts are also artificial divisions, and the area on either side of the boundaries of neighboring districts are in the same geographical region.

Osceola County v. St. Johns River Water Management Dist., 486 So.2d 616, 619 (Fla. 5th DCA 1986) (concerning the boundaries of a water management district); *approved* Osceola County v. St. Johns River Water Management Dist., 504 So.2d 385 (Fla. 1987). Courts in other states also have viewed "political boundary" as meaning more than city/county boundaries. Springfield Utility Bd. v. Emerald People's Utility Dist., 125 P.3d 740 (Or. 2005) ("people's utility district," an entity charged with the provision of electricity, had political boundaries); Bexar Metropolitan Water Dist. v. City of Bulverde, 234 S.W.3d 126 (Tex. App. 2007) (water management district). Florida has many special districts whose borders would constitute "political boundaries": voting precincts, water management districts, fire control districts, children's services districts, community development districts, independent special districts, regional special districts, neighborhood preservation and enhancement districts, health care districts, and so on. See ss. 101.001, 125.901, 163.524, 189.404, 190.004, 191.014, 373.069, Fla.Stat. It follows

that the summary's use of "city/county" boundaries rather than "political boundaries" is inaccurate and therefore misleading.

The use of inconsistent terms which have different meanings is inherently misleading. See People's Property Rights Amendments , 699 So.2d at 1308 (summary used the word "owner," text used the word "people"); Race in Public Education, 778 So.2d at 897; Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers, 705 So.2d 563, 566 (Fla. 1998) (summary said "citizens" while text said "natural person").

Here, a voter reading the summary will certainly believe that he is voting for a requirement that legislative districts track city or county lines. But that is a bait-and-switch because the term "political boundary" also encompasses lines of a very different nature.

Fourth, the summary is misleading because it relies on vague, ambiguous terms. "Language minority" is one such term. It may have a legal definition well known to some specialty lawyers, but it is unlikely to be readily understood by the lay voter. See Polish American Congress v. City of Chicago, 211 F.Supp.2d 1098, 1107 (N.D. Ill. 2002), where the plaintiffs reasonably thought that they constituted a language minority only to find that they fell outside the very narrow statutory definition of "language minority" in 42 U.S.C. s. 1973l(c)(3). In such

circumstances, the failure to define the term is a substantial, fatal defect. See e.g., Race in Public Education, 778 So.2d at 899 (failure to define legal term "bona fide qualification based on sex," voters "not informed of its legal significance. . . . voters would undoubtedly rely on their own conceptions of what constitutes a bona fide qualification," which rendered the summary fatally vague); People's Property Rights Amendments , 699 So.2d at 1311 ("the absence of a more complete definition of the term 'exemption' is misleading because the voting public would not readily understand the distinction between an exemption and immunity from taxation").

Fifth, the summary is misleading because it gives the impression that no law exists addressing discrimination in voting and requiring equality of population among districts. Such negative implications in ballot summaries render the summary defective. See Advisory Opinion to the Attorney General, re Amendment to Bar Government from Treating People Differently Based on Race in Public Education, 778 So.2d 888, 898 (Fla.. 2000) (ballot title "defective because of the misleading negative implication that no such constitutional provision addressing differential treatment currently exists, and for the negative implication that the government is presently practicing discrimination"). Here, the summary implies there is no law preventing discrimination against racial or language minorities.

However, there is, Article 1, s. 2, Fla.Const. Furthermore, federal law implementing the Fifteenth Amendment and the equal protection clause protects these classes as well. See In re Constitutionality of Senate Joint Resolution 2G, 597 So.2d 276, 280-282 (Fla. 1992) (explaining the purpose and impact of s. 2 of the federal Voting Rights Act); Riley v. Kennedy, 128 S.Ct. 1970 (2008) (discussing s. 5 of the Voting Rights Act); 42 U.S.C. s. 1973b(f)(2), addressing language minorities and voting.[11] In addition, federal law already requires equality among congressional district populations to the extent practicable. See Karcher v. Daggett, 462 U.S. 725, 730 (1983). Yet the summary says nothing about any of this, thus clearly implying that these standards are new.

Sixth, the summary is misleading because it varies in a material way from the text of the amendment. The summary says, "Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process ***and*** elect representatives of their choice." The amendment's text is slightly, but significantly, different: "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process ***or*** to diminish their ability to elect representatives

[11] "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny

of their choice." The summary tracks the language of 42 U.S.C. s. 1973(b), which gives the impression that the drafters may intend to import the standards of that statute into the Florida Constitution. The effect of that language is well known. See e.g., Thornburg v. Gingles, 478 U.S. 30 (1986). So the average voter might think that he is simply voting to conform the state Constitution with federal law. However, the amendment's text varies in a way that appears intended to do something broader, as was the case in Armstrong v. Harris, 773 So.2d 7, 17-18 (Fla. 2000), where the use of "or" in the state constitutional phrase "cruel or unusual punishment" was found to confer broader rights than the contemplated change, which read "cruel and unusual." Here however, the voter is not told in the summary of any intention either to conform the state Constitution to federal law — or to confer even broader rights than already exist. This failure to inform the voter of such a crucial purpose is a significant defect in the summary.

Seventh, the summary fails to identify the constitutional provisions substantially and certainly affected by this amendment. As pointed about above, the amendment substantially and certainly affects the equal protection clause in Article 1, s. 2 and Article 3, ss. 2, 3, 4, and 7, Fla.Const., as well as the Legislature's authority under Article 1, s. 4, U.S. Const. But the summary fails to point this out.

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or abridge the right of any citizen of the United States to vote because he is a

For these reasons, the ballot summary is vague and misleading and fails adequately to inform voters of the chief purpose of the amendment.

CONCLUSION

The petition fails the one-subject requirement and contains a defective ballot title and summary. Consequently, the court should order it stricken from the ballot.

RESPECTFULLY SUBMITTED,

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Florida Bar no. 298824

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---

member of a language minority group."

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by hand delivery on, on Attorney General Bill McCollum and Scott Makar, Solicitor General, PL-01, The Capitol, Tallahassee, FL 32399; on July 15, 2008.

_____
Jason Vail

CERTIFICATE OF TYPE SIZE AND STYLE

The brief is printed in 14 point Times New Roman.

_____
Jason Vail

Supreme Court of Florida

THURSDAY, JULY 31, 2008

CASE NOS.: SC08-986; SC08-1163
SC08-1149; SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES & (FIS)

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING & (FIS)

The Florida Legislature's motion for extension of time is granted and The Florida Legislature is allowed to and including August 20, 2008, in which to serve the answer brief on the merits. NO FURTHER EXTENSIONS OF TIME WILL BE GRANTED FOR THE FILING OF THE ANSWER BRIEF ON THE MERITS. Per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all briefs in an electronic format as required by the provisions of that order.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

vm
Served:

HON. CHARLES J. CRIST, JR.
EDWIN THOM RUMBERGER
HON. KURT S. BROWNING
HON. MARCO ANTONIO RUBIO
HON. BILL MCCOLLUM
TIMOTHY MCLENDON
FINANCIAL IMPACT ESTIMATING
M. HOPE KEATING
HON. KEN PRUITT
BARRY S. RICHARD
JASON VAIL
JEREMIAH M. HAWKES
JON L. MILLS
MARK HERRON

Supreme Court of Florida

THURSDAY, JULY 31, 2008

CASE NOS.: SC08-986; SC08-1163;
SC08-1149; SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES & (FIS)

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING & (FIS)

The Sponsor's motion to consolidate oral argument is hereby granted. The above cases are hereby consolidated for the purpose of oral argument and are scheduled for oral argument at 9:00 a.m., Wednesday, November 5, 2008. A maximum of twenty minutes to the side as consolidated is allowed for the argument, but counsel is expected to use only so much of that time as is necessary.

NO CONTINUANCES WILL BE GRANTED EXCEPT UPON A SHOWING OF EXTREME HARDSHIP.

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Thomas D. Hall
Clerk, Supreme Court

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MARK HERRON

Supreme Court of Florida

FRIDAY, AUGUST 22, 2008

CASE NOS.: SC08-986; SC08-1163;
SC08-1149; SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES & (FIS)

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING & (FIS)

At the direction of the Court, the above cases which were scheduled for oral argument on November 5, 2008, have been rescheduled for oral argument at 9:00 a.m., Thursday, November 6, 2008. A maximum of twenty minutes to the side as consolidated is allowed for the argument, but counsel is expected to use only so much of that time as is necessary.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

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HON. CHARLES J. CRIST, JR.
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MARK HERRON

IN THE SUPREME COURT OF FLORIDA
Case Nos. SC08-986; SC08-1163; SC08-1149; SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL
RE: STANDARDS FOR ESTABLISHING
LEGISLATIVE DISTRICT BOUNDARIES & (FIS)

ADVISORY OPINION TO THE ATTORNEY GENERAL
RE: STANDARDS LEGISLATURE TO FOLLOW IN
CONGRESSIONAL REDISTRICTING & (FIS)

_____/

MOTION TO EXPAND TIME FOR ORAL ARGUMENT
FairDistrictFlorida.org

FairDistrictFlorida.org, as an Interested Party and Proponent of these initiative petitions, pursuant to Rules 9.300 and 9.320, Florida Rules of Appellate Procedure, respectfully moves this Court for an expansion of time, seeking an additional ten (10) minutes of oral argument for each side on November 6, 2008.

1. In the original order of June 25, 2008, this Court set oral argument for the Congressional Redistricting initiative (Case SC08-1149) and its accompanying Financial Impact Statement (Case SC08-1163). At that time, this Court also set the same oral argument for purposes of the Legislative Districts initiative Financial Impact Statement (Case SC08-11-65). No provision was made at that time for oral argument for the Legislative Districts initiative.

2. On July 31, 2008, this Court granted FairDistrictFlorida.org's motion to consolidate all four of these cases for purposes of oral argument, granting twenty minutes of time for each side, and setting oral argument for November 5, 2008.

3. On August 22, 2008, this Court rescheduled the oral argument for these consolidated cases to November 6, 2008.

4. The Florida Legislature has filed briefs in opposition to both the Congressional Redistricting and the Legislative Districts initiatives, and has asked to participate in oral argument.

5. FairDistrictsFlorida.org filed briefs supporting both initiatives, and also filed briefs challenging the financial impact statements.

6. This Court has allotted a total of only twenty minutes of oral argument for each of the initiatives and their accompanying financial impact statements.

7. Because the time allotted for all four cases may not be sufficient to address both the initiative petitions and their accompanying financial impact statements, FairDistrictsFlorida.org asks this Court to expand oral argument from twenty (20) to thirty (30) minutes per side.

8. The undersigned counsel has conferred with counsel for the Florida Legislature regarding this motion to expand the time for oral argument and represents that counsel for the Legislature does not object to this request.

WHEREFORE, FairDistrictsFlorida.org, as an interested party in this case, respectfully requests that oral argument on November 6, 2008 be expanded to thirty (30) minutes for each side.

Respectfully submitted by:

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Counsel for Sponsor, FairDistrictsFlorida.org

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail this, _____ day of September, 2008 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.

_____
Attorney

Supreme Court of Florida

MONDAY, SEPTEMBER 15, 2008

CASE NOS.: SC08-986; SC08-1163
SC08-1149; SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES & (FIS)

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING & (FIS)

FairDistrictFlorida.org's motion to expand time for oral argument is hereby granted. A maximum of thirty minutes to the side is allowed for the argument, but counsel is expected to use only so much of that time as is necessary.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

vm
Served:

EDWIN THOM RUMBERGER
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FINANCIAL IMPACT ESTIMATING CONFERENCE
TIMOTHY MCLENDON
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HON. KEN PRUITT
MARK HERRON
M. HOPE KEATING
JEREMIAH M. HAWKES

The Honorable Peggy A. Quince
Chief Justice, and Justices of
The Supreme Court of Florida
The Supreme Court Building
Tallahassee, Florida 32399-1925

RE: Standards for Legislature to Follow in Congressional Redistricting

Dear Chief Justice Quince and Justices:

On June 18, 2008, in accordance with the provisions of Article IV, section 10, Florida Constitution, and section 16.061, Florida Statutes, I petitioned this Honorable Court for an advisory opinion on the initiative petition seeking to amend the Florida Constitution to establish standards for the Legislature to follow in legislative redistricting. On June 20, 2008, this office respectfully requested this Honorable Court's opinion as to whether the financial impact statement prepared by the Financial Impact Estimating Conference is in accordance with section 100.371, Florida Statutes.

On January 29, 2009, this Honorable Court rejected the financial impact statement for the proposed amendment stating that it did not comply with section 100.371, Florida Statutes. In re Advisory Opinion to the Attorney General – Standards for Legislature to Follow in Congressional Redistricting, Case No. SC08-1149 (Fla. January 29, 2009).

On February 13, 2009, the Financial Impact Estimating Conference, in accordance with the provisions of section 100.371(6)(a), Florida Statutes, forwarded to this office a revised financial impact statement on the initiative petition. I respectfully request this Honorable Court's opinion as to whether the revised financial impact statement prepared by the Financial Impact Estimating Conference on the constitutional amendment, proposed by initiative petition entitled *"Standards for Legislature to Follow*

in Congressional Redistricting" (a copy of which is attached) is in accordance with section 100.371, Florida Statutes.

Sincerely,

Bill McCollum
Attorney General

cc: Mr. Kurt S. Browning
Secretary of State

The Honorable Charlie Crist
Governor, State of Florida

The Honorable Jeff Atwater
President, Florida Senate

The Honorable Larry Cretul
Speaker pro tempore, Florida House of Representatives

Mr. Thom Rumberger
Chair, FairDistrictsFlorida.org
704 West Madison Street
Tallahassee, Florida 32304-4324

Mr. Mark Herron
704 West Madison Street
Tallahassee, Florida 32304-4324

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail delivery this _____ day of February, 2009, to the following:

Mr. Thom Rumberger
Chair, FairDistrictsFlorida.org
704 West Madison Street
Tallahassee, Florida 32304-4324

Mr. Mark Herron
704 West Madison Street
Tallahassee, Florida 32304-4324

I hereby certify that a true and correct copy of the foregoing has been furnished via interoffice mail delivery this _____ day of February, 2009, to the following:

Mr. Kurt Browning
Secretary of State
attn: General Counsel

The Honorable Charlie Crist
Governor, State of Florida
attn: General Counsel

The Honorable Jeff Atwater
President, Florida Senate
attn: General Counsel

The Honorable Larry Cretul
Speaker pro tempore, Florida House of Representatives
attn: General Counsel

Director, Division of Elections

_____
Joslyn Wilson
Assistant Attorney General
Fla. Bar No. 0233781

FINANCIAL IMPACT ESTIMATING CONFERENCE

FINANCIAL IMPACT STATEMENT

STANDARDS FOR THE LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING, #07-15

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.

INITIATIVE FINANCIAL INFORMATION STATEMENT
STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING

SUMMARY OF INITIATIVE FINANCIAL INFORMATION STATEMENT

The proposed constitutional amendment adds Section 20 to Article III of the Florida Constitution setting standards for establishing congressional districts or districting plans: congressional districts or districting plans may not be drawn with the intent to favor or disfavor an incumbent or political party; districts shall not be drawn with the intent or result of denying racial or language minorities the equal opportunity to participate in the political process or to diminish their ability to elect representatives of their choice; districts must be contiguous; and, unless otherwise required, districts must be as equal in population as practicable, must be compact, and must make use of existing political and geographical boundaries.

Given information provided through public workshops and collected through staff research, the Financial Impact Estimating Conference expects that the proposed amendment may result in increased costs based on the following:

- The State may incur additional legal costs to litigate the redistricting plans developed under the proposed constitutional standards. Since the amendment increases the number of factors that could be litigated, the districting initiative may expand the scope and complexity of litigation to determine the validity of each new apportionment plan. For example, the requirement that every district be drawn so as not to favor or disfavor any incumbent or political party may spawn challenges. Such costs are more likely during the first reapportionment after the amendment's passage as judicial clarification of the new standards is sought and the related legal doctrine developed. These legal costs are indeterminate.
- The Department of Legal Affairs concurs that there may be increased litigation costs, and that they may experience increased costs if they are asked to litigate these actions.
- The Office of the State Courts Administrator believes there will be an impact at the trial court and appellate level. They assume that litigation will increase. The amount of increased litigation is unknown and the estimated impact on the trial court, the judicial workload, and the appellate workload is indeterminate.
- The amendment does not substantially alter the current responsibilities or costs of the Department of State, the supervisors of elections, or local governments.
- Any additional cost to the Legislature to develop the plans is indeterminate.
- The amendment does not directly impact government revenues.

FINANCIAL IMPACT STATEMENT

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.

I. SUBSTANTIVE ANALYSIS

A. Proposed Amendment

Ballot Title:

STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING

Ballot Summary:

Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

1) Statement and Purpose:

The purpose of this amendment is to set standards for the Legislature to follow when establishing congressional district boundaries.

2) Amendment of Florida Constitution:

The amendment proposes to add Section 20 to Article III as follows:

Section 20. Standards for Establishing Congressional District Boundaries. --.

In establishing Congressional district boundaries:

(1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

(2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

(3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

3) Effective Date and Severability:

Pursuant to Article XI, Section 5, this amendment will be effective on January 4, 2011.

B. Effect of Proposed Amendment

Background

Sponsor of the proposed amendment

The FairDistrictsFlorida.org is the official sponsor of this proposed constitutional amendment. FairDistrictsFlorida.org is a registered political committee "working to reform the way the state draws Legislative and Congressional district lines by establishing constitutionally mandated fairness standards."[1]

The sponsor proposes that the amendment will establish fairness standards for use in creating congressional district boundaries; protecting minority voting rights; prohibiting district lines that favor or disfavor any incumbent or political party; requiring that districts are compact; and requiring that existing political and geographical boundaries be used. [2]

Congressional Redistricting In Florida

Congressional redistricting is not specifically addressed in the Florida Constitution. Section 8.0001, Florida Statutes, states that the U.S. Decennial Census of 2000 is the official census of the state for the purposes of congressional redistricting.[3]

Historically, the legislature has fulfilled its responsibility for redistricting with support from staff from the House, Senate and Office of Economic and Demographic Research as well as outside consultants and attorneys. During the 2002 redistricting, significant time was required by legal, professional and technical staff to perform the many tasks associated with analyzing data, working with the Census Bureau, building data sets and databases, generating reports and maps, writing briefs, developing defense arguments and providing legal advice.

Historical Costs

The total costs to the state for each of the last two redistricting cycles averaged $13.4 million. These costs included technology and staffing costs as well as the costs of legal representation during the redistricting process and in defense of the redistricting plans.

The following chart displays costs by state entity:

10-year cycle	Period of Disbursements	Senate Costs (in millions)			House Costs (in millions)			EDR Costs (in millions)	Joint Legislative Costs (in millions)
		Operations	Legal	Total	Operations	Legal	Total	Operations	Reimburse Plaintiffs for Legal Costs
1990	1989 -- 1998	$ 2.8	$ 1.6	$ 4.4	$ 5.5	$ 2.6	$ 8.1	$ 0.9	$ 1.6
2000	1998 – 2005	$ 1.3	$ 2.6	$ 3.9	$ 1.4	$ 5.5	$ 6.9	$ 0.9	$ -

[1] http://www.fairdistrictsflorida.org/about.asp, "About us," June 4, 2008.
[2] http://www.fairdistrictsflorida.org/about.asp, "Mission statement," June 4, 2008.
[3] Section 8.0001, 2007 Florida Statutes, June 17, 2008.

The following chart provides a summary of the state costs:

10-year cycle	Period of Disbursements	Total State Costs (in millions) Operations	Legal	Reimburse Plaintiffs for Legal Costs	Total
1990	1989 -- 1998	$ 9.2	$ 4.2	$ 1.6	$ 15.0
2000	1998 -- 2005	$ 3.6	$ 8.1	$ -	$ 11.7
Average Cost		$ 6.4	$ 6.2	$ 0.8	$ 13.4

During previous redistricting cycles, each house of the legislature drew plans for the Florida Senate, the Florida House of Representatives, and Florida's congressional seats using computer equipment, software, staff, and other resources.

There is no available breakdown of any costs between legislative redistricting and congressional redistricting.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

Section 100.371, Florida Statutes, requires that the Financial Impact Estimating Conference (FIEC) "...complete an analysis and financial impact statement to be placed on the ballot of the estimated increase or decrease in any revenue or costs to state or local governments resulting from the proposed initiative."

As part of determining the fiscal impact of this proposed amendment, the FIEC principals held three public meetings during May and June 2008 to develop the initial impact statement, and three additional meetings in February 2009 to address the remanded statement.

A. FISCAL ANALYSIS

The fiscal impact summary for this proposed amendment is based on independent research; testimony before the FIEC in public workshop; written statements from the proponents and opponents of the initiative; and discussions among the FIEC principals and other professional staff. Based on all of this material, the FIEC expects that the proposed amendment may result in increased costs; however, the magnitude of this impact is indeterminate.

This expectation is based on the following:

- **The State may incur additional legal costs to litigate the redistricting plans developed under the proposed constitutional standards.**

  Since the amendment increases the number of factors that could be litigated, the districting initiative may expand the scope and complexity of litigation to determine the validity of each new apportionment plan. For example, the requirement that every district be drawn so as not to favor or disfavor any incumbent or political party may spawn challenges. At least initially, complex

individual challenges to specific districts are likely. In addition, any given ruling on the interpretation and application of the standards in one case may spawn new challenges and issues in surrounding districts affected by the first ruling, leading to a ripple effect of litigation or serial claims.

Public testimony on May 23, 2008, indicated that the proposed amendment will increase litigation costs to levels at least seven to ten times those experienced in the most recent apportionments. Comments were also submitted in a written report.[4] Using the historical cost average of $6.2 million (see the Historical Costs portion of this analysis), a 7-fold increase totals $43.4 million and a 10-fold increase totals $62 million. Testimony by the opponents of the amendment indicated that some issues may simply expand the scope of existing litigation, rather than leading to new cases. If the increased cost of litigation only doubled the average-historical amount, the result would be multi-million dollar cost to the state. No assumption was made as to how this estimated cost would breakdown between legislative redistricting and congressional redistricting.

The Department of Legal Affairs concurs that there may be increased litigation costs, and that they may experience increased costs if they are asked to litigate these actions.

Typically, a plaintiff challenging a redistricting plan will list numerous state defendants.[5] While the Attorney General may provide representation for the defendants, individual defendants may wish to have their own representation.

All of these legal costs are indeterminate.

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[4] *Analysis of Financial Impact*, Legislative and Congressional Districting Initiatives, by George Meros, Gray Robinson, P.A., document #133905V1.

[5] See e.g.; MIGUEL DE GRANDY, MARIO DIAZ-BALART, ANDY IRELAND, CASIMER SMERICKI, VAN B. POOLE, TERRY KETCHEL, ROBERTO CASAS, RODOLFO GARCIA, JR., LUIS ROJAS, LINCOLN DIAZ-BALART, JAVIER SOUTO, JUSTO LUIS POSO, ALBERTO CARDENAS, REY VELAZQUEZ, LUIS MORSE, ALBERTO GUTMAN, KAREN E. BUTLER, SGT. AUGUSTA CARTER, JEAN VAN METER, ANNA M. PINELLAS, ROBERT WOODY, GINA HAHN, BILL PETERSEN, TERRY KESTER, MARGIE KINCAID, and BROOKS WHITE, Plaintiffs, v. T.K. WETHERELL, in his official capacity as Speaker of the Florida House of Representatives, GWEN MARGOLIS, in her official capacity as President of the Florida Senate, LAWTON CHILES, in his official capacity as Governor of the State of Florida, JACK GORDON, in his official capacity as Chairman of the Senate Reapportionment Committee, PETER R. WALLACE, in his official capacity as Chairman of the House Reapportionment Committee, JIM SMITH, in his official capacity as Secretary of State of Florida, ROBERT BUTTERWORTH, in his official capacity as Attorney General of Florida, Defendants. FLORIDA STATE CONFERENCE OF NAACP BRANCHES, T. H. POOLE, SR., WHITFIELD JENKINS, LEON W. RUSSELL, WILLYE DENNIS, TURNER CLAYTON, RUFUS BROOKS, VICTOR HART, KERNA ILES, ROOSEVELT WALTERS, JOHNNIE MCMILLIAN, PHYLLIS BERRY, MARY A. PEARSON, MABLE BUTLER, IRIS WILSON, JEFF WHIGHAM, AL DAVIS, PEGGY DEMON, CARLTON MOORE, RICHARD POWELL, NEIL ADAMS, LESLIE MCDERMOTT, ROBERT SAUNDERS, SR., IRV MINNEY, ADA MOORE, ANITA DAVIS, and CALVIN BARNES, Plaintiffs, v. LAWTON CHILES, in his official capacity as Governor of Florida, JIM SMITH, in his official capacity as Secretary of State of Florida, ROBERT BUTTERWORTH, in his official capacity as Attorney General of Florida, GWEN MARGOLIS, in her official capacity as President of the Florida Senate, T. K. WETHERELL, in his official capacity as Speaker of the Florida House of Representatives, JACK GORDON, in his official capacity as Chairperson of the House Reapportionment Committee, and PETER R. WALLACE, in his official capacity as Chairman of the House Reapportionment Committee, Defendants, 794 F. Supp. 1076 (N.D.Fla. 1992)

- **The state court system may incur costs to hear cases that allege violations of the proposed constitutional standards.**

  The Office of the State Courts Administrator believes there will be an impact at the trial court and appellate level. The numbers of lawsuits filed related to the current redistricting standards following the 1990 and 2000 census were 13 and 5, respectively. They assume that the number of litigations will increase. For example, the requirement that every district be drawn so as not to favor or disfavor any incumbent or political party may spawn challenges. At least initially, complex Individual challenges to specific districts are likely. The amount of increased litigation is unknown; therefore, the estimated impact on the trial court, the judicial workload, and the appellate workload is indeterminate.

- **The amendment does not substantially alter the current responsibilities or costs of the Department of State, the supervisors of elections, or local governments.**

  The FIEC also found no evidence that the amendment would substantially alter the responsibilities of these entities.

- **Any additional cost to the Legislature to develop the plans is indeterminate.**

- **The amendment does not directly impact government revenues.**

B. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS:

1. Revenues:

   There will be no direct financial impact on the revenues of state or local government.

2. Expenditures:

   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.

Supreme Court of Florida

WEDNESDAY, FEBRUARY 25, 2009

CASE NO.: SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING (FIS)

Pursuant to the provisions of Article IV, section 10, Florida Constitution, and section 16.061, Florida Statutes, the Attorney General of Florida has requested this Court's opinion on the initiative petition seeking to amend the Florida Constitution to establish standards for the Legislature to follow in congressional redistricting.

On February 13, 2009, the Financial Impact Estimating Conference, in accordance with the provisions of Chapter 04-33, Laws of Florida, forwarded to the Office of the Attorney General a redraft of the a financial impact statement on the initiative petition. Chapter 04-33 provides for this Honorable Court to review the redrafted financial impact statement to determine whether it is in accordance with 100.371, Florida Statutes. The full text of the Attorney General's letter is attached hereto as an exhibit and made a part thereof.

IT IS, THEREFORE, the order of the Court that interested parties shall file their briefs on or before March 17, 2009, and serve a copy thereof on the Attorney General. Answer briefs shall be filed on or before April 6, 2009. Briefs are limited to ten pages and the parties shall address the duties and responsibilities of the Court in this process and review and the application of these duties to this specific case. Please file an original and eight copies of all briefs. In addition to paper briefs, per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all briefs in an electronic format as required by the provisions

of that order. Briefs submitted will be placed on the Court's Internet site (http://www.floridasupremecourt.org).

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

vm
Served:

FINANCIAL IMPACT ESTIMATING CONFERENCE
JEREMIAH M. HAWKES
JASON VAIL
HON. CHARLES J. CRIST, JR.
HON. LARRY CRETUL
HON. KURT S. BROWNING
HON. JEFFREY H. ATWATER
M. HOPE KEATING
BARRY S. RICHARD
MARK HERRON
HON. BILL MCCOLLUM
JON L. MILLS
EDWIN THOM RUMBERGER
TIMOTHY MCLENDON

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

MOTION TO FILE A BRIEF LONGER THAN THE PAGE LIMITS

The Senate moves to file a brief which is longer than the 10-page limit required by the court's order of February 25, 2009. The Senate seeks to file a brief in support of the financial impact statements in these two cases. The Senate intends to argue for a different standard of review than has been used by the court in measuring past impact statements, and to show how the present statements satisfy that standard. Such arguments naturally are somewhat complex. Ten pages is insufficient for the task. Knowing the court's interest in brevity in matters such as these, the Senate has kept its brief to 18 pages including the certificate of service and certificate of type size and style.

Therefore, the Senate asks the court to accept its brief, although it exceeds the established page limit.

RESPECTFULLY SUBMITTED,

JASON VAIL
General Counsel
Florida Senate
Florida Bar no. 298824

R. 402, Senate Office Building
404 S. Monroe St.
Tallahassee, FL 32399-1100
(850)487-5173

Counsel for The Florida Senate

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.

_____
Jason Vail

CERTIFICATE OF TYPE SIZE AND STYLE

The motion is printed in 14 point Times New Roman.

_____
Jason Vail

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

MOTION FOR WAIVER OF ELECTRONIC FILING

For purposes of one exhibit, the Senate moves for a waiver of the court's order requiring the electronic filing of exhibits. The exhibit is a video of a workshop conducted by the Fiscal Impact Estimating Conference. Statements at the workshop form part of the factual basis for the matters expressed in the fiscal impact statements under review. A review of this record is essential. The court cannot make an informed decision without it any more than it can review the decision of a trial court without resort to the record below. There is no transcript of this workshop; only the video is available.

The video file is more than two gigabytes in size. The Senate's email server will not send a file this large.

Therefore, the Senate asks the court to waive the electronic filing rule and allow the filing of a DVD containing the video instead.

RESPECTFULLY SUBMITTED,

JASON VAIL
General Counsel
Florida Senate
Florida Bar no. 298824

R. 402, Senate Office Building
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Jason Vail

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

JASON VAIL
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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 complied 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 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 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

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[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 correctiveness.[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]

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[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,

JASON VAIL
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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.

Jason Vail

CERTIFICATE OF TYPE SIZE AND STYLE

The brief is printed in 14 point Times New Roman.

_____

Jason Vail

George Meros
GrayRobinson, P.A.

Analysis of Financial Impact of
Legislative and Congressional Districting Initiatives

- 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.

- Article III, Section 16(c) of the Florida Constitution requires the Florida Supreme Court to determine the validity of any state legislative apportionment plan and directs the Court to "permit adversary interests to present their views."

- The Court's review traditionally has been "extremely limited." *See In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 824 (Fla. 2002). The Court has analyzed only the plan's compliance with constitutional requisites—specifically, the federal one-person, one-vote requirement and the state requirement that districts contain contiguous, overlapping, or identical territory. *Id.* It does not review compliance with federal or state statutes, including the federal Voting Rights Act, in part because such review would be too "fact-intensive" for the thirty-day review period. *Id.* at 825.

- Challenges to the validity of particular districts under Section 2 of the Voting Rights Act and, on a political gerrymandering claim, under the Equal Protection Clause, have not been entertained by the Supreme Court and have been resolved in local litigation involving only limited areas of the apportionment plan.

- 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 a 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 or their ability to elect representatives of 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.

Exhibit 1

- 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 which such 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.

BAKER.AMY

From: Leznoff, JoAnne [JoAnne.Leznoff@LASPBS.STATE.FL.US]
Sent: Friday, June 06, 2008 2:25 PM
To: BAKER.AMY; Weiss, Christian; Kelly, Cynthia
Cc: Belcher, Marsha
Subject: From the courts on redistricting amendment

Indeterminate statement from the state courts.

From: Lisa Goodner [mailto:goodnerl@flcourts.org]
Sent: Friday, June 06, 2008 2:01 PM
To: Leznoff, JoAnne
Subject: FW: FW:

JoAnne: I'm not sure this is of much help. I think that initially we thought we would have something to go by to estimate the increase in litigation but that did not prove to be the case. They tell me this is all we can tell you. Please let me know if you have any other questions.
Thanks
Lg

Due to the proposed constitutional amendments, the Office of the State Courts Administrator believes there will be an impact at the trial court 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 amendments. Unfortunately, the amount of increased litigation is unknown and the estimated impact on the trial court and judicial workload is indeterminate. In addition, the estimate impact on appellate workload is indeterminate.

Exhibit 2

6/12/2008

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

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STATEMENT OF THE CASE

On May 22, 2008, the Secretary of State sent to the Attorney General and to the Financial Impact Estimating Conference ("FIEC"), the petition for two constitutional initiatives, "Standards for Legislature to Follow in Congressional Redistricting" and "Standards for the Legislature to Follow in Legislative Redistricting." The Attorney General petitioned this Court for an advisory opinion as to the validity of the initiatives. (Case No. SC08-1149 and SC08-986). In an opinion dated January 29, 2009, this Court found that both initiative proposals complied with the constitutional one-subject requirement and the ballot title and summary requirements. *Advisory Opinion to the Att'y Gen. re: Standards for Establishing Legis. Dist. Boundaries*, 34 Fla. L. Weekly S64 (Fla. Jan. 29, 2009).

The FIEC offered both the sponsor and the public the opportunity to testify with regard to likely financial impact of the initiatives. On June 18, 2008, the Conference forwarded its prepared financial impact statements and financial information statements 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 FIEC's financial impact statements

comply with Section 100.371, Florida Statutes. In an opinion on January 29, 2009, this Court found that the original fiscal impact statements for the two initiatives were misleading and failed to comply with the standards of Section 100.371(5)(a), Florida Statutes. *See Advisory Opinion to the Att'y Gen. re: Standards for Establishing Legis. Dist. Boundaries – Fiscal Impact Statements*, 34 Fla. L. Weekly S62 (Fla. Jan. 29, 2009).

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]

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

> 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

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, just like the earlier versions, 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.

A Fiscal Impact Statement must be no more than 75 words in length, must be clearly and unambiguous, and must accurately address estimated increases or decreases in revenues or costs to the state or to local

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local government expenditures or government revenues.

governments caused by the proposed amendment. The purpose of the statements is to inform the public and accuracy is paramount. The Constitution requires that the impact statement must reflect "*probable* financial impact." FLA. CONST., art. XI, § 5(b) (emphasis added).

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 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 provided). The Court's review is further defined by Section 100.371(5)(b)3, Florida Statutes, which provides 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." *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).

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[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."

This Court has analogized the standards for fiscal impact statements to those for the ballot title and summary. *Id.* As this Court noted, given the need to ensure voters have access to accurate information, and given the similarity in terminology between the two relevant statutes, Section 100.371 (fiscal impact statements) and Section 101.161, Florida Statutes (ballot titles and summaries), it is logical to employ a similar scrutiny. *Id.* These standards include a basic neutrality and accuracy requirement. As this Court noted, "[i]t 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." *Id.*

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).

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. The revised statements do not speculate as to "probably increased costs (millions of dollars)" to state government as did the flawed earlier statements. Nor do the revised statements speculate as to "likely . . . additional costs" for a state court system that will be involved in whatever litigation occurs.

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." *Standards for Establishing Legis. Dist. Boundaries*, 34 Fla. L. Weekly at S63. Under the circumstances and under the holding of that case, there can be no *probable* financial impact as a matter of law. 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." 34 Fla. L. Weekly at S63. We 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.

Importantly, these fiscal impact statements are not legislative findings. The Legislature did not vote on this text. This Court has the role of

determining whether this language provides the public with an unambiguous statement of probable cost. The revised statements themselves base their tentative conclusions on possibilities and contingencies. The result of placing such statements on the ballot is ambiguity to the voting public. Such a result is exactly what the Court is asked to prevent by the Constitution and the relevant statute. Whether the proposed amendment will cause more litigation—and its related expenses—cannot be known.

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). There, this Court rejected a financial impact statement similar to the one at issue here, which would require local governments to submit desired changes to their master plans to the voters through referenda. The impact statement 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.).[3]

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. While it is possible that there will be additional litigation, the amendment is intended to provide the Legislature with clear standards for how districts are designed. 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." *Standards for Establishing Legis. Dist. Boundaries*, 34 Fla. L. Weekly at S63. The extent to which increased litigation over the new districts or plans occurs depends on how closely these standards are

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[3] The third attempt at a fiscal impact statement for the Required Referenda initiative is currently before this Court for review. The relevant sentence has been modified to read, "Local governments will incur additional costs due to the requirement to conduct referenda in order to adopt comprehensive plans or amendments thereto. The amount of such costs depends upon the frequency, timing and method of referenda, and includes the costs of ballot preparation, election administration, and associated expenses."

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. *See Standards for Establishing Legis. Dist. Boundaries*, 34 Fla. L. Weekly at S63; *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.

Frankly, the two proposed redistricting amendments at issue here simply do 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 *beyond* the substantial litigation that inevitably attends congressional and legislative redistricting, the likely costs of such additional litigation, and what the direct cause of the litigation might be.

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. *See Standards for Establishing Legis. Dist. Boundaries*, 34 Fla. L. Weekly at S63. 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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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

MOTION TO FILE BRIEF IN EXCESS OF TEN PAGE LIMIT

Sponsor, FairDistrictsFlorida.org, respectfully moves that this Court accept the brief filed on March 17, 2009, in excess of the ten page limit required by the Court's order of February 25, 2009.

Sponsor seeks this relief because of the significant issues raised by the continuing insistence of the Financial Impact Estimating Conference to find a financial impact with respect to these initiatve proposals. Sponsor believes that these issues require argument in excess of the ten page limit.

Therefore, Sponsor asks that this Court accept its brief, although it exceeds the ten page limit.

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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

ANSWER BRIEF

OF THE FLORIDA SENATE

IN SUPPORT OF THE FINANCIAL

IMPACT STATEMENTS

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SUMMARY OF THE ARGUMENT

The sponsor attacks the second sentence of the financial impact statement as vague and ambiguous, but in fact it does nothing more than state a truism: if you have more litigation than in the past, it will likely cost the state more money.

The sponsor also contends that the sentence says that there will be more litigation if the amendment passes, but the thing says nothing of the sort. It is an "if ... then" sentence that expresses the probability of one event occurring if another reasonably foreseeable event happens. This is neither confusing to voters nor objectionable.

The sponsors argue that no prediction about the likelihood of lawsuits arising from the proposed standards is permissible because the only possible cause of litigation is the Legislature's failure to follow the Constitution. This ignores the real world causes for lawsuits, which vary widely. Underlying most lawsuits challenging the constitutionality of a legislative act, however, is a plaintiff's *belief* the Legislature acted improperly. Southern Reporter is full of cases where legislative acts have unsuccessfully been challenged as unconstitutional.

The failure to mention that costs might instead go down if litigation declines from past levels is neither confusing nor prejudicial. The reasonable voter needs

no one's help to understand the obvious converse inference in the sentence that if litigation declines, so will costs.

ARGUMENT

The impact statements reach the unobjectionable conclusion that the "fiscal impact cannot be determined precisely." The Financial Impact Estimating Conference qualifies this determination with the equally unobjectionable observation that if litigation increases from historical levels, there may be an increased cost. As the Senate argued in its initial brief, the conference's conclusions — the concerns about the potential for increased litigation — are not crystal ball gazing but are supported by the record.

The amendments' supporter finds fault only with the impact statements' second sentence — "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 statement is not fatally speculative, as the sponsor supposes. The sentence merely states an unremarkable truism. No reasonable person could find it confusing, vague or ambiguous: more litigation, especially more complex litigation, results in more and higher costs; so if the amendments provoke more litigation, which may also be more complex, state government may end up paying more than it has in the past. Everybody

understands that litigation is expensive. Everybody understands that the more litigation you have, the more expensive things get. This is hardly the sort of confusing statement that this court has feared would lead voters to reject an amendment. See, e.g., Advisory Opinion to Atty. Gen. re Authorizes Miami-Dade and Broward County Voters to Approve Slot Machines in Parimutuel Facilities, 882 So.2d 966, 969 (Fla. 2004).

The sponsor's core complaint is that the conference "continues to speculate that the new districting standards *will* spawn more litigation." Initial Brief of Sponsor at 10 (emphasis added). But the sentence does not state a certainty or contain a firm prediction; it expresses a probability. "If ... then" statements are conditional statements that express probabilities, not truths or certainties. See Robert Fogelin, Understanding Arguments 31-32 (3d ed. 1987).[1]

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

[1] "The sentence that occurs between the 'if' and the 'then' is called the *antecedent* of the conditional; the sentence that occurs after the 'then' is called its *consequent*. In using an indicative conditional, we are not asserting the truth of its antecedent, and we are usually not asserting the truth of the consequent, either." (e.o.)

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)."). So, there is no reason why this impact statement is flawed, either.

The sponsor seems to think that, in its prior opinion in the matter, this court foreclosed any mention that the amendments might provoke more litigation than the state has seen in the past. Specifically, the sponsor points to the court's statement that "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." Initial Brief of Sponsor at 10. The court's view rests on the presumption that only legislative deviance from the Constitution sparks lawsuits. But what provokes lawsuits often is not so much a legislative failure to follow the Constitution as a plaintiff's *belief* the Legislature has failed to do so. Southern Reporter is full of cases in which litigants have unsuccessfully questioned the constitutionality of legislative acts. In fact, this court recently entertained such a case, Florida Association of Professional Lobbyists, Inc. v.

Division of Legislative Information Services, 34 Fla. L. Weekly S271 (March 19, 2009). The legislative action in that matter, enactment of lobbyist regulations, spawned two separate lawsuits, one of which ended up in federal court, rose to the 11th Circuit Court of Appeals, and landed here for a determination of state law issues. It is doubtful there is an ironclad cause-effect relationship between the Legislature's adherence to constitutional principles and the frequency of lawsuits that excludes other reasons for litigation. For a discussion of the logical principle involved, see Understanding Arguments, pp. 105-110.

This brings us back to the Senate's main position. As the Senate argued at length in its initial brief, the question whether the amendments will provoke, or the degree they are likely to provoke, litigation is not one the court can answer in a factual vacuum. To the extent they express concern about the prospect of increased litigation, the impact statements are conclusions resting on the resolution of fact questions. Consequently, the court cannot review the statements without examining the record before the conference. Only then is the court in a position to say whether the conference's conclusion lacks merit — or is unfounded speculation.

Last, the sponsor complains that because the impact statement mentioned the possibility of increases, it should also have mentioned the possibility of

decreases. Thus, in its view, without mentioning the down with the up, the statement is defective, apparently on the ground that it is overly negative. This argument treats voters as mindless robots, incapable of thinking for themselves. Obviously, if increases in litigation are likely to cost more, then it is reasonable to suppose the opposite is true: decreases in litigation result in fewer costs. This contrary inference about the effect of less litigation is clear and obvious. Voters are capable of understanding this. Thus, the second sentence is not unduly negative or prejudicial.

CONCLUSION

For these reasons, the court should approve the statements.

RESPECTFULLY SUBMITTED,

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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
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ANSWER BRIEF OF SPONSOR
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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*,

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[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

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[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

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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,

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/s/ Mark Herron
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ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES

REQUEST FOR ORAL ARGUMENT

Pursuant to Fla.R.App.P. 9.320, the Senate requests oral argument.

RESPECTFULLY SUBMITTED,

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I hereby certify that a copy of the foregoing has been served by U.S. mail 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 6, 2009.

_____
Jason Vail

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The brief is printed in 14 point Times New Roman.

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Jason Vail

Supreme Court of Florida

THURSDAY, APRIL 9, 2009

CASE NO.: SC08-1163

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES (FIS)

CASE NO.: SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING (FIS)

The Senate's Motion to File a Brief Longer that the Page Limit is hereby denied and said brief filed with this Court on March 17, 2009, is hereby stricken. The Senate is allowed to and including April 20, 2009, to serve an amended initial brief which does not exceed ten pages in length.

Please file an original and eight copies of all briefs. In addition to paper briefs, per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all briefs in an electronic format as required by the provisions of that order. Briefs submitted will be placed on the Court's Internet site (http://www.floridasupremecourt.org).

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Supreme Court of Florida

THURSDAY, APRIL 9, 2009

CASE NO.: SC08-1163

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES (FIS)

CASE NO.: SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING (FIS)

The Sponsor's Motion to File Brief in Excess of Ten Page Limit is hereby denied and said brief filed with this Court on March 17, 2009, is hereby stricken. The Sponsor is allowed to and including April 20, 2009, to serve an amended initial brief which does not exceed ten pages in length.

Please file an original and eight copies of all briefs. In addition to paper briefs, per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all briefs in an electronic format as required by the provisions of that order. Briefs submitted will be placed on the Court's Internet site (http://www.floridasupremecourt.org).

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Supreme Court of Florida

THURSDAY, APRIL 9, 2009

CASE NO.: SC08-1163

ADVISORY OPINION OF THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES (FIS)

CASE NO.: SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING (FIS)

The Senate's Motion for Waiver of Electronic Filing is hereby granted.

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TIMOTHY MCLENDON

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

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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]

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[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

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> 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 definded 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).

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[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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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.

/s/ Mark Herron
Attorney

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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Sec. 100.371, Fla.Stat. 2, 3

Sec. 216.135, Fla.Stat. 4

Sec. 216.136, Fla.Stat. 3

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

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[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

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[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

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[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.

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[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,

JASON VAIL
General Counsel
Florida Senate
Florida Bar no. 298824

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(850)487-5173

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

CERTIFICATE OF TYPE SIZE AND STYLE

The brief is printed in 14 point Times New Roman.

_____
Jason Vail

Supreme Court of Florida

THURSDAY, MAY 7, 2009

CASE NOS.: SC08-1163; SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES (FIS)

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING (FIS)

The above cases have been submitted to the Court without oral argument.

Per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, if you have not already done so, counsel are directed to transmit a copy of all briefs in an electronic format as required by the provisions of that order.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

vm
Served:

HON. JEFFREY H. ATWATER
HON. CHARLES J. CRIST, JR.
HON. KURT S. BROWNING
BARRY SCOTT RICHARD
HON. BILL MCCOLLUM
EDWIN THOM RUMBERGER
FINANCIAL IMPACT ESTIMATING CONFERENCE
MARK HERRON
M. HOPE KEATING
HON. LARRY CRETUL
JEREMIAH M. HAWKES
TIMOTHY MCLENDON
JASON VAIL
JON L. MILLS

June 20, 2008

The Honorable R. Fred Lewis
Chief Justice, and Justices of
The Supreme Court of Florida
The Supreme Court Building
Tallahassee, Florida 32399-1925

RE: Standards for the Legislature to Follow in Legislative Redistricting

Dear Chief Justice Lewis and Justices:

On May 29, 2008, in accordance with the provisions of Article IV, section 10, Florida Constitution, and section 16.061, Florida Statutes, I petitioned this Honorable Court for an advisory opinion on the initiative petition seeking to amend the Florida Constitution to establish standards for the Legislature to follow in legislative redistricting.

On June 18, 2008, the Financial Impact Estimating Conference, in accordance with the provisions of section 100.371(5)(a), Florida Statutes, forwarded to this office a financial impact statement on the initiative petition.

Therefore, I respectfully request this Honorable Court's opinion as to whether the financial impact statement prepared by the Financial Impact Estimating Conference on the constitutional amendment, proposed by initiative petition, entitled "Standards For Legislature To Follow In Legislative Redistricting" (a copy of which is attached) is in accordance with section 100.371, Florida Statutes.

Sincerely,

Bill McCollum
Attorney General

cc: Mr. Kurt S. Browning
Florida Department of State
R. A. Gray Building, Room 316
500 South Bronough Street
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The Honorable Charlie Crist
Governor, State of Florida
The Capitol
400 South Monroe Street
Tallahassee, Florida 32399-0001

The Honorable Ken Pruitt
President, Florida Senate
Senate Office Building, Room 312
404 South Monroe Street
Tallahassee, Florida 32399-1100

The Honorable Marco Rubio
Speaker, Florida House of Representatives
420 The Capitol
402 South Monroe Street
Tallahassee, Florida 32399-1300

Mr. Thom Rumberger
Chair, FairDistrictsFlorida.org
704 West Madison Street
Tallahassee, Florida 32304-4324

Mr. Mark Herron
704 West Madison Street
Tallahassee, Florida 32304

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail delivery this 20th day of June, 2008, to the following:

Mr. Thom Rumberger
Chair, FairDistrictsFlorida.org
704 West Madison Street
Tallahassee, Florida 32304-4324

Mr. Mark Herron
704 West Madison Street
Tallahassee, Florida 32304

I hereby certify that a true and correct copy of the foregoing has been furnished via interoffice mail delivery this 20th day of June, 2008, to the following:

Mr. Kurt S. Browning
Secretary, Florida Department of State
attn: General Counsel

The Honorable Charlie Crist, Governor, State of Florida
attn: General Counsel

The Honorable Ken Pruitt, President, Florida Senate
attn: General Counsel

The Honorable Marco Rubio, Speaker, Florida House of Representatives
attn: General Counsel

Director, Division of Elections
Florida Department of State

_____

Gerry Hammond
Senior Assistant Attorney General
Florida Bar No. 273155

Supreme Court of Florida

No. SC08-1163

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES (FIS).

No. SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING (FIS).

[December 17, 2009]

PER CURIAM.

On January 29, 2009, this Court approved for placement on the ballot two proposed amendments to the Florida Constitution detailing additional guidelines that the Florida Legislature must follow when it conducts legislative and congressional reapportionment. See Advisory Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries, 2 So. 3d 175, 191 (Fla. 2009). While this Court considered the validity of the petitions, the Attorney General also

requested that the Court review the corresponding financial impact statements to evaluate their compliance with section 100.371, Florida Statutes (2008). See Advisory Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries (FIS), 2 So. 3d 161, 162 (Fla. 2009). We remanded the statements to the Financial Impact Estimating Conference (FIEC) to be redrafted because the statements in their then-current form did not satisfy the statutory requirements. See id. at 166.

On February 18, 2009, the Attorney General filed revised financial impact statements with this Court and requested an opinion with regard to whether the statements comply with section 100.371, Florida Statutes (2008). As with the previous submissions, the revised statements are identical:

> 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.

We possess jurisdiction to consider the validity of financial impact statements pursuant to article IV, section 10, and article V, section 3(b)(10) of the Florida Constitution.

ANALYSIS

Applicable Law

Article XI, section 5 of the Florida Constitution addresses financial impact statements and provides in relevant part:

(c) 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 the initiative pursuant to section 3.

Section 100.371(5), Florida Statutes (2008), addresses financial impact statements and provides:

(5)(a) Within 45 days after receipt of a proposed revision or amendment to the State Constitution by initiative petition from the Secretary of State, the Financial Impact Estimating Conference shall complete an analysis and financial impact statement to be placed on the ballot of the estimated increase or decrease in any revenues or costs to state or local governments resulting from the proposed initiative. The Financial Impact Estimating Conference shall submit the financial impact statement to the Attorney General and Secretary of State.

. . . .

(c) . . . .

2. Principals of the Financial Impact Estimating Conference shall reach a consensus or majority concurrence on a clear and unambiguous financial impact statement, no more than 75 words in length, and immediately submit the statement to the Attorney General. Nothing in this subsection prohibits the Financial Impact Estimating Conference from setting forth a range of potential impacts in the financial impact statement. . . .

3. If the members of the Financial Impact Estimating Conference are unable to agree on the statement required by this subsection, or if the Supreme Court has rejected the initial submission by the Financial Impact Estimating Conference and no redraft has been approved by the Supreme Court by 5 p.m. on the 75th day before the election, the following statement shall appear on the ballot pursuant to s. 101.161(1): "The financial impact of this measure, if any, cannot be reasonably determined at this time."

. . . .

(e)1. Any financial impact statement that the Supreme Court finds not to be in accordance with this subsection shall be remanded solely to the Financial Impact Estimating Conference for redrafting,

> provided the court's advisory opinion is rendered at least 75 days before the election at which the question of ratifying the amendment will be presented. The Financial Impact Estimating Conference shall prepare and adopt a revised financial impact statement no later than 5 p.m. on the 15th day after the date of the court's opinion.

In our opinion that rejected the original financial impact statements, we explained our duty with regard to the review of such statements:

> [W]hen we review a financial impact statement for compliance with section 100.371, we address "whether the statement is clear, unambiguous, consists of no more than seventy-five words, and is limited to addressing the estimated increase or decrease in any revenues or costs to the state or local governments." Advisory Op. to Att'y Gen. re: Funding of Embryonic Stem Cell Research, 959 So. 2d 195, 202 (Fla. 2007). Because the financial impact statement will be printed on the ballot, the same due process concerns that inure to the title and summary of a proposed amendment are also applicable to the financial impact statement. See Askew v. Firestone, 421 So. 2d 151, 155 (Fla. 1982) ("[T]he voter should not be misled . . . . What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot." (alteration in original) (quoting Hill v. Milander, 72 So. 2d 796, 798 (Fla. 1954))). Accordingly, we have 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.
>
> . . . .The rationale behind such a review is both clear and logical. 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.

Legislative District Boundaries (FIS), 2 So. 3d at 164.

Application of Law

We conclude that the current statements satisfy the requirements of section 100.371. The statements consist of thirty-four words each, which falls well within the seventy-five word limit mandated by the statute. See § 100.371(5)(c)2., Fla. Stat. (2008). In addition, the current statements do not contain the vague and speculative reference to "millions of dollars" in increased costs that this Court rejected in the original financial impact statements. See Legislative District Boundaries (FIS), 2 So. 3d at 165 n.3; see also Advisory Op. to Att'y Gen. re Referenda Required for Adoption & Amendment of Local Gov't Comprehensive Land Use Plans, 992 So. 2d 190, 193 (Fla. 2008) (rejecting statement which provided a financial impact of "millions of dollars" because under this language, "the cost of implementation of the amendment could be anywhere from $2 million to $999 million," and concluding that such vague language may cause citizens to vote against the amendment "solely because of fear generated by the misleading statement concerning the potential economic consequences of the amendment").

Moreover, the statements do not include any nonmonetary impacts or financial impacts beyond the revenues or costs to state or local governments, the inclusion of which has led to the rejection of impact statements in the past. See, e.g., Advisory Op. to Att'y Gen. re Authorizes Miami-Dade & Broward County Voters to Approve Slot Machines in Parimutuel Facilities, 880 So. 2d 689 (Fla.

2004); Advisory Op. to Att'y Gen. re Public Protection from Repeated Medical Malpractice, 880 So. 2d 686 (Fla. 2004); Advisory Op. to Att'y Gen. re Repeal of High Speed Rail Amendment, 880 So. 2d 624 (Fla. 2004).

Instead, the statements commence with the conclusion that the impact of the amendments cannot be precisely determined, a conclusion which is clearly permitted under the statute. See § 100.371(5)(c)3., Fla. Stat. (2008) (allowing an FIS to provide that "[t]he financial impact of this measure, if any, cannot be reasonably determined at this time"). The statements then follow with a second, conditional sentence—if litigation increases beyond the number or complexity of cases which would have occurred in the amendment's absence, then additional costs may be incurred. FairDistrictsFlorida.org, the sponsor of the proposed constitutional amendments, contends that this conditional second sentence constitutes impermissible speculation which may not appear in an estimate of financial impact. It is true that we have previously condemned the use of speculation in prior financial impact statements. Indeed, we rejected the original financial impact statements in part because the FIEC's attempt to establish a litigation-cost baseline from which to measure any alleged increased cost of the proposed amendments was deemed to be "dubious and highly speculative." Legislative District Boundaries (FIS), 2 So. 3d at 165-66.

Despite this condemnation, this Court has nonetheless previously approved financial impact statements that contain conditional phrases. Most notably, in 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), we held that two financial impact statements complied with Florida law where the statements explained that the probable impact of two proposed amendments was dependent on future action by the Legislature and, therefore, could not be determined. As in the present case, the impact statements contained conditional language:

> Although state and local governments could potentially receive substantial revenue from non-taxed services subject to legislative review, the probable impact of the amendment is dependent upon future action of the legislature and cannot be determined. If the legislature exempts all services that are currently non-taxed, state and local government revenues will not be affected. If the legislature fails to exempt one or more services that are currently non-taxed, state and local revenues will increase.
>
> . . . .
>
> Although the value of sales tax exemptions subject to legislative review is substantial, the probable impact of the amendment on state and local government revenues is dependent upon future actions of the legislature and cannot be determined. If the legislature reenacts and continues all existing exemptions, state and local government revenues will not be affected. If the legislature does not reenact one or more exemptions, state and local government revenues will increase.

Id. at 485, 489. Thus, prior precedent compels a conclusion that the conditional phrase in the second sentence of the financial impact statements is not

impermissible and does not render the statements noncompliant with section 100.371.

Although we do not reject the statements as revised, it may become necessary to reconsider whether to allow financial impact statements that contain conditional phrases on the ballot in light of our constitutional duty to protect and preserve the integrity of the amendment process:

> [F]inancial 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. Scare tactics and vague, unsupported predictions of financial disaster have no place in this constitutional-amendment process, and any predictions of financial impact must be grounded in fact, not partisan ideology. Otherwise, the core purpose of financial impact statements (i.e., to inform voters so that an educated decision may be made with regard to a proposed amendment) would be completely defeated.

Legislative District Boundaries (FIS), 2 So. 3d at 165; see also Repeated Medical Malpractice, 880 So. 2d at 687 (Lewis, J., specially concurring) (expressing concern that broad interpretation of law governing financial impact could reduce statements into "a vehicle for any manner of content and language, including politicized statements designed as an attempt to sway the voters of this state, as long as those statements are clear and unambiguous").

CONCLUSION

Based upon prior precedent from this Court, we hold that the financial impact statements comply with section 100.371, Florida Statutes (2008), and may be placed on the ballot.

It is so ordered.

LEWIS, LABARGA, and PERRY, JJ., concur.
CANADY and POLSTON, JJ., concur in result only.
QUINCE, C.J., dissents with an opinion.
PARIENTE, J., recused.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

QUINCE, C.J., dissenting.

I dissent because I do not believe that this financial impact statement complies with the spirit and purpose of these statements. A financial impact statement is intended to give the voters a realistic, and I believe, unbiased statement of what the voter might expect the State or other political subdivision of the State to expend in order to implement the amendment if it should pass. The statement should be neutral and state both sides of the expenditure issue, if there is more than one possibility. The financial impact statement should not be used as a scare tactic to discourage the voter. This financial statement is not a neutral statement of the financial consequences. The other side in this instance is that there may be little or no financial impact beyond what is already experienced when legislative districts are being established. This possible impact could have also

been stated as the drafters only used thirty-four of the seventy-five words allowable for financial impact statements.

I would not allow this statement to be placed on the ballot.

Two Cases:

Original Proceeding – Advisory Opinion – Attorney General

Bill McCollum, Attorney General, Louis F. Hubener, Solicitor General, Tallahassee, Florida,

for Petitioner

Barry Richard and M. Hope Keating of Greenberg Traurig, P.A., Tallahassee, Florida, Jon L. Mills of Boies, Schiller and Flexner, LLP, Miami, Florida, and Timothy McLendon, Gainesville, Florida, Mark Herron of Messer, Caparello and Self, P.A., Tallahassee, Florida, and E. Thom Rumberger of Rumberger, Kirk and Caldwell, P.A., Tallahassee, Florida,

for FairDistrictsFlorida.org, Sponsor

Jason Vail, General Counsel, Florida Senate, and Jeremiah M. Hawkes, General Counsel, Florida House of Representatives, Tallahassee, Florida, on behalf of The Florida Legislature,

as Opponents