

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – The bill may result in fewer additions to the state constitution by limiting the number of citizen initiatives.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

Ballot Initiative Process

The Florida Constitution has more methods of amendment than any other state constitution.¹ Article XI of the Florida Constitution allows voters to approve state constitutional amendments proposed via the following methods:²

- Proposal by joint resolution passed by a three-fifths vote of each house of the legislature;
- Proposal by the Constitution Revision Commission;
- Proposal by the Taxation and Budget Reform Commission; or
- Proposal by the citizen initiative petition.

Florida adopted the citizen initiative process in 1968.³ Originally created to enable citizens to amend their constitution,⁴ the process has evolved into an expensive undertaking dominated by special interest groups that pay professional signature gatherers to collect petition signatures.⁵ Current Florida law does not address compensation for signature gatherers.

Some of the recently adopted Constitutional amendments have created huge financial commitments for Florida's taxpayers. Legislative analysts estimate that one particular amendment will cost \$425 million to \$625 million a year for the next five years,⁶ while another will cost Florida's taxpayers an estimated \$20 billion to \$28 billion through the 2010-2011 fiscal year.⁷

¹ Representative Talbot "Sandy" D'Alemberte, *The Florida State Constitution – A Reference Guide*; cited in P.K. Jameson & Marsha Hosack, *Citizen Initiative in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues, and Statutory Initiative Alternatives*, 23 Fla. St. U. L. Rev. 417 (1995) (hereinafter "Jameson & Hosack.")

² Art. XI, s. 1, Fla. Const. (legislature); Art. XI, s. 2, Fla. Const. (Revision Commission); Art. XI, s. 3, Fla. Const. (citizen initiative); Art. XI, s. 4, Fla. Const. (constitutional convention); Art. XI, s. 6, Fla. Const. (Taxation and Budget Reform Commission).

³ Art. XI, s. 3, Fla. Const.

⁴ The citizen initiative process is often referred to as 'direct democracy,' as opposed to the more traditional representative democracy. "Initiatives generally allow the public to bypass the Legislature and reserve direct lawmaking power in the voters of the state." Jameson & Hosack.

⁵ "Professional signature gatherers, carrying most or all of the nine [forms from rival signature-gathering firms], first ask people to sign the one paying the most." David S. Broder, "Collecting Signatures for a Price," *Washington Post*, April 12, 1998.

⁶ Electors passed the "Voluntary Universal Pre-Kindergarten" amendment in November of 2002 by a 59.2% majority. (Data available at <http://election.dos.state.fl.us/initiatives/index.shtml>). "Florida's first Constitutional Amendment Initiative Impact Conference estimated the annual cost would be from \$425 million to \$625 million." Dr. David Denslow and Carol Weissert, *Tough Choices: Shaping Florida's Future*, October 2005, p. 123.

⁷ Electors passed the "Reduced Class Size" amendment in November of 2002 by a 52.4% majority. (Data available at <http://election.dos.state.fl.us/initiatives/index.shtml>). "The same Constitutional Amendment Initiative Impact Conference that estimated the cost of the pre-K amendment had an even tougher job: estimating the cost of the class size amendment. The figure they reached was a ten-year cost of \$20 billion to \$27.5 billion, with annual costs of \$2.5 billion from then on." Denslow and Weissert, *Tough Choices*, p. 124.

The procedure for placing an initiative on the ballot is provided in s. 100.371, F.S. To obtain ballot position:

- The sponsor of an amendment must register as a political committee pursuant to s. 106.03, F.S., and submit the text of the amendment with the form on which the signatures will be obtained;
- The Secretary of State must approve the submitted form before signatures are obtained;
- After signatures are obtained, the Secretary of State must determine the total number of valid signatures (signatures are valid for four years from the date when made) and the distribution from congressional districts;⁸
- The certification of ballot position must be completed by February 1 of the year the general election is held; and
- The Supreme Court must approve the validity of the proposal.

In 2006, 611,009 signatures were required for ballot certification. There are two citizen initiatives that made ballot position by the required February 1, 2006, deadline for the 2006 general election.⁹ The first amendment was approved by the voters and requires the legislature to annually use some of the state's tobacco settlement funds for a statewide tobacco education and prevention program targeted at youth.¹⁰ The second proposed amendment would have created a fifteen member commission to replace the legislature to apportion single-member legislative and congressional districts,¹¹ but was ordered to be excluded from the ballot by the Florida Supreme Court on March 23, 2006, because it did not meet the single subject requirement of Art. XI, s. 3, Fla. Const. Therefore, the court determined that the ballot summary was misleading and did not comply with s. 101.161, F.S.¹²

An amendment relating to the constitutional amendment process proposed by the Legislature was also adopted by the voters in 2006 and now requires that any proposed amendment to or revision of the State Constitution, regardless of the method by which it is proposed, must be approved by at least 60 percent of the voters of the state voting on the measure, rather than by a simple majority.¹³

Signatures are valid for four years from the time they are collected.¹⁴ According to data collected by the National Conference of State Legislatures, Florida's four year period is the longest determined circulation period among the 24 "initiative states."¹⁵

Signature Verification

The responsibility for signature verification belongs to supervisors of elections, pursuant to s. 99.097, F.S. This statute covers signatures gathered on behalf of a candidate seeking placement on a ballot and signatures gathered in support of ballot initiatives. For ballot initiatives, Art. XI, s. 3, Fla. Const., requires "a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight percent of the votes cast in each of such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen."

⁸ Art. XI, s. 3, Fla. Const., requires that signatures be obtained in at least ½ of the state's congressional districts, and of the state as a whole, equal to eight percent of the voters casting ballots in the last Presidential election.

⁹ The February 1 deadline was approved in the 2004 general election and is contained in s. 5(b), Art. XI, Fla. Const.

¹⁰ Floridians for Youth Tobacco Education, Inc. The smoking education initiative began July 20, 2005, and collected 650,403 certified petition signatures. (Information collected from the Division of Elections web site).

¹¹ Committee for Fair Elections. The apportionment commission initiative began March 23, 2005, and collected 689,325 certified petition signatures. Information taken from the Division of Elections web site.

¹² Order Nos. SC05-1754 & SC05-1895, March 23, 2006.

¹³ Art. XI, s. 5(e), Fla. Const. Interestingly, the amendment was adopted by a 57% margin. See <http://election.dos.state.fl.us/initiatives>

¹⁴ S. 100.371(3), F.S.

¹⁵ See, "Table 11 – Circulation Periods," *Initiative and Referendum in the 21st Century: Final Report and Recommendations of the NCSL I&R Task Force*, National Conference of State Legislatures, July 2002.

Section 99.097(1), F.S., provides that supervisors are generally permitted to choose, “based on local conditions,” from two possible methods of signature verification. The first method involves a “name-by-name, signature-by-signature check of the number of authorized signatures.”¹⁶ The second method involves a “check of a random sample” of submitted signatures.¹⁷

In 1978, the Division of Elections issued a formal opinion to the Leon County Supervisor of Elections advising that the random sampling method contained in s. 99.097(1)(b), F.S., was not applicable to ballot initiatives because “the number of signatures required... is specifically and exactly spelled out [in the constitution]. It cannot be altered by statute.”¹⁸

Later that year, in the case of *Let’s Help Florida v. Smathers*, 360 So.2d 494, (Fla. 1st DCA, 1978), an initiative sponsor sued the Department of State and the Supervisor of Elections for Leon County, demanding that the random sampling method be used on its collected signatures. The appellate court ruled in favor of the Secretary of State and the Supervisor, stating:

Section 99.097(1)(a) is consistent with exactitude and accuracy, and is therefore not constitutionally offensive if permissibly applied to Article XI, Section 3, Florida Constitution initiative proceedings.

However, Article XI, Section 3, having mandated that there shall be no less than eight percent of described electors who shall sign [initiative petitions], we do not presume that the Legislature intended to enact a law where, by a random or spot check, less than eight percent would become permissible. It has no authority to so legislate. It follows, therefore, that Section 99.097(1)(b) and (2) has no application to Article XI, Section 3, Florida Constitution, relating to proposed initiative amendment to the Constitution.

In 2003, the Division of Elections was again asked to issue a formal opinion regarding the subject of random sampling and signature verification. It opined:

Pursuant to Division of Elections Opinion DE-78-7 and the First District Court of Appeals in *Let’s Help Florida v. Smathers* [citation omitted], random sampling cannot be used for constitutional initiative petition signature verification.... The Legislature did not have the authority to reduce the number of actual verified signatures required by the Florida Constitution.¹⁹

The supervisor is entitled to charge a fee of 10 cents per signature or the actual cost of checking each signature, whichever is less.²⁰ However, the initiative sponsor may certify under oath that the fee represents an “undue burden on personal resources or upon the resources otherwise available.” Upon filing such an oath, the sponsor is entitled to have the supervisor verify the signatures at no charge.²¹

¹⁶ S. 99.097(1)(a), F.S.

¹⁷ S. 99.097(1)(b), F.S.

¹⁸ Department of State, Division of Elections Opinion No. DE 78-07, January 23, 1978.

¹⁹ Department of State, Division of Elections Opinion No. DE 03-04, March 18, 2003.

²⁰ S. 99.097(4), F.S.

²¹ In this event, the Chief Financial Officer of the state is required to reimburse the supervisor’s expenses, rather than the sponsor of the ballot initiative. S. 99.097(4), F.S.

Criminal Penalties

Certain criminal sanctions exist with regard to the voter registration and petition process. Paying a person to register to vote,²² paying someone to solicit voter registrations based upon the number of registrations obtained,²³ and altering a voter registration application are all third degree felonies.²⁴ Signing a petition for a particular issue more than once, or signing another person's name, or a fictitious name, to a petition, is a first degree misdemeanor.²⁵ Supervisors of elections are currently authorized to investigate fraudulent registrations and illegal voting, and may report their findings to the state attorney or the Florida Elections Commission.²⁶

During the 2004 election cycle, numerous stories appeared in newspapers throughout the State of Florida concerning alleged petition fraud. Two petition gatherers were arrested in Santa Rosa County for over 40 counts each of uttering a forged document.²⁷ Several other supervisors of elections found petitions signed with the names of dead voters.²⁸

The Florida Department of Law Enforcement issued a press release in October of 2004 indicating that it had received numerous complaints relating to voting irregularities regarding voter fraud and had initiated several investigations. While the FDLE did not reveal details of the investigations, it did say the investigations focused on the following conduct:

In some cases, persons who believed they were signing petitions later found out that their signatures or possible forged signatures were used to complete a fraudulent voter registration. In other instances, it appears that workers hired to obtain legitimate voter registrations filled in the information on the registration forms that should have been completed by the registrants. On several occasions, workers appear to have signed multiple voter registrations themselves using information obtained during the registration drive. In many of the situations complained about, the workers were being paid on the basis of each registration form submitted.²⁹

Property Rights

Nationwide, political activities such as handbill distribution and signature-gathering have generated legal conflicts when entities seek to gather signatures on the private property of others, particularly store-fronts and shopping malls.³⁰ There is an inherent tension between the First, Fifth, and Fourteenth Amendments to the U.S. Constitution in regard to an entity's political activities taking place on another entity's private property.

The recent Florida case of *Publix Super Markets, Inc. v. Tallahasseeans for Practical Law Enforcement, et al.*, 2005 WL 3673662 (Fla. 2d Cir. 2005) discusses this tension. In this case the circuit court frames the issue as follows:

²² S. 104.102(1), F.S.

²³ S. 104.102(3), F.S.

²⁴ S. 104.012(4), F.S.

²⁵ S. 104.185, F.S.

²⁶ S. 104.42, F.S.

²⁷ See, "Two Pace residents accused in voter scam," Derek Pivnick, *Pensacola News Journal*, page 1A, July 2, 2004.

²⁸ See, "Names of dead persons found on petitions," Joni James and Lucy Morgan, *St. Petersburg Times*, September 28, 2004.

²⁹ "FDLE Investigates Statewide Voter Fraud," press release, Florida Department of Law Enforcement, October 21, 2004.

³⁰ See, e.g., *Batchelder v. Allied Stores International, Inc.*, 388 Mass. 83 (1983) (A "free elections" provision in Massachusetts constitution protected signature gatherers at a private mall (but see *Commonwealth v. Hood*, 452 N.E.2d 188 (Mass. 1983) in which the same court declined to extend state protection to speech unrelated to a pending election that was expressed on private property)); and *New Jersey Coalition Against the War in the Middle East v. JMB Realty Corp.*, 138 N.J. 326 (1994) (New Jersey's state constitution contained 'enhanced' free speech rights entitling pamphleteers to distribute materials in shopping centers subject to reasonable restrictions).

The issue presented in this litigation is whether Publix, which invites the public onto its premises primarily for the purpose of grocery-shopping... has the right to exclude persons in a non-discriminatory manner where such persons seek to use the property for purposes other than shopping.

The court answers this question in the affirmative, summarily noting that the First Amendment of the U.S. Constitution and Art. I, s. 4 of the Florida Constitution “only protect against government infringement of an individual’s right to engage in free speech.”³¹ Because Publix stores are located on privately-owned or leased properties, the court determined that it “can find no authority to support Defendants’ contention that they have a constitutional right to solicit at such properties over Publix’s objection.”³²

The court recognized that a state “may provide greater protection under its state constitution for free expression on private property, so long as such protection does not conflict with... federally protected... rights” of the owner.³³ In *New Jersey Coalition Against the War in the Middle East v. JMB Realty Corp.*, 138 N.J. 326 (1994), and the California case of *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), the relevant state constitution was deemed to have ‘enhanced’ free speech rights beyond those contained in the federal Constitution. However, the circuit court noted that “the Florida Supreme Court has held that the scope of the Florida Constitution’s protection of freedom of speech is the same as that required under the First Amendment [citation omitted],”³⁴ and that Florida courts “must apply the principles of freedom of speech announced in the decisions of the United States Supreme Court [citations omitted].”³⁵

In finalizing its review of the relevant case law in Florida, other states, and the Supreme Court, the Court states:

Owners of private property have the right to allow... periodic use of their premises by civic groups without waiving or otherwise forfeiting their right to exclude other groups seeking to use the premises for political speech, solicitation of petition signatures, or other non-shopping purposes. [Previous case law has] rejected claims that the retailers were improperly discriminating based on such action....

Defendants are not entitled under the First Amendment or the Florida Constitution to solicit signatures... on Publix’s privately owned property without Publix’s permission.³⁶

Proposed Changes

Signature Verification

The bill amends s. 100.371, F.S., to make the following clarifications and amendments regarding signature verification:

- Requiring that signatures be submitted to the supervisor of elections within 30 days of being collected, and requiring supervisors to verify signatures within 30 days of submission;
- Requiring supervisors of elections to record the date an elector’s signature form is received and the date the signature is verified by the supervisor;

³¹ *Publix Super Markets, Inc. v. Tallahasseans for Practical Law Enforcement, et al.*, at 3.

³² *Id.*

³³ *Id.* at 4.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 5.

- Requiring the signature form to contain the elector's original signature, the date signed (as recorded by the elector), and the elector's address and voter identification number (or date of birth);
- Providing a process allowing an elector to revoke a previously verified petition signature; the revocation process is intended to operate just as the signature gathering process, including any applicable time frames; and
- Providing that supervisors may allow deficiencies in a petition to be corrected by the elector and verify the signature after such corrections.

These clarifications are also referenced in s. 99.097, F.S., which contains procedural matters relating to signature verification, among which is the 'undue burden' fee waiver. The waiver requirement is amended to provide that any sponsor of an initiative drive who claims that having to pay for signature verification would impose an 'undue burden' on the sponsor shall not utilize paid signature gatherers unless the supervisor or the General Revenue fund are reimbursed for verification fees. As discussed below, these clarifications also apply to the petition-revocation process.

Signature Revocation

Florida's 4-year circulation period is the longest determined circulation period among the 24 states with an initiative process. The recommendations contained in the National Conference of State Legislatures' *Initiative and Referendum in the 21st Century* report suggest that states seek to strike a balance between circulation periods that are too short (for example, Massachusetts provides only a 60-day period) and those that are too long, allowing a voter to move out of the jurisdiction (thereby invalidating the signature) or change positions on the subject.³⁷

The bill retains Florida's 4-year period, but creates a revocation process whereby an elector may take affirmative steps to revoke his or her signature. The petition-revocation process mirrors the petition process, including the requirements for signature gatherers and subsequent verification by supervisors of elections. The bill also requires supervisors of elections to make petition-revocation forms available to the public at main and branch offices.

Signature Gatherers

The bill requires paid petition gatherers and petition-revocation gatherers to wear identifying badges and requires the elector to note the signature gatherer's identity on the signature form.

It is currently a third-degree felony for a person to pay another person to collect *voter registrations* based on the number of registrations gathered.³⁸ The bill furthers this concept by preventing initiative petition gatherers from being paid based on the number of signatures collected, but imposes no specific criminal penalty for such behavior.³⁹

Private Property and Signature Gathering

Within the bounds of the ballot-initiative procedure statute, the bill codifies the judicial decision contained in *Publix v. Tallahasseeans for Practical Law Enforcement, et al.*, discussed in detail above. The bill states that owners of private property, as well as private leaseholders exercising lawful control over the property, may prohibit ballot initiative activities.

³⁷ *Initiative and Referendum in the 21st Century*, pp. 36 -37.

³⁸ S. 104.102(3), F.S.

³⁹ However, S. 104.41, F.S. provides that "[a]ny violation of this [Florida Election] code not otherwise provided for is a misdemeanor of the first degree, punishable as provided in s. 775.082 or 775.083."

C. SECTION DIRECTORY:

- Section 1.** Amends s. 99.097, F.S., clarifying supervisors of elections' obligation to verify signatures on petitions for validity and providing that sponsors claiming an 'undue burden' may not utilize paid signature gatherers unless the supervisor or the General Revenue fund are reimbursed for verification fees.
- Section 2.** Amends s. 100.371, F.S., regarding citizen initiatives. The section:
- Requires supervisors of elections to record the date an elector's signature form is received and the date the signature is verified by the supervisor;
 - Requires the signature form to contain the elector's original signature, the date signed (as recorded by the elector), and the elector's address and voter identification number (or date of birth);
 - Provides a process allowing an elector to revoke a previously verified petition signature;
 - Requires both petition signatures and revocation signatures to be submitted to supervisors of elections within 30 days;
 - Requires supervisors of elections to verify both petition signatures and revocation signatures within 30 days;
 - Requires paid petition gatherers to wear identifying badges;
 - Requires the elector to identify, on a petition or petition-revocation form, the fact that a petition gatherer approached them to complete the form;
 - Prevents paid signature gatherers from being paid on a "per-signature" basis;
 - Provides that supervisors may allow deficiencies in a petition to be corrected by the elector and verify the signature after such corrections.
 - Confirms the rights of private property owners to exclude signature gatherers supporting or opposing initiative amendments.
- Section 3.** Provides that signatures collected prior to the effective date of August 1, 2007, may be verified under the previous controlling law.
- Section 4.** Provides a severability clause for the bill.
- Section 5.** Provides an effective date of August 1, 2007, except as otherwise provided therein.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

N/A

2. Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Pursuant to Art VII, s. 18(d), Fla. Const., as it relates to elections laws, this bill is exempt from the unfunded mandate provisions of Art. VII, s. 18(a), Fla. Const.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The Department of State's current grant of rulemaking authority contained in s. 100.371(6), F.S., is renumbered and amended to include the additional requirements provided by Section 1 of the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES