The Florida Senate

COMMITTEE MEETING EXPANDED AGENDA

JUDICIARY
Senator Flores, Chair
Senator Joyner, Vice Chair

MEETING DATE: Monday, April 4, 2011
TIME: 3:15 —5:15 p.m.
PLACE: *Toni Jennings Committee Room,* 110 Senate Office Building

MEMBERS: Senator Flores, Chair; Senator Joyner, Vice Chair; Senators Bogdanoff, Braynon, Richter, Simmons, and Thrasher

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	**SJR 1672** Flores (Compare HJR 7039)	Retention of Justices or Judges; Proposes amendments to the State Constitution to increase the vote required to retain a justice or judge in a judicial office and to provide for the increased vote requirement to apply beginning with retention elections during the 2012 General Election. EE RC JU 03/28/2011 Not Considered JU 04/04/2011 BC	
2	**SJR 1704** Hays (Compare HJR 7037)	Judicial Qualifications Commission; Proposes an amendment to the State Constitution to require that certain proceedings, records, and materials of the Judicial Qualifications Commission be open to the public and to require the commission to notify the Speaker of the House of Representatives of complaints received or initiated, investigations conducted, and complaints concluded. JU 03/28/2011 Not Considered JU 04/04/2011 GO RC	
	Consideration of proposed committee bill:		
3	**SPB 7222**	Judicial Nominating Commissions; Provides for the Attorney General, rather than the Board of Governors of The Florida Bar, to submit nominees for certain positions on judicial nominating commissions. Provides for the termination of terms of all current members of judicial nominating commissions. Provides for staggered terms of newly appointed members.	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
4	**SJR 2084** Judiciary	Repeal of Supreme Court Rule by General Law; Proposes an amendment to the State Constitution to reduce the vote threshold required for the Legislature to enact a law repealing a rule of court and to prohibit the Supreme Court from readopting a rule repealed by the Legislature for a prescribed period. JU 04/04/2011 BC RC	
5	**CS/SB 88** Community Affairs / Gaetz (Compare H 43)	Public Employee Compensation; Revises provisions relating to the prohibition against the payment of extra compensation. Prohibits provisions in contracts that provide for severance pay. Allows for severance pay under specified circumstances. Deletes a provision that allows a municipality to pay extra compensation. Repeals provisions relating to a prohibition against severance pay for officers or employees of water management districts, etc. CA 03/07/2011 Fav/CS JU 04/04/2011 GO	
6	**CS/CS/SB 204** Health Regulation / Criminal Justice / Wise (Identical CS/CS/H 39)	Controlled Substances; Defines the term "homologue" for purposes of the Florida Comprehensive Drug Abuse Prevention and Control Act. Includes certain hallucinogenic substances on the list of controlled substances in Schedule I. Provides that it is a misdemeanor of the first degree to be in possession of not more than a specified amount of certain hallucinogenic substances. Reenacts provisions relating to prohibited acts and penalties regarding controlled substances and the offense severity chart of the Criminal Punishment Code, etc. CJ 01/11/2011 Fav/CS HR 03/14/2011 Fav/CS JU 04/04/2011 BC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
7	**CS/SB 476** Regulated Industries / Evers (Identical CS/CS/H 883, Compare CS/H 63, CS/H 5007, CS/S 366, CS/S 1824)	Public Lodging Establishments; Provides that vacation rentals are residential property for purposes of provisions related to the treatment of such properties. Providing that public lodging establishments formerly classified as resort condominiums and resort dwellings are classified as vacation rentals. Revises mandatory education requirements for certain violations. Revises membership of the advisory council of the Division of Hotels and Restaurants of the Department of Business and Professional Regulation, etc. RI 03/22/2011 Fav/CS JU 04/04/2011 BC	
8	**CS/SJR 658** Community Affairs / Fasano (Compare HJR 273, CS/CS/HJR 381, HJR 537, H 1053, CS/H 1163, SJR 210, SJR 390, SJR 1578, Link S 1564, S 1722)	Homestead/Nonhomestead Property; Proposes amendments to the State Constitution to prohibit increases in the assessed value of homestead property if the just value of the property decreases, reduce the limitation on annual assessment increases applicable to nonhomestead real property, provide an additional homestead exemption for owners of homestead property who have not owned homestead property for a specified time before purchase of the current homestead property, etc. CA 03/14/2011 Fav/CS JU 04/04/2011 BC RC	
9	**SB 1722** Fasano (Compare CS/CS/HJR 381, H 1053, CS/H 1163, Link CS/SJR 658, S 1564)	Ad Valorem Taxation; Reduces the amount that any change in the value of nonhomestead residential property resulting from an annual reassessment may exceed the assessed value of the property for the prior year. Reduces the amount that any change in the value of certain residential and nonresidential real property resulting from an annual reassessment may exceed the assessed value of the property for the prior year. Provides a first-time Florida homesteader with an additional homestead exemption, etc. CA 03/28/2011 Favorable JU 04/04/2011 BC RC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
10	**SB 844** Benacquisto (Similar CS/H 575)	Violations/Probation/Community Control/Widman Act; Creates the "Officer Andrew Widman Act." Authorizes a circuit court judge, after making a certain finding, to issue a warrant for the arrest of a probationer or offender who has violated the terms of probation or community control. Authorizes the court to commit or release the probationer or offender under certain circumstances. Authorizing the court, in determining whether to require or set the amount of bail, to consider the likelihood that the person will be imprisoned for the violation of probation or community control, etc. CJ 03/22/2011 Fav/1 Amendment JU 04/04/2011 BC	
11	**CS/SB 926** Commerce and Tourism / Storms (Similar CS/H 405)	Liability/Employers of Developmentally Disabled; Provides that an employer, under certain circumstances, is not liable for the acts or omissions of an employee who is a person with a developmental disability. Provides that a supported employment service provider that provides or has provided supported employment services to a person with a developmental disability is not liable for the actions or conduct of the person occurring within the scope of the person's employment. Defines the terms "developmental disability" and "supported employment service provider." Provides for application of the act. CM 03/16/2011 Fav/CS CF 03/22/2011 Favorable JU 04/04/2011	
12	**SB 1144** Margolis (Identical H 767)	Local Government; Authorizes a board of county commissioners to negotiate the lease of certain real property for a limited period. Authorizes transfers of right-of-way between local governments by deed. CA 03/14/2011 Favorable JU 04/04/2011 TR	
13	**SJR 1218** Altman (Compare HJR 1471)	Religious Freedom; Proposes an amendment to the State Constitution to provide that an individual may not be barred from participating in any public program because of choosing to use public benefits at a religious provider and to delete a prohibition against using public revenues in aid of any church, sect, or religious denomination or any sectarian institution. JU 04/04/2011 CF ED BC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
14	**SB 1294** Hays (Compare H 1273)	Application of Foreign Law; Specifies the public policy of this state in applying the choice of a foreign law, legal code, or system under certain circumstances. Declares that certain decisions rendered under such laws, codes, or systems are void. Declares that certain choice of venue or forum provisions in a contract are void. Declares that claims of forum non conveniens or related claims must be denied under certain circumstances. Provides that the act does not apply to a corporation, partnership, or other form of business association, etc. JU 04/04/2011 CM CF	
15	**SJR 1438** Hays (Identical HJR 1103)	Sovereignty of the State; Proposes an amendment to the State Constitution to assert the sovereignty of the state and refuse to comply with unconstitutional federal mandates. JU 04/04/2011 GO RC	
16	**CS/SB 1206** Criminal Justice / Negron (Compare H 821)	Eyewitness Identification; Cites this act as the "Eyewitness Identification Reform Act." Requires state, county, municipal, and other law enforcement agencies that conduct lineups to follow certain specified procedures. Requires the eyewitness to sign an acknowledgement that he or she received the instructions about the lineup procedures from the law enforcement agency. Requires the Criminal Justice Standards and Training Commission to create educational materials and conduct training programs on how to conduct lineups in compliance with the act, etc. CJ 03/28/2011 Fav/CS JU 04/04/2011 BC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
17	**CS/CS/SB 402** Community Affairs / Criminal Justice / Negron (Similar CS/CS/H 45)	Regulation of Firearms and Ammunition; Prohibits specified persons and entities, when acting in their official capacity, from regulating or attempting to regulate firearms or ammunition in any manner except as specifically authorized by s. 790.33, F.S., by general law, or by the State Constitution. Eliminates provisions authorizing counties to adopt an ordinance requiring a waiting period between the purchase and delivery of a handgun. Provides a penalty for knowing and willful violations of prohibitions, etc. CJ 02/08/2011 Fav/CS CA 03/21/2011 Fav/CS JU 04/04/2011 RC	
18	**CS/CS/SB 432** Health Regulation / Criminal Justice / Evers (Compare CS/H 155) **(If Received)**	Privacy of Firearms Owners; Provides that a licensed medical care provider or health care facility may not record information regarding firearm ownership in a patient's medical record. Provides an exception for relevance of the information to the patient's medical care or safety. Provides that unless the information is relevant to the patient's medical care or safety, inquiries regarding firearm ownership or possession should not be made by licensed health care providers or health care facilities, etc. CJ 02/22/2011 Fav/CS HR 03/14/2011 Temporarily Postponed HR 03/22/2011 Temporarily Postponed HR 03/28/2011 Fav/CS JU 04/04/2011 If received BC	
19	**SB 2064** Children, Families, and Elder Affairs	Mental Health and Substance Abuse Treatment; Redefines the term "court" to include county courts in certain circumstances. Requires the Department of Children and Family Services to provide a discharged defendant with up to a 7-day supply of psychotropic medication when he or she is returning to jail from a state treatment facility. Authorizes a county court to order the conditional release of a defendant for the provision of outpatient care and treatment. Creates the Forensic Hospital Diversion Pilot Program, etc. CF 03/28/2011 Favorable JU 04/04/2011 BC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
20	**CS/SB 828** Community Affairs / Bogdanoff (Identical CS/H 667)	Public Records/Local Government Inspector General; Expands an exemption from public records requirements to include certain records relating to investigations in the custody of an inspector general of a local government. Provides for future repeal and legislative review of such revisions to the exemption under the Open Government Sunset Review Act. Provides a statement of public necessity. CA 03/21/2011 Fav/CS JU 04/04/2011 GO	
21	**CS/SB 504** Children, Families, and Elder Affairs / Bogdanoff (Similar H 387)	Child Visitation; Requires probable cause of sexual abuse in order to create a presumption of detriment. Provides that persons meeting specified criteria may not visit or have contact with a child without a hearing and court order. Revises requirements for a hearing seeking to rebut a presumption of detriment. Revises provisions relating to hearings on whether to prohibit or restrict visitation or other contact with the person who is alleged to have influenced a child's testimony, etc. CF 03/22/2011 Fav/CS JU 04/04/2011 BC	
22	**SB 1398** Bogdanoff (Compare H 4067, H 4135, H 4137, CS/H 7023, H 7115, H 7117, H 7125, S 962, S 974, S 1100)	Judiciary; Repeals provisions relating to regular terms of the Supreme Court, compensation of the marshal, census commissions for the judicial circuits, and terms of the circuit courts. Repeals provisions relating to terms of the First Judicial Circuit through the Twentieth Judicial Circuit. Repeals provisions relating to requiring a judge to attend the first day of each term of the circuit court. Repeals provisions relating to requiring a judge to state a reason for nonattendance. Repeals provisions relating to guardians of incapacitated world war veterans, etc. JU 04/04/2011 BC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
23	**SB 2040** Judiciary (Compare H 691, S 518, S 1896)	Unauthorized Immigrants; Requires every employer to use the federal program for electronic verification of employment eligibility in order to verify the employment eligibility of each employee hired on or after a specified date. Provides an exception in the case of employees who present specified documents to the employer. Requires the Attorney General to request from the Department of Homeland Security a list of employers who are registered with the E-Verify Program and to post that list to the Attorney General's website, etc. JU 04/04/2011 CJ BC	
24	**SB 318** Siplin (Identical H 55)	Postsecondary Student Fees; Provides an exemption from payment of nonresident tuition at a state university or a Florida College System institution for an undocumented student who meets specified requirements. Requires the Board of Governors of the State University System to adopt regulations and the State Board of Education to adopt rules. JU 03/14/2011 Temporarily Postponed JU 04/04/2011 HE CJ BC	

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LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Simmons) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the resolving clause and insert:

That the following amendment to Section 10 of Article V of the State Constitution is agreed to and shall be submitted to the electors of this state for approval or rejection at the next general election or at an earlier special election specifically authorized by law for that purpose:

ARTICLE V

JUDICIARY

SECTION 10. Retention; election and terms.—

(a) Any justice or judge may qualify for retention by a


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vote of the electors in the general election next preceding the expiration of the justice's or judge's term in the manner prescribed by law. If a justice or judge is ineligible or fails to qualify for retention, a vacancy shall exist in that office upon the expiration of the term being served by the justice or judge. When a justice or judge so qualifies, the ballot shall read substantially as follows: "Shall Justice (or Judge) ...(name of justice or judge)... of the ...(name of the court)... be retained in office?" If a majority of the qualified electors voting within the territorial jurisdiction of the court vote to retain, the justice or judge shall be retained for a term of six years. The term of the justice or judge retained shall commence on the first Tuesday after the first Monday in January following the general election. If a majority of the qualified electors voting within the territorial jurisdiction of the court vote to not retain, a vacancy shall exist in that office upon the expiration of the term being served by the justice or judge. If at least 40 percent of the qualified electors within the territorial jurisdiction of the court vote not to retain a justice or judge, the Governor, with the advice and consent of a two-thirds majority of the Senate, may declare a vacancy of that office upon the expiration of the term being served by the justice or judge.

(b)(1) The election of circuit judges shall be preserved notwithstanding the provisions of subsection (a) unless a majority of those voting in the jurisdiction of that circuit approves a local option to select circuit judges by merit selection and retention rather than by election. The election of circuit judges shall be by a vote of the qualified electors

within the territorial jurisdiction of the court.

(2) The election of county court judges shall be preserved notwithstanding the provisions of subsection (a) unless a majority of those voting in the jurisdiction of that county approves a local option to select county judges by merit selection and retention rather than by election. The election of county court judges shall be by a vote of the qualified electors within the territorial jurisdiction of the court.

(3)a. A vote to exercise a local option to select circuit court judges and county court judges by merit selection and retention rather than by election shall be held in each circuit and county at the general election in the year 2000. If a vote to exercise this local option fails in a vote of the electors, such option shall not again be put to a vote of the electors of that jurisdiction until the expiration of at least two years.

b. After the year 2000, a circuit may initiate the local option for merit selection and retention or the election of circuit judges, whichever is applicable, by filing with the custodian of state records a petition signed by the number of electors equal to at least ten percent of the votes cast in the circuit in the last preceding election in which presidential electors were chosen.

c. After the year 2000, a county may initiate the local option for merit selection and retention or the election of county court judges, whichever is applicable, by filing with the supervisor of elections a petition signed by the number of electors equal to at least ten percent of the votes cast in the county in the last preceding election in which presidential electors were chosen. The terms of circuit judges and judges of

county courts shall be for six years.

BE IT FURTHER RESOLVED that the following statement be placed on the ballot:

CONSTITUTIONAL AMENDMENT

ARTICLE V, SECTION 10

BROADER PUBLIC SUPPORT FOR RETENTION OF JUSTICES AND JUDGES.—This proposed amendment increases the threshold of public support needed to retain justices and judges chosen by merit selection and retention. Under current law, a justice or judge who appears on the ballot in a retention election is retained if a simple majority of electors vote to retain the justice or judge. This amendment provides that a justice or judge who appears on the ballot in a retention election is retained if at least 40 percent of qualified electors vote to retain the justice or judge. This amendment also authorizes the Governor, with the advice and consent of a two-thirds majority of the Senate, to declare a vacancy of the justice or judge's office upon the expiration of his or her term. The amendment does not apply to judges who are chosen by election and not by merit selection and retention. This amendment takes effect immediately upon approval by the voters and applies to retention elections beginning with the 2012 General Election.

BE IT FURTHER RESOLVED that the following statement be placed on the ballot if a court declares the preceding statement defective and the decision of the court is not reversed:

CONSTITUTIONAL AMENDMENT

ARTICLE V, SECTION 10

RETENTION OF JUSTICES AND JUDGES.—Currently, retention of a

justice or judge who seeks a new 6-year term requires a simple majority vote of the qualified electors voting within the territorial jurisdiction of the court. This amendment increases the requirement to at least 40 percent of those qualified electors. The amendment takes effect as soon as it is approved by the electors, and it applies to any vote to retain a justice or judge on the ballot in the same general election.

BE IT FURTHER RESOLVED that the following statement be placed on the ballot if a court declares the preceding statement defective and the decision of the court is not reversed:

CONSTITUTIONAL AMENDMENT

ARTICLE V, SECTION 10

INCREASING THE THRESHOLD REQUIRED TO RETAIN JUSTICES AND JUDGES.—Proposing an amendment to the State Constitution to increase the threshold required to retain justices and judges. Under current law, a justice or judge appears on the ballot at the end of each term of office for a retention election. If a majority of the votes cast are for retention, the justice or judge continues in office, but if a majority votes not to retain, the justice or judge is removed from office at the end of the term of office. This amendment changes the threshold to at least 40 percent; that is, of the votes cast, 40 percent or more would have to be votes to retain the justice or judge in order for the justice or judge to retain his or her office for another term. This provision will apply to all state court appellate justices and judges, but will apply only to trial court judges in your judicial circuit or your county if your circuit or county has approved merit selection and retention;

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otherwise, this proposed amendment will not affect your circuit court judges or county court judges, respectively. The amendment applies immediately to any justice or judge who is on the ballot for a retention vote in this election.

BE IT FURTHER RESOLVED that the following statement be placed on the ballot if a court declares the preceding statement defective and the decision of the court is not reversed:

CONSTITUTIONAL AMENDMENT

ARTICLE V, SECTION 10

INCREASING THE VOTE REQUIRED TO RETAIN A JUSTICE OR JUDGE.—The State Constitution currently provides that a justice or judge qualifies to be retained in office for an additional term by receiving the votes of a majority of the qualified electors voting within the court's jurisdiction in an election before the term of the justice or judge ends. This proposed amendment raises the required votes for retention from a majority of the qualified electors voting within the court's jurisdiction to at least 40 percent. If more than 40 percent of qualified electors vote against retention, the Governor, with the advice and consent of a two-thirds majority of the Senate, may declare a vacancy in the office when the justice's or judge's term expires. The proposed amendment takes effect immediately and applies beginning with any judicial retention vote that is occurring in this same general election.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete everything before the resolving clause

and insert:

A bill to be entitled

A joint resolution proposing an amendment to Section 10 of Article V of the State Constitution to increase the vote required to retain a justice or judge in a judicial office and to provide for the increased vote requirement to apply beginning with retention elections during the 2012 General Election.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SJR 1672
INTRODUCER:	Senator Flores
SUBJECT:	Retention of Justices or Judges
DATE:	March 25, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Maclure	JU	**Pre-meeting**
2.			EE	
3.			RC	
4.			BC	
5.				
6.				

I. Summary:

The joint resolution proposes an amendment to the Florida Constitution to increase the vote required to retain a justice or judge in judicial office and to provide for an increased vote requirement to apply beginning with retention elections during the 2012 General Election. The joint resolution would require a vote of at least 60 percent rather than a majority of the qualified electors voting within the territorial jurisdiction of the court to vote to retain a justice or judge. If more than 40 percent of the qualified electors voting within the territorial jurisdiction of the court vote to not retain, a vacancy shall exist in that office upon the expiration of the term being served by the justice or judge.

This joint resolution amends section 10, Article V of the Florida Constitution.

This joint resolution creates section 32, Article XII of the Florida Constitution.

II. Present Situation:

Retention of Justices or Judges

Currently in Florida, justices of the Florida Supreme Court and judges of the district courts of appeal hold office through a system of merit selection and retention, under which the Governor appoints justices and appellate judges from nominations submitted by judicial nominating commissions, and the justices and judges face a retention vote after an initial term of at least one

year and thereafter every six years.[1] Under the constitution, any justice or judge may qualify for retention by a vote of the electors in the general election next preceding the expiration of the justice's or judge's term in the manner prescribed by law.[2] If a justice or judge is ineligible or fails to qualify for retention, a vacancy shall exist in that office upon the expiration of the term being served by the justice or judge.[3]

If a majority of the qualified electors voting within the territorial jurisdiction of the court vote to retain, the justice or judge shall be retained for a term of six years.[4] The term of the justice or judge retained commences on the first Tuesday after the first Monday in January following the general election. If a majority of the qualified electors voting within the territorial jurisdiction of the court vote to not retain, a vacancy shall exist in that office upon the expiration of the term being served by the justice or judge.[5]

Meanwhile in Florida, county and circuit judges currently are elected to judicial office. Under the constitution, the election of county judges is preserved unless a majority of those voting in the in the jurisdiction of that county approve a local option to select county judges by merit selection and retention rather than by election.[6] Similarly, the election of circuit judges is preserved unless a majority of those voting in the jurisdiction of that circuit approve a local option to select circuit judges by merit selection and retention rather than by election.[7] The election of circuit judges or county court judges shall be by a vote of the qualified electors within the territorial jurisdiction of the court.[8] Thus far, no circuit or county has approved changing from election to merit selection and retention.[9]

Constitutional Amendments

Section 1, Article XI, of the Florida Constitution authorizes the Legislature to propose constitutional amendments by joint resolution approved by a three-fifths vote of the membership of each house. The amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State's office, or at a special election held for that purpose.[10] Section 5(e), Article XI, of the Florida Constitution requires 60-percent voter approval for a constitutional amendment to take effect. An approved amendment will be effective on the first Tuesday after the first Monday in January following the election at which it is approved, or on such other date as may be specified in the amendment or revision.[11]

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[1] The Florida Bar, Bar Issue Paper, *Merit Selection and Retention* (revised October 2008), *available at* http://www.floridabar.org/DIVCOM/PI/BIPS2001.nsf/BIP+List?OpenForm (last visited Mar. 25, 2011).
[2] FLA. CONST. art. V, s. 10(a).
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] FLA. CONST. art. V, s. 10(b)(2).
[7] FLA. CONST. art. V, s. 10(b)(1).
[8] FLA. CONST. art. V, s. 10(b)(1) and (2).
[9] *See* The Florida Bar, *supra* note 1.
[10] FLA. CONST. art. XI, s. 5(a).
[11] FLA. CONST. art. XI, s. 5(e).

III. Effect of Proposed Changes:

The joint resolution modifies the requirements for retaining justices and judges in the Florida Constitution and provides for an increased vote requirement to apply beginning with retention elections during the 2012 General Election. Under the joint resolution, it would require a vote of at least 60 percent rather than a majority of the qualified electors voting within the territorial jurisdiction of the court to vote to retain a justice or judge. If more than 40 percent of the qualified electors voting within the territorial jurisdiction of the court vote to not retain, a vacancy shall exist in that office upon the expiration of the term being served by the justice or judge. The requirement for a 60-percent vote to retain will also apply to circuit and county judges if the circuit or county changes its method of selecting judges from a direct election to a merit selection and retention system.

The joint resolution amends the schedule to the Florida Constitution, Article XII, to provide that the proposed 60-percent threshold for retaining a justice or judge takes effect upon approval by the voters and applies to any retention vote during the same general election in 2012. Thus, the increased threshold for retaining a justice or judge would have immediate effect.

The joint resolution provides four different ballot summaries. The first ballot summary directs that it will be placed on the ballot, and each subsequent ballot summary provides that it will be placed on the ballot in the event that a court declares the preceding ballot summary defective and the decision of the court is not reversed. This feature appears to have the effect of allowing the proposed amendment to survive up to three successful challenges to the amendment for a defective ballot summary.

The amendment takes effect upon approval by the electors and applies beginning with any retention vote during the 2012 general election.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Department of State Division of Elections (department) is required to publish the proposed constitutional amendment twice in a newspaper of general circulation in each county. The average cost per word to advertise an amendment is $106.14 according to the department. If the joint resolution passes and the proposed constitutional amendment is placed on the ballot, the department will incur costs of $85,018.14 to advertise the proposed amendment.[12]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[12] See Fiscal Note on SJR 1672 prepared by the Florida Department of State (March 9, 2011).

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LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Simmons) recommended the following:

Senate Amendment (with ballot amendment)

Delete lines 81 - 106

and insert:

2. A determination that formal charges will not be filed and the judge or justice agreeing to waive the confidentiality of the records or materials relating to the complaint; or

3. The entry of a stipulation or other settlement agreement before the investigative panel determines whether to file formal ~~against a justice or judge such~~ charges, ~~and~~

all further proceedings before the commission shall be open to the public and all records and materials of the commission

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relating to the complaint against the justice or judge shall be open to the public for inspection or copying. However, information that is otherwise confidential or exempt shall retain its status. The records and materials shall be accessible to the public regardless of whether they were received or created while the proceedings were confidential or open to the public.

(5) The commission shall have access to all information from all executive, legislative and judicial agencies, including grand juries, subject to the rules of the commission. At any time, on request of the speaker of the house of representatives or the governor, the commission shall make available all information in the possession of the commission for use in consideration of impeachment or suspension, respectively. Upon request, the commission shall notify the speaker of the house of representatives of all complaints received or initiated, all investigations conducted, and all complaints dismissed, settled, or otherwise concluded.

====== B A L L O T S T A T E M E N T A M E N D M E N T ======
And the ballot statement is amended as follows:

Delete lines 229 - 373

and insert:

CONSTITUTIONAL AMENDMENT

ARTICLE V, SECTION 12

MEETINGS, RECORDS, AND ACTIONS OF THE JUDICIAL QUALIFICATIONS COMMISSION.—The Judicial Qualifications Commission is an independent commission created by the State Constitution to investigate and prosecute before the Florida

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Supreme Court alleged misconduct by a justice or judge. Currently under the Constitution, commission proceedings are confidential until formal charges are filed by the investigative panel of the commission. Once formal charges are filed, the formal charges and all further proceedings of the commission are public. This proposed amendment provides that all records and materials in the possession of the commission which are not otherwise confidential or exempt from disclosure and which relate to a complaint against a justice or judge shall be open to the public once formal charges are filed, once a decision is made not to pursue formal charges and the justice or judge waives the confidentiality of the records and materials, or once the commission and the justice or judge enter into a settlement agreement before the commission's investigative panel determines whether to pursue formal charges. Additionally, the amendment provides that further proceedings of the commission are also open to the public once a decision is made not to pursue formal charges or once the commission and the justice or judge enter into a settlement agreement before a decision is made on whether to pursue formal charges.

Currently the State Constitution authorizes the House of Representatives to impeach a justice or judge and authorizes the Governor to suspend a justice or judge. Further, the Speaker of the House of Representatives or the Governor may request, and the Judicial Qualifications Commission must make available, all information in the commission's possession for use in deciding whether to impeach or suspend a justice or judge. This proposed amendment requires the commission to notify the Speaker of the House of Representatives of all complaints received or initiated

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against a justice or judge, all investigations conducted, and all complaints dismissed, settled, or otherwise concluded.

BE IT FURTHER RESOLVED that the following statement be placed on the ballot if a court declares the preceding statement defective and the decision of the court is not reversed:

CONSTITUTIONAL AMENDMENT

ARTICLE V, SECTION 12

MAKING JUDICIAL QUALIFICATIONS COMMISSION MEETINGS AND RECORDS PUBLIC AND REQUIRING NOTICE TO THE HOUSE SPEAKER.—Proposing an amendment to the State Constitution to increase public access to records and meetings of the Judicial Qualifications Commission relating to complaints against justices or judges in this state. The commission is responsible for investigating and prosecuting allegations of alleged misconduct by state justices and judges. Currently, the State Constitution provides that until formal charges are filed by the commission's investigative panel the proceedings of the commission are confidential. However, once formal charges are filed, the charges and all further proceedings are open to the public. The initial complaint and other documents in possession of the commission before the filing of formal charges do not become public after the filing of formal charges. This proposed amendment provides that all further proceedings shall be open to the public and all records and materials in the possession of the commission relating to a complaint against a justice or judge shall be open to the public for inspection or copying once one of the following events occurs: formal charges are filed; a decision is made not to file formal charges and the justice or


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judge waives the confidentiality of the records and materials; or, before a decision is made on whether to file formal charges, the commission and the justice or judge enter into a settlement agreement. The proposed amendment applies only to information that is not otherwise confidential or exempt from disclosure.

The State Constitution currently authorizes the House of Representatives to impeach a justice or judge and authorizes the Governor to suspend a justice or judge. The Constitution also authorizes the Speaker of the House of Representatives or the Governor to request from the Judicial Qualifications Commission all information in the commission's possession for use in deciding whether to impeach or suspend. The commission must make the information available to the Governor and the Speaker of the House of Representatives. This proposed amendment to the State Constitution requires the commission to notify the Speaker of the House of Representatives of all complaints received or initiated against a justice or judge, all investigations conducted, and all complaints dismissed, settled, or otherwise concluded.

BE IT FURTHER RESOLVED that the following statement be placed on the ballot if a court declares the preceding statement defective and the decision of the court is not reversed:

CONSTITUTIONAL AMENDMENT

ARTICLE V, SECTION 12

COMPLAINTS AGAINST AND INVESTIGATIONS OF JUSTICES AND JUDGES.—Proposing an amendment to the State Constitution to provide that all records, materials, and proceedings related to complaints and investigations of the Judicial Qualifications

Commission which are not otherwise exempt from disclosure shall be open to the public for inspection and copying upon the filing of formal charges against the justice or judge, upon a determination that formal charges will not be filed and the justice or judge waives the confidentiality of the records or materials, or upon the commission and the justice or judge entering into a settlement before a decision is made about whether to file formal charges. This provision applies to all records and materials in the possession of the commission relating to that complaint against the justice or judge. The commission is responsible for investigating and prosecuting allegations of misconduct by state justices and judges. Currently, after formal charges are filed, all further proceedings conducted are open to the public and records and materials thereafter created or acquired by the commission are open to the public.

The State Constitution also provides currently that the House of Representatives may investigate a justice or judge for misconduct and may initiate impeachment proceedings against a justice or judge for the misconduct. This proposed amendment requires the Judicial Qualifications Commission to notify the Speaker of the House of Representatives of all complaints received or initiated against justices and judges, of all investigations conducted against justices and judges, and of all complaints against justices and judges which are dismissed, settled, or otherwise concluded.

BE IT FURTHER RESOLVED that the following statement be placed on the ballot if a court declares the preceding statement

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defective and the decision of the court is not reversed:

CONSTITUTIONAL AMENDMENT

ARTICLE V, SECTION 12

REVISING DISCLOSURE REQUIREMENTS FOR THE JUDICIAL QUALIFICATIONS COMMISSION.—The State Constitution provides for the Judicial Qualifications Commission to investigate and recommend to the Supreme Court of Florida the discipline of any justice or judge whose conduct warrants discipline. The State Constitution also provides that commission proceedings are confidential until formal charges are filed, at which point further proceedings are open to the public. This proposed amendment maintains the requirement for those proceedings to be open to the public, but also provides for increased public access to proceedings of the commission and its records and materials. Specifically, under the amendment, the proceedings of the commission must be open to the public upon a determination by the commission that formal charges will not be filed and the justice or judge waives the confidentiality of the records and matierials or upon the entry into a settlement agreement with the justice or judge before the commission makes a decision on whether to file formal charges. Also under the amendment, all records and materials of the commission related to a complaint must be accessible to the public, excluding information that is otherwise confidential or exempt from disclosure, once the proceedings relating to the complaint are open to the public. The proposed amendment additionally requires the commission to notify the Speaker of the House of Representatives of all complaints received, initiated, or concluded and of all investigations conducted.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SJR 1704
INTRODUCER:	Senator Hays
SUBJECT:	Judicial Qualifications Commission
DATE:	March 25, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Maclure	JU	**Pre-meeting**
2.			GO	
3.			RC	
4.				
5.				
6.				

I. Summary:

The joint resolution amends provisions of the Florida Constitution relating to the Judicial Qualifications Commission, to require that upon the finding of probable cause and the filing of formal charges, a determination that formal charges will not be filed, or the entry of a stipulation or other settlement agreement before the investigative panel determines whether to file formal charges, all further proceedings before the Judicial Qualifications Commission shall be open to the public, and all records and materials of the commission relating to the complaint against the justice or judge shall be open to the public for inspection or copying. However, information that is otherwise confidential or exempt shall retain its status. The records and materials shall be accessible to the public regardless of whether they were received or created while the proceedings were confidential or open to the public.

The joint resolution requires the Judicial Qualifications Commission to notify the Speaker of the Florida House of Representatives of all complaints received or initiated, all investigations conducted, and all complaints dismissed, settled, or otherwise concluded.

This joint resolution also includes a ballot summary, and three contingent summaries, which outline the provisions of the joint resolution.

This joint resolution proposes an amendment to section 12, Article V of the Florida Constitution.

II. Present Situation:

Judicial Qualifications Commission

The Judicial Qualifications Commission is created under Article V, section 12, of the Florida Constitution. The Judicial Qualifications Commission is vested with jurisdiction to investigate and recommend to the Florida Supreme Court the discipline, including the removal from office, or any justice or judge whose conduct demonstrates a present unfitness to hold office or warrants discipline.[1] "For purposes of this section, discipline is defined as any or all of the following: reprimand, fine, suspension with or without pay, or lawyer discipline."[2] The commission shall have jurisdiction over justices and judges regarding allegations that misconduct occurred before or during service as a justice or judge if a complaint is made no later than one year following service as a justice or judge.[3]

The Judicial Qualifications Commission is comprised of:

- Two judges from the district courts of appeal (selected by judges of the district courts of appeal);
- Two judges from the circuit courts (selected by judges of the circuit courts);
- Two judges from the county courts (selected by judges of the county courts);
- Four electors who are Florida residents and members of the Florida Bar (selected by the governing body of the Florida Bar); and
- Five electors who are Florida residents who have never held judicial office or been members of the Florida Bar and who are selected by the Governor.[4]

The members of the Judicial Qualifications Commission serve staggered terms not to exceed six years as prescribed by general law.[5] No member of the Judicial Qualifications Commission shall hold office in a political party or participate in any campaign for judicial office or hold public office; provided that a judge may campaign for judicial office and hold that office.[6] The commission shall elect one of its members as its chairperson.[7]

The Judicial Qualifications Commission is divided into an investigative panel and a hearing panel as established by rule of the commission.[8] The investigative panel has jurisdiction to receive or initiate complaints, conduct investigations, dismiss complaints, and upon a vote of a simple majority of the panel submit formal charges to the hearing panel.[9] The hearing panel has the authority to receive and hear formal charges from the investigative panel and upon a two-thirds vote of the panel recommend to the Florida Supreme Court the removal of a justice or judge or the involuntary retirement of a justice or judge for any permanent disability that

[1] FLA. CONST. art. V, s. 12(a)(1).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] FLA. CONST. art. V, s. 12(a)(2).
[6] *Id.*
[7] *Id.*
[8] FLA. CONST. art. V, s. 12(b).
[9] *Id.*

seriously interferes with the performance of judicial duties.[10] Upon a simple majority vote of the membership of the hearing panel, the panel may recommend to the Florida Supreme Court that the justice or judge be subject to appropriate discipline.[11]

Confidentiality of Proceedings of the Judicial Qualifications Commission

Until formal charges against a justice or judge are filed by the investigative panel with the clerk of the Supreme Court of Florida, all proceedings by or before the commission shall be confidential; provided, however, upon a finding of probable cause and the filing by the investigative panel with the clerk of the formal charges against a justice or judge, the charges and all further proceedings before the commission shall be public.[12]

The constitutional provisions authorizing the Judicial Qualifications Commission do not address the extent to which records related to a disciplinary investigation by the commission are subject to disclosure. However, the rules of the commission provide that "[a]ll notices, papers and pleadings mailed to a judge prior to formal charges being instituted shall be enclosed in a cover marked '"confidential."'"[13] The rules further provide that:

> (a) Upon the filing of the Notice of Formal Charges against a judge with the Clerk of the Supreme Court of Florida, the Notice of Formal Charges and all subsequent proceedings before the Hearing Panel shall be public.
>
> (b) The original of all pleadings *subsequent to* the Notice of Formal Charges shall be filed with the Clerk of the Supreme Court of Florida, which office is designated by the Commission for receiving, docketing, filing and making such records available for public inspection.[14]

The commission's rules also specify that – on request of the Speaker of the House of Representatives or the Governor – the commission shall make available all information in possession of the commission for use in consideration of impeachment or suspension, respectively.[15]

The Florida Supreme Court articulated a rationale for confidentiality of complaints concerning the judiciary in the following statement:

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[10] *Id.*
[11] *Id.*
[12] FLA. CONST. art. V, s. 12(a)(4). *Accord* ss. 456.073(10) and 455.225(10), F.S. (Providing that the complaint and all information obtained pursuant to a disciplinary complaint filed against a professional licensed by the Department of Health or Department of Business and Professional Regulation are confidential until 10 days after probable cause is found to exist by the probable cause panel, but if confidentiality is not waived, or probable cause is not found, the complaint and all information are not available to the public). *But see* s 106.25(7), F.S., under which sworn complaints and investigative reports filed under ch. 106, F.S., with the Elections Commission are confidential with specified exceptions that include, upon a determination of probable cause or no probable cause by the Elections Commission.
[13] Fla. Jud. Qual. Comm'n Rule 23.
[14] Fla. Jud. Qual. Comm'n Rule 10.
[15] Fla. Jud. Qual. Comm'n Rule 6(e).

> The purpose is to process complaints concerning the judiciary from any and all sources, while requiring confidentiality as a means to protect both the complainant from possible recriminations and the judicial officer from unsubstantiated charges. Confidentiality is also necessary for the Commission to carry out its responsibility to make suitable recommendations concerning judicial personnel problems that affect court efficiency. Eliminating the confidentiality of these proceedings would also eliminate many sources of information and complaints received by the Commission not only from lay citizens and litigants but also from lawyers and judges within the system.[16]

Constitutional Amendments

Section 1, Article XI, of the Florida Constitution, authorizes the Legislature to propose constitutional amendments by joint resolution approved by a three-fifths vote of the membership of each house. The amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State's office, or at a special election held for that purpose.[17] Section 5(e), Article XI, of the Florida Constitution requires 60-percent voter approval for a constitutional amendment to take effect. An approved amendment will be effective on the first Tuesday after the first Monday in January following the election at which it is approved, or on such other date as may be specified in the amendment or revision.[18]

III. Effect of Proposed Changes:

The joint resolution amends Art. V, s. 12(a)(4) of the Florida Constitution, relating to the Judicial Qualifications Commission, to require that upon the finding of probable cause and the filing of formal charges, a determination that formal charges will not be filed, or the entry of a stipulation or other settlement agreement before the investigative panel determines whether to file formal charges, all further proceedings before the Judicial Qualifications Commission shall be open to the public, and all records and materials of the commission relating to the complaint against the justice or judge shall be open to the public for inspection or copying. However, information that is otherwise confidential or exempt shall retain its status. The records and materials shall be accessible to the public regardless of whether they were received or created while the proceedings were confidential or open to the public.

The joint resolution also amends Art. V, s. 12(a)(5) of the Florida Constitution to require the Judicial Qualifications Commission to notify the Speaker of the Florida House of Representatives of all complaints received or initiated, all investigations conducted, and all complaints dismissed, settled, or otherwise concluded.

The joint resolution provides four different ballot summaries. The first ballot summary directs that it will be placed on the ballot, and each subsequent ballot summary provides that it will be placed on the ballot in the event that a court declares the preceding ballot summary defective and the decision of the court is not reversed. This feature appears to have the effect of allowing the

[16] See *Forbes v. Earle*, 298 So. 2d 1, 4 (Fla. 1974).
[17] FLA. CONST. art. XI, s. 5(a).
[18] FLA. CONST. art. XI, s. 5(e).

proposed amendment to survive up to three successful challenges to the amendment for a defective ballot summary.

Because the resolution does not specify an alternate date, if approved by the electors, the amendment will take effect on the first Tuesday after the first Monday in January following the election at which it is approved.[19]

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Department of State Division of Elections (department) is required to publish the proposed constitutional amendment twice in a newspaper of general circulation in each county. The average cost per word to advertise an amendment is $106.14 according to the department. If the joint resolution passes and the proposed constitutional amendment is placed on the ballot, the department will incur costs to advertise the proposed amendment.[20]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

[19] FLA. CONST. art. XI, s. 5(e).
[20] See, e.g., Fiscal Note on SJR 2 prepared by the Florida Department of State (January 4, 2011).

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Simmons) recommended the following:

Senate Amendment (with title amendment)

Delete lines 14 - 56
and insert:
Section 1. Subsection (1) of section 43.291, Florida Statutes, is amended to read:
43.291 Judicial nominating commissions.—
(1) Each judicial nominating commission shall be composed of the following members:
(a) Four members of The Florida Bar, appointed by the Governor, who are engaged in the practice of law, each of whom is a resident of the territorial jurisdiction served by the commission to which the member is appointed. The Attorney

552438

General and the Board of Governors of The Florida Bar shall submit to the Governor three recommended nominees for each position. The Governor shall select the appointee from the list of nominees recommended for that position, but the Governor may reject all of the nominees recommended for a position and request that the Attorney General and the Board of Governors submit a new list of three different recommended nominees for that position who have not been previously recommended by the Attorney General and the Board of Governors.

(b) Five members appointed by the Governor, each of whom is a resident of the territorial jurisdiction served by the commission to which the member is appointed, of which at least two are members of The Florida Bar engaged in the practice of law.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete lines 4 - 9

and insert:

General and the Board of Governors of The Florida Bar to submit nominees for certain positions on judicial nominating commissions; providing

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SPB 7222
INTRODUCER:	For consideration by the Judiciary Committee
SUBJECT:	Judicial Nominating Commissions
DATE:	March 25, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Boland	Maclure		**Pre-meeting**
2.				
3.				
4.				
5.				
6.				

I. Summary:

Currently, vacancies in judgeships are filled by appointment of the Governor, as directed by the Florida Constitution. The Governor makes these appointments from a list of not fewer than three and not more than six persons nominated by a judicial nominating committee. The membership of each judicial nominating committee is a creature of statute and has varied throughout Florida's history. Presently, each judicial nominating committee is composed of nine members, and five of those members are appointed to the commission at the sole discretion of the Governor. The remaining four commission positions are also appointed by the Governor; however, the Governor must make his appointment for each of those four positions from a list of nominees recommended to the Governor by the Board of Governors of The Florida Bar. The Board of Governors of the Florida Bar recommends three people for each position on the judicial nominating commission, and the Governor must make his selection from that list of three or reject all three recommendations and request that a new list of three be provided.

The bill amends the current statute controlling the appointment process for members of judicial nominating commissions. Specifically, the bill eliminates the role of The Florida Bar in the appointment of members to the commissions by removing statutory direction for the Board of Governors of The Bar to make recommendations to the Governor for the appointment of four members of each commission. Instead, the bill vests the authority to make recommendations for these four positions with the Attorney General. Furthermore, the bill amends the current statute to provide that the terms of all current members of a judicial nominating commission are terminated, and the Governor shall appoint two new members for terms ending July 1, 2012 (one of which shall be an appointment selected from nominations by the Attorney General), two new members for terms ending July 1, 2013, and two new members for terms ending July 1, 2014.

This bill substantially amends section 43.291, Florida Statutes.

II. Present Situation:

When there is a vacancy on an appellate or trial court, the State Constitution directs the Governor to fill the vacancy by appointing one person from no fewer than three and no more than six persons nominated by a judicial nominating commission.[1] The commission shall offer recommendations within 30 days of the vacancy, unless the period is extended for no more than 30 days by the Governor, and the Governor shall make the appointment within 60 days of receiving the nominations.[2]

Article V, section 11(d) of the Florida Constitution provides for a separate judicial nominating commission, as provided by general law, for the Supreme Court, each district court of appeal, and each judicial circuit for all trial courts within the circuit. The nine-member composition of each judicial nominating commission is a creature of statute.[3] The statute provides for the Governor to make all nine appointments. However, four of those appointments are based on nominees from The Florida Bar, while five are within the Governor's sole appointment discretion. The four commission members recommended by the Bar must be members of The Florida Bar, must be engaged in the practice of law, and must reside in the territorial jurisdiction where they are appointed. In that same regard, the Board of Governors of The Florida Bar submits three recommended nominees for each open position to the Governor. The Governor has the authority to reject all the nominees and request a new list of recommended nominees who have not been previously recommended. Of the five commission members appointed by the Governor under his or her sole discretion, at least two must be members of The Florida Bar engaged in the practice of law, and all must reside in the territorial jurisdiction where they are appointed. Members serve four-year terms and may be suspended for cause by the Governor.[4]

The Legislature enacted the current statutory framework governing membership of the judicial nominating commissions in 2001.[5] Immediately prior to that change, the Board of Governors of The Florida Bar had authority to directly appoint members of each commission. Specifically, prior to the 2001 changes:

- Three members were appointed by the Board of Governors of the Florida Bar, each of whom had to be a member of the Florida Bar and actively engaged in the practice of law in the applicable territorial jurisdiction;
- Three members were appointed by the Governor, each of whom had to be a resident of the applicable territorial jurisdiction; and
- Three members were appointed by majority vote of the other six members, each of whom had to be an elector who resided in the applicable territorial jurisdiction.[6]

[1] FLA. CONST. art. V, s. 11(a).
[2] FLA. CONST. art. V, s. 11(c).
[3] Section 43.291, F.S.
[4] *Id*.
[5] Chapter 2001-282, s. 1, Laws of Fla.
[6] See s. 43.29, F.S. (2000) (repealed by ch. 2001-282, s. 3, Laws of Fla.)

III. Effect of Proposed Changes:

The bill eliminates The Florida Bar's statutory role in the recommendation of members of a judicial nominating commission and vests that function in the Attorney General. The bill provides that, in regard to four positions on each judicial nominating commission, the Attorney General shall submit to the Governor three recommended nominees for each position. The Governor shall select the appointee from the list of nominees recommended for that position, but the Governor may reject all of the nominees recommended for a position and request that the Attorney General submit a new list of three different recommended nominees for that position who have not been previously recommended by the Attorney General. The bill retains the provisions in current law under which the Governor is directed to appoint five additional members of each judicial nominating commission and each of those appointments remains within the Governor's sole discretion.

The bill removes the provision, currently in statute, that current members of a judicial nominating commission appointed directly by the Board of Governors of The Florida Bar shall serve the remainder of their terms. The bill provides that all current members of a judicial nominating commission are hereby terminated, and the Governor shall appoint new members to each judicial nominating commission in the following manner:

- Two appointments for terms ending July 1, 2012, one of which shall be an appointment selected from nominations submitted by the Attorney General;
- Two appointments for terms ending July 1, 2013; and
- Two appointments for terms ending July 1, 2014.

In setting the terms as shown above, the bill staggers the terms of six of the members of each judicial nominating commission. The bill maintains those staggered terms by providing that each expired term or vacancy shall be filled by appointment in the same manner as the member whose position is being filled. Additionally, it should be noted that the statute only enumerates conditions for the terms of six appointments on each judicial nominating commission, and only one of those appointments must be selected from nominations submitted by the Attorney General. Due to the bill's prior mandate that each judicial nominating commission be composed of nine members, four of which must be selected from nominations submitted by the Attorney General, each of the three subsequent appointments must be selected from nominations submitted by the Attorney General. The bill provides that each subsequent appointment, except an appointment to fill a vacant, unexpired term, shall be for four years.

The bill provides that this act shall take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

This bill could have an impact on the Attorney General's office to the extent that the duty to recommend nominees to the Governor for appointment to judicial nominating commissions creates additional workload or expenses for the Attorney General or her or his staff.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 2084
INTRODUCER:	Judiciary Committee
SUBJECT:	Repeal of Supreme Court Rule by General Law
DATE:	April 1, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Boland/Maclure	Maclure		**Pre-meeting**
2.				
3.				
4.				
5.				
6.				

I. Summary:

Currently under the State Constitution, the power to make rules of practice and procedure in all courts lies solely with the Supreme Court. The one caveat to that power is that the Legislature may, by a two-thirds vote of each house, enact general laws that repeal rules of court. This joint resolution proposes an amendment to the State Constitution to replace the provision requiring a "two-thirds vote of the membership of each house of the legislature" with one requiring a three-fifths vote to enact general laws repealing Supreme Court rules. Thus, the proposed amendment allows rules of court to be repealed by general law adopted by three-fifths of the membership of each house of the Legislature and further provides that the Supreme Court may not readopt a rule within three years after the rule has been repealed by general law.

The joint resolution amends section 2, Article V of the Florida Constitution.

II. Present Situation:

Rules for Practice and Procedure

Section 2, Article V the Florida Constitution provides that the Supreme Court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought.

Committees of The Florida Bar frequently draft, and propose to the Supreme Court, amendments to court rules of procedure. However, the Court has the sole power to adopt rules of the court for

the practice and procedure of law. A Florida statute states that when a rule is adopted by the Supreme Court concerning practice and procedure, and such rule conflicts with a statute, the rule supersedes the statutory provision.[1] Furthermore, the Florida Supreme Court has held that the Court has the exclusive power to create rules of practice and procedure and statutes that encroach on that power, if not merely incidental to substantive legislation, are unconstitutional under the notion of separation of powers.[2]

The Florida Supreme Court has defined substantive law as follows:

> Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. It includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property.[3]

The Court has defined practice and procedure as follows:

> Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof.
>
> Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.[4]

Repeal of Court Rules by General Law

Article V, section 2 of the State Constitution articulates a check and balance on the Supreme Court's power to make rules of practice and procedure. Specifically, it provides that rules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature. The provision is silent, however, on Supreme Court readoption of a rule repealed by general law.

Constitutional Amendments

Section 1, Article X of the State Constitution authorizes the Legislature to propose amendments to the State Constitution by joint resolution approved by a three-fifths vote of the membership of each house. The amendment must be placed before the electorate at the next general election

[1] Section 25.371, F.S.
[2] *Massey v. David*, 979 So. 2d 931, 937 (Fla. 2008).
[3] *Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991) (internal citation omitted).
[4] *Allen v. Butterworth*, 756 So. 2d 52, 60 (Fla. 2000) (quoting *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring)).

held after the proposal has been filed with the Secretary of State's office, or at a special election held for that purpose. Section 5(e), Article XI of the State Constitution requires 60-percent voter approval for a constitutional amendment to take effect. An approved amendment will be effective on the first Tuesday after the first Monday in January following the election at which it is approved, or on such other date as may be specified in the amendment or revision.[5]

III. Effect of Proposed Changes:

The joint resolution proposes an amendment to Article V, section 2 of the Florida Constitution. The proposed amendment would replace the current constitutional requirement, that a general law repealing a rule of court must be enacted by a two-thirds vote of the membership of each house of the Legislature, with a requirement that a general law repealing a rule of court must be enacted by a three-fifths vote of the membership of each house of the Legislature. Furthermore, the proposed amendment adds a provision to the end of Article V, subsection 2(a) which would prohibit the Supreme Court from readopting a rule within three years after the rule has been repealed by general law.

The joint resolution provides four different ballot summaries. The first ballot summary directs that it will be placed on the ballot, and each subsequent ballot summary provides that it will be placed on the ballot in the event that a court declares the preceding ballot summary defective and the decision of the court is not reversed. This feature appears to have the effect of allowing the proposed amendment to survive up to three successful challenges to the amendment for a defective ballot summary.

An effective date for the amendment is not specified. Therefore, the amendment, if approved by the voters, will take effect on the first Tuesday after the first Monday in January following the election at which it is approved.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

[5] FLA. CONST. art. XI, s. 5(e).

B. Private Sector Impact:

None.

C. Government Sector Impact:

If the joint resolution is passed by the Legislature, the Department of State will bear the costs associated with twice publishing the proposed amendment and notice of the date of the election at which it will be submitted to electors in one newspaper of general circulation in each county in which a newspaper is published.[6] The department estimates that the cost for publication of a proposed constitutional amendment is $106.14 per word.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[6] FLA. CONST. art. XI, s. 5(d).

471882

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Thrasher) recommended the following:

Senate Amendment

Delete lines 91 - 95

and insert:

(5) Any agreement or contract, executed on or after July 1, 2011, which involves extra compensation between a unit of government and an officer, agent, employee, or contractor may not include provisions that limit the ability of any party to the agreement or contract to discuss the agreement or contract.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	CS/SB 88
INTRODUCER:	Community Affairs Committee and Senators Gaetz and Storms
SUBJECT:	Public Employee Compensation
DATE:	April 1, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wolfgang	Yeatman	CA	**Fav/CS**
2.	Munroe	Maclure	JU	**Pre-meeting**
3.			GO	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The committee substitute makes the following changes with respect to public employee compensation:

- prohibits the payment of severance pay with certain exceptions,
- restricts bonus schemes,
- deletes provisions of law inconsistent with these restrictions, and
- prohibits confidentiality agreements.

This bill amends the following sections of the Florida Statutes: 215.425, 166.021, and 112.061. This bill repeals ss. 125.01(1)(bb) and 373.0795, F.S.

II. Present Situation:

Section 215.425, F.S., provides that no extra compensation shall be made to any officer, agent, employee, or contractor after the service has been rendered or the contract made. The section specifies the following exceptions:

- extra compensation given to state employees who are included within the senior management group pursuant to rules adopted by the Department of Management Services;
- extra compensation given to county, municipal, or special district employees pursuant to policies adopted by county or municipal ordinances or resolutions of governing boards of special districts or to employees of the clerk of the circuit court pursuant to written policy of the clerk; or
- a clothing and maintenance allowance given to plainclothes deputies pursuant to s. 30.49, F.S.

Numerous attorney general opinions have been issued interpreting s. 215.425, F.S.[1] According to the attorney general opinions, the following forms of remuneration would violate s. 215.425, F.S.:

- Severance pay or wages in lieu of notice of termination;[2]
- Bonuses to existing employees for services for which they have already performed and been compensated, in the absence of a preexisting employment contract making such bonuses a part of their salary;[3] and
- Lump-sum payments made as an incentive for an employee to end his or her employment.

The following were not deemed to violate s. 215.425, F.S.:

- Certain settlements;
- Lump-sum supplemental payments as an increased benefit to qualified current employees who elect early retirement;[4] and
- Accrued annual or sick leave.[5]

The key issue in these attorney general opinions seemed to be whether the benefits were benefits that were anticipated as part of the initial contract or hiring policy or whether they were additional payment for services over and above that fixed by contract or law when the services were rendered.[6] Benefits that were anticipated as part of the hiring process were deemed to be included in the salary/payment for services. Whereas, additional benefits, not anticipated at the hiring date or available to all employees as part of a retirement plan, were deemed to be extra compensation prohibited by the statute.

Sections 125.01(1)(bb) and 166.021(7), F.S., allow cities and counties to "provide for an extra compensation program, including a lump-sum bonus payment program, to reward outstanding employees whose performance exceeds standards, if the program provides that a bonus payment may not be included in an employee's regular base rate of pay and may not be carried forward in subsequent years," notwithstanding the prohibition against extra compensation set forth in s. 215.425, F.S.

[1] *See* Op. Att'y Gen. Fla. 2009-03 (2009); Op. Att'y Gen. Fla. 2007-26 (2007); Op. Att'y Gen. Fla. 97-21 (1997); and Op. Att'y Gen. Fla. 91-51 (1991).
[2] Op. Att'y Gen. Fla. 2007-26 (2007); Op. Att'y Gen. Fla. 91-51 (1991).
[3] Op. Att'y Gen. Fla. 91-51 (1991).
[4] Op. Att'y Gen. Fla. 97-21 (1997).
[5] Op. Att'y Gen. Fla. 2009-03 (2009).
[6] Op. Att'y Gen. Fla. 2007-26 (2007).

Section 110.1245(2), F.S., tasks the Department of Management Services (DMS) and other state agencies with paying bonuses when funds are specifically appropriated by the Legislature for bonuses. Statutory eligibility criteria are outlined as follows:

- The employee must have been employed prior to July 1 of that fiscal year and have been continuously employed through the date of distribution.
- The employee must not have been on leave without pay consecutively for more than 6 months during the fiscal year.
- The employee must have had no sustained disciplinary action during the period beginning July 1 through the date the bonus checks are distributed. Disciplinary actions include written reprimands, suspensions, dismissals, and involuntary or voluntary demotions that were associated with a disciplinary action.
- The employee must have demonstrated a commitment to the agency mission by reducing the burden on those served, continually improving the way business is conducted, producing results in the form of increased outputs, and working to improve processes.
- The employee must have demonstrated initiative in work and have exceeded normal job expectations.
- The employee must have modeled the way for others by displaying agency values of fairness, cooperation, respect, commitment, honesty, excellence, and teamwork.
- A periodic evaluation process of the employee's performance.
- A process for peer input that is fair, respectful of employees, and affects the outcome of the bonus distribution.
- A division of the agency by work unit for purposes of peer input and bonus distribution.
- A limitation on bonus distributions equal to 35 percent of the agency's total authorized positions. This requirement may be waived by the Office of Policy and Budget in the Executive Office of the Governor upon a showing of exceptional circumstances.[7]

Section 110.191(1)(c), F.S., authorizes bonuses in specified circumstances to leased employees authorized by the Legislature, an agency, or the judicial branch.

Section 373.0795, F.S., prohibits severance pay for water management district employees. "Severance pay" is defined to mean the actual or constructive compensation, in salary, benefits, or perquisites, of an officer or employee of a water management district, or any subdivision or agency thereof, for employment services yet to be rendered for a term greater than 4 weeks before or immediately following termination of employment (excluding leave time and retirement).[8]

III. Effect of Proposed Changes:

Section 1 amends s. 215.425, F. S., to revise existing law that prohibits extra compensation made to a public employee after the service has been rendered or the contract made. The bill deletes current provisions allowing counties, municipalities, or special districts to give bonuses as long as they have policies in place. The bill creates requirements for any policy, ordinance, rule, or resolution designed to implement a bonus scheme. The scheme must:

[7] Section 110.1245(2), F.S.
[8] Section 373.0795(1), F.S.

- Base the award of a bonus on work performance;
- Describe the performance standards and evaluation process by which a bonus will be awarded;
- Notify all employees of the policy, ordinance, rule, or resolution before the beginning of the evaluation period on which a bonus will be based; and
- Consider all employees for the bonus.

The bill prohibits units of government from contracting to give severance pay to an officer, agent, employee, or contractor.

An officer, agent, employee, or contractor may receive severance pay only if the severance pay is:

- Paid wholly from private funds and is not a violation of the employee code of ethics;[9]
- Part of an interstate interchange of employees;[10]
- Given as part of a settlement agreement if there is no prohibition against publicly discussing the settlement; or
- Expressly included in a contract for employment which was entered into before July 1, 2011.

The bill clarifies that it does not create an entitlement to severance pay in the absence of its authorization.

The bill defines "severance pay" as the actual or constructive compensation, including salary, benefits, or perquisites, for employment services yet to be rendered which is provided to an employee who has recently been or is about to be terminated. The term does not include compensation for:

- Earned and accrued annual, sick, compensatory, or administrative leave; or
- Early retirement under provisions established in an actuarially funded pension plan subject to part VII of chapter 112, F.S.

Any agreement or contract involving extra compensation between a unit of government and an officer, agent, employee, or contractor may not include provisions that limit the ability of any party to the agreement or contract to discuss the agreement or contract.

Section 2 deletes subsection (7) of 166.021, F.S., allowing municipalities to provide extra compensation programs, including a lump sum bonus payment program to reward outstanding employees whose performance exceeds standards, under specified conditions.

Section 3 conforms cross references.

[9] Under part III of chapter 112, F.S.
[10] Under part II of chapter 112, F.S.

Section 4 repeals paragraph (bb) of s. 125.01(1), F.S., allowing counties to provide extra compensation programs. It also repeals s. 373.0795, F.S., which prohibits severance pay (under an inconsistent definition) for water management districts.

Section 5 provides an effective date of July 1, 2011.

Other Potential Implications:

Restrictions on severance pay will limit the ability of public employers to recruit employees by including severance pay clauses in their contracts. Alternatively, it will eliminate abuses associated with severance pay that may be occurring now.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Article I, Section 10 of the State Constitution and the Contract Clause of the United States Constitution prohibit laws impairing contractual obligations. To the extent that the bill (lines 91-95) prohibits any agreement or contract involving extra compensation between a unit of government and an officer, agent, employee, or contractor from including provisions that limit the ability of any party to the agreement or contract to discuss the agreement or contract, the bill raises issues as to whether it impairs any existing contractual obligations. Retrospective operation is not favored by courts, and a law is not construed as retroactive unless the act clearly, by express language or necessary implication, indicates that the Legislature intended a retroactive application.[11] Lines 91-95 of the bill do not appear to provide any legislative intent for a retroactive application of its prohibition on any affected contractual provisions.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

[11] See *Heberle v. P.R.O. Liquidating Co.,* 186 So. 2d 280, 282 (1st DCA 1966) ("A strict rule of statutory construction indulged in by the courts is the presumption that the legislature, in the absence of a positive expression, intended statutes or amendments enacted by it to operate prospectively only, not retroactively.").

B. Private Sector Impact:

None.

C. Government Sector Impact:

Cost savings may arise from the prohibition against severance pay. Under current law, employees could likely receive severance pay as a part of their initial contract, but not in an ad hoc manner subsequent to negotiating their terms of employment. Therefore, since ad hoc severance pay is already prohibited under s. 215.425, F.S., the bill will prohibit government employers from using severance pay as a recruitment tool.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Community Affairs on March 7, 2011:
Makes the following changes with respect to public employee compensation. It:

- prohibits the payment of severance pay with certain exceptions,
- restricts bonus schemes,
- deletes inconsistent provisions of law, and
- prohibits confidentiality agreements.

B. Amendments:

None.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	CS/CS/SB 204
INTRODUCER:	Health Regulation Committee, Criminal Justice Committee, and Senators Wise and Dockery
SUBJECT:	Controlled Substances
DATE:	April 1, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	**Fav/CS**
2.	Fernandez/O'Callaghan	Stovall	HR	**Fav/CS**
3.	Munroe	Maclure	JU	**Pre-meeting**
4.			BC	
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The bill schedules several synthetic cannabinoids or synthetic cannabinoid-mimicking compounds in Schedule I of Florida's controlled substance schedules. The U.S. Drug Enforcement Administration (DEA) temporarily placed these substances in Schedule I of the federal controlled substance schedules.[1] The effect of the federal scheduling prohibits the legal sale of these substances by retailers and the possession and sale of these substances is a federal crime. The placement of synthetic cannabinoids in the schedule of controlled substances under ch. 893, Florida Statutes, would authorize Florida law enforcement official and prosecutors to arrest and prosecute the possession and sale of these substances under Florida law. Possession of 3 grams or less of the scheduled substances, which is not in powdered form, is a misdemeanor of the first degree under Florida law.

[1] Drug Enforcement Administration (DEA), U.S. Department of Justice, Final Order, Schedules of Controlled Substances: Temporary Placement of Five Synthetic Cannabinoids Into Schedule I, 76 Fed. Reg. 11075 (Mar. 1, 2011) (to be codified at 21 C.F.R. pt. 1308), http://www.gpo.gov/fdsys/pkg/FR-2011-03-01/html/2011-4428.htm (last visited on Mar. 1, 2011). Also see the DEA's Notice of Intent, 75 Fed. Reg. 71635 (Nov. 24, 2010). Unless otherwise indicated, all information for the Present Situation section of this bill analysis is from these sources.

This bill amends sections 893.02 and 893.03, Florida Statutes. This bill reenacts ss. 893.13(1), (2), (4), and (5), 893.135(1)(l), and 921.0022(3)(b), (c), and (e), F.S., to incorporate the amendment to s. 893.03, F.S., in references thereto.

II. Present Situation:

The Drug Enforcement Administration (DEA) has provided the following information regarding synthetic cannabinoids (often referred to by the slang terms "K2" or "Spice"):

> Synthetic cannabinoids have been developed over the last 30 years for research purposes to investigate the cannabinoid system. No legitimate non-research uses have been identified for these synthetic cannabinoids. They have not been approved by the U.S. Food and Drug Administration for human consumption. These THC-like synthetic cannabinoids, 1-pentyl-3-(1-naphthoyl)indole (JWH-018), 1-butyl-3-(1- naphthoyl)indole (JWH-073), 1-[2-(4-morpholinyl)ethyl]-3-(1- naphthoyl)indole (JWH-200), 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (CP-47,497), and 5-(1,1-dimethyloctyl)-2- [(1R,3S)-3-hydroxycyclohexyl]-phenol (cannabicyclohexanol; CP-47,497 C8 homologue), are so termed for their THC-like pharmacological properties. Though they have similar properties to delta-9- tetrahydrocannabinol (THC) found in marijuana and have been found to be more potent than THC in animal studies. Numerous herbal products have been analyzed and JWH-073, JWH-018, JWH-200, CP-47,497, and cannabicyclohexanol have been identified in varying mixture profiles and amounts spiked on plant material.

The DEA found that these substances have a high potential for abuse, no currently accepted medical use in treatment in the United States, and are not safe for use under medical supervision.[2] Based on the DEA findings, these substances appear to meet the criteria for scheduling under Schedule I under both federal and Florida law.[3] On March 1, 2011, the DEA issued a final order to temporarily place these substances in Schedule I of the federal controlled substance schedules.[4]

Currently, these substances are not controlled substances under Florida law, and possession and sale offenses are not generally applicable, though it has been reported that the Polk County Sheriff's Office recently arrested several retailers for violation of Florida's imitation controlled substance statute, s. 817.564, F.S.[5] It remains to be seen whether convictions will occur under these statutes, and if they do occur, whether they will be upheld if subject to appellate challenge.

The DEA indicated that the emergence of these synthetic cannabinoids represents a recent phenomenon in the designer drug market.[6] The popularity of these THC-like synthetic

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[2] *Id.*
[3] *See* s. 893.03(1), F.S.
[4] Drug Enforcement Administration, *supra* note 1.
[5] Curtis, Henry Pierson, "Imitation marijuana: More than dozen arrested in Polk County for selling 'legal weed'," *Orlando Sentinel*, Nov. 18, 2010, http://articles.orlandosentinel.com/2010-11-18/news/os-fake-pot-arrests-polk-county-20101118_1_synthetic-marijuana-small-gasoline-stations-legal-weed (last visited March 30, 2011).
[6] Drug Enforcement Administration, *supra* note 1.

cannabinoids has greatly increased in the United States and they are being abused for their psychoactive properties. The substances are primarily found laced on plant material and are also being abused alone as self-reported on Internet discussion boards. The most common route of administration of these synthetic cannabinoids is by smoking, using a pipe, water pipe, or rolling the drug-spiked plant material in cigarette papers.

The DEA stated that "products containing these THC-like synthetic cannabinoids are marketed as 'legal' alternatives to marijuana and are being sold over the Internet and in tobacco and smoke shops, drug paraphernalia shops, and convenience stores."[7] Further, "a number of the products and synthetic cannabinoids appear to originate from foreign sources and are manufactured in the absence of quality controls and devoid of regulatory oversight."[8] "The marketing of products that contain one or more of these synthetic cannabinoids is geared towards teens and young adults."[9] Despite disclaimers that the products are not intended for human consumption,[10] retailers promote that routine urinalysis tests will not typically detect the presence of these synthetic cannabinoids."[11]

The DEA further stated that abuse of these substances or products containing these substances "has been characterized by both acute and long term public health and safety problems":

- These synthetic cannabinoids alone or spiked on plant material have the potential to be extremely harmful due to their method of manufacture and high pharmacological potency. The DEA has been made aware that smoking these synthetic cannabinoids for the purpose of achieving intoxication and experiencing the psychoactive effects is identified as a reason for emergency room visits and calls to poison control centers.[12]

- "The body appears to recognize the synthetic compounds as a foreign substance and often causes a physiological rejection."[13] Health warnings have been issued by numerous state public health departments and poison control centers describing the adverse health effects associated with these synthetic cannabinoids and their related products including agitation, anxiety, vomiting, tachycardia, elevated blood pressure, seizures, hallucinations and non-responsiveness. Case reports describe psychotic episodes, withdrawal, and dependence associated with use of these synthetic cannabinoids, similar to syndromes observed in

[7] *Id*.
[8] *Id.*
[9] *Id.*
[10] *Id*. (Labeling these products as "not for human consumption" tends to keep the products out of purview of the Federal Food and Drug Administration (FDA). Additionally, not all the ingredients used in the production of the materials are listed.).
[11] *Id.*
[12] "[T]he American Association of Poison Control Centers (AAPCC) has reported receiving over 1,500 calls as of September 27, 2010, relating to products spiked with these synthetic cannabinoids from 48 states and the District of Columbia." It is unknown how many of those calls were to Florida poison control centers. There have been several media reports of persons having to go to the hospital after use of synthetic cannabinoids. *See, e.g.,* Repecki, Tiffany, "Cape teen hospitalized after smoking 'synthetic marijuana'," *Cape Coral Daily Breeze*, Mar. 31, 2010, http://www.cape-coral-daily-breeze.com/page/content.detail/id/520354.html (last visited Mar. 30, 2011), and Wyazan, Sam, "Teenagers treated after smoking 'K2 Spice' substance," *Tallahassee Democrat* (abstract), Jun. 30, 2010, http://pqasb.pqarchiver.com/tallahassee/access/2074740741.html?FMT=ABS&date=Jun+30%2C+2010 (last visited Jan. 3, 2011).
[13] Florida Fusion Center Brief: K2 or Spice, The Florida Department of Law Enforcement (Jun. 2010). A copy of this document is on file with the Senate Health Regulation Committee.

cannabis abuse. Emergency room physicians have reported admissions connected to the abuse of these synthetic cannabinoids. Additionally, when responding to incidents involving individuals who have reportedly smoked these synthetic cannabinoids, first responders report that these individuals suffer from intense hallucinations. Detailed chemical analysis by the DEA and other investigators have found these synthetic cannabinoids spiked on plant material in products marketed to the general public. The risk of adverse health effects is further increased by the fact that similar products vary in the composition and concentration of synthetic cannabinoids(s) spiked on the plant material.

According to the National Conference of State Legislatures, as of November 23, 2010, "at least 11 state legislatures and another six state agencies have taken action to outlaw the use of these drugs."[14]

III. Effect of Proposed Changes:

The bill amends s. 893.02, F.S., the definitions section of ch. 893, F.S., to define the term "homologue" as "a chemical compound in a series in which each compound differs by one or more alkyl functional groups on an alkyl side chain." The term "homologue" appears in the scheduling nomenclature of one of the substances scheduled by the bill.

The bill also amends. s. 893.03, F.S., to place the following synthetic cannabinoids or synthetic cannabinoid-mimicking compounds in Schedule I of Florida's controlled substance schedules:

- 2-[(1R, 3S) -3-hydroxycyclohexyl] -5- (2-methyloctan-2-yl) phenol, also known as CP 47, 497 and its dimethyloctyl (C8) homologue.
- (6aR, 10aR) -9- (hydroxymethyl) -6, 6-dimethyl-3- (2-methyloctan-2-yl) -6a, 7, 10, 10a-tetrahydrobenzo [c] chromen-1-ol, also known as HU-210.
- 1-Pentyl-3- (1-naphthoyl) indole, also known as JWH-018.
- 1-Butyl-3- (1-naphthoyl) indole, also known as JWH-073.
- 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl) indole, also known as JWH-200.

If a person is in actual or constructive possession of a controlled substance, unless it was lawfully obtained from a practitioner or pursuant to valid prescription, he or she is liable for a third-degree felony punishable by imprisonment up to five years and the imposition of a fine of up to $5,000.
If a person possesses 3 grams or less of the synthetic cannabinoids and it is not of a powdered form, he or she commits a first-degree misdemeanor punishable by jail time of up to one year and the imposition of a fine of up to 1,000.

The bill also reenacts ss. 893.13(1), (2), (4), and (5), 893.135(1)(l), and 921.0022(3)(b), (c), and (e), F.S., to incorporate the amendment to s. 893.03, F.S., in references thereto.

The effective date of the bill is July 1, 2011.

[14] "Synthetic Cannabinoids (K2)," National Conference of State Legislatures, updated Mar. 21, 2011 http://www.ncsl.org/?tabid=21398 (last visited Mar. 30, 2011).

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The scheduling of synthetic cannabinoids as provided in the bill should not impact retailers because the DEA has already scheduled these substances, and the federal action would require the removal of these substances and prohibit their sale.

C. Government Sector Impact:

On March 2, 2011, the Criminal Justice Impact Conference (CJIC) estimated that the CS/SB 204 will have a potentially insignificant prison bed impact (small additional number of prison beds projected).[15] Although, CS/CS/SB 204 has not been reviewed by the conference for its impact on the prison bed population, it is likely that it will have a similar impact.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

[15] Criminal Justice Impact Conference, Office of Economic and Demographic Research (Mar. 2, 2011), *available at* http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/index.cfm.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Health Regulation on March 14, 2011:
Provides that any violator found carrying 3 grams or less of the scheduled synthetic cannabinoids or synthetic cannabinoid-mimicking compounds is subject to a first-degree misdemeanor unless the violator is found carrying it in a powdered form.

CS by Criminal Justice on January 11, 2011:
Adds an additional synthetic cannabinoid (JWH 200) to Schedule I of Florida's controlled substance schedules. This addition is consistent with proposed federal scheduling.

B. Amendments:

None.

277878

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Simmons) recommended the following:

Senate Amendment (with title amendment)

Delete lines 74 - 78

and insert:

(b) A local law, ordinance, or regulation may not restrict the use of vacation rentals, prohibit vacation rentals, or regulate vacation rentals based solely on their classification, use, or occupancy. This paragraph does not apply to any local law, ordinance or rule adopted on or before April 1, 2011.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

277878

Delete lines 4 - 7

and insert:

changes made by the act; prohibiting local governments from regulating vacation rentals based solely on their classification or use; providing an exception; amending ss. 509.221 and 509.241, F.S.;

695764

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Simmons) recommended the following:

Senate Amendment

Delete line 265

and insert:

Section 10. This act shall take effect upon becoming a law.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	CS/SB 476
INTRODUCER:	Regulated Industries Committee and Senator Evers
SUBJECT:	Public Lodging Establishments
DATE:	April 1, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	**Fav/CS**
2.	Boland	Maclure	JU	**Pre-meeting**
3.			BC	
4.				
5.				
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Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The bill preempts to the state matters related to the nutritional content and marketing of foods offered in public lodging establishments and public food service establishments. This bill prohibits local governments from enacting such ordinances.

The bill replaces the classifications "resort condominium" and "resort dwelling" with the single term "vacation rental." It provides that vacation rentals are residential property and may not be prohibited or treated differently than other residential properties based solely on their classification, use, or occupancy.

The bill requires that public food services establishments must complete, rather than simply attend, a remedial education program when such program is given as a sanction because of a violation of ch. 509, F.S., or rules of the Division of Hotels and Restaurants (division), because the establishment was operating without a license, or because the establishment operated with a revoked or suspended license. The bill also requires that such educational programs be administered by a food safety training program provider whose program has been approved by the division rather than programs sponsored by the Hospitality Education Program.

The bill changes the number of members appointed to the advisory council by the Secretary of Business and Professional Regulation from seven members to six members. Additionally, the bill creates one new voting member of the advisory council who must represent the Florida Vacation Rental Managers Association. Consequently, the number of members composing the advisory council remains at 10 members.

This bill substantially amends the following sections of the Florida Statutes: 381.008, 386.203, 509.032, 509.221, 509.241, 509.242, 509.251, 509.261, and 509.291.

II. Present Situation:

The Division of Hotels and Restaurants (division) within the Department of Business and Professional Regulation (department) is the state agency charged with enforcing the provisions of ch. 509, F.S., and all other applicable laws relating to the inspection and regulation of public lodging establishments and public food service establishments for the purpose of protecting the public health, safety, and welfare. According to the department, there are more than 37,273 licensed public lodging establishments, including hotels, motels, nontransient and transient rooming houses, and resort condominiums and dwellings.[1]

The term "public lodging establishments" includes transient and nontransient public lodging establishments.[2] The principal differences between transient and nontransient public lodging establishments are the number of times that the establishments are rented in a calendar year and the length of the rentals.

Section 509.013(4)(a)1., F.S., defines a "transient public lodging establishment" to mean:

> any unit, group of units, dwelling, building, or group of buildings within a single complex of buildings which is rented to guests more than three times in a calendar year for periods of less than 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented to guests.

Section 509.013(4)(a)2., F.S., defines a "nontransient public lodging establishment" to mean:

> any unit, group of units, dwelling, building, or group of buildings within a single complex of buildings which is rented to guests for periods of at least 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented to guests for periods of at least 30 days or 1 calendar month.

Section 509.013(4)(b), F.S., exempts the following types of establishments from the definition of "public lodging establishment":

[1] *See Annual Report, Fiscal Year 2009-2010*, Division of Hotels and Restaurants, Department of Business and Professional Regulation. A copy is available at: http://www.myfloridalicense.com/dbpr/hr/reports/annualreports/documents/ar2009_10.pdf (last visited Mar. 1, 2011).
[2] Section 509.013(4)(a), F.S.

> 1. Any dormitory or other living or sleeping facility maintained by a public or private school, college, or university for the use of students, faculty, or visitors;
> 2. Any hospital, nursing home, sanitarium, assisted living facility, or other similar place;
> 3. Any place renting four rental units or less, unless the rental units are advertised or held out to the public to be places that are regularly rented to transients;
> 4. Any unit or group of units in a condominium, cooperative, or timeshare plan and any individually or collectively owned one-family, two-family, three-family, or four-family dwelling house or dwelling unit that is rented for periods of at least 30 days or 1 calendar month, whichever is less, and that is not advertised or held out to the public as a place regularly rented for periods of less than 1 calendar month, provided that no more than four rental units within a single complex of buildings are available for rent;
> 5. Any migrant labor camp or residential migrant housing permitted by the Department of Health; under ss. 381.008-381.00895; and
> 6. Any establishment inspected by the Department of Health and regulated by chapter 513.

Public lodging establishment are classified as a hotel, motel, resort condominium, nontransient apartment, transient apartment, rooming house, bed and breakfast inn, or resort dwelling.[3]

Section 509.242(1)(c), F.S., defines the term "resort condominium" as:

> any unit or group of units in a condominium, cooperative, or timeshare plan which is rented more than three times in a calendar year for periods of less than 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented for periods of less than 30 days or 1 calendar month, whichever is less.

Section 509.242(1)(g), F.S., defines the term "resort dwelling" as

> any individually or collectively owned one-family, two-family, three-family, or four-family dwelling house or dwelling unit which is rented more than three times in a calendar year for periods of less than 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented for periods of less than 30 days or 1 calendar month, whichever is less.

According to the vacation rental industry, the terms resort condominium and resort dwellings are not commonly used in the industry. Instead these classes of public lodging establishments are termed "vacation rentals."

The 37,273 public lodging establishments licensed by the division are distributed as follows:[4]

[3] Section 509.242(1), F.S.
[4] *2011 Legislative Analysis for SB 476*, Office of Legislative Affairs, Department of Business and Professional Regulation (Jan. 31, 2011).

- Nontransient apartments – 17,413 licenses covering 980,556 units;
- Transient apartments – 993 licenses covering 13,752 units;
- Nontransient rooming houses – 153 licenses covering 2,100 units;
- Transient rooming houses – 211 licenses covering 3,091 units;
- Resort condominiums – 3,174 licenses covering 91,453 units; and
- Resort dwellings – 10,602 licenses covering 25,112 units.

Public Food Service Establishments – Licensure

The division is responsible for inspecting public food service establishments to ensure that they meet the requirements of ch. 509, F.S., and division rules.[5] Each public food service establishment must obtain a license and meet the standards set by the division to maintain that license.[6]

Any public food service establishment that has operated or is operating in violation of ch. 509, F.S., or the rules of the division, operating without a license, or operating with a suspended or revoked license may be subject by the division to:

- Fines not to exceed $1,000 per offense;
- Mandatory attendance, at personal expense, at an educational program sponsored by the Hospitality Education Program;[7] and
- The suspension, revocation, or refusal of a license issued pursuant to ch. 509, F.S.

Advisory Council

Section 509.291, F.S., creates a 10-member advisory council to assist the division by advising it on matters affecting the private-sector entities regulated by the division. The stated purpose is to "promote better relations, understanding, and cooperation between such industries and the division; to suggest means of better protecting the health, welfare, and safety of persons using the services offered by such industries; to give the division the benefit of its knowledge and experience concerning the industries and individual businesses affected by the laws and rules administered by the division; to promote and coordinate the development of programs to educate and train personnel for such industries; and perform other duties that may be prescribed by law."[8]

III. Effect of Proposed Changes:

State Preemption of Nutritional Content and Marketing

The bill amends s. 509.032(7)(a), F.S., to preempt matters related to the nutritional content and marketing of foods offered in public lodging establishments and public food service establishments to the state. This prohibits local governments from enacting such ordinances.

[5] Section 509.032, F.S.
[6] Section 509.241, F.S.
[7] Section 509.302, F.S. This program was not funded in FY 2010-2011.
[8] Section 509.291, F.S.

Vacation Rentals

The bill amends s. 509.242(1)(c), F.S., to replace the term "resort condominium" with the term "vacation rental." It deletes the definition for the term "resort dwelling" in s. 509.242(1)(g), F.S. It defines a "vacation rental" to mean any unit or group of units in a condominium, cooperative, or timeshare plan or any individually or collectively owned single-family, two-family, three-family, or four-family dwelling house or dwelling unit that is also a transient public lodging establishment.

The bill creates s. 509.032(7)(b), F.S., to provide that vacation rentals are residential property and may not be prohibited or treated differently than other residential properties based solely on their classification, use, or occupancy.

The bill also amends ss. 381.008(8),[9] 386.203(4),[10] 509.032(2),[11] 509.221(9),[12] 509.241(2),[13] and 509.251(1),[14] F.S., to replace the term "resort condominium or resort dwellings" with the term "vacation rentals."

Revocation or Suspension of Public Food Service Establishment Licenses

The bill amends s. 509.261, F.S., which relates to the applicable sanctions for public food service establishment licensees that violate of ch. 509, F.S., or rules of the division, operate without a license, or operate with a revoked or suspended license. The bill provides that the sanction of a remedial education program requires completion of the program, rather than attendance. In addition, such educational programs are to be administered by a food safety training program provider whose program has been approved by the division as provided in s. 509.049, F.S., rather than programs sponsored by the Hospitality Education Program.

Advisory Council

The bill amends s. 509.291(1)(a), F.S., by changing the number of members appointed to the advisory council by the Secretary of Business and Professional Regulation from seven members to six members. Additionally, the bill creates one new voting member of the advisory council who must represent the Florida Vacation Rental Managers Association.[15] Consequently, the number of members composing the advisory council remains at 10 members.

[9] Section 381.008(8), F.S., defines the term "residential migrant housing" for purposes of the migrant housing provisions in ss. 381.008-381.00897, F.S.
[10] Section 386.203(4), F.S., defines the term "designated smoking guest rooms at public lodging establishments" for purposes of the Florida Clean Indoor Air Act in part II of ch. 386, F.S.
[11] Section 509.032(2), F.S., relates to the inspection of public lodging establishments.
[12] Section 509.221(9), F.S., provides, under current law, an exemption for resort condominiums and nontransient apartments from specified sanitary requirements in subsection (2), (5), and (6) of s. 509.221, F.S., which include requirements related to public bath rooms, providing soap and towels in guest rooms, and providing pillow covers and bed sheets.
[13] Section 509.241, F.S., which provides under current that condominium associations that do not own a resort condominium do not need to apply for a public lodging establishment license under s. 509.242(1)(c), F.S.
[14] Section 509.251, F.S., sets forth the license fees under current law for public lodging establishments, including resort condominiums and resort dwellings.
[15] The Florida Vacation Rental Managers Association is a statewide association the represents the companies and professionals who rent and manage resort, vacation and other short-term rentals. Information about the association can be found at: http://www.fvrma.org/ (Last visited March 2, 2011).

Effective Date

The bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill requires that public food services establishments must complete, rather than simply attend, a remedial education program when such program is given as a sanction because of a violation of ch. 509, F.S., or rules of the Division of Hotels and Restaurants (division), because the establishment was operating without a license, or because the establishment operated with a revoked or suspended license. Such completion would be at personal expense.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Regulated Industries on March 22, 2011:
The committee substitute (CS) does not amend s. 509.013(4), F.S., to revise the definitions for the terms "transient public lodging establishment" and "nontransient public lodging establishment."

The CS amends s. 509.032(7)(a), F.S., to preempt matters related to the nutritional content and marketing of foods offered in public lodging establishments and public food service establishments.

The CS does not create s. 509.101(3), F.S., to require each operator of a vacation rental to retain advance payment or deposit paid by a guest until the occupancy begins or is cancelled according to the rental agreement or the operator's cancellation rules.

The CS amends s. 509.261, F.S., which relates to the applicable sanctions for public food service establishment licensees.

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Joyner) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the resolving clause and insert:

SECTION 4. Taxation; assessments.—By general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation, provided:

(a) Agricultural land, land producing high water recharge to Florida's aquifers, or land used exclusively for noncommercial recreational purposes may be classified by general law and assessed solely on the basis of character or use.

(b) As provided by general law and subject to conditions, limitations, and reasonable definitions specified therein, land

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used for conservation purposes shall be classified by general law and assessed solely on the basis of character or use.

(c) Pursuant to general law tangible personal property held for sale as stock in trade and livestock may be valued for taxation at a specified percentage of its value, may be classified for tax purposes, or may be exempted from taxation.

(d) All persons entitled to a homestead exemption under Section 6 ~~of this Article~~ shall have their homestead assessed ~~at just value as of January 1 of the year following the effective date of this amendment. This assessment shall change only~~ as provided in this subsection.

(1) Assessments subject to this subsection shall change ~~be changed~~ annually on January 1 ~~1st~~ of each year.~~;~~ ~~but those changes in assessments~~

a. A change in an assessment may ~~shall~~ not exceed the lower of the following:

1.~~a.~~ Three percent ~~(3%)~~ of the assessment for the prior year.

2.~~b.~~ The percent change in the Consumer Price Index for all urban consumers, U.S. City Average, all items 1967=100, or a successor index ~~reports~~ for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics.

b. The Legislature may provide by general law that except for changes, additions, reductions, or improvements to homestead property assessed as provided in paragraph (d)(5), an assessment may not increase if the just value of the property is less than the just value of the property on the preceding January 1.

(2) An ~~No~~ assessment may not ~~shall~~ exceed just value.

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(3) After a ~~any~~ change of ownership, as provided by general law, homestead property shall be assessed at just value as of January 1 of the following year, unless the provisions of paragraph (8) apply. Thereafter, the homestead shall be assessed as provided in this subsection.

(4) New homestead property shall be assessed at just value as of January 1 ~~1st~~ of the year following the establishment of the homestead, unless the provisions of paragraph (8) apply. That assessment shall ~~only~~ change only as provided in this subsection.

(5) Changes, additions, reductions, or improvements to homestead property shall be assessed as provided for by general law.~~; provided,~~ However, after the adjustment for any change, addition, reduction, or improvement, the property shall be assessed as provided in this subsection.

(6) In the event of a termination of homestead status, the property shall be assessed as provided by general law.

(7) The provisions of this subsection ~~amendment~~ are severable. If a provision ~~any of the provisions~~ of this subsection is ~~amendment shall be~~ held unconstitutional by a ~~any~~ court of competent jurisdiction, the decision of the ~~such~~ court does ~~shall~~ not affect or impair any remaining provisions of this subsection ~~amendment~~.

(8)a. A person who ~~establishes a new homestead as of January 1, 2009, or January 1 of any subsequent year and who~~ has received a homestead exemption pursuant to Section 6 ~~of this Article~~ as of January 1 of either of the 2 ~~two~~ years immediately preceding the establishment of a ~~the~~ new homestead is entitled to have the new homestead assessed at less than just value. ~~If~~

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~~this revision is approved in January of 2008, a person who establishes a new homestead as of January 1, 2008, is entitled to have the new homestead assessed at less than just value only if that person received a homestead exemption on January 1, 2007.~~ The assessed value of the newly established homestead shall be determined as follows:

1. If the just value of the new homestead is greater than or equal to the just value of the prior homestead as of January 1 of the year in which the prior homestead was abandoned, the assessed value of the new homestead shall be the just value of the new homestead minus an amount equal to the lesser of $500,000 or the difference between the just value and the assessed value of the prior homestead as of January 1 of the year in which the prior homestead was abandoned. Thereafter, the homestead shall be assessed as provided in this subsection.

2. If the just value of the new homestead is less than the just value of the prior homestead as of January 1 of the year in which the prior homestead was abandoned, the assessed value of the new homestead shall be equal to the just value of the new homestead divided by the just value of the prior homestead and multiplied by the assessed value of the prior homestead. However, if the difference between the just value of the new homestead and the assessed value of the new homestead calculated pursuant to this sub-subparagraph is greater than $500,000, the assessed value of the new homestead shall be increased so that the difference between the just value and the assessed value equals $500,000. Thereafter, the homestead shall be assessed as provided in this subsection.

b. By general law and subject to conditions specified

therein, the legislature shall provide for application of this paragraph to property owned by more than one person.

(e) The legislature may, by general law, for assessment purposes and subject to the provisions of this subsection, allow counties and municipalities to authorize by ordinance that historic property may be assessed solely on the basis of character or use. Such character or use assessment shall apply only to the jurisdiction adopting the ordinance. The requirements for eligible properties must be specified by general law.

(f) A county may, in the manner prescribed by general law, provide for a reduction in the assessed value of homestead property to the extent of any increase in the assessed value of that property which results from the construction or reconstruction of the property for the purpose of providing living quarters for one or more natural or adoptive grandparents or parents of the owner of the property or of the owner's spouse if at least one of the grandparents or parents for whom the living quarters are provided is 62 years of age or older. Such a reduction may not exceed the lesser of the following:

(1) The increase in assessed value resulting from construction or reconstruction of the property.

(2) Twenty percent of the total assessed value of the property as improved.

(g) For all levies other than school district levies, assessments of residential real property, as defined by general law, which contains nine units or fewer and which is not subject to the assessment limitations set forth in subsections (a) through (d) shall change only as provided in this subsection.

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(1) Assessments subject to this subsection shall be changed annually on the date of assessment provided by law. However,~~;~~ ~~but~~ those changes in assessments may ~~shall~~ not exceed 3 ~~ten~~ percent ~~(10%)~~ of the assessment for the prior year. The Legislature may provide by general law that an assessment may not increase if the just value of the property is less than the just value of the property on the preceding date of assessment provided by law.

(2) An ~~No~~ assessment may not ~~shall~~ exceed just value.

(3) After a change of ownership or control, as defined by general law, including any change of ownership of a legal entity that owns the property, such property shall be assessed at just value as of the next assessment date. Thereafter, such property shall be assessed as provided in this subsection.

(4) Changes, additions, reductions, or improvements to such property shall be assessed as provided for by general law.~~;~~ However, after the adjustment for any change, addition, reduction, or improvement, the property shall be assessed as provided in this subsection.

(h) For all levies other than school district levies, assessments of real property that is not subject to the assessment limitations set forth in subsections (a) through (d) and (g) shall change only as provided in this subsection.

(1) Assessments subject to this subsection shall be changed annually on the date of assessment provided by law. However,~~;~~ ~~but~~ those changes in assessments may ~~shall~~ not exceed 3 ~~ten~~ percent ~~(10%)~~ of the assessment for the prior year. The Legislature may provide by general law that an assessment may not increase if the just value of the property is less than the

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just value of the property on the preceding date of assessment provided by law.

(2) An ~~No~~ assessment may not ~~shall~~ exceed just value.

(3) The legislature must provide that such property shall be assessed at just value as of the next assessment date after a qualifying improvement, as defined by general law, is made to such property. Thereafter, such property shall be assessed as provided in this subsection.

(4) The legislature may provide that such property shall be assessed at just value as of the next assessment date after a change of ownership or control, as defined by general law, including any change of ownership of the legal entity that owns the property. Thereafter, such property shall be assessed as provided in this subsection.

(5) Changes, additions, reductions, or improvements to such property shall be assessed as provided for by general law.~~;~~ However, after the adjustment for any change, addition, reduction, or improvement, the property shall be assessed as provided in this subsection.

(i) The legislature, by general law and subject to conditions specified therein, may prohibit the consideration of the following in the determination of the assessed value of real property used for residential purposes:

(1) Any change or improvement made for the purpose of improving the property’s resistance to wind damage.

(2) The installation of a renewable energy source device.

(j)(1) The assessment of the following working waterfront properties shall be based upon the current use of the property:

a. Land used predominantly for commercial fishing purposes.

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b. Land that is accessible to the public and used for vessel launches into waters that are navigable.

c. Marinas and drystacks that are open to the public.

d. Water-dependent marine manufacturing facilities, commercial fishing facilities, and marine vessel construction and repair facilities and their support activities.

(2) The assessment benefit provided by this subsection is subject to conditions and limitations and reasonable definitions as specified by the legislature by general law.

BE IT FURTHER RESOLVED that the following statement be placed on the ballot:

CONSTITUTIONAL AMENDMENT

ARTICLE VII, SECTIONS 4, 6

ARTICLE XII, SECTIONS 27, 32, 33

PROPERTY TAX LIMITATIONS; ADDITIONAL HOMESTEAD EXEMPTION.—

(1) In certain circumstances, the law requires the assessed value of real property to increase when the just value of the property decreases. This amendment authorizes the Legislature, by general law, to prohibit such increases in the assessment of property whose just value has declined below its just value on the preceding assessment date. This amendment takes effect upon approval by the voters, if approved at a special election held on the date of the 2012 presidential preference primary and operates retroactively to January 1, 2012, or, if approved by the voters at the general election, takes effect January 1, 2013.

(2) This amendment reduces from 10 percent to 3 percent the limitation on annual increases in assessments of nonhomestead real property. This amendment takes effect upon approval of the

voters, if approved at a special election held on the date of the 2012 presidential preference primary and operates retroactively to January 1, 2012, or, if approved by the voters at the general election, takes effect January 1, 2013.

(3) This amendment also provides owners of homestead property who have not owned homestead property during the 3 calendar years immediately preceding purchase of the current homestead property with an additional homestead exemption equal to 50 percent of the property's just value in the first year for all levies other than school district levies, limited to $200,000; applies the additional exemption for the shorter of 5 years or the year of sale of the property; reduces the amount of the additional exemption in each succeeding year for 5 years by the greater of 20 percent of the amount of the initial additional exemption or the difference between the just value and the assessed value of the property; limits the additional exemption to one per homestead property; limits the additional exemption to properties purchased on or after January 1, 2011, if approved by the voters at a special election held on the date of the 2012 presidential preference primary, or on or after January 1, 2012, if approved by the voters at the 2012 general election; prohibits availability of the additional exemption in the sixth and subsequent years after the additional exemption is granted; and provides for the amendment to take effect upon approval of the voters and operate retroactively to January 1, 2012, if approved at the special election held on the date of the 2012 presidential preference primary, or on January 1, 2013, if approved by the voters at the 2012 general election.

(4) This amendment also removes from the State Constitution a

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repeal, scheduled to take effect in 2019, of constitutional amendments adopted in 2008 that limit annual assessment increases for specified nonhomestead real property.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete everything before the resolving clause and insert:

A bill to be entitled

A joint resolution proposing amendments to Sections 4 and 6 of Article VII and Section 27 of Article XII and the creation of Sections 32 and 33 of Article XII of the State Constitution to allow the Legislature by general law to prohibit increases in the assessed value of homestead and specified nonhomestead property if the just value of the property decreases, reduce the limitation on annual assessment increases applicable to nonhomestead real property, provide an additional homestead exemption for owners of homestead property who have not owned homestead property for a specified time before purchase of the current homestead property, and application and limitations with respect thereto, delete a future repeal of provisions limiting annual assessment increases for specified nonhomestead real property, and provide effective dates.

891718

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Joyner) recommended the following:

Senate Substitute for Amendment (764088) (with title amendment)

Delete everything after the resolving clause and insert:

That the following amendments to Sections 4 and 6 of Article VII and Section 27 of Article XII and the creation of Sections 32 and 33 of Article XII of the State Constitution are agreed to and shall be submitted to the electors of this state for approval or rejection at the next general election or at an earlier special election specifically authorized by law for that purpose:

ARTICLE VII


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FINANCE AND TAXATION

SECTION 4. Taxation; assessments.—By general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation, provided:

(a) Agricultural land, land producing high water recharge to Florida's aquifers, or land used exclusively for noncommercial recreational purposes may be classified by general law and assessed solely on the basis of character or use.

(b) As provided by general law and subject to conditions, limitations, and reasonable definitions specified therein, land used for conservation purposes shall be classified by general law and assessed solely on the basis of character or use.

(c) Pursuant to general law tangible personal property held for sale as stock in trade and livestock may be valued for taxation at a specified percentage of its value, may be classified for tax purposes, or may be exempted from taxation.

(d) All persons entitled to a homestead exemption under Section 6 ~~of this Article~~ shall have their homestead assessed ~~at just value as of January 1 of the year following the effective date of this amendment. This assessment shall change only~~ as provided in this subsection.

(1) Assessments subject to this subsection shall change ~~be changed~~ annually on January 1 ~~1st~~ of each year.~~;~~ ~~but those changes in assessments~~

a. A change in an assessment may ~~shall~~ not exceed the lower of the following:

1.~~a.~~ Three percent ~~(3%)~~ of the assessment for the prior year.

2.~~b.~~ The percent change in the Consumer Price Index for all

urban consumers, U.S. City Average, all items 1967=100, or a successor index ~~reports~~ for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics.

b. The Legislature may provide by general law that except for changes, additions, reductions, or improvements to homestead property assessed as provided in paragraph (d)(5), an assessment may not increase if the just value of the property is less than the just value of the property on the preceding January 1.

(2) An ~~No~~ assessment may not ~~shall~~ exceed just value.

(3) After a ~~any~~ change of ownership, as provided by general law, homestead property shall be assessed at just value as of January 1 of the following year, unless the provisions of paragraph (8) apply. Thereafter, the homestead shall be assessed as provided in this subsection.

(4) New homestead property shall be assessed at just value as of January 1 ~~1st~~ of the year following the establishment of the homestead, unless the provisions of paragraph (8) apply. That assessment shall ~~only~~ change only as provided in this subsection.

(5) Changes, additions, reductions, or improvements to homestead property shall be assessed as provided for by general law.~~; provided,~~ However, after the adjustment for any change, addition, reduction, or improvement, the property shall be assessed as provided in this subsection.

(6) In the event of a termination of homestead status, the property shall be assessed as provided by general law.

(7) The provisions of this subsection ~~amendment~~ are severable. If a provision ~~any of the provisions~~ of this

subsection is ~~amendment shall be~~ held unconstitutional by a ~~any~~ court of competent jurisdiction, the decision of the ~~such~~ court does ~~shall~~ not affect or impair any remaining provisions of this subsection ~~amendment~~.

(8)a. A person who ~~establishes a new homestead as of January 1, 2009, or January 1 of any subsequent year and who~~ has received a homestead exemption pursuant to Section 6 ~~of this Article~~ as of January 1 of either of the 2 ~~two~~ years immediately preceding the establishment of a ~~the~~ new homestead is entitled to have the new homestead assessed at less than just value. ~~If this revision is approved in January of 2008, a person who establishes a new homestead as of January 1, 2008, is entitled to have the new homestead assessed at less than just value only if that person received a homestead exemption on January 1, 2007.~~ The assessed value of the newly established homestead shall be determined as follows:

1. If the just value of the new homestead is greater than or equal to the just value of the prior homestead as of January 1 of the year in which the prior homestead was abandoned, the assessed value of the new homestead shall be the just value of the new homestead minus an amount equal to the lesser of $500,000 or the difference between the just value and the assessed value of the prior homestead as of January 1 of the year in which the prior homestead was abandoned. Thereafter, the homestead shall be assessed as provided in this subsection.

2. If the just value of the new homestead is less than the just value of the prior homestead as of January 1 of the year in which the prior homestead was abandoned, the assessed value of the new homestead shall be equal to the just value of the new

homestead divided by the just value of the prior homestead and multiplied by the assessed value of the prior homestead. However, if the difference between the just value of the new homestead and the assessed value of the new homestead calculated pursuant to this sub-subparagraph is greater than $500,000, the assessed value of the new homestead shall be increased so that the difference between the just value and the assessed value equals $500,000. Thereafter, the homestead shall be assessed as provided in this subsection.

b. By general law and subject to conditions specified therein, the legislature shall provide for application of this paragraph to property owned by more than one person.

(e) The legislature may, by general law, for assessment purposes and subject to the provisions of this subsection, allow counties and municipalities to authorize by ordinance that historic property may be assessed solely on the basis of character or use. Such character or use assessment shall apply only to the jurisdiction adopting the ordinance. The requirements for eligible properties must be specified by general law.

(f) A county may, in the manner prescribed by general law, provide for a reduction in the assessed value of homestead property to the extent of any increase in the assessed value of that property which results from the construction or reconstruction of the property for the purpose of providing living quarters for one or more natural or adoptive grandparents or parents of the owner of the property or of the owner’s spouse if at least one of the grandparents or parents for whom the living quarters are provided is 62 years of age or older. Such a

reduction may not exceed the lesser of the following:

(1) The increase in assessed value resulting from construction or reconstruction of the property.

(2) Twenty percent of the total assessed value of the property as improved.

(g) For all levies other than school district levies, assessments of residential real property, as defined by general law, which contains nine units or fewer and which is not subject to the assessment limitations set forth in subsections (a) through (d) shall change only as provided in this subsection.

(1) Assessments subject to this subsection shall be changed annually on the date of assessment provided by law. However, ~~;~~ ~~but~~ those changes in assessments may ~~shall~~ not exceed 3 ~~ten~~ percent ~~(10%)~~ of the assessment for the prior year. The Legislature may provide by general law that an assessment may not increase if the just value of the property is less than the just value of the property on the preceding date of assessment provided by law.

(2) An ~~No~~ assessment may not ~~shall~~ exceed just value.

(3) After a change of ownership or control, as defined by general law, including any change of ownership of a legal entity that owns the property, such property shall be assessed at just value as of the next assessment date. Thereafter, such property shall be assessed as provided in this subsection.

(4) Changes, additions, reductions, or improvements to such property shall be assessed as provided for by general law. ~~;~~ However, after the adjustment for any change, addition, reduction, or improvement, the property shall be assessed as provided in this subsection.

(h) For all levies other than school district levies, assessments of real property that is not subject to the assessment limitations set forth in subsections (a) through (d) and (g) shall change only as provided in this subsection.

(1) Assessments subject to this subsection shall be changed annually on the date of assessment provided by law. However, ~~;~~ ~~but~~ those changes in assessments may ~~shall~~ not exceed 3 ~~ten~~ percent ~~(10%)~~ of the assessment for the prior year. The Legislature may provide by general law that an assessment may not increase if the just value of the property is less than the just value of the property on the preceding date of assessment provided by law.

(2) An ~~No~~ assessment may not ~~shall~~ exceed just value.

(3) The legislature must provide that such property shall be assessed at just value as of the next assessment date after a qualifying improvement, as defined by general law, is made to such property. Thereafter, such property shall be assessed as provided in this subsection.

(4) The legislature may provide that such property shall be assessed at just value as of the next assessment date after a change of ownership or control, as defined by general law, including any change of ownership of the legal entity that owns the property. Thereafter, such property shall be assessed as provided in this subsection.

(5) Changes, additions, reductions, or improvements to such property shall be assessed as provided for by general law. ~~;~~ However, after the adjustment for any change, addition, reduction, or improvement, the property shall be assessed as provided in this subsection.

(i) The legislature, by general law and subject to conditions specified therein, may prohibit the consideration of the following in the determination of the assessed value of real property used for residential purposes:

(1) Any change or improvement made for the purpose of improving the property's resistance to wind damage.

(2) The installation of a renewable energy source device.

(j)(1) The assessment of the following working waterfront properties shall be based upon the current use of the property:

a. Land used predominantly for commercial fishing purposes.

b. Land that is accessible to the public and used for vessel launches into waters that are navigable.

c. Marinas and drystacks that are open to the public.

d. Water-dependent marine manufacturing facilities, commercial fishing facilities, and marine vessel construction and repair facilities and their support activities.

(2) The assessment benefit provided by this subsection is subject to conditions and limitations and reasonable definitions as specified by the legislature by general law.

SECTION 6. Homestead exemptions.—

(a) Every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependent upon the owner, shall be exempt from taxation thereon, except assessments for special benefits, up to the assessed valuation of $25,000 ~~twenty-five thousand dollars~~ and, for all levies other than school district levies, on the assessed valuation greater than $50,000 ~~fifty thousand dollars~~ and up to $75,000 ~~seventy-five thousand dollars~~, upon establishment of right thereto in the


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manner prescribed by law. The real estate may be held by legal or equitable title, by the entireties, jointly, in common, as a condominium, or indirectly by stock ownership or membership representing the owner's or member's proprietary interest in a corporation owning a fee or a leasehold initially in excess of 98 ~~ninety-eight~~ years. The exemption shall not apply with respect to any assessment roll until such roll is first determined to be in compliance with the provisions of Section 4 by a state agency designated by general law. This exemption is repealed on the effective date of any amendment to this Article which provides for the assessment of homestead property at less than just value.

(b) Not more than one exemption shall be allowed any individual or family unit or with respect to any residential unit. No exemption shall exceed the value of the real estate assessable to the owner or, in case of ownership through stock or membership in a corporation, the value of the proportion which the interest in the corporation bears to the assessed value of the property.

(c) By general law and subject to conditions specified therein, the legislature may provide to renters, who are permanent residents, ad valorem tax relief on all ad valorem tax levies. Such ad valorem tax relief shall be in the form and amount established by general law.

(d) The legislature may, by general law, allow counties or municipalities, for the purpose of their respective tax levies and subject to the provisions of general law, to grant an additional homestead tax exemption not exceeding $50,000 ~~fifty thousand dollars~~ to any person who has the legal or equitable

title to real estate and maintains thereon the permanent residence of the owner and who has attained age 65 ~~sixty-five~~ and whose household income, as defined by general law, does not exceed $20,000 ~~twenty thousand dollars~~. The general law must allow counties and municipalities to grant this additional exemption, within the limits prescribed in this subsection, by ordinance adopted in the manner prescribed by general law, and must provide for the periodic adjustment of the income limitation prescribed in this subsection for changes in the cost of living.

(e) Each veteran who is age 65 or older who is partially or totally permanently disabled shall receive a discount from the amount of the ad valorem tax otherwise owed on homestead property the veteran owns and resides in if the disability was combat related, the veteran was a resident of this state at the time of entering the military service of the United States, and the veteran was honorably discharged upon separation from military service. The discount shall be in a percentage equal to the percentage of the veteran's permanent, service-connected disability as determined by the United States Department of Veterans Affairs. To qualify for the discount granted by this subsection, an applicant must submit to the county property appraiser, by March 1, proof of residency at the time of entering military service, an official letter from the United States Department of Veterans Affairs stating the percentage of the veteran's service-connected disability and such evidence that reasonably identifies the disability as combat related, and a copy of the veteran's honorable discharge. If the property appraiser denies the request for a discount, the appraiser must

notify the applicant in writing of the reasons for the denial, and the veteran may reapply. The legislature may, by general law, waive the annual application requirement in subsequent years. This subsection shall take effect December 7, 2006, is self-executing, and does not require implementing legislation.

(f) As provided by general law and subject to conditions specified therein, every person who establishes the right to receive the homestead exemption provided in subsection (a) within 1 year after purchasing the homestead property and who has not owned property in the previous 3 calendar years to which the homestead exemption provided in subsection (a) applied is entitled to an additional homestead exemption in an amount equal to 50 percent of the homestead property's just value on January 1 of the year the homestead is established for all levies other than school district levies. The additional exemption shall apply for a period of 5 years or until the year the property is sold, whichever occurs first. The amount of the additional exemption shall not exceed $200,000 and shall be reduced in each subsequent year by an amount equal to 20 percent of the amount of the additional exemption received in the year the homestead was established or by an amount equal to the difference between the just value of the property and the assessed value of the property determined under Section 4(d), whichever is greater. Not more than one exemption provided under this subsection shall be allowed per homestead property. The additional exemption shall apply to property purchased on or after January 1, 2011, if this amendment is approved at a special election held on the date of the 2012 presidential preference primary, or on or after January 1, 2012, if approved at the 2012 general election, but

shall not be available in the sixth and subsequent years after the additional exemption is first received.

ARTICLE XII

SCHEDULE

SECTION 27. Property tax exemptions and limitations on property tax assessments.—The amendments to Sections 3, 4, and 6 of Article VII, providing a $25,000 exemption for tangible personal property, providing an additional $25,000 homestead exemption, authorizing transfer of the accrued benefit from the limitations on the assessment of homestead property, and this section, if submitted to the electors of this state for approval or rejection at a special election authorized by law to be held on January 29, 2008, shall take effect upon approval by the electors and shall operate retroactively to January 1, 2008, or, if submitted to the electors of this state for approval or rejection at the next general election, shall take effect January 1 of the year following such general election. The amendments to Section 4 of Article VII creating subsections (f) and (g) of that section, creating a limitation on annual assessment increases for specified real property, shall take effect upon approval of the electors and shall first limit assessments beginning January 1, 2009, if approved at a special election held on January 29, 2008, or shall first limit assessments beginning January 1, 2010, if approved at the general election held in November of 2008. ~~Subsections (f) and (g) of Section 4 of Article VII are repealed effective January 1, 2019; however, the legislature shall by joint resolution propose an amendment abrogating the repeal of subsections (f) and (g), which shall be submitted to the electors of this state~~

~~for approval or rejection at the general election of 2018 and, if approved, shall take effect January 1, 2019.~~

SECTION 32. Property assessments.—This section and the amendment of Section 4 of Article VII protecting homestead and specified nonhomestead property having a declining just value and reducing the limit on the maximum annual increase in the assessed value of nonhomestead property from 10 percent to 3 percent, if submitted to the electors of this state for approval or rejection at a special election authorized by law to be held on the date of the 2012 presidential preference primary, shall take effect upon approval by the electors and shall operate retroactively to January 1, 2012, or, if submitted to the electors of this state for approval or rejection at the 2012 general election, shall take effect January 1, 2013.

SECTION 33. Additional homestead exemption for owners of homestead property who recently have not owned homestead property.—This section and the amendment to Section 6 of Article VII providing for an additional homestead exemption for owners of homestead property who have not owned homestead property during the 3 calendar years immediately preceding purchase of the current homestead property, if submitted to the electors of this state for approval or rejection at a special election authorized by law to be held on the date of the 2012 presidential preference primary, shall take effect upon approval by the electors and operate retroactively to January 1, 2012, and the additional homestead exemption shall be available for properties purchased on or after January 1, 2011, or if submitted to the electors of this state for approval or rejection at the 2012 general election, shall take effect

<u>January 1, 2013, and the additional homestead exemption shall be available for properties purchased on or after January 1, 2012.</u>

BE IT FURTHER RESOLVED that the following statement be placed on the ballot:

CONSTITUTIONAL AMENDMENT

ARTICLE VII, SECTIONS 4, 6

ARTICLE XII, SECTIONS 27, 32, 33

PROPERTY TAX LIMITATIONS; ADDITIONAL HOMESTEAD EXEMPTION.—

(1) In certain circumstances, the law requires the assessed value of real property to increase when the just value of the property decreases. This amendment authorizes the Legislature, by general law, to prohibit such increases in the assessment of property whose just value has declined below its just value on the preceding assessment date. This amendment takes effect upon approval by the voters, if approved at a special election held on the date of the 2012 presidential preference primary and operates retroactively to January 1, 2012, or, if approved by the voters at the general election, takes effect January 1, 2013.

(2) This amendment reduces from 10 percent to 3 percent the limitation on annual increases in assessments of nonhomestead real property. This amendment takes effect upon approval of the voters, if approved at a special election held on the date of the 2012 presidential preference primary and operates retroactively to January 1, 2012, or, if approved by the voters at the general election, takes effect January 1, 2013.

(3) This amendment also provides owners of homestead property who have not owned homestead property during the 3 calendar years immediately preceding purchase of the current

homestead property with an additional homestead exemption equal to 50 percent of the property's just value in the first year for all levies other than school district levies, limited to $200,000; applies the additional exemption for the shorter of 5 years or the year of sale of the property; reduces the amount of the additional exemption in each succeeding year for 5 years by the greater of 20 percent of the amount of the initial additional exemption or the difference between the just value and the assessed value of the property; limits the additional exemption to one per homestead property; limits the additional exemption to properties purchased on or after January 1, 2011, if approved by the voters at a special election held on the date of the 2012 presidential preference primary, or on or after January 1, 2012, if approved by the voters at the 2012 general election; prohibits availability of the additional exemption in the sixth and subsequent years after the additional exemption is granted; and provides for the amendment to take effect upon approval of the voters and operate retroactively to January 1, 2012, if approved at the special election held on the date of the 2012 presidential preference primary, or on January 1, 2013, if approved by the voters at the 2012 general election.

(4) This amendment also removes from the State Constitution a repeal, scheduled to take effect in 2019, of constitutional amendments adopted in 2008 that limit annual assessment increases for specified nonhomestead real property.

================ T I T L E A M E N D M E N T ================

And the title is amended as follows:

Delete everything before the resolving clause

and insert:

A bill to be entitled

A joint resolution proposing amendments to Sections 4 and 6 of Article VII and Section 27 of Article XII and the creation of Sections 32 and 33 of Article XII of the State Constitution to allow the Legislature by general law to prohibit increases in the assessed value of homestead and specified nonhomestead property if the just value of the property decreases, reduce the limitation on annual assessment increases applicable to nonhomestead real property, provide an additional homestead exemption for owners of homestead property who have not owned homestead property for a specified time before purchase of the current homestead property, and application and limitations with respect thereto, delete a future repeal of provisions limiting annual assessment increases for specified nonhomestead real property, and provide effective dates.

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LEGISLATIVE ACTION

Senate . House

. .

. .

. .

.

The Committee on Judiciary (Richter) recommended the following:

Senate Amendment to Amendment (891718) (with ballot and title amendments)

Delete lines 142 - 147

and insert:

~~but~~ those changes in assessments may ~~shall~~ not exceed 10 ~~ten~~ percent ~~(10%)~~ of the assessment for the prior year. The Legislature may provide by general law that an assessment may not increase if the just value of the property is less than the just value of the property on the preceding date of assessment provided by law.

Delete lines 165 - 170

and insert:
~~but~~ those changes in assessments <u>may</u> ~~shall~~ not exceed <u>10</u> ~~ten~~ percent ~~(10%)~~ of the assessment for the prior year. <u>The Legislature may provide by general law that an assessment may not increase if the just value of the property is less than the just value of the property on the preceding date of assessment provided by law.</u>

Delete lines 336 - 340
and insert:
<u>amendment of Section 4 of Article VII protecting homestead property having a declining just value, if submitted to the electors of this state for approval</u>

====== B A L L O T S T A T E M E N T A M E N D M E N T ======
And the ballot statement is amended as follows:
Delete lines 381 - 412
and insert:
(2) This amendment also provides owners of homestead property who have not owned homestead property during the 3 calendar years immediately preceding purchase of the current homestead property with an additional homestead exemption equal to 50 percent of the property's just value in the first year for all levies other than school district levies, limited to $200,000; applies the additional exemption for the shorter of 5 years or the year of sale of the property; reduces the amount of the additional exemption in each succeeding year for 5 years by the greater of 20 percent of the amount of the initial additional exemption or the difference between the just value

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and the assessed value of the property; limits the additional exemption to one per homestead property; limits the additional exemption to properties purchased on or after January 1, 2011, if approved by the voters at a special election held on the date of the 2012 presidential preference primary, or on or after January 1, 2012, if approved by the voters at the 2012 general election; prohibits availability of the additional exemption in the sixth and subsequent years after the additional exemption is granted; and provides for the amendment to take effect upon approval of the voters and operate retroactively to January 1, 2012, if approved at the special election held on the date of the 2012 presidential preference primary, or on January 1, 2013, if approved by the voters at the 2012 general election.

(3) This amendment also removes from the State Constitution

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete lines 428 - 430

and insert:

if the just value of the property decreases, provide an

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	CS/SJR 658
INTRODUCER:	Community Affairs Committee and Senator Fasano
SUBJECT:	Homestead/Non-Homestead Property
DATE:	April 1, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gizzi	Yeatman	CA	**Fav/CS**
2.	Munroe	Maclure	JU	**Pre-meeting**
3.			BC	
4.			RC	
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The joint resolution proposes an amendment to the Florida Constitution to prohibit increases in the assessed value of homestead property if the just value of the property decreases and to reduce, from 10 percent to 3 percent, the limitation on annual assessment increases applicable to non-homestead property. The joint resolution also creates an additional homestead exemption for specified homestead owners.

This joint resolution will require approval by a three-fifths vote of the membership of each house of the Legislature for passage.

This joint resolution creates sections 32 and 33, Article XII, of the Florida Constitution.
This joint resolution proposes an amendment to sections 4 and 6, Article VII, of the Florida Constitution.

II. Present Situation:

Property Valuation

A.) Just Value

Article VII, section 4, of the Florida Constitution, requires that all property be assessed at just value for ad valorem tax purposes. Just value has been interpreted by the courts to mean fair market value, or what a willing buyer would pay a willing seller for the property in an arm's length transaction.[1]

B.) Assessed Value

The Florida Constitution authorizes certain exceptions to the just valuation standard for specific types of property.[2] Agricultural land, land producing high water recharge to Florida's aquifers, and land used exclusively for noncommercial recreational purposes may be assessed solely on the basis of their character or use.[3] Livestock and tangible personal property that is held for sale as stock in trade may be assessed at a specified percentage of its value or totally exempt from taxation.[4] Counties and municipalities may authorize historic properties to be assessed solely on the basis of character and use.[5] Counties may also provide a reduction in the assessed value of property improvements on existing homesteads made to accommodate parents or grandparents who are 62 years of age or older.[6] The Legislature is authorized to prohibit the consideration of improvements to residential real property for purposes of improving the property's wind resistance or the installation of renewable energy source devices in the assessment of the property.[7] Certain working waterfront property is assessed based upon the property's current use.[8]

C.) Additional Assessment Limitations

Sections 4(g) and (h), Article VII, of the Florida Constitution, were created in January 2008, when Florida electors voted to provide an assessment limitation for residential real property containing nine or fewer units, and for all real property not subject to other specified classes or uses. For all levies, with the exception of school levies, the assessed value of property in each of these two categories may not be increased annually by more than 10 percent of the assessment in the prior year. However, residential real property containing nine or fewer units **must** be assessed at just value whenever there is a change in ownership or control. For the other real property subject to the limitation, the Legislature **may** provide that such property shall be assessed at just value after a change of ownership or control.[9]

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[1] *See Walter v. Shuler*, 176 So. 2d 81 (Fla. 1965); *Deltona Corp. v. Bailey*, 336 So. 2d 1163 (Fla. 1976); *Southern Bell Tel. & Tel. Co. v. Dade County*, 275 So. 2d 4 (Fla. 1973).

[2] The constitutional provisions in article VII, section 4, of the Florida Constitution, were implemented in part II of ch. 193, F.S.

[3] FLA. CONST. art. VII, s. 4(a).

[4] FLA. CONST. art. VII, s. 4(c).

[5] FLA. CONST. art. VII, s. 4(e).

[6] FLA. CONST. art. VII, s. 4(f).

[7] FLA. CONST. art. VII, s. 4(i).

[8] FLA. CONST. art. VII, s. 4(j).

[9] FLA. CONST. art. VII, s. 4(g) and (h).

Article XII, section 27, of the Florida Constitution, provides that the amendments creating a limitation on annual assessment increases in subsections (f) and (g) are repealed effective January 1, 2019, and that the Legislature must propose an amendment abrogating the repeal, which shall be submitted to the voters for approval or rejection on the general election ballot for 2018.

D.) Taxable Value

The taxable value of real and tangible personal property is the assessed value minus any exemptions provided by the Florida Constitution or by Florida Statutes. Such exemptions include, but are not limited to: homestead exemptions and exemptions for property used for educational, religious, or charitable purposes.[10]

Homestead Exemption

Article VII, section 6, of the Florida Constitution, as amended in January 2008, provides that every person with legal and equitable title to real estate and who maintains the permanent residence of the owner is eligible for a $25,000 homestead tax exemption applicable to all ad valorem tax levies including school districts. An additional $25,000 homestead exemption applies to homesteads that have an assessed value greater than $50,000 and up to $75,000, excluding ad valorem taxes levied by schools.

Additional Homestead Exemption, Amendment 3 Proposed for 2010 Ballot *(2009 SJR 532)*

In 2009, the Legislature passed SJR 532 which was to go before the voters as Amendment 3 on the November 2010 ballot. The proposed amendment 3 sought to reduce the annual assessment limitation from 10 to five percent annually and to provide an additional homestead exemption for "a person or persons" who have not owned a principal residence in the previous *eight* years that is equal to *25 percent* of the just value of the homestead in the first year for all levies, up to *$100,000*. The amount of the additional homestead exemption decreases by 20 percent of the initial exemption each succeeding five years until it is no longer available in the sixth and subsequent years.[11]

However, in August 2010, the Florida Supreme Court removed Amendment 3 from the 2010 Ballot, on the grounds that the ballot title and summary were misleading and failed to comply with the constitutional accuracy requirement implicitly provided in Art. XI, section 5(a), of the Florida Constitution.[12] The Court stated that the accuracy requirement is implicitly indicated in section 5(a) through the statement that the proposed amendment "shall be submitted to the electors at the next general election." Specifically, the Court stated that:

> Implicit in this provision is the requirement that the proposed amendment be *accurately* represented on the ballot; otherwise, voter approval would be a nullity.[13]

[10] FLA. CONST. art. VII, ss. 3 and 6.
[11] Fla. CS for SJR 532, 1st Eng. (2009) (Senator Lynn and others)
[12] *Roberts v. Doyle*, 43 So. 3d 654 (Fla. 2010).
[13] *Id.* at 657, citing *Armstrong v. Harris*, 773 So. 2d 7, 12 (Fla. 2000) (further reiterating that the accuracy requirement is codified in s. 106.161(1), F.S. (2009)).

The Court further stated that the accuracy requirement is codified in Florida Statutes in s. 106.161(1), F.S., which in part provides that:

> 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 . . .

In determining whether a ballot title and summary are in compliance with the accuracy requirement, courts utilize a two-prong test, asking "first, whether the ballot title and summary 'fairly inform the voter of the chief purpose of the amendment,' and second, 'whether the language of the title and summary, as written, misleads the public.' "[14]

Based on this test, the Florida Supreme Court determined that the ballot title and summary for Amendment 3 were "neither accurate nor informative" and "are confusing to the average voter."[15] The Court supported its holding based on the following:

- Neither the title nor the summary provided notice that the additional exemption is only available for properties purchased on or after January 1, 2010. Stating that the "lack of an effective date renders it impossible for a voter to know which homeowners would qualify for the exemption."[16]
- The terms "new homestead owners" in the title coupled with "first-time homestead" in the summary are ambiguous as it conveys the message that to be eligible for the additional exemption, the property owner must have both not owned a principal residence during the preceding eight years *and* have never previously declared the property homestead.[17]
- The use of both the terms "principal residence" and "first-time homestead" in the ballot title and summary is misleading.[18]
- There is a material omission in the ballot title and summary, as they fail to "note that the additional exemption is not available to a person whose spouse has owned a principal residence in the preceding eight years."[19]

"Save Our Homes" Assessment Limitation

The "Save Our Homes" provision in article VII, section 4(d) of the Florida Constitution, limits the amount that a homestead's assessed value can increase annually to the lesser of three percent or the Consumer Price Index (CPI).[20] The Save Our Homes limitation was amended into the Florida Constitution in 1992, to provide that:

[14] *Id.* at 659, citing *Florida Dep't of State v. Slough,* 992 So. 2d 142, 147 (Fla. 2008).
[15] *Id.* at 657 and 660.
[16] *Id.*
[17] *Id.*
[18] *Roberts,* at 657 and 660.
[19] *Id.* at 657 and 661.
[20] FLA. CONST. art. VII, s. 4(d).

- All persons entitled to a homestead exemption under section 6, Art. II of the State Constitution, have their homestead assessed at just value by January 1 of the year following the effective date of the amendment.
- Thereafter, annual changes in homestead assessments on January 1 of each year could not exceed the lower of:
  - Three percent of the prior year's assessment, or
  - The percent change in the Consumer Price Index (CPI) for all urban consumers, U.S. City Average, all items 1967=100, or successor reports for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics.
- No assessment may exceed just value.

In 2008, Florida voters approved an additional amendment to article VII, section 4(d), of the Florida Constitution, to provide for the portability of the accrued "Save Our Homes" benefit. This amendment allows homestead property owners who relocate to a new homestead to transfer up to $500,000 of the "Save Our Homes" accrued benefit to the new homestead.

Section 193.155, Florida Statutes

In 1994, the Legislature enacted ch. 94-353, Laws of Florida, to implement the "Save Our Homes" amendment into s. 193.155, F.S. The legislation required all homestead property to be assessed at just value by January 1, 1994.[21] Starting on January 1, 1995, or the year after the property receives a homestead exemption (whichever is later), property receiving a homestead exemption must be reassessed annually on January 1 of each year. As provided in the "Save Our Homes" provision in Article VII, section 4(d), of the Florida Constitution, s. 193.155, F.S., requires that any change resulting from the reassessment may not exceed the lower of:

- Three percent of the assessed value from the prior year; or
- The percentage change in the CPI for all urban consumers, U.S. City Average, all items 1967=100, or successor reports for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics.[22]

Pursuant to s. 193.155(2), F.S., if the assessed value of the property exceeds the just value, the assessed value must be lowered to just value of the property.

Rule 12D-8.0062, Florida Administrative Code (F.A.C.): "The Recapture Rule"

In October 1995, the Governor and the Cabinet adopted rule 12D-8.0062, F.A.C., of the Department of Revenue, entitled "Assessments; Homestead; and Limitations."[23] The

[21] *See Fuchs v. Wilkinson*, 630 So. 2d 1044 (Fla. 1994) (stating that "the clear language of the amendment establishes January 1, 1994, as the first "just value" assessment date, and as a result, requires the operative date of the amendment's limitations, which establish the "tax value" of homestead property, to be January 1, 1995").

[22] Section 193.155(1), F.S.

[23] While s. 193.155, F.S., did not provide specific rulemaking authority, the Department of Revenue adopted Rule 12S-9.0062, F.A.C., pursuant to its general rulemaking authority under s. 195.927, F.S. Section 195.027, F.S., provides that the Department of Revenue shall prescribe reasonable rules and regulations for the assessing and collecting of taxes, and that the Legislature intends that the department shall formulate such rules and regulations that property will be assessed, taxes will be collected, and that the administration will be uniform, just and otherwise in compliance with the requirements of general law and the constitution.

administrative intent of this rule is to govern "the determination of the assessed value of property subject to the homestead assessment limitation under Article VII, section 4(c), of the Florida Constitution, and s. 193.155, F.S."[24]

Subsection (5) of Rule 12D-8.0062, F.A.C., is popularly known as the "recapture rule." This provision requires property appraisers to increase the prior year's assessed value of a homestead property by the lower of three percent or the CPI on all property where the value is lower than the just value. The specific language in Rule 12D-8.0062(5), F.A.C., which is referred to as the "recapture provision" states:

> (5) Where the current year just value of an individual property exceeds the prior year assessed value, the property appraiser is *required* to increase the prior year's assessed value ….[25]

Under current law, this requirement applies even if the just value of the homestead property has decreased from the prior year. Therefore, homestead owners entitled to the "Save Our Homes" cap whose property is assessed at less than just value may see an increase in the assessed value of their home during years where the just/market value of their property decreased.[26]

Subsection (6) provides that if the change in the CPI is negative, then the assessed value shall be equal to the prior year's assessed value decreased by that percentage.

Markham v. Department of Revenue[27]

On March 17, 1995, William Markham, a Broward County Property Appraiser, filed a petition challenging the validity of the Department of Revenue's proposed "recapture rule" within Rule 12D-8.0062, F.A.C. Markham alleged that the proposed rule was "an invalid exercise of delegated legislative authority and is arbitrary and capricious."[28] Markham also claimed that subsection (5) of the rule was at variance with the constitution – specifically that it conflicted with the "intent" of the ballot initiative and that a third limitation relating to market value or movement[29] should be incorporated into the language of the rule to make it compatible with the language in Article VII, section 4(c), of the Florida Constitution.

A final order was issued by The Division of Administrative Hearings on June 21, 1995, which upheld the validity of Rule 12D-8.0062, F.A.C., and the Department of Revenue's exercise of delegated legislative authority. The hearing officer determined that subsections (5) and (6) of the administrative rule were consistent with Article VII, section 4(c), of the Florida Constitution. The hearing officer also held that the challenged portions of the rule were consistent with the

[24] Rule 12D-8.0062(1), F.A.C.
[25] Rule 12D-8.0062(5), F.A.C. (emphasis added).
[26] *Markham v. Dep't of Revenue*, Case No. 95-1339RP (Fla. DOAH 1995) (stating that "subsection (5) requires an increase to the prior year's assessed value in a year where the CPI is greater than zero").
[27] *Id.*
[28] *Id*.
[29] *Id.* at ¶ 21 (stating that "[t]his limitation, grounded on "market movement," would mean that in a year in which market value did not increase, the assessed value of a homestead property would not increase").

agency's mandate to adopt rules under s. 195.027(1), F.S., since the rule had a factual and logical underpinning, was plain and unambiguous, and did not conflict with the implemented law.[30]

In response to the petitioner's assertion of a third limitation on market movement, the hearing officer concluded that the rule was not constitutionally infirm since there was no mention of "market movement" or "market value" in the ballot summary of the amendment nor did the petitioner present any evidence of legislative history concerning the third limitation.[31]

III. Effect of Proposed Changes:

This joint resolution proposes an amendment to Article VII, section 4, of the Florida Constitution, to prohibit increases in the assessed value of homestead property if the just value of the property decreases, and to reduce the limitation on annual assessment increases applicable to non-homestead property from 10 percent to three percent. This joint resolution also amends Article VII, section 6, of the Florida Constitution, to create an additional homestead exemption for specified homestead owners.

The joint resolution creates sections 32 and 33, Article XII, of the State Constitution, to provide when the amendments prescribed herein shall take effect.

Assessment Limitation on Homestead Property *(Recapture Rule)*

The joint resolution proposes an amendment paragraph 1 of subsection (d) in s. 4, Article VII, of the Florida Constitution, to provide that an assessment to homestead property may not increase if the just value of the property is less than the just value of the property on the preceding January 1. The joint resolution also deletes obsolete language provided in paragraph 8 of subsection (d) in s. 4, Article VII, of the Florida Constitution. This does not apply to the assessment of changes, additions, reductions, or improvements to homestead property as provided in (d)(5) of section 4, Article VII, of the Florida Constitution.

The joint resolution creates section 32, Article XII, of the Florida Constitution, to provide that if approved by Florida voters, this amendment will take effect on January 1, 2013.

Assessment Limitation on Non-Homestead Property

The joint resolution proposes to amend paragraph 1 of subsections (g) and (h) in s. 4, Article VII, of the Florida Constitution, to reduce the annual assessment limitation for specified non-homestead property from 10 percent to three percent. This assessment limitation is pursuant to general law and subject to the conditions specified in such law.

The joint resolution also creates section 32, Article XII, of the Florida Constitution, to provide that if approved by Florida voters, this amendment will take effect on January 1, 2013.

[30] *Id.* at ¶ 20.
[31] *Id.* at ¶ 22.

Additional Homestead Exemption for Specified Homestead Owners

The joint resolution proposes to create subsection (f) in s. 6, Article VII, of the Florida Constitution. This amendment allows individuals that are entitled to a homestead exemption under s. 6(a), Article VII, of the Florida Constitution, that have not previously received a homestead exemption in the past three years to receive an additional homestead exemption equal to 50 percent of the just value of the homestead property up to $200,000 for a period of five years or until the property is sold. The additional exemption is available within one year of purchasing the homestead and would be reduced by 20 percent of the initial exemption on January 1 of each succeeding year, until it is no longer available in the sixth and subsequent years. The exemption does not apply to school levies.

The joint resolution also creates section 33, Article XII, of the Florida Constitution, to provide that if approved by Florida voters, this amendment will take effect on January 1, 2013, and shall be available for properties purchased on or after January 1, 2012.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The mandate provisions in Article VII, section 18, of the Florida Constitution, do not apply to joint resolutions.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Constitutional Amendments

Section 1, Article XI, of the Florida Constitution, authorizes the Legislature to propose amendments to the State Constitution by joint resolution approved by three-fifths vote of the membership of each house. The amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State, or at a special election held for that purpose.

Section 5(d), Article XI, of the Florida Constitution, requires proposed amendments or constitutional revisions to be published in a newspaper of general circulation in each county where a newspaper is published. The amendment or revision must be published once in the tenth week and again in the sixth week immediately preceding the week the election is held. The Division of Elections within the Department of State estimated that the average cost per word to advertise an amendment to the State Constitution is $106.14 for this fiscal year.

Section 5(e), Article XI, of the Florida Constitution, requires a 60 percent voter approval for a constitutional amendment to take effect. An approved amendment becomes effective on the first Tuesday after the first Monday in January following the election at which it is approved, or on such other date as may be specified in the amendment or revision.

Section 5(a), Article XI, of the Florida Constitution, and s. 106.161(1), F.S., require constitutional amendments submitted to the vote of the people to be printed in clear and unambiguous language on the ballot. In determining whether a ballot title and summary are in compliance with the accuracy requirement, Florida courts utilize a two-prong test, asking "first, whether the ballot title and summary 'fairly inform the voter of the chief purpose of the amendment,' and second, 'whether the language of the title and summary, as written, misleads the public.'"[32]

Equal Protection Clause

The United States Constitution provides that "no State shall . . . deny to any person within its jurisdiction, the equal protection of law."[33] In the past, taxpayers have argued that disparate treatment in real property tax assessments constitutes an equal protection violation.[34] In these instances, courts have used the rational basis test to determine the constitutionality of discriminatory treatment in property tax assessments.[35] Under the rational basis test, a court must uphold a state statute so long as the classification bears a rational relationship to a legitimate state interest.[36]

It has been argued that the recapture rule provided in ss. (5) of Rule 12D-8.0062, F.A.C., diminishes the existing inequity between property assessments over time.[37] To the extent that this view is adopted, taxpayers may argue that the elimination of the recapture rule creates a stronger argument for an Equal Protection Clause violation. If this argument is made, the court would need to determine whether the components of this joint resolution are rationally related to a legitimate state interest.

[32] *Roberts*, at 659, citing *Florida Dep't of State v. Slough,* 992 So.2d 142, 147 (Fla. 2008).
[33] U.S. CONST. amend. XIV, § 1. *See also* FLA. CONST. art. I, s. 2.
[34] *Reinish v. Clark*, 765 So. 2d 197 (Fla. 1st DCA 2000) (holding that the Florida homestead exemption did not violate the Equal Protection Clause, the Privileges and Immunities Clause, or the Commerce Clause). *See also Lanning v. Pilcher*, 16 So. 3d 294 (Fla. 1st DCA 2009) (holding that the Save Our Homes Amendment of the State Constitution did not violate a nonresident's rights under the Equal Protection Clause). *See also Nordlinger v. Hahn*, 505 U.S. 1 (1992) (stating that the constitutional amendment in California that limited real property tax increases, in the absence of a change of ownership to 2% per year, was not a violation of the Equal Protection Clause).
[35] *Nordlinger,* at 33-34, stating that a "classification *rationally* furthers a state interest when there is some fit between the disparate treatment and the legislative purpose").
[36] *Id.*
[37] Walter Hellerstein et al., Shackelford Professor of Taxation, LEGAL ANALYSIS OF PROPOSED ALTERNATIVES TO FLORIDA'S HOMESTEAD PROPERTY TAX LIMITATIONS: FEDERAL CONSTITUTIONAL AND RELATED ISSUES, at 83 (on file with the Senate Committee on Community Affairs).

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

If approved by the voters, this joint resolution will provide an ad valorem tax relief to specified homestead owners. Owners of specified residential rental and commercial real property will experience further reduction in tax assessments due to the three percent assessment limitation. This joint resolution will also have an effect on local government revenue.

B. Private Sector Impact:

Assessment Limitation on Homestead Property *(Recapture Rule)*
If approved by the voters, taxes will be reduced for those taxpayers whose homesteads have depreciated but are still assessed at less than just value. The joint resolution will redistribute the tax burden. It may benefit homestead property that has a "Save Our Homes" differential; however, non-homestead and recently established homestead property will pay a larger proportion of the cost of local services. To the extent that local governments do not raise millage rates, taxpayers may experience a reduction in government and education services due to any reductions in ad valorem tax revenues.

Assessment Limitation on Non-Homestead Property
Owners of existing residential rental and commercial real property may experience property tax savings and will not see their taxes increase significantly in a single year. To the extent that local taxing authorities' budgets are not reduced, the tax burden on other properties will increase to offset these tax losses. New properties or properties that have changed ownership or undergone significant improvements will be assessed at just value, and will be at a competitive disadvantage compared to older properties with respect to their tax burden.

Additional Homestead Exemption for Specified Homestead Owners
If approved by the voters, specified homestead owners will experience temporary reductions in ad valorem taxes. The value of the reduction will decrease by one-fifth each year and will disappear in the sixth year after the homestead is established. During this period, the ad valorem taxes levied on the homestead will increase significantly each year. Other property owners in the taxing jurisdiction will pay higher taxes if the jurisdiction adjusts the millage rate to offset the loss to the tax base.

C. Government Sector Impact:

Local governments may experience a reduction in the ad valorem tax base if this joint resolution is approved by voters. Since this amendment would require voter approval, the Revenue Estimating Conference has adopted an indeterminate negative estimate for SJR 658.

Additional Homestead Exemption for Specified Homestead Owners
Should this amendment be approved by the Florida voters, the Revenue Estimating Conference has determined that the statewide impact on non-school taxes for the additional homestead exemption for specified homestead owners would be as follows: [38]

FY 2013-14	FY 2014-15	Recurring Impact
-$94.5 million	-$186.5 million	-$344.5 million

Assessment Limitation on Homestead Property *(Recapture Rule)*
The Revenue Estimating Conference has not reviewed the recapture provisions of SJR 658, however when addressing similar legislation on the recapture amendment (2011 SJR 210), the Revenue Estimating Conference determined that the fiscal impact on school taxes, should the joint resolution be approved by the voters, would be as follows for :

FY 2013-14	FY 2014-15	Recurring Impact
-$5.0 million	-$8.0 million	-$17.0 million

[39]

The fiscal impact on non-school taxes would be as follows:

FY 2013-14	FY 2014-15	Recurring Impact
-$6.0 million	-$11.0 million	-$18.0 million

[40]

Assessment Limitation on Non-Homestead Property
The Revenue Estimating Conference has not provided a fiscal impact on the constitutional amendment within SJR 658 that reduces from 10 percent to three percent, the limitation on annual assessment increases applicable to non-homestead property.

Publication Requirements
Section 5(d), Article XI, of the Florida Constitution, requires proposed amendments or constitutional revisions to be published in a newspaper of general circulation in each county where a newspaper is published. The amendment or revision must be published once in the tenth week and again in the sixth week immediately preceding the week the election is held. The Division of Elections within the Department of State estimated that the average cost per word to advertise an amendment to the State Constitution is $106.14 for this fiscal year.[41] The division has not estimated the full publication costs to advertise this constitutional amendment at this time.

[38] Revenue Estimating Conference, *First-Time Homesteaders SJR 658 & HJR 381* (Feb. 20, 2011) (assuming that 40 percent of homesteaders will be first-time homesteaders, to account for the definition of first-time homebuyers).
[39] Revenue Estimating Conference, *Recapture SJR 210 & HJR 381* (Feb. 17, 2011).
[40] Revenue Estimating Conference, *Recapture SJR 210 & HJR 381* (Feb. 17, 2011).
[41] Florida Department of State, *Senate Joint Resolution 390 Fiscal Analysis* (Jan. 28, 2011) (on file with the Senate Committee on Community Affairs).

VI. Technical Deficiencies:

On lines 55-56 of the bill, language that refers to the Consumer Price Index to be the report "as initially reported by the United States Department of Labor, Bureau of Labor Statistics" was inadvertently typed and stricken and should be restored to current law.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Community Affairs on March 14, 2011:
This committee substitute makes technical and clarifying amendments as recommended by the Department of Revenue.[42] Specifically the committee substitute:

- Changes references to "fair market" and "market" value to "just" value to make it consistent with provisions in the Florida Constitution and Florida Statutes.
- Changes the terms "an increase" to "a change" on line 49 of the joint resolution.
- Provides that the joint resolution has no effect on the assessment of changes, additions, reductions, or improvements to homestead property as provided in (d)(5) of section 4, Article VII, of the Florida Constitution.

B. Amendments:

None.

[42] *See* Florida Department of Revenue, *SJR 658 Fiscal Analysis,* at 3 (Feb. 11, 2011) (on file with the Senate Committee on Community Affairs).


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LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Joyner) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

Section 1. If House Joint Resolution 381 or Senate Joint Resolution 658, 2011 Regular Session, is approved by a vote of the electors in the general election held in November 2012, section 193.155, Florida Statutes, is amended to read:

193.155 Homestead assessments. ~~Homestead property shall be assessed at just value as of January 1, 1994.~~ Property receiving the homestead exemption ~~after January 1, 1994,~~ shall be assessed at just value as of January 1 of the year in which the property receives the exemption unless the provisions of subsection (8)

apply.

(1) Beginning in ~~1995, or~~ the year following the year the property receives a homestead exemption~~, whichever is later~~, the property shall be reassessed annually on January 1. Except for changes, additions, reductions, or improvements to homestead property assessed as provided in subsection (4):

(a) Any change resulting from such reassessment shall not exceed the lower of the following:

1.~~(a)~~ Three percent of the assessed value of the property for the prior year; or

2.~~(b)~~ The percentage change in the Consumer Price Index for All Urban Consumers, U.S. City Average, all items 1967=100, or successor reports for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics.

(b) The Legislature may provide by general law an assessment may not increase if the just value of the property is less than the just value of the property on the preceding January 1.

(2) If the assessed value of the property as calculated under subsection (1) exceeds the just value, the assessed value of the property shall be lowered to the just value of the property.

(3)(a) Except as provided in this subsection or subsection (8), property assessed under this section shall be assessed at just value as of January 1 of the year following a change of ownership. Thereafter, the annual changes in the assessed value of the property are subject to the limitations in subsections (1) and (2). For the purpose of this section, a change of

ownership means any sale, foreclosure, or transfer of legal title or beneficial title in equity to any person, except as provided in this subsection. There is no change of ownership if:

1. Subsequent to the change or transfer, the same person is entitled to the homestead exemption as was previously entitled and:

a. The transfer of title is to correct an error;

b. The transfer is between legal and equitable title or equitable and equitable title and no additional person applies for a homestead exemption on the property; or

c. The change or transfer is by means of an instrument in which the owner is listed as both grantor and grantee of the real property and one or more other individuals are additionally named as grantee. However, if any individual who is additionally named as a grantee applies for a homestead exemption on the property, the application shall be considered a change of ownership;

2. Legal or equitable title is changed or transferred between husband and wife, including a change or transfer to a surviving spouse or a transfer due to a dissolution of marriage;

3. The transfer occurs by operation of law to the surviving spouse or minor child or children under s. 732.401; or

4. Upon the death of the owner, the transfer is between the owner and another who is a permanent resident and is legally or naturally dependent upon the owner.

(b) For purposes of this subsection, a leasehold interest that qualifies for the homestead exemption under s. 196.031 or s. 196.041 shall be treated as an equitable interest in the property.

(4)(a) Except as provided in paragraph (b), changes, additions, or improvements to homestead property shall be assessed at just value as of the first January 1 after the changes, additions, or improvements are substantially completed.

(b) Changes, additions, or improvements that replace all or a portion of homestead property damaged or destroyed by misfortune or calamity shall not increase the homestead property's assessed value when the square footage of the homestead property as changed or improved does not exceed 110 percent of the square footage of the homestead property before the damage or destruction. Additionally, the homestead property's assessed value shall not increase if the total square footage of the homestead property as changed or improved does not exceed 1,500 square feet. Changes, additions, or improvements that do not cause the total to exceed 110 percent of the total square footage of the homestead property before the damage or destruction or that do not cause the total to exceed 1,500 total square feet shall be reassessed as provided under subsection (1). The homestead property's assessed value shall be increased by the just value of that portion of the changed or improved homestead property which is in excess of 110 percent of the square footage of the homestead property before the damage or destruction or of that portion exceeding 1,500 square feet. Homestead property damaged or destroyed by misfortune or calamity which, after being changed or improved, has a square footage of less than 100 percent of the homestead property's total square footage before the damage or destruction shall be assessed pursuant to subsection (5). This paragraph applies to changes, additions, or improvements commenced within 3 years

after the January 1 following the damage or destruction of the homestead.

(c) Changes, additions, or improvements that replace all or a portion of real property that was damaged or destroyed by misfortune or calamity shall be assessed upon substantial completion as if such damage or destruction had not occurred and in accordance with paragraph (b) if the owner of such property:

1. Was permanently residing on such property when the damage or destruction occurred;

2. Was not entitled to receive homestead exemption on such property as of January 1 of that year; and

3. Applies for and receives homestead exemption on such property the following year.

(d) Changes, additions, or improvements include improvements made to common areas or other improvements made to property other than to the homestead property by the owner or by an owner association, which improvements directly benefit the homestead property. Such changes, additions, or improvements shall be assessed at just value, and the just value shall be apportioned among the parcels benefiting from the improvement.

(5) When property is destroyed or removed and not replaced, the assessed value of the parcel shall be reduced by the assessed value attributable to the destroyed or removed property.

(6) Only property that receives a homestead exemption is subject to this section. No portion of property that is assessed solely on the basis of character or use pursuant to s. 193.461 or s. 193.501, or assessed pursuant to s. 193.505, is subject to this section. When property is assessed under s. 193.461, s.

193.501, or s. 193.505 and contains a residence under the same ownership, the portion of the property consisting of the residence and curtilage must be assessed separately, pursuant to s. 193.011, for the assessment to be subject to the limitation in this section.

(7) If a person received a homestead exemption limited to that person's proportionate interest in real property, the provisions of this section apply only to that interest.

(8) Property assessed under this section shall be assessed at less than just value when the person who establishes a new homestead has received a homestead exemption as of January 1 of either of the 2 immediately preceding years. ~~A person who establishes a new homestead as of January 1, 2008, is entitled to have the new homestead assessed at less than just value only if that person received a homestead exemption on January 1, 2007, and only if this subsection applies retroactive to January 1, 2008.~~ For purposes of this subsection, a husband and wife who owned and both permanently resided on a previous homestead shall each be considered to have received the homestead exemption even though only the husband or the wife applied for the homestead exemption on the previous homestead. The assessed value of the newly established homestead shall be determined as provided in this subsection.

(a) If the just value of the new homestead as of January 1 is greater than or equal to the just value of the immediate prior homestead as of January 1 of the year in which the immediate prior homestead was abandoned, the assessed value of the new homestead shall be the just value of the new homestead minus an amount equal to the lesser of $500,000 or the

difference between the just value and the assessed value of the immediate prior homestead as of January 1 of the year in which the prior homestead was abandoned. Thereafter, the homestead shall be assessed as provided in this section.

(b) If the just value of the new homestead as of January 1 is less than the just value of the immediate prior homestead as of January 1 of the year in which the immediate prior homestead was abandoned, the assessed value of the new homestead shall be equal to the just value of the new homestead divided by the just value of the immediate prior homestead and multiplied by the assessed value of the immediate prior homestead. However, if the difference between the just value of the new homestead and the assessed value of the new homestead calculated pursuant to this paragraph is greater than $500,000, the assessed value of the new homestead shall be increased so that the difference between the just value and the assessed value equals $500,000. Thereafter, the homestead shall be assessed as provided in this section.

(c) If two or more persons who have each received a homestead exemption as of January 1 of either of the 2 immediately preceding years and who would otherwise be eligible to have a new homestead property assessed under this subsection establish a single new homestead, the reduction from just value is limited to the higher of the difference between the just value and the assessed value of either of the prior eligible homesteads as of January 1 of the year in which either of the eligible prior homesteads was abandoned, but may not exceed $500,000.

(d) If two or more persons abandon jointly owned and

jointly titled property that received a homestead exemption as of January 1 of either of the 2 immediately preceding years, and one or more such persons who were entitled to and received a homestead exemption on the abandoned property establish a new homestead that would otherwise be eligible for assessment under this subsection, each such person establishing a new homestead is entitled to a reduction from just value for the new homestead equal to the just value of the prior homestead minus the assessed value of the prior homestead divided by the number of owners of the prior homestead who received a homestead exemption, unless the title of the property contains specific ownership shares, in which case the share of reduction from just value shall be proportionate to the ownership share. In calculating the assessment reduction to be transferred from a prior homestead that has an assessment reduction for living quarters of parents or grandparents pursuant to s. 193.703, the value calculated pursuant to s. 193.703(6) must first be added back to the assessed value of the prior homestead. The total reduction from just value for all new homesteads established under this paragraph may not exceed $500,000. There shall be no reduction from just value of any new homestead unless the prior homestead is reassessed at just value or is reassessed under this subsection as of January 1 after the abandonment occurs.

(e) If one or more persons who previously owned a single homestead and each received the homestead exemption qualify for a new homestead where all persons who qualify for homestead exemption in the new homestead also qualified for homestead exemption in the previous homestead without an additional person qualifying for homestead exemption in the new homestead, the

reduction in just value shall be calculated pursuant to paragraph (a) or paragraph (b), without application of paragraph (c) or paragraph (d).

(f) For purposes of receiving an assessment reduction pursuant to this subsection, a person entitled to assessment under this section may abandon his or her homestead even though it remains his or her primary residence by notifying the property appraiser of the county where the homestead is located. This notification must be in writing and delivered at the same time as or before timely filing a new application for homestead exemption on the property.

(g) In order to have his or her homestead property assessed under this subsection, a person must file a form provided by the department as an attachment to the application for homestead exemption. The form, which must include a sworn statement attesting to the applicant’s entitlement to assessment under this subsection, shall be considered sufficient documentation for applying for assessment under this subsection. The department shall require by rule that the required form be submitted with the application for homestead exemption under the timeframes and processes set forth in chapter 196 to the extent practicable.

(h)1. If the previous homestead was located in a different county than the new homestead, the property appraiser in the county where the new homestead is located must transmit a copy of the completed form together with a completed application for homestead exemption to the property appraiser in the county where the previous homestead was located. If the previous homesteads of applicants for transfer were in more than one

county, each applicant from a different county must submit a separate form.

2. The property appraiser in the county where the previous homestead was located must return information to the property appraiser in the county where the new homestead is located by April 1 or within 2 weeks after receipt of the completed application from that property appraiser, whichever is later. As part of the information returned, the property appraiser in the county where the previous homestead was located must provide sufficient information concerning the previous homestead to allow the property appraiser in the county where the new homestead is located to calculate the amount of the assessment limitation difference which may be transferred and must certify whether the previous homestead was abandoned and has been or will be reassessed at just value or reassessed according to the provisions of this subsection as of the January 1 following its abandonment.

3. Based on the information provided on the form from the property appraiser in the county where the previous homestead was located, the property appraiser in the county where the new homestead is located shall calculate the amount of the assessment limitation difference which may be transferred and apply the difference to the January 1 assessment of the new homestead.

4. All property appraisers having information-sharing agreements with the department are authorized to share confidential tax information with each other pursuant to s. 195.084, including social security numbers and linked information on the forms provided pursuant to this section.

5. The transfer of any limitation is not final until any values on the assessment roll on which the transfer is based are final. If such values are final after tax notice bills have been sent, the property appraiser shall make appropriate corrections and a corrected tax notice bill shall be sent. Any values that are under administrative or judicial review shall be noticed to the tribunal or court for accelerated hearing and resolution so that the intent of this subsection may be carried out.

6. If the property appraiser in the county where the previous homestead was located has not provided information sufficient to identify the previous homestead and the assessment limitation difference is transferable, the taxpayer may file an action in circuit court in that county seeking to establish that the property appraiser must provide such information.

7. If the information from the property appraiser in the county where the previous homestead was located is provided after the procedures in this section are exercised, the property appraiser in the county where the new homestead is located shall make appropriate corrections and a corrected tax notice and tax bill shall be sent.

8. This subsection does not authorize the consideration or adjustment of the just, assessed, or taxable value of the previous homestead property.

9. The property appraiser in the county where the new homestead is located shall promptly notify a taxpayer if the information received, or available, is insufficient to identify the previous homestead and the amount of the assessment limitation difference which is transferable. Such notification shall be sent on or before July 1 as specified in s. 196.151.

10. The taxpayer may correspond with the property appraiser in the county where the previous homestead was located to further seek to identify the homestead and the amount of the assessment limitation difference which is transferable.

11. If the property appraiser in the county where the previous homestead was located supplies sufficient information to the property appraiser in the county where the new homestead is located, such information shall be considered timely if provided in time for inclusion on the notice of proposed property taxes sent pursuant to ss. 194.011 and 200.065(1).

12. If the property appraiser has not received information sufficient to identify the previous homestead and the amount of the assessment limitation difference which is transferable before mailing the notice of proposed property taxes, the taxpayer may file a petition with the value adjustment board in the county where the new homestead is located.

(i) Any person who is qualified to have his or her property assessed under this subsection and who fails to file an application by March 1 may file an application for assessment under this subsection and may, pursuant to s. 194.011(3), file a petition with the value adjustment board requesting that an assessment under this subsection be granted. Such petition may be filed at any time during the taxable year on or before the 25th day following the mailing of the notice by the property appraiser as provided in s. 194.011(1). Notwithstanding s. 194.013, such person must pay a nonrefundable fee of $15 upon filing the petition. Upon reviewing the petition, if the person is qualified to receive the assessment under this subsection and demonstrates particular extenuating circumstances judged by the

property appraiser or the value adjustment board to warrant granting the assessment, the property appraiser or the value adjustment board may grant an assessment under this subsection. For the 2008 assessments, all petitioners for assessment under this subsection shall be considered to have demonstrated particular extenuating circumstances.

(j) Any person who is qualified to have his or her property assessed under this subsection and who fails to timely file an application for his or her new homestead in the first year following eligibility may file in a subsequent year. The assessment reduction shall be applied to assessed value in the year the transfer is first approved, and refunds of tax may not be made for previous years.

(k) The property appraisers of the state shall, as soon as practicable after March 1 of each year and on or before July 1 of that year, carefully consider all applications for assessment under this subsection which have been filed in their respective offices on or before March 1 of that year. If, upon investigation, the property appraiser finds that the applicant is entitled to assessment under this subsection, the property appraiser shall make such entries upon the tax rolls of the county as are necessary to allow the assessment. If, after due consideration, the property appraiser finds that the applicant is not entitled under the law to assessment under this subsection, the property appraiser shall immediately make out a notice of such disapproval, giving his or her reasons therefor, and a copy of the notice must be served upon the applicant by the property appraiser either by personal delivery or by registered mail to the post office address given by the

applicant. The applicant may appeal the decision of the property appraiser refusing to allow the assessment under this subsection to the value adjustment board, and the board shall review the application and evidence presented to the property appraiser upon which the applicant based the claim and shall hear the applicant in person or by agent on behalf of his or her right to such assessment. Such appeal shall be heard by an attorney special magistrate if the value adjustment board uses special magistrates. The value adjustment board shall reverse the decision of the property appraiser in the cause and grant assessment under this subsection to the applicant if, in its judgment, the applicant is entitled to be granted the assessment or shall affirm the decision of the property appraiser. The action of the board is final in the cause unless the applicant, within 15 days following the date of refusal of the application by the board, files in the circuit court of the county in which the homestead is located a proceeding against the property appraiser for a declaratory judgment as is provided by chapter 86 or other appropriate proceeding. The failure of the taxpayer to appear before the property appraiser or value adjustment board or to file any paper other than the application as provided in this subsection does not constitute any bar to or defense in the proceedings.

(9) Erroneous assessments of homestead property assessed under this section may be corrected in the following manner:

(a) If errors are made in arriving at any assessment under this section due to a material mistake of fact concerning an essential characteristic of the property, the just value and assessed value must be recalculated for every such year,

including the year in which the mistake occurred.

(b) If changes, additions, or improvements are not assessed at just value as of the first January 1 after they were substantially completed, the property appraiser shall determine the just value for such changes, additions, or improvements for the year they were substantially completed. Assessments for subsequent years shall be corrected, applying this section if applicable.

(c) If back taxes are due pursuant to s. 193.092, the corrections made pursuant to this subsection shall be used to calculate such back taxes.

(10) If the property appraiser determines that for any year or years within the prior 10 years a person who was not entitled to the homestead property assessment limitation granted under this section was granted the homestead property assessment limitation, the property appraiser making such determination shall record in the public records of the county a notice of tax lien against any property owned by that person in the county, and such property must be identified in the notice of tax lien. Such property that is situated in this state is subject to the unpaid taxes, plus a penalty of 50 percent of the unpaid taxes for each year and 15 percent interest per annum. However, when a person entitled to exemption pursuant to s. 196.031 inadvertently receives the limitation pursuant to this section following a change of ownership, the assessment of such property must be corrected as provided in paragraph (9)(a), and the person need not pay the unpaid taxes, penalties, or interest.

Section 2. If House Joint Resolution 381 or Senate Joint Resolution 658, 2011 Regular Session, is approved by a vote of


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the electors in a special election held concurrent with the presidential preference primary in 2012, of section 193.155, Florida Statutes, is amended to read:

193.155 Homestead assessments. ~~Homestead property shall be assessed at just value as of January 1, 1994.~~ Property receiving the homestead exemption ~~after January 1, 1994,~~ shall be assessed at just value as of January 1 of the year in which the property receives the exemption unless the provisions of subsection (8) apply.

(1) Beginning in ~~1995, or~~ the year following the year the property receives a homestead exemption~~, whichever is later~~, the property shall be reassessed annually on January 1. Except for changes, additions, reductions, or improvements to homestead property assessed as provided in subsection (4):

(a) Any change resulting from such reassessment shall not exceed the lower of the following:

1.~~(a)~~ Three percent of the assessed value of the property for the prior year; or

2.~~(b)~~ The percentage change in the Consumer Price Index for All Urban Consumers, U.S. City Average, all items 1967=100, or successor reports for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics.

(b) The Legislature may provide by general law that an assessment may not increase if the just value of the property is less than the just value of the property on the preceding January 1.

(2) If the assessed value of the property as calculated under subsection (1) exceeds the just value, the assessed value

of the property shall be lowered to the just value of the property.

(3)(a) Except as provided in this subsection or subsection (8), property assessed under this section shall be assessed at just value as of January 1 of the year following a change of ownership. Thereafter, the annual changes in the assessed value of the property are subject to the limitations in subsections (1) and (2). For the purpose of this section, a change of ownership means any sale, foreclosure, or transfer of legal title or beneficial title in equity to any person, except as provided in this subsection. There is no change of ownership if:

1. Subsequent to the change or transfer, the same person is entitled to the homestead exemption as was previously entitled and:

a. The transfer of title is to correct an error;

b. The transfer is between legal and equitable title or equitable and equitable title and no additional person applies for a homestead exemption on the property; or

c. The change or transfer is by means of an instrument in which the owner is listed as both grantor and grantee of the real property and one or more other individuals are additionally named as grantee. However, if any individual who is additionally named as a grantee applies for a homestead exemption on the property, the application shall be considered a change of ownership;

2. Legal or equitable title is changed or transferred between husband and wife, including a change or transfer to a surviving spouse or a transfer due to a dissolution of marriage;

3. The transfer occurs by operation of law to the surviving


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spouse or minor child or children under s. 732.401; or

4. Upon the death of the owner, the transfer is between the owner and another who is a permanent resident and is legally or naturally dependent upon the owner.

(b) For purposes of this subsection, a leasehold interest that qualifies for the homestead exemption under s. 196.031 or s. 196.041 shall be treated as an equitable interest in the property.

(4)(a) Except as provided in paragraph (b), changes, additions, or improvements to homestead property shall be assessed at just value as of the first January 1 after the changes, additions, or improvements are substantially completed.

(b) Changes, additions, or improvements that replace all or a portion of homestead property damaged or destroyed by misfortune or calamity shall not increase the homestead property's assessed value when the square footage of the homestead property as changed or improved does not exceed 110 percent of the square footage of the homestead property before the damage or destruction. Additionally, the homestead property's assessed value shall not increase if the total square footage of the homestead property as changed or improved does not exceed 1,500 square feet. Changes, additions, or improvements that do not cause the total to exceed 110 percent of the total square footage of the homestead property before the damage or destruction or that do not cause the total to exceed 1,500 total square feet shall be reassessed as provided under subsection (1). The homestead property's assessed value shall be increased by the just value of that portion of the changed or improved homestead property which is in excess of 110 percent of

the square footage of the homestead property before the damage or destruction or of that portion exceeding 1,500 square feet. Homestead property damaged or destroyed by misfortune or calamity which, after being changed or improved, has a square footage of less than 100 percent of the homestead property's total square footage before the damage or destruction shall be assessed pursuant to subsection (5). This paragraph applies to changes, additions, or improvements commenced within 3 years after the January 1 following the damage or destruction of the homestead.

(c) Changes, additions, or improvements that replace all or a portion of real property that was damaged or destroyed by misfortune or calamity shall be assessed upon substantial completion as if such damage or destruction had not occurred and in accordance with paragraph (b) if the owner of such property:

1. Was permanently residing on such property when the damage or destruction occurred;

2. Was not entitled to receive homestead exemption on such property as of January 1 of that year; and

3. Applies for and receives homestead exemption on such property the following year.

(d) Changes, additions, or improvements include improvements made to common areas or other improvements made to property other than to the homestead property by the owner or by an owner association, which improvements directly benefit the homestead property. Such changes, additions, or improvements shall be assessed at just value, and the just value shall be apportioned among the parcels benefiting from the improvement.

(5) When property is destroyed or removed and not replaced,

the assessed value of the parcel shall be reduced by the assessed value attributable to the destroyed or removed property.

(6) Only property that receives a homestead exemption is subject to this section. No portion of property that is assessed solely on the basis of character or use pursuant to s. 193.461 or s. 193.501, or assessed pursuant to s. 193.505, is subject to this section. When property is assessed under s. 193.461, s. 193.501, or s. 193.505 and contains a residence under the same ownership, the portion of the property consisting of the residence and curtilage must be assessed separately, pursuant to s. 193.011, for the assessment to be subject to the limitation in this section.

(7) If a person received a homestead exemption limited to that person's proportionate interest in real property, the provisions of this section apply only to that interest.

(8) Property assessed under this section shall be assessed at less than just value when the person who establishes a new homestead has received a homestead exemption as of January 1 of either of the 2 immediately preceding years. ~~A person who establishes a new homestead as of January 1, 2008, is entitled to have the new homestead assessed at less than just value only if that person received a homestead exemption on January 1, 2007, and only if this subsection applies retroactive to January 1, 2008.~~ For purposes of this subsection, a husband and wife who owned and both permanently resided on a previous homestead shall each be considered to have received the homestead exemption even though only the husband or the wife applied for the homestead exemption on the previous homestead. The assessed value of the

newly established homestead shall be determined as provided in this subsection.

(a) If the just value of the new homestead as of January 1 is greater than or equal to the just value of the immediate prior homestead as of January 1 of the year in which the immediate prior homestead was abandoned, the assessed value of the new homestead shall be the just value of the new homestead minus an amount equal to the lesser of $500,000 or the difference between the just value and the assessed value of the immediate prior homestead as of January 1 of the year in which the prior homestead was abandoned. Thereafter, the homestead shall be assessed as provided in this section.

(b) If the just value of the new homestead as of January 1 is less than the just value of the immediate prior homestead as of January 1 of the year in which the immediate prior homestead was abandoned, the assessed value of the new homestead shall be equal to the just value of the new homestead divided by the just value of the immediate prior homestead and multiplied by the assessed value of the immediate prior homestead. However, if the difference between the just value of the new homestead and the assessed value of the new homestead calculated pursuant to this paragraph is greater than $500,000, the assessed value of the new homestead shall be increased so that the difference between the just value and the assessed value equals $500,000. Thereafter, the homestead shall be assessed as provided in this section.

(c) If two or more persons who have each received a homestead exemption as of January 1 of either of the 2 immediately preceding years and who would otherwise be eligible

to have a new homestead property assessed under this subsection establish a single new homestead, the reduction from just value is limited to the higher of the difference between the just value and the assessed value of either of the prior eligible homesteads as of January 1 of the year in which either of the eligible prior homesteads was abandoned, but may not exceed $500,000.

(d) If two or more persons abandon jointly owned and jointly titled property that received a homestead exemption as of January 1 of either of the 2 immediately preceding years, and one or more such persons who were entitled to and received a homestead exemption on the abandoned property establish a new homestead that would otherwise be eligible for assessment under this subsection, each such person establishing a new homestead is entitled to a reduction from just value for the new homestead equal to the just value of the prior homestead minus the assessed value of the prior homestead divided by the number of owners of the prior homestead who received a homestead exemption, unless the title of the property contains specific ownership shares, in which case the share of reduction from just value shall be proportionate to the ownership share. In calculating the assessment reduction to be transferred from a prior homestead that has an assessment reduction for living quarters of parents or grandparents pursuant to s. 193.703, the value calculated pursuant to s. 193.703(6) must first be added back to the assessed value of the prior homestead. The total reduction from just value for all new homesteads established under this paragraph may not exceed $500,000. There shall be no reduction from just value of any new homestead unless the prior

homestead is reassessed at just value or is reassessed under this subsection as of January 1 after the abandonment occurs.

(e) If one or more persons who previously owned a single homestead and each received the homestead exemption qualify for a new homestead where all persons who qualify for homestead exemption in the new homestead also qualified for homestead exemption in the previous homestead without an additional person qualifying for homestead exemption in the new homestead, the reduction in just value shall be calculated pursuant to paragraph (a) or paragraph (b), without application of paragraph (c) or paragraph (d).

(f) For purposes of receiving an assessment reduction pursuant to this subsection, a person entitled to assessment under this section may abandon his or her homestead even though it remains his or her primary residence by notifying the property appraiser of the county where the homestead is located. This notification must be in writing and delivered at the same time as or before timely filing a new application for homestead exemption on the property.

(g) In order to have his or her homestead property assessed under this subsection, a person must file a form provided by the department as an attachment to the application for homestead exemption. The form, which must include a sworn statement attesting to the applicant’s entitlement to assessment under this subsection, shall be considered sufficient documentation for applying for assessment under this subsection. The department shall require by rule that the required form be submitted with the application for homestead exemption under the timeframes and processes set forth in chapter 196 to the extent

practicable.

(h)1. If the previous homestead was located in a different county than the new homestead, the property appraiser in the county where the new homestead is located must transmit a copy of the completed form together with a completed application for homestead exemption to the property appraiser in the county where the previous homestead was located. If the previous homesteads of applicants for transfer were in more than one county, each applicant from a different county must submit a separate form.

2. The property appraiser in the county where the previous homestead was located must return information to the property appraiser in the county where the new homestead is located by April 1 or within 2 weeks after receipt of the completed application from that property appraiser, whichever is later. As part of the information returned, the property appraiser in the county where the previous homestead was located must provide sufficient information concerning the previous homestead to allow the property appraiser in the county where the new homestead is located to calculate the amount of the assessment limitation difference which may be transferred and must certify whether the previous homestead was abandoned and has been or will be reassessed at just value or reassessed according to the provisions of this subsection as of the January 1 following its abandonment.

3. Based on the information provided on the form from the property appraiser in the county where the previous homestead was located, the property appraiser in the county where the new homestead is located shall calculate the amount of the

assessment limitation difference which may be transferred and apply the difference to the January 1 assessment of the new homestead.

4. All property appraisers having information-sharing agreements with the department are authorized to share confidential tax information with each other pursuant to s. 195.084, including social security numbers and linked information on the forms provided pursuant to this section.

5. The transfer of any limitation is not final until any values on the assessment roll on which the transfer is based are final. If such values are final after tax notice bills have been sent, the property appraiser shall make appropriate corrections and a corrected tax notice bill shall be sent. Any values that are under administrative or judicial review shall be noticed to the tribunal or court for accelerated hearing and resolution so that the intent of this subsection may be carried out.

6. If the property appraiser in the county where the previous homestead was located has not provided information sufficient to identify the previous homestead and the assessment limitation difference is transferable, the taxpayer may file an action in circuit court in that county seeking to establish that the property appraiser must provide such information.

7. If the information from the property appraiser in the county where the previous homestead was located is provided after the procedures in this section are exercised, the property appraiser in the county where the new homestead is located shall make appropriate corrections and a corrected tax notice and tax bill shall be sent.

8. This subsection does not authorize the consideration or

adjustment of the just, assessed, or taxable value of the previous homestead property.

9. The property appraiser in the county where the new homestead is located shall promptly notify a taxpayer if the information received, or available, is insufficient to identify the previous homestead and the amount of the assessment limitation difference which is transferable. Such notification shall be sent on or before July 1 as specified in s. 196.151.

10. The taxpayer may correspond with the property appraiser in the county where the previous homestead was located to further seek to identify the homestead and the amount of the assessment limitation difference which is transferable.

11. If the property appraiser in the county where the previous homestead was located supplies sufficient information to the property appraiser in the county where the new homestead is located, such information shall be considered timely if provided in time for inclusion on the notice of proposed property taxes sent pursuant to ss. 194.011 and 200.065(1).

12. If the property appraiser has not received information sufficient to identify the previous homestead and the amount of the assessment limitation difference which is transferable before mailing the notice of proposed property taxes, the taxpayer may file a petition with the value adjustment board in the county where the new homestead is located.

(i) Any person who is qualified to have his or her property assessed under this subsection and who fails to file an application by March 1 may file an application for assessment under this subsection and may, pursuant to s. 194.011(3), file a petition with the value adjustment board requesting that an

assessment under this subsection be granted. Such petition may be filed at any time during the taxable year on or before the 25th day following the mailing of the notice by the property appraiser as provided in s. 194.011(1). Notwithstanding s. 194.013, such person must pay a nonrefundable fee of $15 upon filing the petition. Upon reviewing the petition, if the person is qualified to receive the assessment under this subsection and demonstrates particular extenuating circumstances judged by the property appraiser or the value adjustment board to warrant granting the assessment, the property appraiser or the value adjustment board may grant an assessment under this subsection. For the 2008 assessments, all petitioners for assessment under this subsection shall be considered to have demonstrated particular extenuating circumstances.

(j) Any person who is qualified to have his or her property assessed under this subsection and who fails to timely file an application for his or her new homestead in the first year following eligibility may file in a subsequent year. The assessment reduction shall be applied to assessed value in the year the transfer is first approved, and refunds of tax may not be made for previous years.

(k) The property appraisers of the state shall, as soon as practicable after March 1 of each year and on or before July 1 of that year, carefully consider all applications for assessment under this subsection which have been filed in their respective offices on or before March 1 of that year. If, upon investigation, the property appraiser finds that the applicant is entitled to assessment under this subsection, the property appraiser shall make such entries upon the tax rolls of the

county as are necessary to allow the assessment. If, after due consideration, the property appraiser finds that the applicant is not entitled under the law to assessment under this subsection, the property appraiser shall immediately make out a notice of such disapproval, giving his or her reasons therefor, and a copy of the notice must be served upon the applicant by the property appraiser either by personal delivery or by registered mail to the post office address given by the applicant. The applicant may appeal the decision of the property appraiser refusing to allow the assessment under this subsection to the value adjustment board, and the board shall review the application and evidence presented to the property appraiser upon which the applicant based the claim and shall hear the applicant in person or by agent on behalf of his or her right to such assessment. Such appeal shall be heard by an attorney special magistrate if the value adjustment board uses special magistrates. The value adjustment board shall reverse the decision of the property appraiser in the cause and grant assessment under this subsection to the applicant if, in its judgment, the applicant is entitled to be granted the assessment or shall affirm the decision of the property appraiser. The action of the board is final in the cause unless the applicant, within 15 days following the date of refusal of the application by the board, files in the circuit court of the county in which the homestead is located a proceeding against the property appraiser for a declaratory judgment as is provided by chapter 86 or other appropriate proceeding. The failure of the taxpayer to appear before the property appraiser or value adjustment board or to file any paper other than the application as

provided in this subsection does not constitute any bar to or defense in the proceedings.

(9) Erroneous assessments of homestead property assessed under this section may be corrected in the following manner:

(a) If errors are made in arriving at any assessment under this section due to a material mistake of fact concerning an essential characteristic of the property, the just value and assessed value must be recalculated for every such year, including the year in which the mistake occurred.

(b) If changes, additions, or improvements are not assessed at just value as of the first January 1 after they were substantially completed, the property appraiser shall determine the just value for such changes, additions, or improvements for the year they were substantially completed. Assessments for subsequent years shall be corrected, applying this section if applicable.

(c) If back taxes are due pursuant to s. 193.092, the corrections made pursuant to this subsection shall be used to calculate such back taxes.

(10) If the property appraiser determines that for any year or years within the prior 10 years a person who was not entitled to the homestead property assessment limitation granted under this section was granted the homestead property assessment limitation, the property appraiser making such determination shall record in the public records of the county a notice of tax lien against any property owned by that person in the county, and such property must be identified in the notice of tax lien. Such property that is situated in this state is subject to the unpaid taxes, plus a penalty of 50 percent of the unpaid taxes


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for each year and 15 percent interest per annum. However, when a person entitled to exemption pursuant to s. 196.031 inadvertently receives the limitation pursuant to this section following a change of ownership, the assessment of such property must be corrected as provided in paragraph (9)(a), and the person need not pay the unpaid taxes, penalties, or interest.

Section 3. If House Joint Resolution 381 or Senate Joint Resolution 658, 2011 Regular Session, is approved by a vote of the electors in the general election held in November 2012, subsection (3) of section 193.1554, Florida Statutes, is amended to read:

193.1554 Assessment of nonhomestead residential property.—

(3) Beginning in 2013 ~~2009~~, or the year following the year the property is placed on the tax roll, whichever is later, the property shall be reassessed annually on January 1. Except for changes, additions, reductions, or improvements to nonhomestead property assessed as provided in subsection (6):

(a) Any change resulting from such reassessment may not exceed 3 ~~10~~ percent of the assessed value of the property for the prior year.

(b) The Legislature may provide by general law that an assessment may not increase if the just value of the property is less than the just value of the property on the preceding January 1.

Section 4. If House Joint Resolution 381 or Senate Joint Resolution 658, 2011 Regular Session, is approved by a vote of the electors in a special election held concurrent with the presidential preference primary in 2012, subsection (3) of section 193.1554, Florida Statutes, is amended to read:


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193.1554 Assessment of nonhomestead residential property.—

(3) Beginning in 2012 ~~2009~~, or the year following the year the property is placed on the tax roll, whichever is later, the property shall be reassessed annually on January 1. Except for changes, additions, reductions, or improvements to nonhomestead property assessed as provided in subsection (6):

(a) Any change resulting from such reassessment may not exceed 3 ~~10~~ percent of the assessed value of the property for the prior year.

(b) The Legislature may provide by general law that an assessment may not increase if the just value of the property is less than the just value of the property on the preceding January 1.

Section 5. If House Joint Resolution 381 or Senate Joint Resolution 658, 2011 Regular Session, is approved by a vote of the electors in the general election held in November 2012, subsection (3) of section 193.1555, Florida Statutes, is amended to read:

193.1555 Assessment of certain residential and nonresidential real property.—

(3) Beginning in 2013 ~~2009~~, or the year following the year the property is placed on the tax roll, whichever is later, the property shall be reassessed annually on January 1. Except for changes, additions, reductions, or improvements to nonhomestead property assessed as provided in subsection (6):

(a) Any change resulting from such reassessment may not exceed 3 ~~10~~ percent of the assessed value of the property for the prior year.

(b) The Legislature may provide by general law that an


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assessment may not increase if the just value of the property is less than the just value of the property on the preceding January 1.

Section 6. If House Joint Resolution 381 or Senate Joint Resolution 658, 2011 Regular Session, is approved by a vote of the electors in a special election held concurrent with the presidential preference primary in 2012, subsection (3) of section 193.1555, Florida Statutes, is amended to read:

193.1555 Assessment of certain residential and nonresidential real property.—

(3) Beginning in 2012 ~~2009~~, or the year following the year the property is placed on the tax roll, whichever is later, the property shall be reassessed annually on January 1. Except for changes, additions, reductions, or improvements to nonhomestead property assessed as provided in subsection (6):

(a) Any change resulting from such reassessment may not exceed 3 ~~10~~ percent of the assessed value of the property for the prior year.

(b) The Legislature may provide by general law that an assessment may not increase if the just value of the property is less than the just value of the property on the preceding January 1.

Section 7. If House Joint Resolution 381 or Senate Joint Resolution 658, 2011 Regular Session, is approved by a vote of the electors in the general election held in November 2012, section 196.078, Florida Statutes, is created to read:

196.078 Additional homestead exemption for a first-time Florida homesteader.—

(1) As used in this section, the term "first-time Florida

homesteader" means a person who establishes the right to receive the homestead exemption provided in s. 196.031 within 1 year after purchasing the homestead property and who has not owned property in the previous 3 years to which the homestead exemption provided in s. 196.031(1)(a) applied.

(2) Every first-time Florida homesteader is entitled to an additional homestead exemption in an amount equal to 50 percent of the homestead property's just value on January 1 of the year the homestead is established for all levies other than school district levies. The additional exemption applies for a period of 5 years or until the year the property is sold, whichever occurs first. The amount of the additional exemption may not exceed $200,000 and shall be reduced in each subsequent year by an amount equal to 20 percent of the amount of the additional exemption received in the year the homestead was established or by an amount equal to the difference between the just value of the property and the assessed value of the property determined under s. 193.155, whichever is greater. Not more than one exemption provided under this subsection is allowed per homestead property. The additional exemption applies to property purchased on or after January 1, 2012, but is not available in the sixth and subsequent years after the additional exemption is first received.

(3) The property appraiser shall require a first-time Florida homesteader claiming an exemption under this section to submit, not later than March 1 on a form prescribed by the Department of Revenue, a sworn statement attesting that the taxpayer, and each other person who holds legal or equitable title to the property, has not owned property in the prior 3

years that received the homestead exemption provided by s. 196.031. In order for the exemption to be retained upon the addition of another person to the title to the property, the person added must also submit, not later than the subsequent March 1 on a form prescribed by the department, a sworn statement attesting that he or she has not owned property in the prior 3 years that received the homestead exemption provided by s. 196.031.

(4) Sections 196.131 and 196.161 apply to the exemption provided in this section.

Section 8. If House Joint Resolution 381 or Senate Joint Resolution 658, 2011 Regular Session, is approved by a vote of the electors in a special election held concurrent with the presidential preference primary in 2012, section 196.078, Florida Statutes, is created to read:

196.078 Additional homestead exemption for a first-time Florida homesteader.—

(1) As used in this section, the term "first-time Florida homesteader" means a person who establishes the right to receive the homestead exemption provided in s. 196.031 within 1 year after purchasing the homestead property and who has not owned property in the previous 3 years to which the homestead exemption provided in s. 196.031(1)(a) applied.

(2) Every first-time Florida homesteader is entitled to an additional homestead exemption in an amount equal to 50 percent of the homestead property's just value on January 1 of the year the homestead is established for all levies other than school district levies. The additional exemption applies for a period of 5 years or until the year the property is sold, whichever

occurs first. The amount of the additional exemption may not exceed $200,000 and shall be reduced in each subsequent year by an amount equal to 20 percent of the amount of the additional exemption received in the year the homestead was established or by an amount equal to the difference between the just value of the property and the assessed value of the property determined under s. 193.155, whichever is greater. Not more than one exemption provided under this subsection is allowed per homestead property. The additional exemption applies to property purchased on or after January 1, 2011, but is not available in the sixth and subsequent years after the additional exemption is first received.

(3) The property appraiser shall require a first-time Florida homesteader claiming an exemption under this section to submit, not later than March 1 on a form prescribed by the Department of Revenue, a sworn statement attesting that the taxpayer, and each other person who holds legal or equitable title to the property, has not owned property in the prior 3 years that received the homestead exemption provided by s. 196.031. In order for the exemption to be retained upon the addition of another person to the title to the property, the person added must also submit, not later than the subsequent March 1 on a form prescribed by the department, a sworn statement attesting that he or she has not owned property in the prior 3 years that received the homestead exemption provided by s. 196.031.

(4) Sections 196.131 and 196.161 apply to the exemption provided in this section.

Section 9. (1) In anticipation of implementing this act,


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the executive director of the Department of Revenue is authorized, and all conditions are deemed met, to adopt emergency rules under ss. 120.536(1) and 120.54(4), Florida Statutes, to make necessary changes and preparations so that forms, methods, and data records, electronic or otherwise, are ready and in place if sections 2, 4, 6, and 8 or sections 1, 3, 5, and 7 of this act become law.

(2) Notwithstanding any other provision of law, such emergency rules shall remain in effect for 18 months after the date of adoption and may be renewed during the pendency of procedures to adopt rules addressing the subject of the emergency rules.

Section 10. This act shall take effect upon becoming a law, except that the sections of this act that take effect upon the approval of House Joint Resolution 381 or Senate Joint Resolution 658, 2011 Regular Session, by a vote of the electors in a special election held concurrent with the presidential preference primary in 2012 shall apply retroactively to the 2012 tax roll if the revision of the State Constitution contained in House Joint Resolution 381 or Senate Joint Resolution 658, 2011 Regular Session, is approved by a vote of the electors in a special election held concurrent with the presidential preference primary in 2012; or the sections of this act that take effect upon the approval of House Joint Resolution 381 or Senate Joint Resolution 658, 2011 Regular Session, by a vote of the electors in the general election held in November 2012 shall apply to the 2013 tax roll if the revision of the State Constitution contained in House Joint Resolution 381 or Senate Joint Resolution 658, 2011 Regular Session, is approved by a

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vote of the electors in the general election held in November 2012.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to ad valorem taxation; amending s. 193.155, F.S.; revising provisions relating to annual reassessment of property; providing that an assessment may not increase if the just value of the property is less than the just value of the property on the preceding January 1; deleting an obsolete provision; amending s. 193.1554, F.S.; providing exceptions to reducing the amount that any change in the value of nonhomestead residential property resulting from an annual reassessment may exceed the assessed value of the property for the prior year; providing exceptions; providing that an assessment may not increase if the just value of the property is less than the just value of the property on the preceding date of assessment provided by law; amending s. 193.1555, F.S.; reducing the amount that any change in the value of certain residential and nonresidential real property resulting from an annual reassessment may exceed the assessed value of the property for the prior year; providing exceptions; providing that an assessment may not


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increase if the just value of the property is less than the just value of the property on the preceding date of assessment provided by law; creating s. 196.078, F.S.; providing a definition; providing a first-time Florida homesteader with an additional homestead exemption; providing for calculation of the exemption; providing for the applicability period of the exemption; providing for an annual reduction in the exemption during the applicability period; providing application procedures; providing for applicability of specified provisions; providing for contingent effect of provisions and varying dates of application depending on the adoption and adoption date of specified joint resolutions; authorizing the Department of Revenue to adopt emergency rules; providing for application and renewal of emergency rules; providing for certain contingent effect and retroactive application; providing an effective date.


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LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Joyner) recommended the following:

Senate Substitute for Amendment (901724) (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. If House Joint Resolution 381 or Senate Joint Resolution 658, 2011 Regular Session, is approved by a vote of the electors in the general election held in November 2012, subsection (3) of section 193.1554, Florida Statutes, is amended to read:

193.1554 Assessment of nonhomestead residential property.—

(3) Beginning in 2013 ~~2009~~, or the year following the year the property is placed on the tax roll, whichever is later, the

property shall be reassessed annually on January 1. Any change resulting from such reassessment may not exceed 3 ~~10~~ percent of the assessed value of the property for the prior year, except as provided in subsection (6).

Section 2. If House Joint Resolution 381 or Senate Joint Resolution 658, 2011 Regular Session, is approved by a vote of the electors in a special election held concurrent with the presidential preference primary in 2012, subsection (3) of section 193.1554, Florida Statutes, is amended to read:

193.1554 Assessment of nonhomestead residential property.—

(3) Beginning in 2012 ~~2009~~, or the year following the year the property is placed on the tax roll, whichever is later, the property shall be reassessed annually on January 1. Any change resulting from such reassessment may not exceed 3 ~~10~~ percent of the assessed value of the property for the prior year, except as provided in subsection (6).

Section 3. If House Joint Resolution 381 or Senate Joint Resolution 658, 2011 Regular Session, is approved by a vote of the electors in the general election held in November 2012, subsection (3) of section 193.1555, Florida Statutes, is amended to read:

193.1555 Assessment of certain residential and nonresidential real property.—

(3) Beginning in 2013 ~~2009~~, or the year following the year the property is placed on the tax roll, whichever is later, the property shall be reassessed annually on January 1. Any change resulting from such reassessment may not exceed 3 ~~10~~ percent of the assessed value of the property for the prior year, except as provided in subsection (6).

Section 4. If House Joint Resolution 381 or Senate Joint Resolution 658, 2011 Regular Session, is approved by a vote of the electors in a special election held concurrent with the presidential preference primary in 2012, subsection (3) of section 193.1555, Florida Statutes, is amended to read:

193.1555 Assessment of certain residential and nonresidential real property.—

(3) Beginning in 2012 ~~2009~~, or the year following the year the property is placed on the tax roll, whichever is later, the property shall be reassessed annually on January 1. Any change resulting from such reassessment may not exceed 3 ~~10~~ percent of the assessed value of the property for the prior year, except as provided in subsection (6).

Section 5. If House Joint Resolution 381 or Senate Joint Resolution 658, 2011 Regular Session, is approved by a vote of the electors in the general election held in November 2012, section 196.078, Florida Statutes, is created to read:

196.078 Additional homestead exemption for a first-time Florida homesteader.—

(1) As used in this section, the term "first-time Florida homesteader" means a person who establishes the right to receive the homestead exemption provided in s. 196.031 within 1 year after purchasing the homestead property and who has not owned property in the previous 3 years to which the homestead exemption provided in s. 196.031(1)(a) applied.

(2) Every first-time Florida homesteader is entitled to an additional homestead exemption in an amount equal to 50 percent of the homestead property's just value on January 1 of the year the homestead is established for all levies other than school

district levies. The additional exemption applies for a period of 5 years or until the year the property is sold, whichever occurs first. The amount of the additional exemption may not exceed $200,000 and shall be reduced in each subsequent year by an amount equal to 20 percent of the amount of the additional exemption received in the year the homestead was established or by an amount equal to the difference between the just value of the property and the assessed value of the property determined under s. 193.155, whichever is greater. Only one exemption provided under this subsection is allowed per homestead property. The additional exemption applies to property purchased on or after January 1, 2012, but is not available in the 6th and subsequent years after the additional exemption is first received.

(3) The property appraiser shall require a first-time Florida homesteader claiming an exemption under this section to submit by March 1 on a form prescribed by the Department of Revenue a sworn statement attesting that the taxpayer, and each other person who holds legal or equitable title to the property, has not owned property in the prior 3 years which received the homestead exemption provided by s. 196.031. In order for the exemption to be retained upon the addition of another person to the title to the property, the person added must also submit by the subsequent March 1 on a form prescribed by the department a sworn statement attesting that he or she has not owned property in the prior 3 years which received the homestead exemption provided by s. 196.031.

(4) Sections 196.131 and 196.161 apply to the exemption provided in this section.


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Section 6. If House Joint Resolution 381 or Senate Joint Resolution 658, 2011 Regular Session, is approved by a vote of the electors in a special election held concurrent with the presidential preference primary in 2012, section 196.078, Florida Statutes, is created to read:

196.078 Additional homestead exemption for a first-time Florida homesteader.—

(1) As used in this section, the term "first-time Florida homesteader" means a person who establishes the right to receive the homestead exemption provided in s. 196.031 within 1 year after purchasing the homestead property and who has not owned property in the previous 3 years to which the homestead exemption provided in s. 196.031(1)(a) applied.

(2) Every first-time Florida homesteader is entitled to an additional homestead exemption in an amount equal to 50 percent of the homestead property's just value on January 1 of the year the homestead is established for all levies other than school district levies. The additional exemption applies for a period of 5 years or until the year the property is sold, whichever occurs first. The amount of the additional exemption may not exceed $200,000 and shall be reduced in each subsequent year by an amount equal to 20 percent of the amount of the additional exemption received in the year the homestead was established or by an amount equal to the difference between the just value of the property and the assessed value of the property determined under s. 193.155, whichever is greater. Only one exemption provided under this subsection is allowed per homestead property. The additional exemption applies to property purchased on or after January 1, 2011, but is not available in the 6th and

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subsequent years after the additional exemption is first received.

(3) The property appraiser shall require a first-time Florida homesteader claiming an exemption under this section to submit by March 1 on a form prescribed by the Department of Revenue a sworn statement attesting that the taxpayer, and each other person who holds legal or equitable title to the property, has not owned property in the prior 3 years which received the homestead exemption provided by s. 196.031. In order for the exemption to be retained upon the addition of another person to the title to the property, the person added must also submit by the subsequent March 1 on a form prescribed by the department a sworn statement attesting that he or she has not owned property in the prior 3 years which received the homestead exemption provided by s. 196.031.

(4) Sections 196.131 and 196.161 apply to the exemption provided in this section.

Section 7. (1) In anticipation of implementing this act, the executive director of the Department of Revenue is authorized, and all conditions are deemed met, to adopt emergency rules under ss. 120.536(1) and 120.54(4), Florida Statutes, to make necessary changes and preparations so that forms, methods, and data records, electronic or otherwise, are ready and in place if sections 2, 4, and 6, or sections 1, 3, and 5 of this act become law.

(2) Notwithstanding any other provision of law, such emergency rules shall remain in effect for 18 months after the date of adoption and may be renewed during the pendency of procedures to adopt rules addressing the subject of the

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emergency rules.

Section 8. This act shall take effect upon becoming a law, except that the sections of this act which take effect upon the approval of House Joint Resolution 381 or Senate Joint Resolution 658, 2011 Regular Session, by a vote of the electors in a special election held concurrent with the presidential preference primary in 2012 apply retroactively to the 2012 tax roll if the revision of the State Constitution contained in House Joint Resolution 381 or Senate Joint Resolution 658, 2011 Regular Session, is approved by a vote of the electors in a special election held concurrent with the presidential preference primary in 2012; or the sections of this act which take effect upon the approval of House Joint Resolution 381 or Senate Joint Resolution 658, 2011 Regular Session, by a vote of the electors in the general election held in November 2012 apply to the 2013 tax roll if the revision of the State Constitution contained in House Joint Resolution 381 or Senate Joint Resolution 658, 2011 Regular Session, is approved by a vote of the electors in the general election held in November 2012.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to ad valorem taxation; amending ss. 193.1554 and 193.1555, F.S.; reducing the amount that any change in the value of certain real property resulting from an annual reassessment may exceed the

assessed value of the property for the prior year under specified circumstances; providing exceptions; creating s. 196.078, F.S.; providing a definition; providing a first-time Florida homesteader with an additional homestead exemption; providing for calculation of the exemption; providing for the applicability period of the exemption; providing for an annual reduction in the exemption during the applicability period; providing application procedures; providing for applicability of specified provisions; providing for contingent effect of provisions and varying dates of application depending on the adoption and adoption date of specified joint resolutions; authorizing the Department of Revenue to adopt emergency rules; providing for application and renewal of emergency rules; providing for certain contingent effect and retroactive application; providing an effective date.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 1722
INTRODUCER:	Senator Fasano
SUBJECT:	Ad Valorem Taxation
DATE:	April 1, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gizzi	Yeatman	CA	**Favorable**
2.	Munroe	Maclure	JU	**Pre-meeting**
3.			BC	
4.			RC	
5.				
6.				

I. Summary:

The bill provides statutory implementation of SJR 658 or HJR 381, should either joint resolution be approved by the voters. The bill reduces the limitation on annual assessment increases applicable to non-homestead property and residential and nonresidential property from 10 percent to 3 percent. The bill also provides an additional homestead exemption for specified "first-time Florida homesteaders," as defined herein.

Upon voter approval of HJR 81 or SJR 658, this bill amends sections 193.1554 and 193.1555, Florida Statutes.

Upon voter approval of HJR 381 or SJR 658, this bill creates s. 196.078, Florida Statutes, and an undesignated section of law to provide emergency rulemaking authority to the Department of Revenue.

II. Present Situation:

Property Valuation

A.) Just Value

Article VII, section 4 of the Florida Constitution, requires that all property be assessed at just value for ad valorem tax purposes. Just value has been interpreted by the courts to mean fair

market value, or what a willing buyer would pay a willing seller for the property in an arm's length transaction.[1]

B.) Assessed Value

The Florida Constitution authorizes certain exceptions to the just valuation standard for specific types of property.[2] Agricultural land, land producing high water recharge to Florida's aquifers, and land used exclusively for noncommercial recreational purposes may be assessed solely on the basis of their character or use.[3] Livestock and tangible personal property that is held for sale as stock in trade may be assessed at a specified percentage of its value or totally exempt from taxation.[4] Counties and municipalities may authorize historic properties to be assessed solely on the basis of character and use.[5] Counties may also provide a reduction in the assessed value of property improvements on existing homesteads made to accommodate parents or grandparents that are 62 years of age or older.[6] The Legislature is authorized to prohibit the consideration of improvements to residential real property for purposes of improving the property's wind resistance or the installation of renewable energy source devices in the assessment of the property.[7] Certain working waterfront property is assessed based upon the property's current use.[8]

C.) Additional Assessment Limitations

Sections 4(g) and (h), Article VII, of the Florida Constitution, were created in January 2008, when Florida electors voted to provide an assessment limitation for residential real property containing nine or fewer units, and for all real property not subject to other specified classes or uses. For all levies, with the exception of school levies, the assessed value of property in each of these two categories may not be increased annually by more than 10 percent of the assessment in the prior year. However, residential real property containing nine or fewer units **must** be assessed at just value whenever there is a change in ownership or control. For the other real property subject to the limitation, the Legislature **may** provide that such property shall be assessed at just value after a change of ownership or control.[9]

Article XII, section 27 of the Florida Constitution, provides that the amendments creating a limitation on annual assessment increases in subsections (f) and (g) are repealed effective January 1, 2019, and that the Legislature must propose an amendment abrogating the repeal, which shall be submitted to the voters for approval or rejection on the general election ballot for 2018.

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[1] *See Walter v. Shuler*, 176 So. 2d 81 (Fla. 1965); *Deltona Corp. v. Bailey*, 336 So. 2d 1163 (Fla. 1976); *Southern Bell Tel. & Tel. Co. v. Dade County*, 275 So. 2d 4 (Fla. 1973).
[2] The constitutional provisions in article VII, section 4 of the Florida Constitution, were implemented in Part II of ch. 193, F.S.
[3] FLA. CONST. art. VII, s. 4(a).
[4] FLA. CONST. art. VII, s. 4(c).
[5] FLA. CONST. art. VII, s. 4(e).
[6] FLA. CONST. art. VII, s. 4(f).
[7] FLA. CONST. art. VII, s. 4(i).
[8] FLA. CONST. art. VII, s. 4(j).
[9] FLA. CONST. art. VII, s. 4(g) and (h).

D.) Taxable Value

The taxable value of real and tangible personal property is the assessed value minus any exemptions provided by the Florida Constitution or by Florida Statutes. Such exemptions include, but are not limited to: homestead exemptions and exemptions for property used for educational, religious, or charitable purposes.[10]

Homestead Exemption

Article VII, section 6 of the Florida Constitution, as amended in January 2008, provides that every person with legal and equitable title to real estate and who maintains the permanent residence of the owner is eligible for a $25,000 homestead tax exemption applicable to all ad valorem tax levies including school districts. An additional $25,000 homestead exemption applies to homesteads that have an assessed value greater than $50,000 and up to $75,000, excluding ad valorem taxes levied by schools.

Additional Homestead Exemption, Amendment 3 Proposed for 2010 Ballot *(2009 SJR 532)*

In 2009, the Legislature passed SJR 532 which was scheduled to go before the voters as Amendment 3 on the November 2010 ballot. The proposed amendment 3 sought to reduce the annual assessment limitation from 10 to five percent annually and to provide an additional homestead exemption for "a person or persons" who have not owned a principal residence in the previous *eight* years that is equal to *25 percent* of the just value of the homestead in the first year for all levies, up to *$100,000*. The amount of the additional homestead exemption decreases by 20 percent of the initial exemption each succeeding five years until it is no longer available in the sixth and subsequent years.[11]

However, in August 2010, the Florida Supreme Court removed Amendment 3 from the 2010 Ballot, on the grounds that the ballot title and summary were misleading and failed to comply with the constitutional accuracy requirement implicitly provided in Article XI, section 5(a) of the Florida Constitution.[12] The Court stated that the accuracy requirement is implicitly indicated in section 5(a) through the statement that the proposed amendment "shall be submitted to the electors at the next general election." Specifically, the Court stated that:

> Implicit in this provision is the requirement that the proposed amendment be *accurately* represented on the ballot; otherwise, voter approval would be a nullity.[13]

The Court further stated that the accuracy requirement is codified in Florida Statutes in s. 106.161(1), F.S., which in part provides that:

[10] FLA. CONST. art. VII, ss. 3 and 6.
[11] Fla. CS for SJR 532, 1st Eng. (2009) (Senator Lynn and others).
[12] *Roberts v. Doyle*, 43 So. 3d 654 (Fla. 2010).
[13] *Id.* at 657, citing *Armstrong v. Harris*, 773 So. 2d 7, 12 (Fla. 2000) (further reiterating that the accuracy requirement is codified in s. 106.161(1), F.S. (2009)).

> 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 . . .

In determining whether a ballot title and summary are in compliance with the accuracy requirement, courts utilize a two-prong test, asking "first, whether the ballot title and summary 'fairly inform the voter of the chief purpose of the amendment,' and second, 'whether the language of the title and summary, as written, misleads the public'."[14]

Based on this test, the Florida Supreme Court determined that the ballot title and summary for Amendment 3 were "neither accurate nor informative" and "are confusing to the average voter."[15] The Court supported its holding based on the following:

- Neither the title nor the summary provided notice that the additional exemption is only available for properties purchased on or after January 1, 2010. Stating that the "lack of an effective date renders it impossible for a voter to know which homeowners would qualify for the exemption."[16]
- The term "new homestead owners" in the title coupled with "first-time homestead" in the summary is ambiguous as it conveys the message that to be eligible for the additional exemption, the property owner must have both not owned a principal residence during the preceding eight years *and* have never previously declared the property homestead.[17]
- The use of both the terms "principal residence" and "first-time homestead" in the ballot title and summary is misleading.[18]
- There is a material omission in the ballot title and summary, as they fail to "note that the additional exemption is not available to a person whose spouse has owned a principal residence in the preceding eight years."[19]

2011 Regular Session: Senate Joint Resolution 658 and House Joint Resolution 381

A.) Senate Joint Resolution 658

Senate Joint Resolution (SJR) 658 proposes an amendment to Article VII, section 4 of the Florida Constitution, to prohibit increases in the assessed value of homestead property if the just value of the property decreases, and to reduce the limitation on annual assessment increases applicable to non-homestead property from 10 percent to three percent.[20]

SJR 658 also proposes an amendment to Article VII, section 6 of the Florida Constitution, to create an additional homestead exemption for specified homestead owners. This amendment allows individuals that are entitled to a homestead exemption under s. 6(a), Article VII of the Florida Constitution, that have not previously received a homestead exemption in the past three

[14] *Id.* at 659, citing *Florida Dep't of State v. Slough,* 992 So. 2d 142, 147 (Fla. 2008).
[15] *Id.* at 657 and 660.
[16] *Id.*
[17] *Id.*
[18] *Roberts,* at 657 and 660.
[19] *Id.* at 657 and 661.
[20] *See* CS/SJR 658 (2011 Regular Session).

years[21] to receive an additional homestead exemption equal to 50 percent of the just value of the homestead property up to $200,000 for a period of five years or until the property is sold. The additional exemption is available within one year of purchasing the homestead and would be reduced by 20 percent of the initial exemption on January 1 of each succeeding year, until it is no longer available in the sixth and subsequent years. The exemption does not apply to school levies.[22]

B.) House Joint Resolution 381

HJR 381 makes similar amendments to sections 4 and 6 of Article VII of the Florida Constitution. However, HJR 381 does not amend Article VII, section 4 of the Florida Constitution to prohibit increases in the assessed value of the homestead property if the just value of the property decreases.[23]

SJR 658 and HJR 381 also provide different effective dates:

- The reduction in non-homestead property annual assessment increases from 10 to 3 percent takes effect January 1, 2013, in SJR 658, whereas it takes effect January 1, 2012, in HJR 381.
- The additional homestead exemption applies to properties purchased on or after January 1, 2012, and takes effect January 1, 2013, in SJR 658, whereas it applies to properties purchased on or after January 1, 2011, and takes effect January 1, 2012, in HJR 381.

III. Effect of Proposed Changes:

This bill provides statutory implementation of SJR 658 or HJR 381, should either joint resolution be approved by the voters. The bill provides separate amendments to each statute based upon when the joint resolution is approved by the voters, which may be: during a general election held in November 2012 *or* during a special election held concurrent with the presidential preference primary in 2012.

Assessment of Non-Homestead Residential Property

Section 1 Upon voter approval of SJR 658 or HJR 381 during a *general election held in November 2012*, this section amends s. 193.1554, F.S., to reduce the limitation on annual assessment increases applicable to non-homestead residential property from 10 percent to three percent and provides for these provisions to begin in 2013.

Section 2 Upon voter approval of SJR 658 or HJR 381 during *a special election held concurrent with the presidential preference primary in 2012*, this section amends s. 193.1554, F.S., to reduce the limitation on annual assessment increases applicable to non-homestead residential property from 10 percent to three percent and provides for these provisions to begin in 2012.

Assessment of Certain Residential and Non-Residential Real Property

Section 3 Upon voter approval of SJR 658 or HJR 381 during a *general election held in November 2012*, this section amends s. 193.1555, F.S., to reduce the limitation on annual

[21] SJR 658 specifies "three calendar years," HJR 381 just states "three years."
[22] *Id.*
[23] *See* CS/HJR 381 (2011 Regular Session).

assessment increases applicable to certain residential and nonresidential property from 10 percent to three percent and provides for these provisions to begin in 2013.
Section 4 Upon voter approval of SJR 658 or HJR 381 during a *special election held concurrent with the presidential preference primary in 2012*, this section amends s. 193.1555, F.S., to reduce the limitation on annual assessment increases applicable to certain residential and nonresidential property from 10 percent to three percent and provides for these provisions to begin in 2012.

Additional Homestead Exemption for Specified Homestead Owners

Section 5 Upon voter approval of SJR 658 or HJR 381 during a *general election held in November 2012*, this bill creates s. 196.078, F.S., to provide an additional homestead exemption for specified homestead owners (defined in the bill as "first-time homesteaders").

Specifically this section:

- Definition Defines "first-time Florida homesteader" as a person who establishes the right to receive the homestead exemption provided in s. 196.031, F.S., within one year after purchasing the homestead property and who has not owned property in the previous three years to which the homestead exemption provided in s. 196.031(1)(a), F.S., applied.
- Amount of Exemption Provides that every first-time Florida homesteader is entitled to an additional homestead exemption in an amount equal to 50 percent of the just value of the homestead property up to $200,000 for a period of five years or until the property is sold. The additional exemption is available within one year of purchasing the homestead and would be reduced by 20 percent of the initial exemption on January 1 of each succeeding year, until it is no longer available in the sixth and subsequent years. The exemption does not apply to school levies. Not more than one exemption shall be allowed per homestead property.
- Sworn Statement Directs the property appraiser to require all first-time Florida homesteaders claiming the additional exemption under this section to submit a sworn statement on a form by the Department of Revenue no later than March 1, attesting that the taxpayer and each other person who hold legal/equitable title to the property has not owned property in the prior three years that received the homestead exemption provided in s. 196.031, F.S. In order for the exemption to be retained upon the addition of another person to the title of the property, that person must also submit a sworn statement as prescribed herein.

Sections 196.131 and 196.161, F.S., shall apply to the exemption provided in this section.

Section 6 Upon voter approval of SJR 658 or HJR 381 during a *special election held concurrent with the presidential preference primary in 2012*, this bill creates s. 196.078, F.S., to provide an additional homestead exemption for specified homestead owners (defined in the bill as "first-time homesteaders").

Similar to section 5 of the bill, this section:

- Definition Defines "first-time Florida homesteader" as a person who establishes the right to receive the homestead exemption provided in s. 196.031, F.S., within one year after purchasing the homestead property and who has not owned property in the previous three years to which the homestead exemption provided in s. 196.031(1)(a), F.S., applied.

- Amount of Exemption Provides that every first-time Florida homesteader is entitled to an additional homestead exemption in an amount equal to 50 percent of the just value of the homestead property up to $200,000 for a period of five years or until the property is sold. The additional exemption is available within one year of purchasing the homestead and would be reduced by 20 percent of the initial exemption on January 1 of each succeeding year, until it is no longer available in the sixth and subsequent years. The exemption does not apply to school levies. Not more than one exemption shall be allowed per homestead property.
- Sworn Statement Directs the property appraiser to require all first-time Florida homesteaders claiming the additional exemption under this section to submit a sworn statement on a form by the Department of Revenue no later than March 1, attesting that the taxpayer and each other person who hold legal/equitable title to the property has not owned property in the prior three years that received the homestead exemption provided in s. 196.031, F.S. In order for the exemption to be retained upon the addition of another person to the title of the property, that person must also submit a sworn statement as prescribed herein.

Sections 196.131 and 196.161, F.S., shall apply to the exemption provided in this section.

Department of Revenue Emergency Rulemaking Authority

Section 7 provides that in anticipation of implementing this act, the executive director of the Department of Revenue (DOR) is authorized to adopt emergency rules under ss. 120.536(1) and 120.54(4), F.S., in order to make the necessary changes and preparations so that forms, methods, and electronic or other data records are ready and in place if the relative provisions of this act become law.

The bill also states that, notwithstanding other provisions of law, such DOR emergency rules shall remain in effect for 18 months after the date of adoption and may be renewed thereafter during the pendency of procedures to adopt rules addressing the subject of the emergency rules.

Effective Date

Section 8 provides that this act shall take effect upon becoming law, except that:

- Provisions of this act that take effect upon the approval of HJR 381 or SJR 658 by the electors at a *special election held concurrent with the presidential preference primary in 2012* shall apply retroactively to the 2012 tax roll if the revision of the State Constitution contained in HJR 381 or SJR 658 is approved in such special election.
- Provisions of this act that take effect upon the approval of HJR 381 or SJR 658 by the electors at a *general election held in November 2012* shall apply to the 2013 tax roll if the revision of the State Constitution contained in HJR 381 or SJR 658 is approved in such general election.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill seeks to implement the proposed constitutional amendments to sections 4 and 6 of Article VII, of the Florida Constitution, contained in HJR 381 or SJR 658, 2011

Regular Session, subject to voter approval. For these reasons, the bill does not fall under the mandate provisions in Article VII, section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

If HJR 381 or SJR 658 is approved by the voters, this bill will provide an ad valorem tax relief to specified homestead owners. Owners of specified residential rental and commercial real property will experience further reduction in tax assessments due to the three percent assessment limitation. The provisions of this bill, as implemented by either joint resolution, will have an effect on local government revenue.

B. Private Sector Impact:

Assessment Limitation on Non-Homestead Property and Residential & Non-Residential Property

If HJR 381 or SJR 658 is approved by the voters, owners of existing residential rental and commercial real property may experience property tax savings and will not see their taxes increase significantly in a single year. To the extent that local taxing authorities' budgets are not reduced, the tax burden on other properties will increase to offset these tax losses. New properties or properties that have changed ownership or undergone significant improvements will be assessed at just value, and will be at a competitive disadvantage compared to older properties with respect to their tax burden.

Additional Homestead Exemption for Specified Homestead Owners

If HJR 381 or SJR 658 is approved by the voters, specified homestead owners will experience temporary reductions in ad valorem taxes. The value of the reduction will decrease by one-fifth each year and will disappear in the sixth year after the homestead is established. During this period, the ad valorem taxes levied on the homestead will increase significantly each year. Other property owners in the taxing jurisdiction will pay higher taxes if the jurisdiction adjusts the millage rate to offset the loss to the tax base.

C. Government Sector Impact:

If HJR 381 or SJR 658 is approved by the voters and the provisions of this bill take effect, local governments may experience a reduction in the ad valorem tax base. The

revenue estimating conference adopted an indeterminate negative estimate for SJR 658 and HJR 381 since those amendments would require voter approval.

Additional Homestead Exemption for Specified Homestead Owners

Should either joint resolution be approved by the Florida voters, the Revenue Estimating Conference determined that the statewide impact on non-school taxes for the additional homestead exemption for specified homestead owners would be as follows:

For the January 1, 2013, effective date (SJR 658):[24]

FY 2013-14	FY 2014-15	Recurring Impact
-$94.5 million	-$186.5 million	-$344.5 million

For the January 1, 2012, effective date (HJR 381):[25]

FY 2012-13	FY 2013-14	FY 2014-15	Recurring Impact
-$110.0 million	-$165.1 million	-$221.0 million	-$281.0 million

Assessment Limitation on Non-Homestead Property

Should either joint resolution be approved by the Florida voters, the Revenue Estimating Conference has determined that the statewide impact on non-school taxes for reducing the limitation on annual assessment increases for non-homestead property from 10 percent to three percent would be as follows:[26]

For the January 1, 2013, effective date (SJR 658):

FY 2013-14	FY 2014-15	FY 2015-16
-$225.0 million	-$526.1 million	-$903.9 million

For the January 1, 2012, effective date (HJR 381):

FY 2012-13	FY 2013-14	FY 2014-15	FY 2015-16
-$121.6 million	-$326.1 million	-$619.6 million	-$990.9 million

VI. Technical Deficiencies:

The Department of Revenue states that the use of the term "purchasing" may give rise to multiple interpretations of what "purchasing" means which might cause some taxpayers to be excluded from the exemption by such interpretations. For these reasons, the Department

[24] Revenue Estimating Conference, *First-Time Homesteaders part of SJR 658 & HJR 381* (Feb. 20, 2011) (assuming that 40 percent of homesteaders will be first-time homesteaders to account for the definition of first-time homebuyers).
[25] Revenue Estimating Conference, *First-Time Homesteaders part of HJR 381* (March 9, 2011) (assuming that 40 percent of homesteaders will be first-time homesteaders to account for the definition of first-time homebuyers).
[26] Revenue Estimating Conference, *Reduction of annual assessment limitation for non-homestead property from 10 percent to 3 percent, HJR 381, SJR 658* (March 14, 2011).

recommends deleting the term "purchasing/purchased" and inserting "acquiring/acquired" on the following lines of the bill: line 85, line 103, line 132, line 150.[27]For clarification of the amendment discussed above, the Department recommends inserting the following language on lines 87 and 134 of the bill after the period:

- "For purposes of this section, the date on which the deed or other transfer instrument was signed and notarized or otherwise executed shall be considered the date a property was acquired."

The Department has also made the following recommendations:

- On lines 102 and 149, insert the following for consistency with ss. 196.031(1)(a) and 193.155(7), F.S., and because the term "homestead's property just value" is not defined in bill:
  - "Except for owners of an estate held by the entireties or held jointly with the right of survivorship, the amount of the exemption may not exceed the proportionate assessed valuation of all owners who reside on the property."
- In terms of the Department's emergency rulemaking authority, add the terms "amended and repealed" on line 179, so that the Department may "renew, amend, and repeal" any emergency rule.
- Property exemptions are applied to the assessed value of the property, which may include any limitations or exemptions to the property's just value. For these reasons, clarification may be needed on lines 90 and 137 of the bill which states that "the amount [of the additional homestead exemption] shall be equal to 50 percent of the homestead property's just value on January 1 . . . ."

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[27] Florida Department of Revenue, *Fiscal Impact of SB 1722*, 6-7 (March 14, 2011) (on file with the Senate Committee on Community Affairs).

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 844
INTRODUCER:	Senator Benacquisto and others
SUBJECT:	Violations/Probation/Community Control/Widman Act
DATE:	April 1, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	**Fav/1 amendment**
2.	Boland	Maclure	JU	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	☐	Statement of Substantial Changes
B. AMENDMENTS.....	☒	Technical amendments were recommended
	☐	Amendments were recommended
	☐	Significant amendments were recommended

I. Summary:

The bill provides that when a person who is before a circuit court for First Appearance on a new law violation is under community supervision, the court may issue an arrest warrant for the violation if the court finds reasonable grounds to believe that a community supervision violation has occurred.

At a First Appearance hearing on a violation of community supervision, if the offender admits the violation, the court may order that the offender be taken before the court that granted the probation or community control.

If the offender does not admit the violation, the First Appearance court may commit the offender or may release the offender with or without bail to await further hearing. In deciding whether or not to set bail, the court may consider the likelihood of a prison sanction on the violation of community supervision based on the new law violation arrest. The bill also provides that the court may order the return of the person under community supervision to the court that originally granted the community supervision for further proceedings.

The bill does not apply in cases where the offender is subject to the special requirements for hearings as to his or her dangerousness to the community.

The bill is named in honor of Officer Andrew Widman, a Fort Myers police officer who was killed during the exchange of gunfire with an offender who had not yet been arrested on a violation of community supervision warrant issued after his First Appearance on a new law violation in Lee County.

This bill substantially amends section 948.06, Florida Statutes.

II. Present Situation:

Violation of Probation or Community Control

Section 948.01, F.S., provides the circumstances under which the trial court can place a person on probation[1] or community control[2] (community supervision). Any person who is found guilty by a jury, or by the court sitting without a jury, or enters a plea of guilty or nolo contendere may be placed on probation or community control regardless of whether adjudication is withheld.[3]

The Department of Corrections supervises all probationers sentenced in circuit court.[4] Section 948.03, F.S., provides a list of standard conditions of probation. In addition to the standard conditions of probation, the court may add additional conditions to the probation that it deems proper.[5] The condition requiring the probationer to not commit any new criminal offenses is a standard condition.[6]

If a person who has been sentenced to probation commits a new criminal offense, that person thereby commits a violation of the terms of probation. In such instances, upon being informed of the new law violation, generally the probation officer files an affidavit with the sentencing court alleging a violation of probation based upon the existence of the new law violation.[7] The court evaluates the facts as alleged in the affidavit to determine if sufficient probable cause of a violation exists and may then issue a warrant for the probationer's arrest.[8]

It is not uncommon for the sentencing court to set a condition of "no bond" in the case until the probationer has appeared before that particular judge who has jurisdiction over the probationer's case. If a different judge sees the probationer at First Appearance on the violation case, he or she

[1] "Probation" is defined as a form of community supervision requiring specified contacts with parole and probation officers and other terms and conditions as provided in s. 948.03, F.S. Section 948.001(5), F.S.

[2] "Community control" is defined as a form of intensive, supervised custody in the community, including surveillance on weekends and holidays, administered by officers with restricted caseloads. Community control is an individualized program in which the freedom of an offender is restricted within the community, home, or noninstitutional residential placement and specific sanctions are imposed and enforced. Section 948.001(3), F.S.

[3] Section 948.01(1), F.S.

[4] *Id*.

[5] Section 948.03(2), F.S.

[6] Fl. R. Crim. Pro. 3.790 (2010).

[7] Section 948.06(1)(b), F.S.

[8] *Id*.

generally honors the trial court judge's "no bond" requirement. This is the common course of local practice.

Under limited circumstances listed in s. 903.0351, F.S., the First Appearance judge *must* order pretrial detention without bail until the resolution of the probation violation or community control violation hearing. These violators fall into certain categories:

- Violent felony offenders of special concern as defined in s. 948.06, F.S.
- A violator arrested for committing a qualifying offense set forth in s. 948.06(8)(c), F.S.
- A violator who has previously been found to be a habitual violent felony offender, a three-time violent felony offender, or a sexual predator, and who has been arrested for committing one of the qualifying offenses set forth in s. 948.06(8)(c), F.S.

In addition to the "normal" channels through which an alleged violation progresses, s. 948.06(1)(b), F.S., provides for the warrantless arrest of an offender reasonably believed by a law enforcement officer to have violated his or her community supervision in a material respect. It states:

> Whenever within the period of probation or community control there are reasonable grounds to believe that a probationer or offender in community control has violated his or her probation or community control in a material respect, any law enforcement officer who is aware of the probationary or community control status of the probationer or offender in community control or any parole or probation supervisor may arrest or request any county or municipal law enforcement officer to arrest such probationer or offender without warrant wherever found and return him or her to the court granting such probation or community control.[9]

Section 903.046, F.S., provides that the court may consider the defendant's past or present conduct and record of convictions in determining the bail amount for a new criminal offense. A defendant before the court for First Appearance on a new criminal law violation whose criminal history reflects his or her community supervision status should have that current status weighed as a bond-related factor by the First Appearance judge according to s. 903.046, F.S., and Rule 3.131(3)(b), Florida Rules of Criminal Procedure, even though a violation may not yet have been filed, warrant issued, or warrantless arrest made.

The Case of Abel Arango and the Death of Officer Andrew Widman[10]

In 1999, Abel Arango (A/K/A Abel Arrango) was sentenced on a split-sentence to five years in prison with 15 years of probation following his release for convictions of grand theft, burglary of an unoccupied structure or conveyance, carrying a concealed firearm, and armed robbery. The

[9] Section 948.06(1)(a), F.S.

[10] The facts relayed in this bill analysis have been gathered from a memo prepared by FDLE Commissioner Gerald Bailey at the request of the Governor's office, telephone conversations with FDLE personnel, Arango's Department of Corrections Release Information posted on the Department's website, a telephone conversation with a gentleman with the South Florida Detention and Removal Office of U.S. Immigration and Customs Enforcement, as well as newspaper accounts of the death of Officer Widman. The referenced information is on file with the Senate Committee on Criminal Justice.

offenses occurred in Collier County, he was sentenced by the Circuit Court in and for Collier County, therefore the Collier court had continuing jurisdiction over the case (the successful completion of 15 years probation) upon Arango's release from prison in 2004.[11]

Arango reported to the probation office as required by the sentencing court until his arrest on Friday, May 16, 2008, in Lee County. On that day he was arrested on five felony cocaine-related charges: two possession charges, two sale charges, and one trafficking of more than 28 grams but less than 150 kilograms.

By the time Arango appeared at First Appearance in Lee County the next day, his criminal history, probationary status, and wants and warrants (of which there were none) were made available to the court by court services personnel. The First Appearance judge set a total of $100,000 bond in the Lee County (new law violation) cases. Arango was able to make this bond and, as a result, was released from the Lee County jail.

It should be noted that in setting the bond at $100,000, the First Appearance judge set the bond at more than double the amount on the standard bond schedule; therefore, although there was no active warrant for a violation of probation, it appears that Arango's probation status was taken into account by the judge.[12]

In the meantime, Arango's probation officer received a message on Monday, May 19, sent by FDLE on Friday night. This "Florida Administrative Message" informed the probation officer that law enforcement had arrested Arango on Friday. She attempted to contact Arango by telephone, and when he did not answer the probation officer left a message for him to call her immediately. The call was not returned.

On Friday, May 23, the probation officer delivered a sworn affidavit to the Collier County Circuit Court (the sentencing court in the probation cases) alleging the violation of probation in the Collier County cases, based upon the new arrest, and requesting a warrant be issued for Arango's arrest. The warrant was issued with a "no bond" provision and was entered into the Florida Crime Information Center (FCIC) on Monday, June 2, 2008.

Arango appeared at the Lee County Circuit Court for arraignment on the cocaine charges on Monday, June 16. Although the violation of probation warrant was active and in the FCIC system, no system queries were made on Arango prior to or during the time of his arraignment.

It is unknown whether court personnel or the bailiffs had knowledge of the warrant at that time. Presumably they did not as it is unlikely that an updated criminal history would be run on a defendant between First Appearance and the arraignment a month later. Arango attended and left arraignments without being arrested on the active violation of probation warrant.

[11] Although there was a federal detainer for Arango and he spent several months after his prison release at the Krome's Detention Center, ICE was unable to deport him to Cuba because the U.S. has no formal diplomatic ties or agreement for repatriation with Cuba, so Arango was released in July, 2008.

[12] See the Presentment by the Fall Term 2008 Lee County Grand Jury, In re: Death of Fort Myers Police Officer Andrew Widman on July 18, 2008, filed with the Circuit Court of the Twentieth Judicial Circuit on September 11, 2008.

On June 23, Arango's probation officer again attempted to contact him by going to his house but was unable to locate anyone at the residence. The Collier County Sheriff's Office ran warrant queries in the FCIC system twice in July, both of which showed the active warrant. It is unknown why this was done.

On Friday, July 18, 2008, Fort Myers Police officers responded to a reported domestic dispute between Arango and his girlfriend. Gunshots were exchanged between Arango and the officers. Officer Andrew Widman and Arango were killed during the gunfire.

Section 1 of the bill names the bill "The Officer Andrew Widman Act" in his honor.

III. Effect of Proposed Changes:

The bill provides that a First Appearance court may reach beyond the matter of pretrial release or detention on a new law violation arrest under certain circumstances.

If the court has reasonable grounds to believe that the offender appearing before the court at First Appearance on the new law violation is under community supervision and has violated the terms of supervision in a material respect by committing the new law violation, the court may order the arrest of the offender for the violation at that time. Previously, the two actions, one for the new law violation and one for the violation of community supervision, were dealt with as separate offenses.

To the extent that the bill consolidates two previously separate actions, the bill may allow the court to expedite the arrest of an offender whose terms of community supervision have been violated due to the alleged new law violation, if he or she has not already been arrested on the violation by law enforcement under the provisions of s. 948.06(1)(a), F.S.

The court must inform the offender of the violation of community supervision. If he or she admits the violation, the court may order that the offender be brought before the court that granted the community supervision.

If the offender does not admit the violation of community supervision, the court may either commit the offender or release him or her with or without bail to await further hearing on the matter, or simply order that the offender be brought before the court that granted the community supervision.

Should the court reach the question of releasing the offender on the violation of community supervision, the court may consider, specifically, whether it is more likely than not that a prison sanction would be handed down by the original sentencing court for a violation of community supervision based upon the new arrest.

The bill does not apply to those offenders who are subject to the "danger to the community" hearings required by s. 948.06(4), F.S., or the "violent felony offender of special concern" hearings required by s. 948.06(8)(e), F.S.

The bill is named in honor of Officer Andrew Widman.

The bill provides an effective date of October 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

In the early 1980's, ss. 949.10 and 949.11, F.S., contained language similar to that of the current bill. One clear difference between the bill and those sections of law, however, is that the 1980's statutes applied to offenders who were the subject of an active violation warrant and subsequent arrest for which they could not be released until after a violation hearing.

These sections provided that the arrest of any person who was on probation (for committing a new crime) was prima facie evidence of a violation of the terms and conditions of such probation. Upon such arrest, probation was immediately temporarily revoked, and such *person had to remain in custody until a hearing* by the Parole and Probation Commission or the court. The statutes required the hearing to be held within 10 days from the date of the arrest and provided that the failure of the commission or the court to hold the hearing within 10 days from the date of arrest resulted in the immediate release of such person from incarceration on the temporary revocation.

Although these sections of statute were repealed in 1982, they were analyzed by various courts. In *Miller v. Toles*, 442 So. 2d 177 (Fla. 1983), an offender alleged that his due process rights were violated because he was not given a hearing until the eleventh day after being placed in custody. The Florida Supreme Court agreed and stated that without provision for expedited final hearings for a parolee or a probationer arrested for alleged commission of a felony, statutes governing subsequent felony arrest of felony parolee or probationer which deny the parolee or probationer arrested a preliminary probable cause hearing "would be subject to constitutional attack as imposing an automatic forfeit of liberty interests upon *arrest*, not *conviction*, for a felony."[13]

The Court acknowledged that probationers could be afforded lesser due process rights but stated that the quid pro quo for doing so was the expedited final hearing. The Court stated

[13] *Miller*, 442 So. 2d at 180.

that without that provision, the statute would be subject to constitutional attack as imposing an automatic forfeit of liberty interests upon arrest, rather than conviction, for a felony.

The bill requires an arrest on a violation of community supervision before the offender's liberty is subject to being taken, and it provides a prompt mechanism by which the offender can be released from custody or from any conditions of release.

There may be an issue of separation of powers to the extent that it could be said that the court is assuming the role of the executive branch (Department of Corrections) by initiating the violation of probation process. However, Florida Statutes provide that the community supervision process may be initiated by other means; specifically the warrantless arrest authorized in s. 948.06(1)(a), F.S. Also, the issue of separation of powers may arise to the extent that the provisions of the bill may be viewed as procedural (the Supreme Court's power) rather than substantive (within the prerogative of the Legislature).

It should be noted that in the case of Abel Arango, this was not a person who met the statutory criteria for special scrutiny at First Appearance in existence at the time. He did not qualify as a "violent felony offender of special concern" nor as an offender who required a special hearing as to his potential danger to the community (*see s. 948.06(4) and (8)(e), F.S.).*

However, Arango was not a typical community supervision offender either, due to the fact that *he was on probation following a prison sentence* and therefore was *more likely* than a typical offender *to be sentenced to prison on a violation* of his probation. The likelihood of a prison sentence on the violation is easily discernable by a prosecutor at First Appearance, by the court, or by pretrial services personnel, any of whom have the ability to review an offender's prior criminal history and sentencing scoresheet.

Although human behavior cannot always be predicted, it could be argued that an offender such as Arango who is surely facing a return to prison if found to be in material violation of his probation, could pose an increased danger to society if he is released from custody at First Appearance on a new crime, regardless of whether the violation affidavit had been filed or a warrant secured under the "normal" procedure. Just as in the Arango case, an offender who is facing a return to prison may feel he or she has "nothing to lose" as it relates to future unlawful behavior pending resolution of the violation he or she must know is coming.

Perhaps due process and separation of powers concerns will be eliminated, or at least diminished, if a reviewing court gives great weight to the public safety issue brought to the attention of the Legislature by the Arango case and addressed by this bill.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Office of the State Courts Administrator made a finding that the bill would have "no substantive effect." The impact statement noted that the bill may streamline violation of probation arrests and pointed out that the bill would have a very minimal impact on court workload, stating that any extra workload on the judge who issues the warrant is negligible because judges already do so upon affidavit from the probation officer.[14]

VI. Technical Deficiencies:

None.

VII. Related Issues:

In the Arango case, subsequent to his arrest on the new law violation (drug charges in Lee County), the Lee County Sheriff's Office ran a warrants check for Arango. Later that night the Lee County Jail ran a second warrants check. Neither query provided probation information on Arango due to inaccurate identifiers having been entered during the queries, such as incorrect spelling of the last name, incorrect race, and the incorrect date of birth.[15]

Had the correct information been entered into the database, it is possible that the Lee County Sheriff's Office could have arrested Arango at that time, prior to First Appearance, for a violation of probation based upon the new law violation. Statutory authority for such an action is found in s. 948.06(1)(a), F.S. (set forth above in the *Present Situation* section).

The correct probation status report was supplied to the First Appearance court the next morning by the Lee County Pretrial Service in Arango's case. Therefore, it appears that an arrest on the violation could have been made by Lee County law enforcement just prior to or soon after the First Appearance proceedings on the drug arrest.

It is equally possible that, if Department of Corrections or law enforcement personnel were assigned specifically to arrest defendants with active warrants at arraignments or other court

[14] Office of the State Courts Administrator, Judicial Impact Statement for SB 844, February 9, 2011 (on file with the Committee on the Judiciary).

[15] Commissioner Bailey, FDLE, August 11, 2008, Memo to the Governor's Office regarding the events leading up to Officer Widman's death. Memo on file with Senate Criminal Justice Committee.

appearances, Arango may have been arrested on the active violation warrant (at arraignments in Lee County on the drug cases) a full month before Officer Widman's death.

Technology is now available through FDLE to provide rapid identification of persons who come into contact with the criminal justice system. The devices connect through a personal computer to the Florida Criminal Justice Network. The individual places two fingers on a platen and within 35-45 seconds critical information about the individual is transmitted. If the Network indicates a "hit," the database can be queried regarding identification, active warrants, criminal history and whether the individual has previously provided a DNA sample for the DNA database.

The rapid identification devices were in limited use at the time of the Arango case. Currently, however, all probation offices throughout the state utilize this technology to confirm the identity and current status of reporting probationers, some Sheriff's offices use the device, the Pinellas County jail uses it at intake, there are approximately 150 mobile units in patrol cars, and the Collier County Courthouse has a device available in an anteroom should identification become an issue in one of the courtrooms. Lee County has been routinely checking local, state and federal databases for active warrants on every person who has a court appearance since November 2008.[16]

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

Barcode 722356 by Criminal Justice on March 22, 2011:
Technical amendment removing redundant language.

[16] Warrants Checks Get Results in Lee County, story published February 8, 2010, http//www.news-press.com.

722356

LEGISLATIVE ACTION

Senate	.	House
Comm: FAV	.	
03/22/2011	.	
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The Committee on Criminal Justice (Dean) recommended the following:

Senate Amendment (with title amendment)

Delete lines 70 - 71
and insert:
.

================ T I T L E A M E N D M E N T ================
And the title is amended as follows:
Delete line 9
and insert:
probationer or offender of the violation; authorizing the court to

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	CS/SB 926
INTRODUCER:	Commerce and Tourism Committee and Senator Storms
SUBJECT:	Liability/Employers of Developmentally Disabled
DATE:	April 1, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hrdlicka	Cooper	CM	**Fav/CS**
2.	Daniell	Walsh	CF	**Favorable**
3.	O'Connor	Maclure	JU	**Pre-meeting**
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

This bill creates a new section of the Florida Statutes providing an employer who employs an individual who has a developmental disability immunity from liability for negligent or intentional acts or omissions by that individual if:

- The employee receives or has received supported employment services through a supported employment service provider; and
- The employer does not have actual notice of the employee's actions that created the unsafe conditions in the workplace.

The bill also allows a supported employment service provider that has provided employment services to a person with a developmental disability to be immune from liability for the actions or conduct of the person that occur within the scope of the person's employment.

This bill creates section 768.0895, Florida Statutes.

II. Present Situation:

Section 393.063, F.S., defines "developmental disability" as "a disorder or syndrome that is attributable to retardation, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely."

The Agency for Persons with Disabilities (APD or agency) has been tasked with serving the needs of Floridians with developmental disabilities.[1] The agency works in partnership with local communities and private providers to assist people who have developmental disabilities and their families. The agency also provides assistance in identifying the needs of people with developmental disabilities for support services.

Supported Employment Services

Supported employment services are services offered to help an individual gain or maintain a job. Generally services include job coaching, intensive job training, and follow-up services. The federal Department of Education State Supported Employment Services Program defines "supported employment services" as on-going support services provided by the designated state unit to achieve job stabilization.[2] Section 93.063, F.S., defines "supported employment" to mean employment located or provided in an integrated work setting, with earnings paid on a commensurate wage basis, and for which continued support is needed for job maintenance.

The Division of Vocational Rehabilitation (DVR), within the Department of Education, administers an employment program that assists individuals with disabilities, including those with the most severe disabilities, to pursue meaningful careers appropriate for their abilities and capabilities.[3] In 2009-10, DVR helped 3,874 people with severe disabilities find jobs.[4] Florida law defines "supported employment services" as "ongoing support services and other appropriate services needed to support and maintain a person who has a most significant disability in supported employment."[5] The service provided is based upon the needs of the eligible individual as specified in the person's individualized plan for employment. Generally, supported employment services are provided in such a way as to assist eligible individuals in entering or maintaining integrated, competitive employment.

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[1] Section 20.197, F.S.

[2] 34 C.F.R. s. 363.6(c)(2)(iii). "Under the State Supported Employment Services Program, the Secretary [of Education] provides grants to assist States in developing and implementing collaborative programs with appropriate entities to provide programs of supported employment services for individuals with the most severe disabilities who require supported employment services to enter or retain competitive employment." 34 C.F.R. s. 363.1; *see also*, U.S. Dep't of Education, *Supported Employment State Grants*, http://www.ed.gov/programs/rsasupemp/index.html (last visited Mar. 18, 2011).

[3] *See* Division of Vocational Rehabilitation, Florida Dep't of Education, http://www.rehabworks.org/ (last visited Mar. 18, 2011).

[4] Division of Vocational Rehabilitation, *2009-10 Performance Highlights*, 2, *available at* http://www.rehabworks.org/docs/AnnualReport10.pdf (last visited Mar. 18, 2011).

[5] Section 413.20(22), F.S. "Supported employment" is also defined in ch. 413, F.S., relating to vocational rehabilitation, to mean "competitive work in integrated working settings for persons who have most significant disabilities and for whom competitive employment has not traditionally occurred or for whom competitive employment has been interrupted or is intermittent as a result of such a disability. Persons who have most significant disabilities requiring supported employment need intensive supported employment services or extended services in order to perform such work." Section 413.20(21), F.S.

Both DVR and APD provide supported employment services or connect individuals with private organizations that supply such services. There are several entities in Florida dedicated to providing these services. However, these entities do not share information about their customers with the employers that employ their customers. This is due to various reasons, including confidentiality concerns or contract agreements between the employer and the organization.

Employer Liability

Under common law principles, an employer is liable for acts of its employee that cause injury to another person if the wrongful act was done while the employee was acting within the apparent scope of employment, serving the interests of his employer.[6] An employee is not acting within the scope of his employment, and therefore the employer is not liable, if the employee is acting to accomplish his own purposes, and not serving the interests of the employer.[7] "The test for determining if the conduct complained of occurred within the scope of employment is whether the employee (1) was performing the kind of conduct he was employed to perform, (2) the conduct occurred within the time and space limits of the employment, and (3) the conduct was activated at least in part by a purpose to serve the employer."[8]

An employer may be held liable for an intentional act of an employee when that act is committed within the real or apparent scope of the employer's business.[9] An employer may be held liable for a negligent act of an employee committed within the scope of his employment even if the employer is without fault.[10] "This is based on the long-recognized public policy that victims injured by the negligence of employees acting within the scope of their employment should be compensated even though it means placing vicarious liability on an innocent employer."[11] An employer is liable for an employee's acts, intentional or negligent, if the employer had control over the employee at the time of the acts. "Absent control, there is no vicarious liability for the act of another, even for an employee. Florida courts do not use the label 'employer' to impose strict liability under a theory of respondeat superior[12] but instead look to the employer's control or right of control over the employee at the time of the negligent act."[13] Employer fault is not an element of vicarious liability claims.[14]

Employers may also be liable for the negligent hiring of an employee. Negligent hiring is defined as an "employer's lack of care in selecting an employee who the employer knew or should have known was unfit for the position, thereby creating an unreasonable risk that another person

[6] *Gowan v. Bay County*, 744 So. 2d 1136, 1138 (Fla. 1st DCA 1999) (quoting *Stinson v. Prevatt*, 94 So. 656, 657 (Fla. 1922)).
[7] *Id.*
[8] *Gowan*, 744 So. 2d at 1138.
[9] *Garcy v. Broward Process Servers, Inc*., 583 So. 2d 714, 716 (Fla. 4th DCA 1991). The term "intentional" means done with the aim of carrying out the act. BLACK'S LAW DICTIONARY (9th ed. 2009).
[10] *Makris v. Williams*, 426 So. 2d 1186, 1189 (Fla. 4th DCA 1983). The term "negligent" is characterized by a person's failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance. BLACK'S LAW DICTIONARY (9th ed. 2009). A negligent act is one that creates an unreasonable risk of harm to another. BLACK'S LAW DICTIONARY (9th ed. 2009).
[11] *Makris*, 426 So. 2d at 1189.
[12] "Respondeat superior" means the doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency. BLACK'S LAW DICTIONARY (9th ed. 2009).
[13] *Vasquez v. United Enterprises of Southwest Florida, Inc*., 811 So. 2d 759, 761 (Fla. 3d DCA 2002).
[14] *Makris*, 426 So. 2d at 1189.

would be harmed."[15] An action for negligent hiring is based on the direct negligence of the employer.[16] However, in order to be liable for an employee's act based upon a theory of negligent hiring, the plaintiff must show that the employee committed a wrongful act that caused the injury.[17] "The reason that negligent hiring is not a form of vicarious liability is that unlike vicarious liability, which requires that the negligent act of the employee be committed within the course and scope of the employment, negligent hiring may encompass liability for negligent acts that are outside the scope of the employment."[18]

In *Williams v. Feather Sound, Inc.*, the Second District Court of Appeal discussed the responsibility of the employer to be aware of an employee's propensity to commit an act at issue:

> Many of these cases involve situations in which the employer was aware of the employee's propensity for violence prior to the time that he committed the tortious assault. The more difficult question, which this case presents, is what, if any, responsibility does the employer have to try to learn pertinent facts concerning his employee's character. Some courts hold the employer chargeable with the knowledge that he could have obtained upon reasonable investigation, while others seem to hold that an employer is only responsible for his actual prior knowledge of the employee's propensity for violence. The latter view appears to put a premium upon failing to make any inquiry whatsoever.[19]

Section 768.096, F.S., creates an employer presumption against negligent hiring if "before hiring the employee, the employer conducted a background investigation of the prospective employee and the investigation did not reveal any information that reasonably demonstrated the unsuitability of the prospective employee for the particular work to be performed or for the employment in general."[20] There is no existing provision in Florida law that would specifically limit the liability of an employer if the employer has hired an individual with disabilities

III. Effect of Proposed Changes:

This bill creates s. 768.0895, F.S., providing an employer who employs an individual who has a developmental disability immunity from liability for negligent or intentional acts or omissions[21] by that individual if:

- The employee receives or has received supported employment services through a supported employment service provider; and
- The employer does not have actual notice of the employee's actions that created the unsafe conditions in the workplace.

[15] BLACK'S LAW DICTIONARY (9th ed. 2009).
[16] *Anderson Trucking Service, Inc. v. Gibson*, 884 So. 2d 1046, 1052 (Fla. 5th DCA 2004).
[17] *Id*.
[18] *Id*. at n.1.
[19] *Williams v. Feather Sound, Inc.*, 386 So. 2d 1238, 1240 (Fla. 2d DCA 1980) (internal citations omitted).
[20] Section 768.096(1), F.S. This section provides that a background investigation must include contacting references, interviewing the employee, or obtaining a criminal background check from the Florida Department of Law Enforcement. However, the election by an employer not to conduct the investigation is not a presumption that the employer failed to use reasonable care in hiring an employee.
[21] An omission is defined as the "failure to do something; esp., a neglect of duty." BLACK'S LAW DICTIONARY (9th ed. 2009).

The bill also allows a supported employment service provider that has provided employment services to a person with a developmental disability to be immune from liability for the actions or conduct of the person that occur within the scope of the person's employment.

The bill provides definitions for "developmental disability" and "supported employment service provider" within the newly created s. 768.0895, F.S. Specifically:

- "Developmental disability" has the same meaning as provided in s. 393.063, F.S.;[22] and
- "Supported employment service provider" means a not-for-profit public or private organization or agency that provides services for persons in supported employment, as defined in s. 393.063, F.S.

The bill provides an effective date of July 1, 2011, and specifies that the bill only applies to causes of action occurring on or after that date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This bill possibly implicates the right of access to the courts under Article I, section 21 of the Florida Constitution by eliminating or circumscribing an individual's right of action against an employer of a person with developmental disabilities. Article I, section 21 of the Florida Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." The Florida Constitution protects "only rights that existed at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution."[23] Constitutional limitations were placed on the Legislature's right to abolish a cause of action in the Florida Supreme Court case *Kluger v. White*, 281 So. 2d 1 (Fla. 1973). The Court held:

[22] Section 393.063, F.S., defines "developmental disability" as "a disorder or syndrome that is attributable to retardation, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely."

[23] 10A FLA. JUR 2D *Constitutional Law* s. 360. When analyzing an access to courts issue, the Florida Supreme Court clarified that 1968 is the relevant year in deciding whether a common law cause of action existed. *Eller v. Shova*, 630 So. 2d 537, 542 n. 4 (Fla. 1993).

> [W]here a right of access … has been provided …, the Legislature is without power to abolish such a right without providing a reasonable alternative … unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.[24]

To the extent that this bill is seen as depriving a person who is injured of the right to go to court to pursue a claim against an employer of a person with developmental disabilities, the bill may face constitutional scrutiny.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

An employer's liability in hiring individuals with disabilities through supported employment service providers may be reduced. This may help employers feel more comfortable hiring individuals with disabilities.[25] In turn, more individuals using supported employment services may find employment opportunities available to them. An individual's liability for negligent or intentional acts or omissions will not change.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Commerce and Tourism on March 16, 2011:
The committee substitute made four clarifying changes from the bill as originally filed:

- Defines "supported employment service provider;"

[24] *Kluger*, 281 So. 2d at 4.
[25] *See* Agency for Persons with Disabilities, *2011 Bill Analysis, SB 926* (Mar. 10, 2011) (on file with the Senate Committee on Children, Families, and Elder Affairs).

- Simplifies the definition of the term "person with a developmental disability" to "developmental disability;"
- Simplifies the reference to the person/employee by using the term "person" throughout; and
- Clarifies that the bill only applies to causes of action arising on or after the effective date of the bill.

B. Amendments:

None.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 1144
INTRODUCER:	Senator Margolis
SUBJECT:	Local Government
DATE:	April 1, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wolfgang	Yeatman	CA	**Favorable**
2.	O'Connor	Maclure	JU	**Pre-meeting**
3.			TR	
4.				
5.				
6.				

I. Summary:

This bill authorizes the board of county commissioners to negotiate the lease of real property for a term not to exceed five years, rather than go through the competitive bidding process. The bill also allows government entities to transfer title to a road by recording a deed with the county or counties in which the right-of-way is located.

This bill substantially amends sections 125.35 and 337.29, Florida Statutes.

II. Present Situation:

County Leasing Authority

Article VIII, section 1 of the Florida Constitution provides, in part, that counties have the power to carry on local government to the extent provided by, or not inconsistent with, general or special law. This constitutional provision is codified in s. 125.01, F.S.[1] Counties are specifically authorized "to employ personnel, expend funds, enter into contractual obligations, and purchase or *lease* and sell or exchange any *real* or personal *property*."[2]

Section 125.35(1)(a), F.S., specifically authorizes the board of county commissioners (board) to "lease real property, belonging to the county."

[1] Op. Att'y Gen. Fla. 88-34 (1988) (citing *Speer v. Olson*, 367 So. 2d 207, 210 (Fla. 1978) (finding that ch. 125, F.S., implements art. VIII, section 1(f) of the Florida Constitution)).
[2] *Id*. (emphasis added).

To lease property, the board of county commissioners must determine that it is in the best interest of the county to do so and must use the competitive bidding process. The board may use its discretion when setting the terms and conditions of the lease.[3]

The board is authorized to negotiate the lease of an airport or seaport facility under such terms and conditions as negotiated by the board.[4] This provision authorizes the board of county commissioners to negotiate a lease of an airport or seaport facility without going through the competitive bidding process.[5]

Alternatively, a local government may, by ordinance, prescribe disposition standards and procedures to be used by the county in leasing real property owned by the county. The standards and procedures must:

- Establish competition and qualification standards upon which disposition will be determined.
- Provide reasonable public notice.
- Identify how an interested person may acquire county property.
- Set the types of negotiation procedures.
- Set the manner in which interested persons will be notified of the board's intent to consider final action and the time and manner for making objections.
- Adhere to the governing comprehensive plan and zoning ordinances.[6]

Competitive Bidding

The competitive bidding process is used throughout the Florida Statutes to ensure that goods and services are being procured at the lowest possible cost.[7] The First District Court of Appeal explained the public benefit of competitive bidding:

> The principal benefit flowing to the public authority is the opportunity of purchasing the goods and services required by it at the best price obtainable. Under this system, the public authority may not arbitrarily or capriciously discriminate between bidders, or make the award on the basis of personal preference. The award must be made to the one submitting the lowest and best bid, or all bids must be rejected and the proposal re-advertised.[8]

Section 125.35(1)(a), F.S., requires the board of county commissioners to use the competitive bidding process when selling and conveying real or personal property or leasing real property belonging to the county. Unlike the competitive bidding process for goods and services, where the state is trying to find the lowest and best bid, when a county is trying to sell or lease real property under s. 125.35, F.S., the board must sell or lease to the "highest and best bidder." However, the competitive bidding process is often time consuming and can result in lost

[3] Section 125.35(1)(a), F.S.
[4] Section 125.35(1)(b), F.S.
[5] See Op. Att'y Gen. Fla. 99-35 (1999).
[6] Section 125.35(3), F.S.
[7] *See, e.g.*, ss. 112.313(12)(b), 253.54, 337.02, 379.3512, and 627.64872(11), F.S.
[8] *Hotel China & Glassware Co. v. Bd. of Public Instruction,* 130 So. 2d 78, 81 (Fla. 1st DCA 1961).

revenue.[9] Temporary leases may be appropriate in certain situations, such as in the event of a natural disaster, or for short-term, revenue-generating ventures, or replacing vendors such as coffee shops in government buildings. However, currently local governments have no discretion to bypass the bidding process.[10]

Road Mapping

Mapping of Florida's roads is done at the state and local levels. "[C]ounty general highway maps are a statewide series of maps depicting the general road system of each county."[11] The Florida Department of Transportation (DOT or department) maintains an Official Transportation Map for the state as well as maps of each of the department's districts. Right-of-way maps contain maps of local and state roads with enough specificity to show how they delineate the boundaries between the public right-of-way and abutting properties.[12] Right-of-way maps are kept by DOT's surveying and mapping offices within each district[13] and by the circuit court clerk of the county.[14]

Section 337.29, F.S., states that title to all roads designated in the State Highway System or State Park Road System is in the state. Local governments must duly record a *deed or right-of-way map* when:

- Title vests for highway purposes in the state, or
- The department acquires lands.[15]

When roads are transferred between jurisdictions, the title to those roads is given to the governmental entity to which the roads were transferred. Title is transferred to the governmental entity upon the recording of a *right-of-way map* by the governmental entity in the county where the rights-of-way are located.[16] Therefore, unlike state acquisition of roadways, local government acquisition cannot be perfected by deed.

In 2010, the Legislature unanimously passed SB 1004 by Senator Gelber (identical to SB 1144). However, Governor Crist vetoed the bill. The Governor believed that competitive bidding protects the public's interest and assures the best use of taxpayer dollars. As a result, the Governor chose to withhold approval for SB 1004.[17]

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[9] Conversation with Jess McCarty, Assistant County Attorney, Miami-Dade County (Mar. 10, 2010).
[10] *See Outdoor Media of Pensacola, Inc. v. Santa Rosa County*, 554 So. 2d 613, 615 (Fla. 1st DCA 1989); *Rolling Oaks Homeowner's Ass'n, Inc. v. Dade County*, 492 So. 2d 686, 689 (Fla. 3d DCA 1986); *Randall Industries, Inc. v. Lee County*, 307 So. 2d 499, 500 (Fla. 2d DCA 1975).
[11] Florida Dep't of Transp., *Surveying & Mapping Office – Maps*, http://www.dot.state.fl.us/surveyingandmapping/maps.shtm (last visited Apr. 1, 2011).
[12] *See generally id.*
[13] *See generally* Fla. Dep't of Transp., *Surveying & Mapping Office – Right of Way Maps*, http://www.dot.state.fl.us/surveyingandmapping/rowmap.shtm (last visited Apr. 1, 2011).
[14] Section 177.131, F.S.
[15] Section 337.29(2), F.S.
[16] Section 337.29(3), F.S. (emphasis added).
[17] Veto Message by Governor Charlie Crist for CS/CS/SB 1004, republished in *Journal of the Senate* (Jul. 20, 2010).

III. Effect of Proposed Changes:

Section 1 amends s. 125.35, F.S., to authorize the board of county commissioners to negotiate the lease of real property for a term not to exceed five years, without going through the competitive bidding process.

Section 2 amends s. 337.29, F.S., to allow government entities to transfer title to a road by recording a deed with the county or counties in which the right-of-way is located. This change may decrease the length of time that the transfer-of-title process requires under current law.

Section 3 provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Currently, when a county wants to lease its property, it must obtain competitive bids and pick the "highest and best bidder."[18] This process often takes many months, especially in large counties. During the course of the bidding process, the county property often remains vacant, resulting in lost revenue and inconvenience to the county.[19] This bill will allow boards of county commissioners (boards) to negotiate leases of county property for five years or less, without going through the competitive bidding process. As a result,

[18] Section 125.35(1)(a), F.S.
[19] Conversation with and e-mail from Jess McCarty, Assistant County Attorney, Miami-Dade County, to professional staff of the Senate Committee on Judiciary (Mar. 10, 2010).

boards will have more flexibility to determine the terms and conditions of these types of leases.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SJR 1218
INTRODUCER:	Senator Altman
SUBJECT:	Religious Freedom
DATE:	April 1, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Anderson	Maclure	JU	**Pre-meeting**
2.			CF	
3.			ED	
4.			BC	
5.				
6.				

I. Summary:

Senate Joint Resolution 1218 proposes an amendment to the Florida Constitution to provide that a person may not be prohibited from participating in a public program because of the person's free choice in using program benefits at a religious provider. In addition, the proposed amendment strikes constitutional language that prohibits public revenue from directly or indirectly supporting sectarian institutions. This provision is commonly known as a Blaine Amendment.

This joint resolution amends article I, section 3, of the Florida Constitution.

II. Present Situation:

The First Amendment to the U.S. Constitution states:

> Congress shall make no law respecting an ***establishment of religion***, or prohibiting the ***free exercise thereof***; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[1]

Similarly, article I, section 3 of the Florida Constitution states:

> There shall be no law respecting the ***establishment of religion*** or prohibiting or penalizing the ***free exercise thereof***. Religious freedom shall not justify practices

[1] Emphasis added.

> inconsistent with public morals, peace or safety. ***No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.***[2]

The U.S. Constitution and the Florida Constitution both contain an Establishment Clause. The Establishment Clauses are based on the clause including the words "establishment of religion." The last sentence of section 3 of article I of the Florida Constitution is known as the "Blaine Amendment" or "no-aid" provision.[3] The U.S. Constitution does not contain a similar provision.

Free Exercise Clauses

Both the U.S. Constitution and the Florida Constitution contain Free Exercise Clauses. The Free Exercise Clauses are based on the clause including the words "free exercise." "Florida courts have generally interpreted Florida's Free Exercise Clause as coequal to the federal clause."[4] "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."[5]

Under the Free Exercise Clauses:

> a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.[6]

A law is *not* neutral if it discriminates against religious practice on its face or "if the object of a law is to infringe upon or restrict practices because of their religious motivation."[7]

The following are examples of Free Exercise Clause violations:

- An ordinance that prohibited the ritual slaughter of animals as part of the Santaria religion;[8]
- Laws that disqualify members of the clergy from holding a public office;[9]
- An ordinance that prohibited preaching in a public park by Jehovah's witnesses while allowing preaching during a Catholic mass or a protestant service;[10] and
- A state statute that treated some religious denominations more favorably than others.[11]

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[2] Emphasis added.
[3] *Bush v. Holmes*, 886 So. 2d 340, 344, 348-49 (Fla. 1st DCA 2004) ("*Holmes II*").
[4] *Id.* at 365 (citing *Toca v. State*, 834 So. 2d 204, 208 (Fla. 2d DCA 2002)).
[5] *Church of the Lukimi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).
[6] *Id.* at 531-32 (citation omitted).
[7] *Id.* at 533.
[8] *Lukimi*, 508 U.S. 520.
[9] *McDaniel v. Paty*, 435 U.S. 618 (1978).
[10] *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

However, under the Free Exercise Clause of the First Amendment, a state *may* exclude individuals and entities from a generally available government benefit on the basis of religion.[12]

Blaine Amendments

"Florida's no-aid provision was adopted into the 1868 Florida Constitution during the historical period in which so-called 'Blaine Amendments' were commonly enacted into state constitutions."[13] The U.S. Constitution does not contain a similar provision.

Blaine Amendments are provisions in many state constitutions that prohibit the use of state funds at "sectarian" schools. The provisions are named for Congressman James G. Blaine, who proposed such an amendment to the U.S. Constitution while he was Speaker of the U.S. House of Representatives in 1875.

The amendment passed overwhelmingly (180-7) in the House, but failed narrowly (by 4 votes) in the U.S. Senate. Supporters of the amendment then turned their attention to the individual states, where they had much more success. In some states, Blaine Amendments were adopted by the usual constitutional amendment process. In the case of states just entering the Union, they were forced to adopt similar language as a requirement for gaining statehood.[14]

According to the Florida First District Court of Appeal:

> [w]hether the Blaine-era amendments are based on religious bigotry is a disputed and controversial issue among historians and legal scholars. Certain commentators contend that the original Blaine-era no-aid provisions were based in part on anti-Catholic religious bigotry. Other commentators argue, however, that anti-Catholic bigotry did not play a significant role in the development of Blaine-era no-aid provisions in state constitutions.[15]

In contrast, a plurality opinion of the U.S. Supreme Court, authored by Justice Thomas, asserts that Blaine Amendments were motivated by an anti-Catholic bias.[16] He went on to note that the exclusion of religious schools from generally available public aid programs "would raise serious questions under the Free Exercise Clause."[17]

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[11] *Larson v. Valente*, 456 U.S. 228 (1982).
[12] *Locke v. Davey*, 540 U.S. 712, 722 (2004).
[13] *Holmes II*, 886 So. 2d at 348-49.
[14] J. Scott Slater, *Florida's "Blaine Amendment" and Its Effect on Educational Opportunities*, 33 STETSON L. REV. 581, 591 (Winter 2004).
[15] *Holmes II*, 886 So. 2d at note 9 (citations omitted).
[16] *Mitchell v. Helms* 530 U.S. 793, 828-829 (2000). Justice Thomas wrote:

> In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now.

Id. (citations omitted).
[17] *Id.* at 835 n.19.

Florida's Blaine Amendment or no-aid provision imposes "further restrictions on the state's involvement with religious institutions than the Establishment Clause" of the U.S. Constitution.[18] The constitutional prohibition in the no-aid provision involves three elements:

- The prohibited state action must involve the use of state tax revenues;
- The prohibited use of state revenues is broadly defined, in that state revenues cannot be used "directly or indirectly in aid of" the prohibited beneficiaries; and
- The prohibited beneficiaries of the use of state revenues are "any church, sect or religious denomination" or "any sectarian institution."[19]

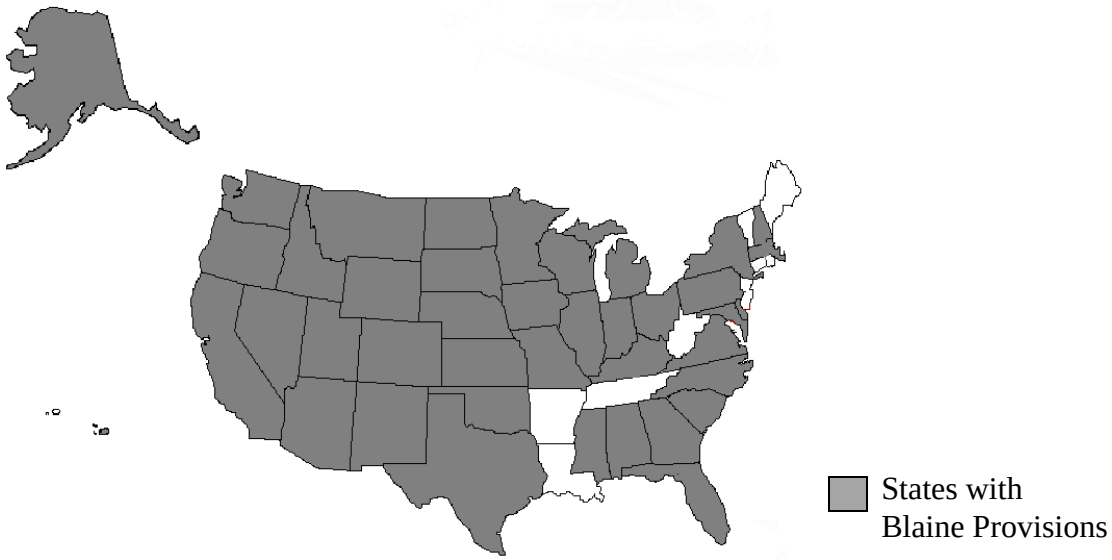
Florida's Blaine Amendment became widely known after the First District Court of Appeal's decision in *Bush v. Holmes*, to invalidate the Opportunity Scholarship Program (OSP).[20]

In a recent application of the Blaine Amendment, a watchdog organization filed suit against the secretary of the Department of Corrections (DOC) to prevent the secretary from expending funds to support faith-based substance abuse transitional housing programs provided by institutions to inmates pursuant to the institutions' contracts with DOC.[21] The trial court entered a judgment on the pleadings in favor of the secretary. On appeal, the First District Court of Appeal recognized that a state constitutional provision, like Florida's no-aid provision, can bar state financial aid to religious institutions without violating either the Establishment Clause or Free Exercise Clause, and reversed the trial court decision and remanded for further factual findings.[22] The Court certified a question to the Florida Supreme Court as one of great public importance under rule 9.330, Florida Rules of Appellate Procedure.[23] The certified question was, "Whether the no-aid provision in Article I, Section 3 of the Florida Constitution prohibits the State from contracting for the provision of necessary social services by religious or sectarian entities?"[24] The Supreme Court did not accept the certified question.[25]

Blaine Amendments in Other Jurisdictions

Not all states adopted Blaine Amendments, and today, approximately 37 states have some version of the provision in their state constitutions.[26] Commentators differ regarding the existence of the true number of Blaine Amendments, or the number of provisions that are actually enforced. The following figure illustrates those states with a Blaine Amendment in the state constitution or some other form of Blaine provision:[27]

[18] *Holmes II*, at 344.
[19] *Id.* at 352.
[20] *Id.* at 340. The Florida Supreme Court also invalidated the Opportunity Scholarship Program but for violating the uniformity requirement of section 1 of article IX of the Florida Constitution. *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).
[21] *Council for Secular Humanism, Inc. v. McNeil*, 44 So. 3d 112 (Fla.1st DCA 2010).
[22] *Id.* at 121.
[23] *Id.*
[24] *Id.*
[25] *McNeil v. Council for Secular Humanism, Inc.*, 41 So. 3d 215 (Fla. 2010).
[26] The Becket Fund for Religious Liberty, *Blaine Amendments: States, available at* http://www.blaineamendments.org/states/states.html (last visited Mar. 31, 2011).
[27] *Id.*



This year, Georgia legislators filed a resolution to remove the Blaine Amendment from that state's constitution.[28]

Constitutional Amendment Process

Article XI of the Florida Constitution sets forth various methods for proposing amendments to the constitution, along with the methods for approval or rejection of proposals. One method by which constitutional amendments may be proposed is by joint resolution agreed to by three-fifths of the membership of each house of the Legislature.[29]Any such proposal must be submitted to the electors, either at the next general election held more than 90 days after the joint resolution is filed with the Secretary of State, or, if pursuant to law enacted by the affirmative vote of three-fourths of the membership of each house of the Legislature and limited to a single amendment or revision, at an earlier special election held more than 90 days after such filing.[30] If the proposed amendment is approved by a vote of at least 60 percent of the electors voting on the measure, it becomes effective as an amendment to the Florida Constitution on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment.[31]

III. Effect of Proposed Changes:

Senate Joint Resolution 1218 proposes an amendment to section 3, article I of the Florida Constitution to provide that a person cannot be prohibited from participating in a public program because of the person's free choice in using program benefits at a religious provider. In effect,

[28] *See* Georgia House Resolution 425 (2011).
[29] FLA. CONST. art. XI, s. 1.
[30] FLA. CONST. art. XI, s. 5(a).
[31] FLA. CONST. art. XI, s. 5(e).

the state is precluded from excluding individuals and entities from a generally available public benefit on the basis of religion.

The resolution, if adopted by the voters, would remove the Blaine Amendment provision from the state constitution. This removes the limitation on the power of the state and its political subdivisions to spend funds "directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."

The joint resolution is silent regarding an effective date for the constitutional amendment. Therefore, in accordance with section 5, article XI, of the Florida Constitution, it would take effect on the first Tuesday after the first Monday in January following the election at which it was approved by the electorate.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Establishment Clause and Blaine Amendment

The Establishment Clause "prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion."[32] The test to determine whether government aid violates the Establishment Clause of the U.S. Constitution is whether the aid:

- Results in governmental indoctrination;
- Defines its recipients by reference to religion or is neutral with respect to religion; or
- Creates an excessive entanglement.[33]

The conditions under which government may aid a religious institution under the Establishment Clause of the U.S. Constitution were identified by the U.S. Supreme Court in *Zelman v. Simmons-Harris*.[34] The *Zelman* Court stated:

[32] *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-649 (2002).
[33] *Agostini v. Felton*, 521 U.S. 203, 234 (1997).
[34] *Zelman*, 536 U.S. at 652.

> that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to [a] religious [institution] wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.[35]

Accordingly, neutrality must be a key feature of government aid programs that benefit a religion. Aid is neutral if the aid has been directed to a religion by a private choice, rather than a government choice. Aid is neutral if "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis."[36]

Courts have found that the following types of aid did not violate the Establishment Clause of the U.S. Constitution:

- Annual subsidies directly to qualifying colleges and universities in Maryland, including religiously affiliated institutions;[37]
- Bussing services for both public and private school children;[38]
- The provision of secular textbooks for both public and private school students;[39]
- Construction grants to colleges and universities regardless of affiliation with or sponsorship by a religious body;[40]
- The provision of grants to religious and other institutions to provide counseling on teenage sexuality;[41] and
- Payment of tuition to private religious schools for children in Cleveland, Ohio, who attended poor quality public schools.[42]

Without knowing exactly how the joint resolution may potentially be challenged if adopted, it is instructional to generally assess how the establishment clause applies to education cases. Initially, a provision must comply with facial constitutionality. In analyzing whether a statute is constitutional on its face, the court will not consider a statute's application in practice or through factual findings.[43] The Florida Supreme Court

[35] *Id.*
[36] *Zelman*, 536 U.S. at 653-54 (quoting *Agostini*, 521 U.S. at 231).
[37] *Roemer v. Maryland Bd. of Pub. Works*, 426 U.S. 736 (1976).
[38] *Everson v. Board of Education*, 330 U.S. 1 (1947).
[39] *Board of Education v. Allen*, 392 U.S. 236 (1968).
[40] *Tilton v. Richardson*, 403 U.S. 672 (1971).
[41] *Bowen v. Kendrick*, 487 U.S. 589 (1988).
[42] *Zelman*, 536 U.S. at 639.
[43] *Bowen*, 487 U.S. at 600-01 (1988). *See also Reno v. Flores*, 507 U.S. 292, 301 (1993), which provides that a facial challenge is assessed without reference to factual findings or evidence of particular applications. To prevail on a facial challenge, a petitioner must establish that no set of circumstances exists under which the challenged act would be valid.

reviewed the First District Court of Appeal's holding that the state's Opportunity Scholarship Program, which provided education vouchers for children to leave failing public schools and attend private schools, violated the "no aid" provision of the state constitution. The Florida Supreme Court, in invalidating the program on other grounds, ruled that it would:

> . . . neither approve nor disapprove the First District's determination that the OSP violates the "no aid" provision in article I, section 3 of the Florida Constitution, an issue we decline to reach."[44]

Because the court decided the case on uniformity grounds, it also did not reach the question of whether the program violated the federal establishment clause.

In upholding an Ohio school voucher program, the U.S. Supreme Court ruled that Ohio did not violate the federal Establishment Clause, as the program took a neutral approach toward religion and individuals had the option to exercise their own free choice regarding private providers.[45] Rather than focusing on the volume of available religious providers, which in this case represented a full 82 percent of participating schools, the Court deemed critical the extent to which the program had the effect of advancing or inhibiting religion.[46] In the absence of demonstrated governmental preference for religious support, the mere incidental advancement of religion, the Court opined, is not constitutionally deficient.[47]

The United States Court of Appeals for the District of Columbia circuit reiterated this principle in *American Jewish Congress v. Corporation for National and Community Service.*[48] Here, the court upheld the AmeriCorps Education Awards Program, a nationwide community service program that provided placement of participants in schools and granted an award to those who completed qualifying service hours. The program did not exclude providers on the basis of religious affiliation or instruction. Some participants were placed in sectarian schools, and some taught religious instruction as part of their coursework. While the program did not expressly restrict instruction to non-secular subjects, instructors received no incentive for teaching religious courses, and these hours did not count toward qualifying service hours.[49] As program challengers failed to demonstrate favoritism toward religious institutions or teachings, the court held, there was no imprimatur of government endorsement.[50]

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[44] *Bush v. Holmes*, 919 So. 2d 392, 413 (Fla. 2006). Here, the court struck down the program on the basis that it violated s. 1(a), art. IX, of the Florida Constitution, as it jeopardized the requirement that the state provide for a uniform system of free public schools: "The OSP contravenes this . . . provision because it allows some children to receive a publicly funded education through an alternative system of private schools . . . not subject to the uniformity requirements of the public school system. The diversion of money not only reduces public funds for a public education but also uses public funds to provide an alternative education in private schools…not subject to the 'uniformity' requirement for public schools." *Id.* at 412.
[45] *Zelman*, 536 U.S. at 639.
[46] *Id.* at 640.
[47] *Id.*
[48] *American Jewish Congress v. Corporation for National and Community Service*, 399 F.3d 351 (D.C. Cir. 2005).
[49] *Id.*
[50] *Id.* at 357.

The Ninth Circuit Court of Appeals did find such an imprimatur, however, in a challenge to a state program establishing a privately funded student tuition organization (STO), where those contributing to the program received a dollar-for-dollar credit on taxes.[51] Although the statute at issue did not directly specify that funding would be provided to religious institutions, in practice, the overwhelming presence of sectarian STOs in the program, and the unrestricted grant of money to these STOs (which then distributed the money solely to religious schools), combined to leave parents with little choice in the selection of providers. Therefore, although the stated purpose of the program was individual choice in education, an on-its-face neutral purpose, its impact was to further religion through education. In support of its invalidation of the STO program, the court cited the U.S. Supreme Court in *McCreary County, Kentucky v. ACLU of Kentucky* and recognized that, ". . .although a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective."[52]

This joint resolution provides both for the removal of the Blaine Amendment from the state constitution and the introduction of new language upholding independent choice. Not all state constitutions contain a Blaine Amendment now, so its deletion here is, in all likelihood, permissible. Without the benefit of having a program in place to review, it is difficult to analyze the new language in this joint resolution for constitutional impact. However, this provision would likely survive a challenge on its face.

The state spending will continue to be limited to within the parameters of the Establishment clauses, and the constitutionality of the spending will be likely turn on whether it:

- Results in governmental indoctrination;
- Defines its recipients by reference to religion; or
- Creates an excessive entanglement.[53]

Joint Resolutions

In order for the Legislature to submit SJR 1218 to the voters for approval, the joint resolution must be agreed to by three-fifths of the membership of each house.[54] If SJR 1218 is agreed to by the Legislature, it will be submitted to the voters at the next general election held more than 90 days after the amendment is filed with the Department of State.[55] As such, SJR 1218 would be submitted to the voters at the 2012 General Election. In order for SJR 1218 to take effect, it must be approved by at least 60 percent of the voters voting on the measure.[56]

[51] *Winn v. Arizona Christian School Tuition Organization*, 562 F.3d 1002 (9th Cir. 2009).
[52] *McCreary County, Kentucky v. ACLU of Kentucky*, 545 U.S. 844, 864 (2005).
[53] *Agostini v. Felton*, 521 U.S. 203, 234 (1997).
[54] FLA. CONST. art. XI, s. 1.
[55] FLA. CONST. art. XI, s. 5(a).
[56] FLA. CONST. art. XI, s. 5(e).

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Private religious institutions could benefit from receiving public funds.

C. Government Sector Impact:

The measure may insulate government programs providing funds to sectarian institutions from lawsuits alleging that the programs violate the Blaine Amendment. The measure may also result in the use of more sectarian institutions to provide government services.

Each constitutional amendment is required to be published in a newspaper of general circulation in each county, once in the sixth week and once in the tenth week preceding the general election.[57] Costs for advertising vary depending upon the length of the amendment. The Department of State executes the publication of the Joint Resolution if placed on the ballot. The cost varies depending on the length of the full text. The Florida Department of State estimates that required publication of a proposed constitutional amendment costs $106.14 per word. These funds must be spent regardless of whether the amendment passes, and would be payable in FY 2012-2013 from the General Revenue Fund.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[57] FLA. CONST., art. XI, s. 5(d).

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 1294
INTRODUCER:	Senators Hays and Evers
SUBJECT:	Application of Foreign Law
DATE:	April 1, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Boland	Maclure	JU	**Pre-meeting**
2.			CM	
3.			CF	
4.				
5.				
6.				

I. Summary:

The bill states that any court decision or ruling based, in whole or in part, on any foreign law or legal code that does not grant the parties affected by the ruling the same fundamental liberties, rights, and privileges granted by the State Constitution or the Constitution of the United States violates public policy and is void and unenforceable. Also, any contract that provides for choice of law to govern disputes between the parties is void and unenforceable if the law chosen incorporates any substantive or procedural law that would not provide the parties the same fundamental liberties, rights, and privileges afforded by the State Constitution and the Constitution of the United States.

The bill states that if a contract provides for a choice of venue outside the state or territory of the United States and if enforcement of that choice of venue would result in a violation of any right guaranteed by the State Constitution or the Constitution of the United States, then the provision must be construed to preserve the constitutional rights of the person against whom enforcement is sought. Finally, a claim of forum non conveniens[1] must be denied if a court of this state finds that granting the claim violates or would likely lead to a violation of any constitutional right of the nonclaimant in the foreign forum.

[1] "Forum non conveniens" is the "doctrine that an appropriate forum – even though competent under the law – may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place." BLACK'S LAW DICTIONARY (9th ed. 2009).

The bill provides that it does not apply to corporations, partnerships, or other forms of business associations, and the bill only applies to actual or foreseeable denials of a natural person's constitutional rights.

This bill creates section 45.022, Florida Statutes.

II. Present Situation:

Application or Interpretation of Foreign Laws or Decisions

Courts in the United States use three guiding doctrines when deciding cases that involve the application or interpretation of foreign laws or decisions: the political question doctrine, the act of state doctrine, and the international comity doctrine.

Political Question Doctrine

A court may determine, under the political question doctrine, that a dispute should be addressed by the political branches of government and that the judicial branch is the inappropriate forum for a decision concerning political matters. The political question doctrine stems from constitutional separation of powers concerns and contemplates the strong legislative and presidential foreign affairs powers.[2]

In *Baker v. Carr*, the U.S. Supreme Court found that if one of the following circumstances exists in a case, then typically the matter is a political question and should not be decided by the court.

- There exists a textually demonstrable constitutional commitment of the issue to a coordinate political department;
- There is a lack of judicially discoverable and manageable standards for resolving the issue;
- It is impossible to decide the issue without an initial policy determination of a kind clearly for nonjudicial discretion;
- It is impossible for a court to undertake independent resolution of the issue without expressing lack of the respect due to coordinate branches of government;
- There is an unusual need for unquestioning adherence to a political decision already made; or
- There is the potential for embarrassment from multifarious pronouncements by various departments on one question.[3]

Act of State Doctrine

The act of state doctrine provides that U.S. courts should not judge the acts of foreign heads of state made within their states' sovereign territory out of respect for those other states' sovereignty. When used in diplomatically sensitive suits, the doctrine stands for the proposition that when the executive branch makes a determination on a matter affecting U.S. foreign

[2] 9 A.L.R. 6th 177.
[3] *Baker v. Carr*, 369 U.S. 186, 216 (1962).

relations, it is not for the judiciary to second-guess that branch's expertise by adjudicating what the executive concludes are sensitive claims.[4]

The classic American statement of the act of state doctrine is found in *Underhill v. Hernandez*, in which Chief Justice Fuller, speaking for a unanimous Court said:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[5]

However, the application of the act of state doctrine is limited, and courts may decide certain controversies involving foreign judgments. The act of state doctrine applies only to "official" acts of a sovereign.[6] If there is a treaty or written U.S. State Department opinion disfavoring the application of the doctrine, the act of state doctrine may be avoided.[7] In addition, the Federal Arbitration Act expressly provides that enforcement of arbitration agreements shall not be refused on the basis of the act of state doctrine.[8]

The act of state doctrine merely requires that those acts by a sovereign within its own territory must be deemed valid under the sovereign's own law.[9]

***International Comity Doctrine*[10]**

The doctrine of "comity" is based on respect for the sovereignty of other states or countries, and under it, the forum state will generally apply the substantive law of a foreign sovereign to causes of action which arise in that sovereign. "International comity" is the recognition that one nation allows within its territory the legislative, executive, or judicial acts of another nation, having due regard to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[11]

The principle of international comity is an abstention doctrine, which recognizes that there are circumstances under which the application of foreign law may be more appropriate than the application of U.S. law. Thus, under this doctrine, courts sometimes defer to laws or interests of a foreign country and decline to exercise the jurisdiction they otherwise have.

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[4] O'Donnell, Michael J., *A Turn for the Worse: Foreign Relations, Corporate Human Rights Abuse, and the Courts,* 24 B.C. Third World L.J. 223 (2004), *available at* http://www.michael-odonnell.com/Note.pdf.
[5] *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).
[6] *W.S. Kirkpatrick Co. v. Environ. Tectonics Corp. Int'l*, 493 U.S. 400 (1990). Note: Commercial acts by foreign governments are not generally deemed to be "official acts."
[7] Scullion, Jennifer., Gerstein, Jason D., Kastner, Jessica, *Proskauer on International Litigation and Dispute Resolution: Ch. 9 Suing Non-U.S. Governmental Entities in U.S. Courts, available at* http://www.proskauerguide.com/litigation/9/XV.
[8] 9 U.S.C. s. 15.
[9] O'Donnell, *supra* note 4.
[10] Information concerning the international comity doctrine was adapted from 44B Am. Jur. 2d International Law s. 8.
[11] *See Allstate Life Insurance, Co. v. Linter Group Ltd.*, 994 F.2d 996 (2d Cir. 1993), citing *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

Furthermore, international comity is a doctrine that permits a court having a legitimate claim to jurisdiction to conclude that another sovereign also has a legitimate claim to jurisdiction under principles of international law and may concede the case to that jurisdiction. The international comity principle provides for recognition of foreign proceedings to the extent that such proceedings are determined to be orderly, fair, and not detrimental to the nation's interests.[12]

The doctrine of comity is used as a guide for the court, in construing a statute, where the issues to be resolved are entangled in international relations. A generally recognized rule of international comity states that an American court will only recognize a final and valid judgment. This doctrine is not obligatory and is not a rule of law, but is a doctrine of practice, convenience, and expediency. However, the doctrine of comity creates a strong presumption in favor of recognizing foreign judicial decrees. A court may deny comity to a foreign legislative, executive, or judicial act if it finds that the extension of comity would be contrary or prejudicial to the interest of the United States, or violates any laws or public policies of the United States.[13]

Uniform Out-of-country Foreign Money-Judgment Recognition Act

The recognition of foreign judgments in Florida is governed by the Uniform Out-of-country Foreign Money-Judgment Recognition Act (Florida Recognition Act).[14] The Supreme Court of Florida has noted that the Florida Recognition Act was adopted to "ensure the recognition abroad of judgments rendered in Florida."[15] Accordingly, the Florida Recognition Act attempts to guarantee the recognition of Florida judgments in foreign countries by providing reciprocity in Florida for judgments rendered abroad.[16] However, even though the Florida Recognition Act presumes that foreign judgments are prima facie enforceable, the Act is also designed to preclude Florida courts from recognizing foreign judgments in certain prescribed cases where the Legislature has determined that enforcement would be unjust or inequitable to domestic defendants.[17]

The Florida Recognition Act delineates three mandatory and eight discretionary circumstances under which a foreign judgment may not be entitled to recognition. In Florida, a foreign judgment is not conclusive if:

- The judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law.
- The foreign court did not have personal jurisdiction over the defendant.
- The foreign court did not have jurisdiction over the subject matter.[18]

A foreign judgment need not be recognized if:

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[12] *See Allstate Life Insurance, Co. v. Linter Group Ltd.*, 994 F.2d 996 (2d Cir. 1993), citing *Cunard S.S. Co. v. Salen Reefer Serv. AB,*773 F.2d 452, 457 (2d Cir. 1985).
[13] *Id*. at 1000.
[14] Sections 55.601-55.607, F.S.
[15] *Nadd v. Le Credit Lyonnais, S.A.*, 804 So.2d 1226, 1228 (Fla. 2001).
[16] *Id*.
[17] *Id*.
[18] *Id*.

- The defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him or her to defend.
- The judgment was obtained by fraud.
- The cause of action or claim for relief on which the judgment is based is repugnant to the public policy of this state.
- The judgment conflicts with another final and conclusive order.
- The proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court.
- In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.
- The foreign jurisdiction where judgment was rendered would not give recognition to a similar judgment rendered in this state.
- The cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the court sitting in this state before which the matter is brought first determines that the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by the U.S. Constitution and the Florida Constitution.[19]

Florida Arbitration Act

In Florida, two or more opposing parties involved in a civil dispute may agree in writing to submit the controversy to voluntary binding arbitration, or voluntary trial resolution, in lieu of litigating the issues involved, prior to or after a lawsuit has been filed, provided no constitutional issue is involved.[20]

A voluntary binding arbitration decision may be appealed in a Florida circuit court and limited to review on the record of whether the decision reaches a result contrary to the U.S. Constitution or the Florida Constitution.[21]

Uniform Child Custody Jurisdiction and Enforcement Act

In 2002, the Legislature enacted the "Uniform Child Custody Jurisdiction and Enforcement Act" (act) to:

- Avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being.
- Promote cooperation with the courts of other states to the end that a custody decree is rendered in the state that can best decide the case in the interest of the child.
- Discourage the use of the interstate system for continuing controversies over child custody.
- Deter abductions.
- Avoid relitigating the custody decisions of other states in this state.
- Facilitate the enforcement of custody decrees of other states.

[19] *Id*.
[20] Section 44.104(1), F.S.
[21] Section 44.104(10)(c), F.S.

- Promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child.
- Make uniform the law with respect to the subject of the act among the states enacting it.[22]

The act prescribes the circumstances under which a court has jurisdiction, mechanisms for granting temporary emergency jurisdiction, and procedures for the enforcement of out-of-state custody orders, including assistance from state attorneys and law enforcement in locating a child and enforcing an out-of-state decree. It facilitates resolution of interstate custody matters and provides for the custody, residence, visitation, or responsibility of a child.

In addition, the act requires a court of this state to treat a foreign country as if it were a state of the U.S. for purposes of applying the provisions of the act. Also, a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of the act must be recognized and enforced, unless the child custody law of the foreign country violates fundamental principles of human rights.[23]

American Law for American Courts Movement

Recently, there has been a movement around the country to ban the use of some foreign laws in United States courts. Although this movement has been primarily targeted at prohibiting the use of Islamic Shariah law, advocates of the movement have promoted model legislation banning the use of any law that infringes on constitutional rights.[24] Presumably, this action has been taken to avoid freedom of religion challenges. The American Public Policy Alliance,[25] a group focused on the promotion of American Law for American Courts, states:

> The purpose of American Laws for American Courts is to preserve the sovereignty of the US and the 50 states and their respective Constitutions by preventing the encroachment of foreign laws and legal systems, such as Shariah law, that run counter to our individual constitutional liberties and freedoms.[26]

This group offers model legislation that lawmakers may adopt and file as bills in their individual states. Notably, in 2010 70 percent of Oklahoma voters voted in favor of an Oklahoma constitutional amendment banning the use of Islamic Shariah law in court decisions.[27] Among other states, Florida, Tennessee, and Louisiana had comparable bills filed during the 2010 regular session in each of those states.[28] Those bills sought to ban the use of foreign laws in court decisions if the foreign laws would violate the fundamental rights guaranteed under the state or

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[22] Section 61.502, F.S. *See also*, s. 5, ch. 002-65, L.O.F. Note: This act replaced the Uniform Child Custody Jurisdiction Act (UCCJA), adopted in 1977.
[23] Section 61.506, F.S.
[24] Public Policy Alliance, *American Law for American Courts*, http://publicpolicyalliance.org/?page_id=38 (last visited April 1, 2011).
[25] The American Public Policy Alliance describes itself as "a non-partisan advocacy organization dedicated to government transparency, government accountability and the constitutionality of U.S. and state laws and policies." See the organization's website, http://publicpolicyalliance.org/ (last visited April 1, 2011).
[26] *Supra* note 24.
[27] Meredith Jessup, *Oklahoma Shariah Ban May Conflict with U.S. Constitution*, The Blaze (Nov. 4, 2010), http://www.theblaze.com/stories/oklahoma-sharia-ban-may-conflict-with-u-s-constitution/ (last visited April 1, 2011).
[28] CS/SB 1962 (2010 Reg. Session); Tennessee HB 3768 (2010); Louisiana HB 785 (2010).

United States Constitutions.[29] The issue has received recent attention in Florida, where a circuit court judge in Hillsborough County issued an order on March 3, 2011, regarding the disposition of proceeds flowing from the 2008 eminent domain taking of a Tampa mosque.[30] The judge's order states that the case will proceed under Ecclesiastical Islamic Law.[31]

III. Effect of Proposed Changes:

The bill defines "foreign law, legal code, or system" as any law, legal code, or system of a jurisdiction outside any state or territory of the United States. The bill states that any court, tribunal, or administrative agency ruling or decision that bases the decision, in whole or in part, on any law, legal code, or system that does not grant the parties affected by the ruling the same fundamental liberties, rights, and privileges granted under the State Constitution and the Constitution of the United States violates public policy of the state of Florida and is void and unenforceable.

Similarly, the bill provides that any contract or contractual provision, if severable, that provides for a choice of law, legal code, or system to govern some or all of the disputes between parties, either in court or in arbitration, is void and unenforceable if the law, legal code, or system chosen includes or incorporates any substantive or procedural law that would not provide the parties the same fundamental liberties, rights, and privileges granted under the State Constitution and the Constitution of the United States. If a contractual provision provides for a choice of venue or forum outside the state or territory of the United States and if enforcement of that choice of venue or forum would result in a violation of any right guaranteed by the State Constitution or Constitution of the United States, then the provision must be construed to preserve the constitutional rights of the person against whom enforcement is sought. Finally, a claim of forum non conveniens[32] must be denied if a court of this state finds that granting the claim violates or would likely lead to a violation of any constitutional right of the nonclaimant in the foreign forum.

The bill does not apply to a corporation, partnership, or other form of business association. Also, the bill only applies to actual or foreseeable denials of a natural person's constitutional rights. Finally, the bill contains a severability clause, providing that if any provision of this bill or its application is held invalid, the invalidity does not affect other provisions or applications of the bill.

The bill provides that it shall take effect upon becoming law.

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[29] *Id*.
[30] William R. Levesque, *Hillsborough Judge in Islamic Law Case No Liberal*, St. Petersburg Times (April 1, 2011), http://www.tampabay.com/news/courts/civil/hillsborough-judge-in-islamic-law-case-no-liberal/1160886 (last visited April 1, 2011).
[31] *Ghassan Mansour et al. v. Islamic Education Center of Tampa, Inc.*, case no. 08-03497 (Fla. 13th Jud. Cir. 2011), http://tool.donation-net.net/Images/Email/1097/110303_Order_in_Connection_with_Plaintiffs__Emergency_Motion.pdf.
[32] "Forum non conveniens" is defined as "The doctrine that an appropriate forum – even though competent under the law – may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place." BLACK'S LAW DICTIONARY (9th ed. 2009).

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:[33]

Federal Preemption

The doctrine of preemption limits state action in foreign affairs. Article VI of the U.S. Constitution states that the laws and treaties of the U.S. are the "supreme Law of the Land," and, therefore, they preempt state law. The Supreme Court has recently held that even if a state statute was not preempted by a direct conflict with federal law, field preemption could still occur if the state law purported to regulate a "traditional state responsibility," but actually "infringed on a foreign affairs power reserved by the Constitution exclusively to the national government."[34] If the bill faces a federal preemption challenge, a court could potentially find that the bill substantially infringes on a foreign affairs power reserved to the national government. Such a finding would likely cause a court hold that the bill is preempted by federal foreign affairs powers.

Dormant Federal Foreign Affairs Powers

Although not explicitly provided for in the U.S. Constitution, the Supreme Court has interpreted the U.S. Constitution to say that the national government has exclusive power over foreign affairs. In *Zschernig v. Miller*, the Supreme Court reviewed an Oregon statute that refused to let a resident alien inherit property because the alien's home country barred U.S. residents from inheriting property. The Court held that the Oregon law as applied exceeded the limits of state power because the law interfered with the national government's exclusive power over foreign affairs. The Court also held that, to be unconstitutional, the state action must have more than "some incidental or indirect effect on foreign countries," and the action must pose a "great potential for disruption or embarrassment" to the national unity of foreign policy.[35] Such a determination would necessarily rely heavily on considerations of current political climates and foreign relations, as well as the United States' perception abroad. Due to the fact that these factors could only be evaluated if and when a challenge to this bill was brought, an

[33] The constitutional analysis was adapted, in part, from 1 J. Transnat'l L. & Pol'y 197.
[34] *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F. 3d 954 (9th Cir. 2010).
[35] *Zschernig v. Miller*, 389 U.S. 429 (1968).

assessment of the likelihood for success that such an action would have is not practical at this time.

Separation of Powers

The first three articles of the U.S. Constitution define the powers given to the three branches of government in the United States.[36] Article I defines the legislative branch and vests with it all power to make law. Article II defines the executive branch and vest in it the power to enforce the law. Article III defines the judicial branch and vests in it all judicial power. For time immemorial, that power has been understood to mean the power to interpret and apply the law.[37]

As discussed above, to the extent that this bill directs Florida courts to consider and interpret foreign decisions and law in a certain manner, it may interfere with the federal government's ability to govern foreign policy with one voice. As such, this bill could be challenged as preempted by the federal government. Similarly, as previously stated, the judiciary's constitutional role is to act as the sole interpreter of laws; therefore, the bill could be challenged as an infringement on the essential role of the judicial branch in violation of the constitutional separation of powers. Similarly, the Florida Constitution explicitly mandates separation of powers between branches of the Florida government. Article II, section 3 of the Florida Constitution specifically states:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

Because of this language, Florida's separation of powers doctrine is even stronger than the federal concept of separation of powers. Therefore, the bill's application could result in a potentially successful separation of powers challenge under the Florida Constitution, as well. In this way, the bill may face an additional separation of powers problem if a court determines that the bill infringes on the court's exclusive judicial authority under the Florida Constitution.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill has the potential to affect a private right to freely contract. Constriction of the right to freely contract could negatively impact business flexibility and competitiveness. However, because the bill explicitly states that it does not apply to corporations or

[36] Articles I, II, III, U.S. Const.
[37] *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

partnerships, the bill is not likely to have a significant impact on Florida's overall business community.

C. Government Sector Impact:

The Office of the State Courts Administrator identified a potential impact on both judicial time and court workload in identifying and determining whether a foreign law denies fundamental liberties, rights, and privileges otherwise afforded litigants under the Florida and the federal constitutions. However, the Office of State Courts Administrator also found that the fiscal impact of the workload increases could not be determined due to the unavailability of data needed to quantifiably establish such an increase.[38]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[38] *Judicial Impact Statement for SB 1294*, Office of State Courts Administrator, Mar. 3, 2011 (on file with the Committee on Judiciary).

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SJR 1438
INTRODUCER:	Senator Hays
SUBJECT:	Sovereignty of the State
DATE:	April 1, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Maclure	Maclure	JU	**Pre-meeting**
2.			GO	
3.			RC	
4.				
5.				
6.				

I. Summary:

The Senate joint resolution proposes an amendment to the Florida Constitution expressing the sovereignty of the state under the Tenth Amendment to the United States Constitution. More specifically, the joint resolution provides that all powers not otherwise enumerated and granted to the federal government by the U.S. Constitution are reserved to the state, and that Floridians are not required to comply with mandates from the federal government which are beyond the scope of its constitutionally delegated powers.

The joint resolution also provides that all compulsory federal legislation that directs states to comply under threat of losing federal funding should be repealed and are not recognized by the state.

This resolution proposes the creation of article I, section 28, of the Florida Constitution.

II. Present Situation:

Tenth Amendment and State Sovereignty

By the provisions of the United States Constitution, certain powers are entrusted solely to the federal government alone, while others are reserved to the states, and still others may be exercised concurrently by both the federal and state governments.[1] All attributes of government that have not been relinquished by the adoption of the United States Constitution and its

[1] 48A FLA. JUR 2D, *State of Florida* s. 13 (2010).

amendments have been reserved to the states.[2] The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." As noted by one Supreme Court Justice:

> [t]his amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities.[3]

Therefore, courts have consistently interpreted the Tenth Amendment to mean that "'[t]he States unquestionably do retai[n] a significant measure of sovereign authority. . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.'"[4] Under the federalist system of government in the United States, states may enact more rigorous restraints on government intrusion than the federal charter imposes.[5] However, a state may not adopt more restrictions on the fundamental rights of a citizen than the United States Constitution allows.[6]

The United States Supreme Court has recognized that the framers of the Constitution explicitly chose a constitution that affords to Congress the power to regulate individuals, not states.[7] Therefore, the Court has consistently held that the Tenth Amendment does not afford Congress the power to require states to enact particular laws or require that states regulate in a particular manner.[8] For example, in *New York v. United States*, the Court, in interpreting the Tenth Amendment, ruled that the Constitution does not confer upon Congress the power to compel states to provide for disposal of radioactive waste generated within their borders, though Congress has substantial power under the Constitution to encourage states to do so.[9]

State Sovereignty Movement

A state sovereignty movement has emerged in the United States over the past couple of years. The premise of this movement is the belief that the balance of power has tilted too far in favor of the federal government. Proponents of this movement urge legislators and citizens to support resolutions or state constitutional amendments declaring the sovereignty of the state over all matters not delegated by the limited enumeration of powers in the United States Constitution to the federal government. The resolutions often mandate that the state government will hold the federal government accountable to the United States Constitution to protect state residents from federal abuse.

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[2] *Id.*
[3] *New York v. United States*, 505 U.S. 144, 156 (1992) (quoting 3 J. Story, *Commentaries on the Constitution of the United States* 752 (1833)).
[4] *Id.*
[5] 48A FLA. JUR 2D, *State of Florida* s. 13 (2010).
[6] *Id*. (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 549 (1985)).
[7] *New York v. United States*, 505 U.S. at 156.
[8] *Id; see also Baggs v. City of South Pasadena*, 947 F. Supp. 1580 (M.D. Fla. 1996).
[9] *New York v. United States*, 505 U.S. at 156.

An advocacy organization supporting state sovereignty reports that multiple states have introduced similar resolutions asserting state sovereignty.[10] Nine legislatures have adopted some variation of the resolution[11] In late June 2009, the Tennessee governor became the first governor to sign such a resolution.[12]

In lieu of a resolution asserting state sovereignty, some state legislators have filed bills proposing binding legislation supporting state sovereignty. For example, a New Hampshire legislator filed a bill to create a "joint committee on the constitutionality of acts, orders, laws, statutes, regulations, and rules of the government of the United States of America in order to protect state sovereignty."[13] Some state legislators have filed legislation for a constitutional amendment asserting state sovereignty.[14] To date, no state constitutional amendment has been adopted.

Constitutional Amendment Process

Article XI of the Florida Constitution sets forth various methods for proposing amendments to the constitution, along with the methods for approval or rejection of proposals. One method by which constitutional amendments may be proposed is by joint resolution agreed to by three-fifths of the membership of each house of the Legislature.[15]Any such proposal must be submitted to the electors, either at the next general election held more than 90 days after the joint resolution is filed with the Secretary of State, or, if pursuant to law enacted by the affirmative vote of three-fourths of the membership of each house of the Legislature and limited to a single amendment or revision, at an earlier special election held more than 90 days after such filing.[16] If the proposed amendment is approved by a vote of at least 60 percent of the electors voting on the measure, it becomes effective as an amendment to the Florida Constitution on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment.[17]

III. Effect of Proposed Changes:

The Senate joint resolution proposes an amendment to the Florida Constitution expressing the sovereignty of the state under the Tenth Amendment to the United States Constitution.

The joint resolution recognizes Florida's residual and inviolable sovereignty under the Tenth Amendment to the United States Constitution over all powers not otherwise enumerated and granted to the federal government. The joint resolution states that the people of this state refuse

[10] Tenth Amendment Center, *10th Amendment Resolutions*, http://www.tenthamendmentcenter.com/nullification/10th-amendment-resolutions/ (last visited April 1, 2011).
[11] Those states include: Arizona, Idaho, Kansas, Louisiana, Nebraska, North Dakota, Oklahoma, South Carolina, and South Dakota.
[12] Tennessee HJR 108 (2009).
[13] New Hampshire HB 1343 (2010). A Missouri legislator filed a bill creating a "Tenth Amendment Commission." The commission refers cases to the Attorney General when the federal government enacts laws requiring the state or a state officer to enact or enforce a provision of federal law believed to be unconstitutional. See Missouri SB 587 (2010).
[14] *See, e.g.*, Oklahoma HJR 1063 (2010).
[15] FLA. CONST., art. XI, s. 1.
[16] FLA. CONST., art. XI, s. 5(a).
[17] FLA. CONST., art. XI, s. 5(e).

to comply with federal government mandates from any branch which are beyond the scope of those constitutionally delegated powers.

The joint resolution also provides that the people of this state refuse to recognize or comply with compulsory federal legislation that directs the state to comply or requires the state to pass certain legislation in order to retain federal funding. The joint resolution further demands the repeal of these mandates.

The specific statement to be placed on the ballot is provided. This language summarizes the provisions in the proposed constitutional amendment.

The joint resolution is silent regarding an effective date for the constitutional amendment. Therefore, in accordance with section 5, article XI, of the Florida Constitution, it would take effect on the first Tuesday after the first Monday in January following the election at which it was approved by at least 60 percent of the electorate voting on the measure.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Preemption

Depending upon the nature and scope of any federal mandates enacted after the effective date of the constitutional amendment, if it is adopted, the federal law could preempt the effect of this proposed constitutional amendment. The Supremacy Clause of the United States Constitution establishes federal law as the "supreme law of the land, and invalidates state laws that interfere with or are contrary to federal law."[18] However, the Tenth Amendment to the U.S. Constitution provides that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. Therefore, courts have consistently interpreted the Tenth Amendment to mean that "'[t]he States unquestionably do retai[n] a significant measure of sovereign authority. . . to the extent that the Constitution has not divested

[18] *ABC Charters, Inc. v. Bronson*, 591 F.Supp.2d 1272 (S.D. Fla. 2008) (quoting *Lozano v. City of Hazleton*, 496 F.Supp.2d 477, 518 (M.D. Pa. 2007)); *see also* U.S. CONST., art. VI.

them of their original powers and transferred those powers to the Federal Government.'"[19]

In conducting a preemption analysis in areas traditionally regulated by the states, there is a presumption against preemption.[20] There are three types of preemption:

- Express preemption;
- Field preemption; and
- Conflict preemption.

"Conflict preemption" occurs when "it is impossible to comply with both federal and state law, or when state law stands as an obstacle to the objectives of federal law."[21] "Field preemption" occurs when federal regulation in a legislative field is so pervasive that Congress left no room for the states to supplement it. "Express preemption" occurs when federal law explicitly expresses Congress' intent to preempt a state law.[22]

The Florida constitutional amendment could be subject to a constitutional challenge if the state, in reliance upon the proposed amendment, refuses to comply with a mandate from the federal government. The constitutionality of the Florida constitutional amendment may turn on whether the court determines that the federal legislation adopted is beyond the scope of the federal government's constitutionally guaranteed powers.

Joint Resolutions

In order for the Legislature to submit the joint resolution to the voters for approval, the joint resolution must be agreed to by three-fifths of the membership of each house.[23] If SJR 1438 is agreed to by the Legislature, it will be submitted to the voters at the next general election held more than 90 days after the amendment is filed with the Department of State.[24] As such, SJR 1438 would be submitted to the voters at the 2012 General Election. In order for SJR 1438 to take effect, it must be approved by at least 60 percent of the voters voting on the measure.[25]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

[19] *New York v. United States*, 505 U.S. 144, 156 (1992) (quoting 3 J. Story, *Commentaries on the Constitution of the United States* 752 (1833)).
[20] 48A FLA. JUR 2D *State of Florida* s. 13.
[21] *Id.*
[22] *Id.*
[23] FLA. CONST. art. XI, s. 1.
[24] FLA. CONST. art. XI, s. 5(a).
[25] FLA. CONST. art. XI, s. 5(e).

B. Private Sector Impact:

None.

C. Government Sector Impact:

Each constitutional amendment is required to be published in a newspaper of general circulation in each county, once in the sixth week and once in the tenth week preceding the general election.[26] Costs for advertising vary depending upon the length of the amendment. According to the Department of State, the average cost per word of publishing a constitutional amendment is $106.14.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[26] FLA. CONST. art. XI, s. 5(d).

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LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Bogdanoff) recommended the following:

Senate Amendment

Delete line 46
and insert:
administrator. In lieu of using an independent administrator, a photo lineup eyewitness identification procedure may be conducted using an alternative method specified and approved by the Criminal Justice Standards and Training Commission. Any alternative method must be carefully structured to achieve neutral administration and to prevent the administrator from knowing which photograph is being presented to the eyewitness during the identification procedure. Alternative methods may

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include any of the following:

1. Automated computer programs that can automatically administer the photo lineup directly to an eyewitness and prevent the lineup administrator from seeing which photo the witness is viewing until after the procedure is completed.

2. A procedure in which photographs are placed in folders, randomly numbered, and shuffled and then presented to an eyewitness such that the administrator cannot see or track which photograph is being presented to the witness until after the procedure is completed.

3. Any other procedure that achieves neutral administration and prevents the administrator from knowing which photograph is being presented to the eyewitness during the identification procedure.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	CS/SB 1206
INTRODUCER:	Criminal Justice Committee and Senators Negron and Joyner
SUBJECT:	Eyewitness Identification
DATE:	April 1, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	**Fav/CS**
2.	Bolland/Maclure	Maclure	JU	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

This bill creates procedures that law enforcement officers must follow when they are conducting photo and live lineups with eyewitnesses to crimes. In particular, it specifies that a lineup must be conducted by someone who is not participating in the criminal investigation and is unaware of which person in the lineup is the suspect.

Further, the bill provides remedies for a defendant when the specified eyewitness identification procedures are not followed. The court may allow a jury in a criminal trial to hear evidence of officer noncompliance, and the court may consider the noncompliance in a motion to suppress the identification of the defendant. The bill requires instructions to the jury regarding the reliability of eyewitness identifications under certain circumstances.

Lastly, the bill requires education and training of law enforcement officers on the new eyewitness identification procedures.

This bill creates an undesignated section of the Florida Statutes.

II. Present Situation:

Eyewitness Identification

Eyewitness misidentification has been a factor in 75 percent of the 267 cases nationwide in which DNA evidence has helped prove wrongful convictions. According to Gary Wells, an Iowa State University psychologist who has studied the problems with eyewitness identification for more than 20 years, it is the number one reason innocent people are wrongfully convicted.[1] The Innocence Project of Florida reports that the same percentage applies in the 12 Florida cases, nine of which involved issues of eyewitness misidentification.[2]

Florida statutes do not currently set forth requirements for law enforcement officers to follow when conducting eyewitness identification procedures during criminal investigations. At least three other states, including North Carolina, Maryland, and Ohio, have enacted statutes regarding eyewitness identification procedures.

There are many variables in eyewitness identification procedures. First, there are different ways to conduct them. For example, in the presentation of photo lineups, there are two main methods: sequential (one photo is shown at the time) and simultaneous (photo array shows all photos at once). Then there are the variables such as what an officer should or should not say to an eyewitness about the procedure, whether the procedure should be videotaped or otherwise recorded, and whether officers have been trained to control body language or other suggestive actions during the procedure.

Some law enforcement agencies, although not statutorily required to follow a particular procedure, have included eyewitness identification procedures in their agency's standard operating procedures. There is no statewide standard, however, and a survey of 230 Florida agencies, conducted by the Innocence Project of Florida, indicated that 37 of those agencies had written policies, while 193 did not.[3]

As Dr. Roy Malpass, a professor in legal psychology at the University of Texas at El Paso and an expert in the field of eyewitness identification, explained during his presentation to the Innocence Commission at its January 2011 meeting, it is important to have protocol compliance. Dr. Malpass also recommended videotaping the identification procedure.

Dr. Malpass made further recommendations and offered certain opinions during his presentation to the Innocence Commission in January. These included:

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[1] Presentation to Innocence Commission, Nov. 22, 2010. Gary L. Wells and Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 Law & Hum. Behav. 1 (2009). See also Rene Stutzman, "Florida Innocence Commission to cops: Fix photo-lineup problems," Orlando Sentinel (Mar. 21, 2011), *available at* http://articles.orlandosentinel.com/2011-03-21/news/os-innocence-commission-vote-20110321-19_1_lineups-florida-s-innocence-commission-florida-innocence-commisssion.

[2] E-mail correspondence with Seth Miller, Executive Director, Innocence Project of Florida, Mar. 23, 2011.

[3] Survey on file with the Criminal Justice Committee.

- There is no definitive study showing that sequential or simultaneous presentation is the superior method of presentation, although he believes that sequential administration suppresses all identifications.
- A "confidence statement" from the witness is not a good predictor of accuracy.
- With regard to training on eyewitness identification, much depends upon the "buy-in" of the people being trained.
- Appropriate instructions regarding the procedure should be developed and given to witnesses. For example: the suspect may or may not be in the line-up; there is no requirement to identify a particular person; and if an identification is not made, the investigation will continue.
- There should be no extraneous comments made by law enforcement officers because informal interaction has the potential to create bias.
- The quality of the photo spread is very important.
- "Blind" administration, in which the officer conducting the procedure is unaware of the identity of the suspect, is a good method for use in both sequential and simultaneous administration.[4]

If an agency has a particular protocol in place and the protocol is not followed, the issue becomes ripe for a challenge on the issue of reliability and therefore, admissibility, of the identification evidence at trial. This possibility provides an incentive for protocol compliance. Conversely, if the protocol is followed, motions to suppress should rarely be filed as there is likely no good-faith basis for filing them.

The Florida Supreme Court has ruled on the admissibility of eyewitness identifications at trial as follows:

> The test for suppression of an out-of-court identification is two-fold: (1) whether the police used an unnecessarily suggestive procedure to obtain the out-of-court identification; and (2) if so, considering all the circumstances, whether the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification. *See Thomas v. State*, 748 So.2d 970, 981 (Fla.1999); *Green v. State*, 641 So.2d 391, 394 (Fla.1994); *Grant v. State*, 390 So.2d 341, 343 (Fla.1980). The factors to be considered in evaluating the likelihood of misidentification include:
>
> [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *Grant*, 390 So.2d at 343 (quoting *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)). If the procedures used by the police in obtaining the out-of-court identification were not unnecessarily suggestive, however, the court need not consider the second part of the test. *See Thomas*, 748 So.2d at 981; *Green*, 641 So.2d at 394; *Grant*, 390 So.2d at 344.[5]

[4] Innocence Commission meeting minutes, January 2011 meeting.
[5] *Rimmer v. State*, 825 So. 2d 304 (Fla. 2002).

Very recently, a central Florida trial court judge has found himself focused on the issue of eyewitness identification after a woman was wrongfully convicted of a crime based on the testimony of three eyewitnesses in his courtroom.[6] The state filed a motion to set aside the conviction, and she has since been released from jail. Then in a robbery case that was set for trial before the same central Florida judge, a defense attorney successfully argued last month for a special jury instruction on eyewitness identification.[7] The state is appealing the court's ruling on the special instruction.

Florida Innocence Commission

During the 2010 Regular Session, the Legislature provided funding for the creation of commission to study the causes of wrongful conviction and subsequent incarceration. In response, the Florida Supreme Court established the Florida Innocence Commission "to conduct a comprehensive study of the causes of wrongful conviction and of measures to prevent such convictions."[8] The commission shall submit an interim report to the Court no later than June 30, 2011, and a final report and recommendations no later than June 30, 2012.[9] At its March 21, 2011, meeting, the commission vote to support legislation that would prescribe procedures law enforcement officers must follow when they are conducting photo and live lineups with eyewitnesses to crimes.[10]

III. Effect of Proposed Changes:

The bill creates a new section of Florida Statutes relating to eyewitness identifications in criminal cases. It is a comprehensive bill that sets forth specific procedures that law enforcement agencies must implement when conducting lineups.

The bill provides definitions of common terms relating to eyewitness identification procedures used in the law enforcement community.

Under the provisions of the bill, law enforcement must fulfill certain criteria in conducting a lineup. The bill also provides remedies should the requirements of the lineup procedure not be followed in conducting the lineup.

Lineup Procedures

Prior to the lineup, officers are required to give the eyewitness five instructions. These are:

1) The perpetrator might or might not be in the lineup;

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[6] Anthony Colarossi, "Anatomy of a botched conviction: How was innocent Haitian woman convicted?," Orlando Sentinel (Oct. 2, 2010), *available at* http://articles.orlandosentinel.com/2010-10-02/news/os-anatomy-botched-conviction-20101002_1_kittsie-simmons-malenne-joseph-officer-jose-m-varela/4.

[7] Anthony Colarossi, "Jurors in robbery trial asked to consider whether to believe eyewitness testimony," Orlando Sentinel (Feb. 17, 2011), *available at* http://articles.orlandosentinel.com/2011-02-17/news/os-witness-identification-motion-20110217.

[8] Fla. Supreme Court, Admin. Order No. AOSC10-39, *In Re: Florida Innocence Commission* (July 2, 2010).

[9] *Id*. at 2.

[10] Stutzman, *supra* note 1.

2) The lineup administrator does not know the suspect's identity;
3) The eyewitness should not feel compelled to make an identification;
4) It is as important to exclude innocent persons as it is to identify the perpetrator; and
5) The investigation will continue with or without an identification.

The eyewitness must be given a copy of these instructions. If he or she refuses to sign a document acknowledging receipt of the instructions, the lineup administrator is directed to sign it and make a notation of the eyewitness refusal.

An independent administrator must conduct the lineup. This approach is sometimes referred to as a "blind" administration. The independent administrator is not participating in the investigation and does not know the identity of the suspect. This is one element of the scientific studies on eyewitness identification which is most agreed upon by the scholars in the area of study as being critical to untainted suspect identification.

Remedies for Noncompliance

The court may consider noncompliance with the statutory suspect identification procedures when deciding a motion to suppress the identification from being presented as evidence at trial. The court may allow the jury to hear evidence of noncompliance in support of claims of eyewitness misidentification raised by the defendant.

The bill also provides that the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications. Jury instructions must be adopted by the Florida Supreme Court; therefore, this particular part of the bill will require action by the Court after it is presented with a proposed instruction for consideration. Standard Jury Instructions for criminal cases are quite often proposed and adopted based upon the Legislature's revision of the criminal statutes, soon after the end of each legislative session. However, in the meantime, an attorney could present his or her own proposed instruction to the trial court, and it could be given to the jury. The trial court has the prerogative to give instructions outside the Standard Jury Instructions; however, the court runs the risk of that issue being raised on appeal.

Education and Training

The bill requires the Criminal Justice Standards and Training Commission, in consultation with the Florida Department of Law Enforcement, to develop educational materials and conduct training programs for law enforcement on the eyewitness identification procedures set forth in the bill.

Effective Date

The bill has a July 1, 2011, effective date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The use of lineups with eyewitnesses to crimes occurs on a limited basis in most law enforcement organizations. Nonetheless, smaller law enforcement agencies, in particular, may experience some fiscal impact from the implementation of the requirements of this bill.

Agencies that have few officers on a shift at any given time may have to call in additional officers anytime a lineup that requires an independent administrator is conducted due to the fact that all or most officers on the shift are a part of the investigation. An officer who has knowledge of the identification of a suspect would not be eligible to conduct the lineup under the provisions of the bill.

Regarding specialized training, currently law enforcement training on eyewitness identification procedures in Florida, provided by the Criminal Justice Standards and Training Commission, occurs at the Basic Recruit Training Level. Some agencies have indicated that statewide training requirements are more costly than in-house training; therefore those agencies would experience a fiscal impact if statewide training on eyewitness identification procedures is required.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on March 28, 2011:
The committee substitute deleted details related to the lineup procedures provided for in the original bill, including:

- Restrictions on the type of photograph of the suspect and fillers that must be utilized in a particular case;
- The number of fillers that must be used;
- The placement of the suspect in the live or photographic lineup for each witness;
- Restrictions on eyewitness contact with live lineup participants;
- Requirements for live lineup participants performing gestures, speech, or other movements;
- Prohibition on communication with the eyewitness regarding the suspect's position in the lineup or other influential communication;
- Procurement of an eyewitness's "confidence statement" by the lineup administrator;
- Separation of witnesses from one another; and
- Videotaping or audiotaping the lineup procedure, or if neither is practical, a full written record by the lineup administrator including the nine requirements set forth in the bill.

The committee substitute also removed the alternative method for identification provided for in the bill.

B. Amendments:

None.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	CS/CS/SB 402
INTRODUCER:	Community Affairs Committee, Criminal Justice Committee, and Senators Negron and Evers
SUBJECT:	Regulation of Firearms and Ammunition
DATE:	April 1, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	**Fav/CS**
2.	Wolfgang	Yeatman	CA	**Fav/CS**
3.	O'Connor	Maclure	JU	**Pre-meeting**
4.			RC	
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

CS/CS/SB 402 does the following:

- Clarifies that the field of firearms and ammunition is preempted by the State Constitution as well as general law.
- Deletes a provision allowing a county the option to adopt a waiting period, not exceeding three days, for the purchase of a handgun.
- Adds storage of firearms/ammunition to the list of categories preempted.
- Clarifies that rules and administrative regulations are preempted.
- Penalizes knowing and willful violation of the state's preemption of this field ($5,000-$100,000).
- Requires the state attorney to prosecute these violations and provides that if the state attorney fails to prosecute these violations he or she can be held accountable under the rules of professional conduct.
- Prohibits public funds from being used to defend a violation of this section.
- Penalizes a knowing violation of this section (immediate termination of employment).

- Provides persons adversely affected by violation of the preemption can sue and receive costs and damages.
- Provides exceptions.

This bill substantially amends and reorganizes section 790.33, Florida Statutes.

II. Present Situation:

The Joe Carlucci Uniform Firearms Act

The Joe Carlucci Uniform Firearms Act (Act), as s. 790.33, F.S., is known, became law in 1987.[1] The policy and intent of the Act is stated as follows:

> It is the intent of this section to provide uniform firearms laws in the state; to declare all ordinances and regulations null and void which have been enacted by any jurisdictions other than state and federal, which regulate firearms, ammunition, or components thereof; to prohibit the enactment of any future ordinances or regulations relating to firearms, ammunition, or components thereof unless specifically authorized by this section or general law; and to require local jurisdictions to enforce state firearms laws.[2]

The Act accomplished its stated purpose by "occupying the whole field of regulation of firearms and ammunition," as stated in subsection (1) of the Act:

> PREEMPTION.—Except as expressly provided by general law, the Legislature hereby declares that it is occupying the whole field of regulation of firearms and ammunition, including the purchase, sale, transfer, taxation, manufacture, ownership, possession, and transportation thereof, to the exclusion of all existing and future county, city, town, or municipal ordinances or regulations relating thereto. Any such existing ordinances are hereby declared null and void.[3]

Section 790.33, F.S., contains a limited exception for local ordinances governing a three-day handgun purchase waiting period.[4] Since 1990 there has been a statewide three-day waiting period as set forth in the Constitution of the State of Florida.[5] The constitutional provision prevails over any local ordinances that may have been enacted. There are statutory exemptions

[1] Chapter 87-23, Laws of Fla.
[2] Section 790.33(3)(a), F.S.
[3] Section 790.33(1), F.S.
[4] Section 790.33(2), F.S. (1988). Note: At the time of enactment in 1987, the Act provided the exception for a 48-hour waiting period.
[5] There shall be a mandatory period of three days, excluding weekends and legal holidays, between the purchase and delivery at retail of any handgun. For the purposes of this section, "purchase" means the transfer of money or other valuable consideration to the retailer, and "handgun" means a firearm capable of being carried and used by one hand, such as a pistol or revolver. Holders of a concealed weapon permit as prescribed in Florida law shall not be subject to the provisions of this paragraph. … This restriction shall not apply to a trade in of another gun. FLA. CONST. art. I, s. 8(b), 8(d).

from the waiting period in the Act. Of these exemptions, two were adopted in s. 790.0655, F.S., as required by the Florida Constitution.[6] The other exemptions are:

- Individuals who already lawfully own another firearm and who show a sales receipt for another firearm or who are known to own another firearm through a prior purchase from the retail establishment;
- A law enforcement or correctional officer as defined in s. 943.10, F.S.;
- A law enforcement agency as defined in s. 934.02, F.S.;
- Sales or transactions between dealers or between distributors or between dealers and distributors who have current federal firearms licenses; or
- Any individual who has been threatened or whose family has been threatened with death or bodily injury, provided the individual may lawfully possess a firearm and provided such threat has been duly reported to local law enforcement.[7]

Since these specific exemptions were not included in the constitutional amendment, and because the Carlucci Act's exemptions pre-date the amendment to the Florida Constitution, they are essentially null and void.

Despite the provisions of the 1987 Joe Carlucci Act and a Florida appellate court opinion upholding the Act,[8] local governments have enacted or considered enacting ordinances that required trigger locks, prohibited concealed carry permit holders from lawfully carrying their firearms on municipal or county property, required special use permits to certain sporting goods stores, and banned recreational shooting.

Discharge of a Firearm

A 2005 Florida Attorney General opinion concluded that a county ordinance prohibiting the discharge of a firearm in proximity to persons or property when such discharge endangers the health, welfare, and safety of the citizens of such county would be preempted by s. 790.33, F.S.[9] Under s. 790.15, F.S., it is a crime to knowingly discharge a firearm in any public place or on or over roads. This prohibition does not apply to a person lawfully defending life or property or performing official duties requiring the discharge of a firearm, or to a person discharging a firearm on public roads or properties expressly approved for hunting by the Fish and Wildlife Conservation Commission or Division of Forestry. The backyard of a home is not a "public place" within meaning of the statute; thus, a juvenile could not be adjudicated delinquent based on his discharging a revolver into the ground in his friend's fenced backyard.[10]

[6] The exemptions apply to persons who hold a valid concealed weapons permit at the time of the purchase or who are trading in another handgun. s. 790.0655(2)(a)-(b), F.S.; FLA. CONST. art. I, s. 8(b), 8(d).
[7] Section 790.33(2)(d)2.-6., F.S.
[8] *National Rifle Association v. City of South Miami,* 812 So. 2d 504 (Fla. 3d DCA 2002).
[9] Op. Att'y Gen. Fla. 2005-40 (2005).
[10] *C.C. v. State,* 701 So. 2d 423 (Fla. 4th DCA 1997).

Immunity for Official Conduct

The general rule under the common law is that legislators enjoy absolute immunity from liability for performance of legislative acts.[11] Absolute immunity for legislators has historically been recognized as a "venerable tradition" that has withstood the development of the law since pre-colonial days.[12] Courts have upheld absolute immunity for legislators at all levels of lawmaking, including federal, state, and local government levels.[13] The courts' reasoning behind such holdings is that when legislators hold legislative powers, they use them for the public good, and are exempt from liability for mistaken use of their legislative powers.[14] Furthermore, courts fear that allowing personal liability could distort legislative discretion, undermine the public good by interfering with the rights of the people to representation, tax the time and energy of frequently part-time citizen legislators, and deter service in local government.[15]

When unlawful ordinances have been enacted, the freedom from personal liability does not make the legislative product itself valid.[16] In such instances, affected citizens have been able to challenge the validity of such ordinances by suing to have them declared invalid or have a court enjoin enforcement.[17]

Courts have found that legislators may be subject to personal liability when they lack discretion.[18] Such situations typically exist when legislators are subject to an affirmative duty, such as when a law or court order has directed them to levy a tax. Such acts are labeled "ministerial," as opposed to "legislative," acts.[19] Arguably, an express and clear preemption would remove discretion from local government officials seeking to engage in lawmaking in the preempted field.

III. Effect of Proposed Changes:

CS/CS/SB 402 expands and clarifies state preemption of the regulation of firearms and ammunition. In the process, s. 790.33, F.S., is also reorganized.

The bill expands "the whole field of regulation of firearms and ammunition" (including administrative regulations or rules adopted by local or state governments) to include the storage of those items. The preemption language relating to zoning ordinances is stricken from subsection (1) of s. 790.33, F.S., on lines 47-54 of the bill, and relocated to lines 172-78.

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[11] *See Tenney v. Brandhove*, 341 U.S. 367 (1951).
[12] *Bogan v. Scott-Harris*, 523 U.S. 44, 48-49 (1998). For additional examples of where absolute immunity of legislative acts has been recognized, see *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Hough v. Amato*, 269 So. 2d 537 (Fla. 1st DCA 1972); *Jones v. Loving*, 55 Miss. 109 (1877); *Ross v. Gonzales*, 29 S.W.2d 437 (Tex. Ct. App. 1930).
[13] *Bogan*, 523 U.S. 44.
[14] *Id.* at 50-51 (citing *Jones*, 55 Miss. 109).
[15] *Id.* at 52.
[16] *Tenney*, 341 U.S. at 379.
[17] *See, e.g., Bogan*, 523 U.S. 44; *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Tenney*, 341 U.S. 367.
[18] *Bogan*, 523 U.S. at 51-52.
[19] *See id.*

Subsection (2) of s. 790.33, F.S., is stricken by the bill. This is the subsection of the Joe Carlucci Act that allows a county the option to adopt a waiting period, not exceeding three days, for the purchase of a handgun. It pre-dates the constitutional amendment and constitutionally required statutory enactment.[20] Eliminating this subsection of the Act merely clarifies the current state of the law regarding the three-day waiting period, which is found in the Florida Constitution and s. 790.0655, F.S.

The bill retains the policy and intent language from the original Act, currently found in subsection (3) of s. 790.33, F.S. It also adds language setting forth the 2011 Legislature's intent to deter and prevent the knowing violation of the preemption law.

Any person who knowingly and willfully enacts or enforces any local ordinance or administrative rule or regulation commits a noncriminal violation (punishable by a fine between $5,000-$100,000). The fine would be levied against the elected or appointed local government official or officials or administrative agency head under whose jurisdiction the violation occurred. The elected or appointed local government official or officials or administrative agency head is personally liable for the payment of all fines, costs, and fees assessed by the court for the noncriminal violation.

The state attorney in the appropriate jurisdiction shall investigate complaints of noncriminal violations of this section and, if the state attorney determines that probable cause of a violation exists, shall prosecute violators in the circuit court where the complaint arose. Any state attorney who fails to execute his or her duties under this section may be held accountable under the appropriate Florida rules of professional conduct.[21]

Except as required by article I, section 16 of the State Constitution or the Sixth Amendment to the United States Constitution, public funds may not be used to defend the unlawful conduct of any person charged with a knowing and willful violation of this section. The bill does not specify whether an official may be reimbursed for costs if he or she is found to be not guilty of the charge.

Additionally, the bill provides that a knowing and willful violation of the preemption law shall be grounds for the immediate termination of employment or contract or removal from office by the Governor.

Civil actions are also provided for in the bill. A person or organization whose membership is adversely affected by an alleged violation of the preemption law may seek declaratory and injunctive relief. The bill also provides for the assessment of actual and consequential damages.

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[20] FLA. CONST. art. I, s. 8; s. 790.0655, F.S.

[21] The Florida Supreme Court has exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted to the Florida Bar. The Bar regulates the profession and recommends disciplinary action for attorneys who violate the Rules Regulating the Florida Bar. The Florida Supreme Court must actually impose the discipline on attorneys, which can range from an admonishment to disbarment. The Florida Bar, *Reporter's Handbook, available at* http://www.floridabar.org/DIVCOM/PI/RHandbook01.nsf/1119bd38ae090a748525676f0053b606/30ceba8bab2146be852568bd00539b14!OpenDocument#I.%20OVERVIEW (last visited Mar. 31, 2011).

The court is required to award a prevailing plaintiff's attorney fees at three times the federal district court rates as well as related costs. Additionally, the bill provides that 15 percent interest per annum shall accrue on the fees, costs, and damages awarded the plaintiff, retroactive to the date the suit is filed. Payment may be secured by the seizure of vehicles used by elected officeholders or officials in the appropriate jurisdiction if the fees, costs, and damages are not paid within 72 hours of the court's ruling having been filed. It is presumed that the term "appropriate municipality" means the jurisdiction wherein the violation occurred.

In subsection (5) of s. 790.33, F.S., as created by the bill, a provision excepting certain zoning ordinances in the original Carlucci Act has been relocated and other exceptions to the prohibitions are set forth in the bill. Specifically, the bill does not prohibit:

- Law enforcement agencies from enacting and enforcing firearm-related regulations within their agencies;
- The entities listed in paragraphs (2)(a)-(i) from regulating or prohibiting employees from carrying firearms or ammunition during the course of their official duties, except as provided in s. 790.251, F.S.;[22]
- A court or administrative law judge from resolving a case or issuing an order or opinion on any matter within the court or judge's jurisdiction;
- The Fish and Wildlife Conservation Commission from regulating the use of firearms or ammunition as a method of taking wildlife and regulating the shooting ranges managed by the commission.

The bill provides that it takes effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

[22] Section 790.251, F.S., is entitled "Protection of the right to keep and bear arms in motor vehicles for self-defense and other lawful purposes; prohibited acts; duty of public and private employers; immunity from liability; enforcement.— (1) SHORT TITLE.—This section may be cited as the 'Preservation and Protection of the Right to Keep and Bear Arms in Motor Vehicles Act of 2008.'" *See specifically* s. 790.251(4), F.S., for the acts of public or private employers that are prohibited.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Government officials that violate the prohibitions in the bill face fines and immediate discharge. Creating significant penalties on government officials for making policy decisions or carrying out invalid regulations or ordinances may deter public service.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Community Affairs on March 21, 2011:

- Clarifies that the field of firearms and ammunition is preempted by the State Constitution as well as general law.
- Adds storage of firearms/ammunition to the list of categories preempted.
- Clarifies that rules and administrative regulations are preempted.
- Penalizes knowing and willful violation of the state's preemption of this field ($5,000-$100,000).
- Requires the state attorney to prosecute these violations and provides that if the state attorney fails to prosecute these violations they can be held accountable under the rules of professional conduct.
- Prohibits public funds from being used to defend a violation of this section.
- Penalizes a knowing violation of this section (immediate termination of employment).
- Provides persons adversely affected by violation of the preemption can sue and receive costs and damages
- Provides exceptions.

CS by Criminal Justice on February 8, 2011:

- Inserts acknowledgement of the Florida Constitution's explicit authority in the regulation of firearms. This is a technical amendment that brings s. 790.33, F.S., which became law in 1987, into conformity with current law.
- Deletes a provision in the bill that specified accounts into which fines assessed in a criminal case would be deposited.
- Clarifies and specifies both the interest rate on money damages, fees and costs, as well as what property may be seized to secure payment of same.

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Bogdanoff) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. Section 790.338, Florida Statutes, is created to read:

790.338 Medical privacy concerning firearms; prohibitions; penalties, exceptions.—

(1) A health care practitioner licensed under chapter 456 or a health care facility licensed under chapter 395 may not intentionally enter any disclosed information concerning firearm ownership into the patient's medical record if the practitioner

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knows that such information is not relevant to the patient's medical care or safety, or the safety of others.

(2) A health care practitioner licensed under chapter 456 or a health care facility licensed under chapter 395 shall respect a patient's right to privacy and should refrain from making a written inquiry or asking questions concerning the ownership of a firearm or ammunition by the patient or by a family member of the patient, or the presence of a firearm in a private home or other domicile of the patient or a family member of the patient. Notwithstanding this provision, a health care practitioner or health care facility that in good faith believes that this information is relevant to the patient's medical care or safety, or the safety of others, may make such a verbal or written inquiry.

(3) Any emergency medical technician or paramedic acting under the supervision of an Emergency Medical Services Director under chapter 401 may make an inquiry concerning the possession or presence of a firearm if he or she, in good faith, believes that information regarding the possession of a firearm by the patient or the presence of a firearm in the home or domicile of a patient or a patient's family member is necessary to treat a patient during the course and scope of a medical emergency or that the presence or possession of a firearm would pose an imminent danger or threat to the patient or others.

(4) A patient may decline to answer or provide any information regarding ownership of a firearm by the patient or a family member of the patient, or the presence of a firearm in the domicile of the patient or a family member of the patient. A patient's decision not to answer a question relating to the

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presence or ownership of a firearm does not alter existing law regarding a physician's authorization to choose his or her patients.

(5) A health care practitioner licensed under chapter 456 or a health care facility licensed under chapter 395 may not discriminate against a patient based solely upon the patient's exercise of the constitutional right to own and possess firearms or ammunition.

(6) A health care practitioner licensed under chapter 456 or a health care facility licensed under chapter 395 shall respect a patient's legal right to own or possess a firearm and should refrain from unnecessarily harassing a patient about firearm ownership during an examination.

(7) Violations of the provisions of subsections (1)-(4) constitute grounds for disciplinary action under ss. 456.072(2) and 395.1055.

Section 2. Paragraph (b) of subsection (4) of section 381.026, Florida Statutes, is amended to read:

381.026 Florida Patient's Bill of Rights and Responsibilities.—

(4) RIGHTS OF PATIENTS.—Each health care facility or provider shall observe the following standards:

(b) Information.—

1. A patient has the right to know the name, function, and qualifications of each health care provider who is providing medical services to the patient. A patient may request such information from his or her responsible provider or the health care facility in which he or she is receiving medical services.

2. A patient in a health care facility has the right to

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know what patient support services are available in the facility.

3. A patient has the right to be given by his or her health care provider information concerning diagnosis, planned course of treatment, alternatives, risks, and prognosis, unless it is medically inadvisable or impossible to give this information to the patient, in which case the information must be given to the patient's guardian or a person designated as the patient's representative. A patient has the right to refuse this information.

4. A patient has the right to refuse any treatment based on information required by this paragraph, except as otherwise provided by law. The responsible provider shall document any such refusal.

5. A patient in a health care facility has the right to know what facility rules and regulations apply to patient conduct.

6. A patient has the right to express grievances to a health care provider, a health care facility, or the appropriate state licensing agency regarding alleged violations of patients' rights. A patient has the right to know the health care provider's or health care facility's procedures for expressing a grievance.

7. A patient in a health care facility who does not speak English has the right to be provided an interpreter when receiving medical services if the facility has a person readily available who can interpret on behalf of the patient.

8. A health care provider or health care facility shall respect a patient's right to privacy and should refrain from

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making a written inquiry or asking questions concerning the ownership of a firearm or ammunition by the patient or by a family member of the patient, or the presence of a firearm in a private home or other domicile of the patient or a family member of the patient. Notwithstanding this provision, a health care provider or health care facility that in good faith believes that this information is relevant to the patient's medical care or safety, or safety or others, may make such a verbal or written inquiry.

9. A patient may decline to answer or provide any information regarding ownership of a firearm by the patient or a family member of the patient, or the presence of a firearm in the domicile of the patient or a family member of the patient. A patient's decision not to answer a question relating to the presence or ownership of a firearm does not alter existing law regarding a physician's authorization to choose his or her patients.

10. A health care provider or health care facility may not discriminate against a patient based solely upon the patient's exercise of the constitutional right to own and possess firearms or ammunition.

11. A health care provider or health care facility shall respect a patient's legal right to own or possess a firearm and should refrain from unnecessarily harassing a patient about firearm ownership during an examination.

Section 3. Subsection (mm) is added to subsection (1) of section 456.072, Florida Statutes, to read:

456.072 Grounds for discipline; penalties; enforcement.—

(1) The following acts shall constitute grounds for which

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the disciplinary actions specified in subsection (2) may be taken:

(mm) Violating any of the provisions of s. 790.338.

Section 4. An insurer issuing any type of insurance policy pursuant to chapter 627, Florida Statutes, may not deny coverage or increase any premium, or otherwise discriminate against any insured or applicant for insurance, on the basis of or upon reliance upon the lawful ownership or possession of a firearm or ammunition or the lawful use or storage of a firearm or ammunition. Nothing herein shall prevent an insurer from considering the fair market value of firearms or ammunition in the setting of premiums for scheduled personal property coverage.

Section 5. This act shall take effect upon becoming a law.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to the privacy of firearm owners; creating s. 790.338, F.S.; providing that a licensed medical care practitioner or health care facility may not record information regarding firearm ownership in a patient's medical record; providing an exception for relevance of the information to the patient's medical care or safety or the safety of others; providing that unless the information is relevant to the patient's medical care or safety or the safety of others,


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inquiries regarding firearm ownership or possession should not be made by licensed health care practitioners or health care facilities; providing an exception for emergency medical technicians and paramedics; providing that a patient may decline to provide information regarding the ownership or possession of firearms; clarifying that a physician's authorization to choose his or her patients is not altered by the act; prohibiting discrimination by licensed health care practitioners or facilities based solely upon a patient's firearm ownership or possession; prohibiting harassment of a patient regarding firearm ownership by a licensed health care practitioner or facility during an examination; providing for disciplinary action; amending s. 381.026, F.S.; providing that unless the information is relevant to the patient's medical care or safety, or the safety of others, inquiries regarding firearm ownership or possession should not be made by licensed health care providers or health care facilities; providing that a patient may decline to provide information regarding the ownership or possession of firearms; clarifying that a physician's authorization to choose his or her patients is not altered by the act; prohibiting discrimination by licensed health care providers or facilities based solely upon a patient's firearm ownership or possession; prohibiting harassment of a patient regarding firearm ownership during an examination by a licensed health care


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provider or facility; amending s. 456.072, F.S.; including the violation of the provisions of s. 790.338, F.S., as grounds for disciplinary action; prohibiting denial of insurance coverage, increased premiums, or any other form of discrimination by insurance companies issuing policies pursuant to ch. 627, F.S., on the basis of an insured’s or applicant’s ownership, possession, or storage of firearms or ammunition; clarifying that an insurer is not prohibited from considering the fair market value of firearms or ammunition in setting personal property coverage premiums; providing an effective date.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	CS/CS/SB 432
INTRODUCER:	Health Regulation Committee, Criminal Justice Committee, and Senator Evers
SUBJECT:	Privacy of Firearm Owners
DATE:	April 1, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	**Fav/CS**
2.	O'Callaghan	Stovall	HR	**Fav/CS**
3.	Munroe	Maclure	JU	**Pre-meeting**
4.			BC	
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The bill specifies that a health care provider or health care facility may not intentionally enter disclosed information concerning firearm ownership into a patient's medical record if the provider knows that the information is not relevant to the patient's medical care or safety. Furthermore, the bill provides that a health care provider or health care facility should refrain from inquiring about ownership of a firearm or ammunition by the patient or a family member of the patient or the presence of a firearm in a home or domicile of the patient or a family member of the patient, unless the provider or facility believes in good faith that the information is relevant to the patient's medical care or safety.

The bill provides that a patient may decline to answer questions about ownership of a firearm or the presence of a firearm in the home of the patient or a patient's family member, and the patient's refusal to answer does not alter existing law regarding a physician's authorization to choose his or her patients. The bill prohibits discrimination by a provider or facility based on a patient's exercise of the constitutional right to own or possess a firearm or ammunition.

The bill requires a provider or facility to respect a patient's legal right to own or possess a firearm and provides that the health care provider or health care facility should refrain from unnecessarily harassing a patient about such ownership.

The bill provides that certain violations under the bill constitute grounds for certain disciplinary actions.

The bill prohibits an insurer from denying coverage or increasing a premium, or otherwise discriminating against an insured or applicant for insurance, based on the lawful ownership, possession, use, or storage of a firearm or ammunition.

The bill provides for certain patient's rights concerning the ownership of firearms or ammunition under the Florida Patient's Bill of Rights and Responsibilities.

This bill substantially amends the following sections of the Florida Statutes: 381.026 and 456.072.

This bill creates section 790.338, Florida Statutes.

This bill creates an undesignated section of the Florida Statutes.

II. Present Situation:

Physicians Inquiring About Firearms

In recent months, there has been media attention surrounding an incident in Ocala, Florida, where, during a routine doctor's visit, an Ocala pediatrician asked a patient's mother whether there were firearms in the home. When the mother refused to answer, the doctor advised her that she had 30 days to find a new pediatrician.[1] The doctor stated that he asked all of his patients the same question in an effort to provide safety advice in the event there was a firearm in the home.[2] He further stated that he asked similar questions about whether there was a pool at the home, and whether teenage drivers use their cell phone while driving for similar reasons – to give safety advice to patients. The mother, however, felt that the question invaded her privacy.[3] This incident has led many to question whether it should be an accepted practice for a doctor to inquire about a patient's firearm ownership.

Various professional medical groups have adopted policies that encourage or recommend that physicians ask patients about the presence of a firearm in the home. For example, the American Medical Association (AMA) encourages its members to inquire as to the presence of household firearms as a part of childproofing the home and to educate patients to the dangers of firearms to children.[4]

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[1] Fred Hiers, *Family and pediatrician tangle over gun question*, July 23 2010, Ocala.com, available at: http://www.ocala.com/article/20100723/news/100729867/1402/news?p=1&tc=pg (last visited Mar. 31, 2011).
[2] *Id*.
[3] *Id*.
[4] American Medical Association, *H-145.990 Prevention of Firearm Accidents in Children*, available at:

Additionally, the American Academy of Pediatrics (AAP) recommends that pediatricians incorporate questions about guns into their patient history taking.[5]

Florida law contains numerous provisions relating to the regulation of the medical profession, regulation of medical professionals, and the sale, purchase, possession, and carrying of firearms.[6] However, Florida law does not contain any provision that prohibits physicians or other medical staff from asking a patient whether he or she owns a firearm or whether there is a firearm in the patient's home.

Florida Firearms Safety Regulations Concerning Minors

Section 790.001, F.S., defines the term "firearm" to mean any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun. The term "firearm" does not include an antique firearm unless the antique firearm is used in the commission of a crime.

Section 790.174, F.S., requires a person who stores or leaves, on a premise under his or her control, a loaded firearm and who knows (or reasonably should know) that a minor[7] is likely to gain access to the firearm without the lawful permission of the minor's parent or the person having charge of the minor, or without the supervision required by law, to keep the firearm in a securely locked box or container or in a location which a reasonable person would believe to be secure. Otherwise the person shall secure the firearm with a trigger lock, except when the person is carrying the firearm on his or her body or within such close proximity thereto that he or she can retrieve and use it as easily and quickly as if he or she carried it on his or her body.

It is a misdemeanor of the second degree, punishable as provided in s. 775.082, F.S., or s. 775.083, F.S., if a person fails to store or leave a firearm in the manner required by law and as a result thereof a minor gains access to the firearm, without the lawful permission of the minor's parent or the person having charge of the minor, and possesses or exhibits it, without the supervision required by law in a public place; or in a rude, careless, angry, or threatening manner in violation of s. 790.10, F.S. However, a person is not guilty of such an act if the minor obtains the firearm as a result of an unlawful entry by any person.

Section 790.175, F.S., requires that upon the retail commercial sale or retail transfer of any firearm, the seller or transferor is required to deliver a written warning to the purchaser or transferee, which must state, in block letters not less than 1/4 inch in height:

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https://ssl3.ama-assn.org/apps/ecomm/PolicyFinderForm.pl?site=www.ama-assn.org&uri=%2fama1%2fpub%2fupload%2fmm%2fPolicyFinder%2fpolicyfiles%2fHnE%2fH-145.990.HTM (last visited accessed Mar. 31, 2011).

[5] American Academy of Pediatrics, *Firearm-Related Injuries Affecting the Pediatric Population*, Pediatrics Vol. 105, No. 4, April 2000, pp. 888-895, available at: http://aappolicy.aappublications.org/cgi/content/full/pediatrics;105/4/888 (last visited Mar. 31, 2011). *See also* American Academy of Pediatrics, Committee on Injury, Violence, and Poison Prevention, TIPP (The Injury Prevention Program), *A Guide to Safety Counseling in Office Practice*, 1994, available at: http://www.aap.org/family/TIPPGuide.pdf (last accessed Mar. 31, 2011).

[6] *See, e.g.*, chs. 456, 458, and 790, F.S., respectively.

[7] A minor is any person under the age of 16. *See s.* 790.174(3), F.S.

> It is unlawful, and punishable by imprisonment and fine, for any adult to store or leave a firearm in any place within the reach or easy access of a minor under 18 years of age or to knowingly sell or otherwise transfer ownership or possession of a firearm to a minor or a person of unsound mind.

Additionally, any retail or wholesale store, shop, or sales outlet that sells firearms must conspicuously post at each purchase counter the following warning in block letters not less than 1 inch in height:

> It is unlawful to store or leave a firearm in any place within the reach or easy access of a minor under 18 years of age or to knowingly sell or otherwise transfer ownership or possession of a firearm to a minor or a person of unsound mind.

Any person or business knowingly violating a requirement to provide warning under this s. 790.175, F.S., commits a misdemeanor of the second degree, punishable as provided in s. 775.082, F.S., or s. 775.083, F.S.

Terminating the Doctor-Patient Relationship

The relationship between a physician and a patient is generally considered a private relationship and contractual in nature. According to the AMA, both the patient and the physician are free to enter into or decline the relationship.[8] Once a physician-patient relationship has been established, patients are free to terminate the relationship at any time.[9] Generally, doctors can only terminate existing relationships after giving the patient notice and a reasonable opportunity to obtain the services of another physician.[10] Florida's statutes do not currently contain any provisions that dictate when physicians and patients can terminate a doctor-patient relationship.

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[8] American Medical Association, Code of Medical Ethics, Opinion 9.12, *Patient-Physician Relationship: Respect for Law and Human Rights*, available at: http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion912.shtml (last visited Mar. 9, 2011). However, doctors who offer their services to the public may not decline to accept patients because of race, color, religion, national origin, sexual orientation, gender identity, or any other basis that would constitute invidious discrimination.

[9] American Medical Association, Code of Medical Ethics, Opinion 9.06, *Free Choice*, available at: http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion906.page (last visited Mar. 31, 2011).

[10] A health care provider owes a duty to the patient to provide the necessary and appropriate medical care to the patient with due diligence and to continue providing those services until: 1) they are no longer needed by the patient; 2) the relationship is ended with the consent of or at the request of the patient; or 3) the health care provider withdraws from the relationship after giving the patient notice and a reasonable opportunity to obtain the services of another health care provider. The relationship typically terminates when the patient's medical condition is cured or resolved, and this often occurs at the last visit when the health care provider notes in his records that the patient is to return as needed. *See Saunders v. Lischkoff*, 188 So. 815 (Fla. 1939). *See also, Ending the Patient-Physician Relationship*, AMA White Paper, available at: http://www.ama-assn.org/ama/pub/physician-resources/legal-topics/patient-physician-relationship-topics/ending-patient-physician-relationship.shtml (last accessed Mar. 9, 2011); American Medical Association, Code of Medical Ethics, Opinion 8.115 *Termination of the Physician-Patient Relationship*, available at: http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion8115.shtml (last visited Mar. 31, 2011).

Health Insurance Portability and Accountability Act

In 1996, Congress enacted the Health Insurance Portability and Accountability Act (HIPAA). The HIPAA contains detailed requirements for the use or disclosure of protected health information (PHI). The regulations define PHI as all "individually identifiable health information," which includes information relating to:

- The individual's past, present, or future physical or mental health or condition;
- The provision of health care to the individual; or
- The past, present, or future payment for the provision of health care to the individual, and that identifies the individual or for which there is a reasonable basis to believe it can be used to identify the individual.[11]

Covered entities[12] may only use and disclose PHI as permitted by the HIPAA or more protective state rules.[13] The HIPAA establishes both civil monetary penalties and criminal penalties for the knowing use or disclosure of individually identifiable health information in violation of the HIPAA.[14]

Confidentiality of Medical Records in Florida

Under s. 456.057(7), F.S., medical records may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the care or treatment of the patient, except upon written authorization of the patient. However, medical records may be released without written authorization in the following circumstances:

- When any person, firm, or corporation has procured or furnished such examination or treatment with the patient's consent.
- When compulsory physical examination is made pursuant to Rule 1.360, Florida Rules of Civil Procedure, in which case copies of the medical records shall be furnished to both the defendant and the plaintiff.
- In any civil or criminal action, unless otherwise prohibited by law, upon the issuance of a subpoena from a court of competent jurisdiction and proper notice to the patient or the patient's legal representative by the party seeking such records.

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[11] 45 C.F.R. s. 160.103

[12] A "covered entity" is a health plan, a health care clearinghouse, or a health care provider who transmits any health information in electronic form in connection with a transaction covered under the HIPAA. *See id.*

[13] In general, covered entities may use PHI for the purposes of treatment, payment and health care operations (TPO) without any special permission from a patient. Special permission, called an authorization, must be obtained for uses and disclosures other than for TPO. For some uses and disclosures, a covered entity need not obtain an authorization but must give the patient the opportunity to agree or object (e.g., give patients the option to disclose health information to family or friends). Finally, in some situations, such as reporting to public health authorities, emergencies, or in research studies in which a waiver has been obtained from an Institutional Review Board (IRB), a covered entity does not need to obtain an authorization or provide an opportunity to agree or object. Yale University, *Health Insurance Portability and Accountability Act*, available at: http://hipaa.yale.edu/overview/index.html (last visited Mar. 9, 2011).

[14] *Id.* Fines under HIPAA range from $100 to $50,000 per violation with specified annual caps. Criminal penalties include fines ranging from $50,000 to $250,000 and imprisonment of up to 10 years. *See* American Medical Association, *HIPAA Violations and Enforcement*, available at: http://www.ama-assn.org/ama/pub/physician-resources/solutions-managing-your-practice/coding-billing-insurance/hipaahealth-insurance-portability-accountability-act/hipaa-violations-enforcement.shtml (last accessed Mar. 31, 2011).

- For statistical and scientific research, provided the information is abstracted in such a way as to protect the identity of the patient or provided written permission is received from the patient or the patient's legal representative.
- To a regional poison control center for purposes of treating a poison episode under evaluation, case management of poison cases, or compliance with data collection and reporting requirements of s. 395.1027, F.S., and the professional organization that certifies poison control centers in accordance with federal law.

The Florida Supreme Court has addressed the issue of whether a health care provider, absent any of the above-referenced circumstances, can disclose confidential information contained in a patient's medical records as part of a medical malpractice action.[15] The Florida Supreme Court ruled that, pursuant to s. 455.241, F.S. (the predecessor to current s. 456.057(7)(a), F.S.), only a health care provider who is a defendant, or reasonably expects to become a defendant, in a medical malpractice action can discuss a patient's medical condition.[16] The Court also held that the health care provider can only discuss the patient's medical condition with his or her attorney in conjunction with the defense of the action.[17] The Court determined that a defendant's attorney cannot have ex parte discussions about the patient's medical condition with any other treating health care provider.

III. Effect of Proposed Changes:

The bill specifies that a health care provider or a health care facility[18] may not intentionally enter disclosed information concerning firearm ownership into a patient's medical record if the provider knows that the information is not relevant to the patient's medical care or safety.

The bill also provides that a health care provider or health care facility must respect a patient's right to privacy and should refrain from making a written or verbal inquiry about the ownership of a firearm or ammunition by the patient or the patient's family members or the presence of a firearm in a home or domicile of the patient or the patient's family members, unless the provider or facility in good faith believes that the information is relevant to the patient's medical care or safety.

The bill provides that a patient may decline to answer questions about ownership of a firearm by the patient or the patient's family members or the presence of a firearm in the home of the patient or a patient's family member. The patient's refusal to answer does not alter existing law regarding a physician's authorization to choose his or her patients. The bill prohibits discrimination by a provider or facility based solely on a patient's exercise of the constitutional right to own or possess a firearm or ammunition.

The bill requires a provider or facility to respect a patient's legal right to own or possess a firearm and provides that a health care provider or health care facility should refrain from unnecessarily harassing a patient about such ownership.

[15] *Acosta v. Richter*, 671 So. 2d 149 (Fla. 1996).
[16] *Id.*
[17] *Id.*
[18] Health care facilities licensed under ch. 395, F.S., include hospitals, ambulatory surgical centers, and mobile surgical facilities.

The bill provides that the following violations constitute grounds for disciplinary actions under s. 456.072(2) and s. 395.1055, F.S.:[19]

- Entering disclosed information concerning firearm ownership into the patient's medical record, if the information is not relevant to the patient's medical care or safety.
- Making a written or verbal inquiry as to the ownership of a firearm or ammunition by a patient or the patient's family members or the presence of a firearm in the home of the patient or the patient's family members and the information is not relevant to the patient's medical care or safety.
- Requiring a patient to answer information regarding the ownership of a firearm by the patient or a family member or the presence of a firearm in the home of the patient or a family member.
- Discriminating against a patient based solely upon the patient's exercise of the constitutional right to own and possess firearms or ammunition.[20]

The bill prohibits an insurer from denying coverage or increasing a premium, or otherwise discriminating against an insured or applicant for insurance, based on the lawful ownership, possession, use, or storage of a firearm or ammunition.

The bill provides the following under the Florida Patient's Bill of Rights and Responsibilities:

- A health care provider or health care facility must respect a patient's right to privacy and should refrain from making a written or verbal inquiry about the ownership of a firearm or ammunition by the patient or the patient's family members or the presence of a firearm in a home or domicile of the patient or the patient's family members, unless the provider or facility in good faith believes that the information is relevant to the patient's medical care or safety.
- A patient may decline to answer questions about ownership of a firearm by the patient or the patient's family members or the presence of a firearm in the home of the patient or a patient's family member, and the patient's refusal to answer does not alter existing law regarding a physician's authorization to choose his or her patients.
- A health care provider or health care facility may not discriminate against a patient based solely on the patient's exercise of the constitutional right to own or possess a firearm or ammunition.
- A health care provider or health care facility must respect a patient's legal right to own or possess a firearm, and a health care provider or health care facility should refrain from unnecessarily harassing a patient about such ownership.

[19] The appropriate board within the DOH, or the DOH if there is no board may impose the following disciplinary actions: (1) Refusal to certify, or to certify with restrictions, an application for a license; (2) Suspension or permanent revocation of a license. (3) Restriction of practice or license. (4) Imposition of an administrative fine not to exceed $10,000 for each count or separate offense. (5) Issuance of a reprimand or letter of concern. (6) Placement of the licensee on probation for a period of time and subject to such conditions as the board or the DOH may specify. (7) Corrective action. (8) Imposition of an administrative fine in accordance with s. 381.0261, F.S., for violations regarding patient rights. (9) Refund of fees billed and collected from the patient or a third party on behalf of the patient. (10) Requirement that the practitioner undergo remedial education.

[20] However, the bill contains a redundancy because it also provides that any violation of s. 790.338, F.S., constitutes grounds for disciplinary action. *See* explanation under the heading "Technical Deficiencies."

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

D. Other Constitutional Issues:

Although this bill states that a health care provider or health care facility should refrain from making a written or verbal inquiry about the ownership of a firearm or ammunition or presence of a firearm in the home of a patient or his or her family, it should be noted that the individual's right to exercise free speech is only regulated in the most egregious of circumstances.

The First Amendment to the United States Constitution provides that "Congress shall make no law ... abridging the freedom of speech."[21] The Florida Constitution similarly provides that "[n]o law shall be passed to restrain or abridge the liberty of speech…"[22] Florida courts have equated the scope of the Florida Constitution with that of the Federal Constitution in terms of the guarantees of freedom of speech.[23]

A regulation that abridges speech because of the content of the speech is subject to the strict scrutiny standard of judicial review.[24] However, the state may regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.[25] "Unlike the case of personal speech, it is not necessary to show a compelling state interest in order to justify infringement of commercial speech through regulation."[26] Commercial free speech that concerns lawful activity and is not misleading may be restricted where the asserted

[21] U.S. CONST. amend. I.
[22] FLA. CONST. art. I, s. 4.
[23] *See, Florida Canners Ass'n v. State, Dep't of Citrus,* 371 So.2d 503 (Fla.1979).
[24] *See, e.g., Reno v. Flores,* 507 U.S. 292, 302 (1993); *Mitchell v. Moore,* 786 So.2d 521, 527 (Fla.2001).
[25] *See United States v. Playboy Entm't Group, Inc.,* 529 U.S. 803, 813 (2000); *Sable Commc'ns of Cal., Inc. v. FCC,* 492 U.S. 115, 126 (1989).
[26] *Florida Canners Ass'n*, 371 So.2d at 519.

governmental interest is substantial, the regulation directly advanced that interest, and the regulation is no more extensive than necessary to serve that interest.[27]

It should also be noted that any civil action that might ensue will likely raise issues surrounding personal, professional, and contractual obligations between the parties; physician-patient privileges of confidentiality; and the weight given to the right to exercise free speech versus a right to privacy.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

A person who violates certain provisions of the bill may be subject to disciplinary action, including, but not limited to, the imposition of an administrative fine not to exceed $10,000 for each count or separate offense and the suspension or permanent revocation of a license.[28]

C. Government Sector Impact:

Additional regulatory and enforcement action may occur for the boards and agencies with oversight responsibilities of the health care professionals and health care facilities due to patient complaints.

VI. Technical Deficiencies:

Lines 53, 59, 78, and 83 refer to health care providers licensed under ch. 456, F.S. Health care providers are not licensed under that chapter, although certain health care practitioners are subject to the general provisions of ch. 456, F.S.

Lines 89 through 90 of the bill provide that certain violations constitute grounds for disciplinary action under ss. 456.072 and 395.1055, F.S. However, s. 395.1055, F.S., does not provide for any disciplinary action and instead requires the Agency for Health Care Administration to adopt rules that relate to standards of care, among other things.

Lines 88 through 89 of the bill provide that a violation of certain provisions within s. 790.338, F.S., constitutes grounds for disciplinary action under s. 456.072(2), F.S. This appears to be redundant because line 163 provides that *any* violation under s. 790.338, F.S., constitutes grounds for which disciplinary actions may be taken under s. 456.072(2), F.S.

[27] *See Abramson v. Gonzalez*, 949 F.2d 1567, 1575-76 (11th Cir. 1992) (holding that is not misleading for an unlicensed person who practices psychology to call himself or herself a psychologist although a state statute defines psychologist as someone with a psychologist license).
[28] *See* s. 456.072, F.S.

VII. Related Issues:

Lines 164 through 170 of the bill may affect an insurer's current insurance policy pertaining to the insuring of firearms.

Because the provision of the bill that prohibits an insurer from discriminating against an insured or applicant for insurance on the basis of his or her lawful ownership, possession, use, or storage of a firearm or ammunition is in an undesignated section of the Florida Statutes, it is unclear what penalty, if any, the insurer would be subject to if the insurer committed this violation.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Health Regulation on March 28, 2011:

- Specifies that a health care provider or health care facility may not intentionally enter disclosed information concerning firearm ownership into a patient's medical record if the provider knows the information is not relevant to the patient's medical care or safety.
- Provides that a health care provider or health care facility should refrain from inquiring about ownership of a firearm or ammunition by the patient or a family member of the patient or the presence of a firearm in a home or domicile of the patient or a family member of the patient, unless the provider or facility believes in good faith that the information is relevant to the patient's medical care or safety.
- Permits a patient to decline to answer questions about ownership of a firearm or the presence of a firearm in the home of the patient or a family member of the patient and a patient's refusal to answer does not alter existing law regarding a physician's authorization to choose his or her patients.
- Prohibits discrimination by a provider or facility based on a patient's constitutional right to own or possess a firearm or ammunition.
- Requires a provider or facility to respect a patient's legal right to own or possess a firearm and to refrain from unnecessarily harassing a patient about such ownership.
- Provides for certain patient rights concerning the ownership of firearms or ammunition in the Florida Patient's Bill of Rights and Responsibilities.
- Provides that any violations related to disclosures, inquiries, discrimination, and harassment constitutes grounds for certain disciplinary actions.
- Prohibits an insurer from denying coverage or increasing a premium, or otherwise discriminating against an insured or applicant for insurance based on the lawful ownership, possession, use, or storage of a firearm or ammunition.

CS by Criminal Justice on February 22, 2011:

- Removes the criminal penalties from the bill and instead provides for noncriminal violations which could result in graduated fines for each successive violation of the prohibitions in the bill.
- Provides limited exemptions from the prohibitions in the bill in the course of emergency treatment, including mental health emergencies, and where certain mental

health professionals believe it is necessary to inquire about firearm possession. The patient's response is only to be disclosed to others participating in the patient's treatment or to law enforcement conducting an active investigation of the events giving rise to a medical emergency.

- Provides an exemption for medical records created on or before the effective date of the bill.

B. Amendments:

None.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 2064
INTRODUCER:	Children, Families, and Elder Affairs Committee
SUBJECT:	Mental Health and Substance Abuse Treatment
DATE:	April 1, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Daniell	Walsh	CF	**Favorable**
2.	O'Connor/Maclure	Maclure	JU	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

I. Summary:

This bill stems from an interim report of the Florida Senate Committee on Children, Families, and Elder Affairs relating to a forensic hospital diversion pilot program. The bill creates the Forensic Hospital Diversion Pilot Program which is to be implemented in Escambia, Hillsborough, and Miami-Dade counties by the Department of Children and Family Services (DCF or department), in conjunction with the First, Eleventh, and Thirteenth Judicial Circuits.

The purpose of the pilot program is to serve individuals with mental illnesses or co-occurring mental illnesses and substance use disorders and who are involved in or at risk of entering state forensic mental health treatment facilities, prisons, jails, or state civil mental health treatment facilities. Eligibility for the pilot program is limited to persons who:

- Are 18 years of age or older;
- Are charged with a felony of the second or third degree;
- Do not have a significant history of violent criminal offenses;
- Are adjudicated incompetent to proceed to trial or not guilty by reason of insanity pursuant to part II of ch. 916, F.S.;
- Meet public safety and treatment criteria established by DCF; and
- Otherwise would be admitted to a state mental health treatment facility.

The bill encourages the Florida Supreme Court to develop educational training for judges in the pilot program areas and authorizes the department to adopt rules. The bill also requires the Office of Program Policy Analysis and Government Accountability to evaluate the pilot program and

submit a report to the Governor, the President of the Senate, and the Speaker of the House of Representatives by December 31, 2012.

The bill also amends Florida's law relating to the involuntary commitment of a defendant who is adjudicated incompetent to provide that a defendant who is being discharged from a state treatment facility shall be provided with up to a seven day supply of the psychotropic medications he or she is receiving at the time of discharge. The bill requires that the most recent formulary approved by the department be used when filling prescriptions for psychotropic medications prescribed to defendants being discharged from state treatment facilities.

Finally, the bill provides that county courts may order the conditional release of a defendant for purposes of outpatient care and treatment.

The bill makes conforming changes.

This bill substantially amends the following sections of the Florida Statutes: 916.106, 916.13, 916.17, and 951.23. The bill creates section 916.185, Florida Statutes.

II. Present Situation:[1]

Forensic Mental Health

On any given day in Florida, there are approximately 17,000 prison inmates, 15,000 local jail detainees, and 40,000 individuals under correctional supervision in the community who experience serious mental illnesses. Annually, as many as 125,000 adults with mental illnesses or substance use disorders requiring immediate treatment are placed in a Florida jail.

Over the past nine years, the population of inmates with mental illnesses or substance use disorders in Florida prisons increased from 8,000 to nearly 17, 000 individuals. In the next nine years, this number is projected to reach more than 35,000 individuals, with an average annual increase of 1,700 individuals. Forensic mental health services cost the state a quarter-billion dollars a year and are now the fastest growing segment of Florida's public mental health system.

Forensic Services

Chapter 916, F.S., called the "Forensic Client Services Act," addresses the treatment and training of individuals who have been charged with felonies and found incompetent to proceed to trial due to mental illness, mental retardation, or autism, or are acquitted by reason of insanity.

Part II of ch. 916, F.S., relates to forensic services for persons who are mentally ill and describes the criteria and procedures for the examination, involuntary commitment, and adjudication of persons who are incompetent to proceed to trial due to mental illness or who have been

[1] The information contained in the Present Situation of this bill analysis is from an interim report by the Committee on Children, Families, and Elder Affairs of the Florida Senate. See Comm. on Children, Families, and Elder Affairs, The Florida Senate, *Forensic Hospital Diversion Pilot Program* (Interim Report 2011-106) (Oct. 2010), *available at* http://archive.flsenate.gov/data/Publications/2011/Senate/reports/interim_reports/pdf/2011-106cf.pdf (last visited Mar. 17, 2011).

adjudicated not guilty by reason of insanity. Persons committed under ch. 916, F.S., are committed to the custody of the Department of Children and Family Services (DCF or department).

Under the authority of ch. 916, F.S., DCF provides mental health assessment, evaluation, and treatment of individuals committed to DCF following adjudication as incompetent to proceed or not guilty by reason of insanity. These individuals are charged with a felony offense and must be admitted to a treatment facility within 15 days of the department's receipt of the commitment packet from the court.[2] Persons committed to the custody of DCF are treated in one of three forensic mental health treatment facilities throughout the state. These facilities contain a total of 1,700 beds and serve approximately 3,000 people each year. The cost to fund these beds is more than $210 million annually.[3]

Individuals admitted to state forensic treatment facilities for competency restoration receive services primarily focused on resolving legal issues, but not necessarily targeting long-term wellness and recovery from mental illnesses. Once competency is restored, individuals are discharged from state treatment facilities and generally returned to jails, where they are rebooked and incarcerated while waiting for their cases to be resolved. A sizable number of individuals experience a worsening of symptoms while waiting in jail, and some are readmitted to state facilities for additional treatment and competency restoration services.

The majority of individuals who enter the forensic treatment system do not go on to prison,[4] but return to court, and either have their charges dismissed for lack of prosecution or the defendant takes a plea such as conviction with credit for time served or probation.[5] Most are then released to the community, often with few or no community supports and services in place.[6] Many are subsequently rearrested and return to the justice and forensic mental health systems, either as the result of committing a new offense or failing to comply with the terms of probation or community control.[7]

Diversion

"Diversion is the process of diverting individuals with severe mental illness and/or co-occurring substance abuse disorders away from the justice system and into the community mental health system, where they are more appropriately served."8 By providing more appropriate community-based services, diversion programs prevent individuals with mental illness and substance abuse

[2] *See* s. 916.107(1)(a), F.S.
[3] Comm. on Children, Families, and Elder Affairs, *supra* note 1.
[4] H. Richard Lamb et al., *Community Treatment of Severely Mentally Ill Offenders Under the Jurisdiction of the Criminal Justice System: A Review*, 50 PSYCHIATRIC SERV. 907-913 (July 1999), *available at* http://psychservices.psychiatryonline.org/cgi/content/full/50/7/907 (last visited Mar. 18, 2011).
[5] Interview with Judge Steven Leifman, Special Advisor to the Florida Supreme Court on Criminal Justice and Mental Health (Aug. 20, 2010).
[6] *Id*.
[7] *Id.*
[8] The Supreme Court, State of Florida, *Mental Health: Transforming Florida's Mental Health System*, *available at* http://www.floridasupremecourt.org/pub_info/documents/11-14-2007_Mental_Health_Report.pdf (last visited Mar. 18, 2011).

disorders from becoming unnecessarily involved in the criminal justice system.[9] There are numerous benefits to the community, criminal justice system, and the diverted individual, including:

- Enhancing public safety by making jail space available for violent offenders.
- Providing judges and prosecutors with an alternative to incarceration.
- Reducing the social costs of providing inappropriate mental health services or no services at all.
- Providing an effective linkage to community-based services, enabling people with mental illness to live successfully in their communities, thus reducing the risk of homelessness, run-ins with the criminal justice system, and institutionalization.[10]

In Florida, this approach is being tested in the Miami-Dade Forensic Alternative Center (MD-FAC), a pilot program implemented in August 2009 by DCF, the Eleventh Judicial Circuit of Florida,[11] and the Bayview Center for Mental Health. The pilot program was established to demonstrate the feasibility of diverting individuals with mental illness adjudicated incompetent to proceed to trial from state hospital placement to placement in community-based treatment and competency restoration services.[12]

"Admission to MD-FAC is limited to individuals who otherwise would be committed to DCF and admitted to state forensic hospitals."[13] In order to be eligible for MD-FAC, an individual must be charged with a less serious offense, such as a second or third degree felony. Following admission, individuals are initially placed in a locked inpatient setting where they receive crisis stabilization, short-term residential treatment, and competency restoration services.[14] As of September 2010, twenty-four individuals have been admitted to the pilot program and diverted from admission to state forensic facilities.[15] To serve these 24 people, MD-FAC operates 10 beds, with an average bed per day cost of $274.00 for a total cost of $1,000,100.[16] MD-FAC reports that increasing the bed capacity will decrease the average bed per day cost at MD-FAC to less than $230, with the possibility of further decreasing costs in the future.[17]

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[9] *Id.*
[10] Nat'l Mental Health Ass'n, TAPA Ctr. for Jail Diversion, Nat'l GAINS Ctr., *Jail Diversion for People with Mental Illness: Developing Supportive Community Coalitions*, (Oct. 2003), *available at* http://www.gainscenter.samhsa.gov/pdfs/jail_diversion/NMHA.pdf (last visited Mar. 18, 2011).
[11] MD-FAC is part of Eleventh Judicial Circuit Criminal Mental Health Project (CMHP). This CMHP runs four diversion programs (Pre-Arrest Diversion, Post-Arrest Misdemeanor Diversion, Post-Arrest Felony Diversion, and Forensic Hospital Diversion). Interview with Judge Steven Leifman, *supra* note 7. The Eleventh Judicial Circuit includes Miami-Dade County, which has one of the nation's largest percentages of mentally ill residents. Abby Goodnough, *Officials Clash Over Mentally Ill in Florida Jails*, N.Y. TIMES, Nov. 15, 2006, *available at* http://www.nytimes.com/2006/11/15/us/15inmates.html (last visited Mar. 18, 2011).
[12] Miami-Dade Forensic Alternative Ctr., *Pilot Program Status Report* (Aug. 2010) (on file with the Senate Comm. on Children, Families, and Elder Affairs).
[13] *Id.*
[14] *Id.*
[15] Additionally, three individuals who met criteria for admission to the program were subsequently admitted to a state hospital because of lack of bed availability at MD-FAC, i.e., the program was at or above capacity. On average, the program has diverted 2.2 individuals per month from admission to state forensic facilities. *Id.*
[16] *Id.*
[17] Staffing standards at MD-FAC allow for additional bed capacity without substantially increasing program staff or fixed costs. As a result, operations will become more efficient as program capacity is increased. *Id.*

As a result of the MD-FAC program:

- The average number of days to restore competency has been reduced, as compared to forensic treatment facilities.[18]
- The burden on local jails has been reduced, as individuals served by MD-FAC are not returned to jail upon restoration of competency.[19]
- Because individuals are not returned to jail, it prevents the individual's symptoms from worsening while incarcerated, possible requiring readmission to state treatment facilities.[20]
- Individuals access treatment more quickly and efficiently because of the ongoing assistance, support, and monitoring following discharge from inpatient treatment and community re-entry.
- Individuals in the program receive additional services not provided in the state treatment facilities, such as intensive services targeting competency restoration, as well as community-living and re-entry skills.
- It is standard practice at MD-FAC to provide assistance to all individuals in accessing federal entitlement benefits that pay for treatment and housing upon discharge.

County Court Authority

As described above, ch. 916, F.S., allows the circuit court to order forensic commitment proceedings for a defendant adjudicated incompetent to proceed to trial. The Florida Supreme Court, in *Onwu v. State*, ruled that only the circuit court, and not the county court, has the authority to order forensic commitment of persons found incompetent to proceed to trial (ITP)

[18]

Comparison of competency restoration services provided in forensic treatment facilities and MD-FAC (average number of days year to date, FY 2009-10):	**Forensic facilities**	**MD-FAC**	**Difference***
Average days to restore competency (admission date to date court notified as competent)	138.9	99.3	39.6 days (-29%)
Average length of stay for individuals restored to competency (this includes the time it takes for counties to pick up individuals)	157.8	139.6	18.2 days (-12%)

"The diminishing advantage of MD-FAC over forensic facilities in terms of average number of days to restore competency (39.6 day reduction) and overall average length of stay for individuals restored to competency (18.2 day reduction) relates to the fact that individuals enrolled in MD-FAC are not rebooked into the jail following restoration of competency. Instead, they remain at the treatment program where they are re-evaluated by court appointed experts while the treatment team develops a comprehensive transition plan for eventual step-down into a less restrictive community placement. When court hearings are held to determine competency and/or authorize step-down into community placements, individuals are brought directly to court by MD-FAC staff. This not only reduces burdens on the county jail, but eliminates the possibility that individuals will decompensate while incarcerated and require subsequent readmission to state treatment facilities. It also ensures that individuals remain linked to the service provider through the community re-entry and re-integration process." *Id.*

[19] MD-FAC program staff provides ongoing assistance, support and monitoring following discharge from inpatient treatment and community re-entry. Additionally, individuals are less likely to return to state hospitals, emergency rooms, and other crisis settings. *Id*

[20] Of the 44 individuals referred to MD-FAC to date, 10 (23 percent) had one or more previous admissions a state forensic hospital for competency restoration and subsequent readmission to the Miami-Dade County Jail. *Id.*

through ch. 916, F.S.[21] The Court noted that the county court may still commit misdemeanor defendants found ITP through the Baker Act.[22]

However, county court judges are without recourse when a misdemeanor defendant found ITP does not meet the criteria for Baker Act involuntary hospitalization, but may still pose a danger to himself or others in the future, and thus requires treatment. In this instance, the county court judge can conditionally release the defendant into the community, but has no authority to order any mental health treatment services. If the defendant receives mental health services while on conditional release, competency may be restored so that a plea can be entered within the year. It is reported that many misdemeanor defendant cases are dismissed by the end of the year because competency has not been restored. In other cases, by the end of the year, the individual has either disappeared or has been rearrested.[23]

Committee on Children, Families, and Elder Affairs' Review of the Forensic Hospital Diversion Pilot Program

During the 2011 interim, the Florida Senate Committee on Children, Families, and Elder Affairs studied forensic mental health in Florida and the benefits of a Forensic Hospital Diversion Pilot Program.[24] The recommendations identified by the interim report include:

- Expanding the forensic hospital diversion pilot program to other areas of the state. The department and representatives from the Office of the State Courts Administrator suggested pilots be implemented in Hillsborough and Escambia counties because they have the largest forensic need in the state.
- Providing program-specific training to judges in the pilot areas.
- Authorizing county court judges to order involuntary outpatient treatment as a condition of release.

III. Effect of Proposed Changes:

This bill stems from an interim report of the Florida Senate Committee on Children, Families, and Elder Affairs relating to a forensic hospital diversion pilot program. The bill creates the Forensic Hospital Diversion Pilot Program to be implemented in Escambia, Hillsborough, and Miami-Dade counties by the Department of Children and Family Services (DCF or department), in conjunction with the First, Eleventh, and Thirteenth Judicial Circuits. The program is to be implemented within available resources and the bill authorizes DCF to reallocate resources from forensic mental health programs or other adult mental health programs serving individuals involved in the criminal justice system. The purpose of the pilot program is to serve individuals with mental illnesses or co-occurring mental illnesses and substance use disorders and who are involved in or at risk of entering state forensic mental health treatment facilities, prisons, jails, or state civil mental health treatment facilities. In creating and implementing the program, DCF is directed to include a comprehensive continuum of care and services that use evidence-based

[21] *Onwu v. State*, 692 So.2d 881 (Fla. 1997).
[22] *Id.* Baker Act procedures are found in part I, ch. 394, F.S.
[23] Telephone interview with Judge Steven Leifman, Special Advisor to the Florida Supreme Court on Criminal Justice and Mental Health (Sep. 28, 2010).
[24] Comm. on Children, Families, and Elder Affairs, *supra* note 1.

practices and best practices to treat people who have mental health and co-occurring substance use disorders. The bill provides definitions for the terms "best practices," "community forensic system," and "evidence-based practices."

Eligibility for the pilot program is limited to persons who:

- Are 18 years of age or older;
- Are charged with a felony of the second or third degree;
- Do not have a significant history of violent criminal offenses;
- Are adjudicated incompetent to proceed to trial or not guilty by reason of insanity pursuant to part II of ch. 916, F.S.;
- Meet public safety and treatment criteria established by DCF; and
- Otherwise would be admitted to a state mental health treatment facility.

The bill encourages the Florida Supreme Court, in consultation with the Supreme Court Mental Health and Substance Abuse Committee, to develop educational training for judges in the pilot program areas. The bill authorizes DCF to adopt rules to administer the program. The bill also requires the Office of Program Policy Analysis and Government Accountability (OPPAGA) to evaluate the pilot program and submit a report to the Governor, the President of the Senate, and the Speaker of the House of Representatives by December 31, 2012. The OPPAGA is directed to examine the efficiency and cost-effectiveness of providing forensic services in secure, outpatient, community-based settings in the report.

The bill amends s. 916.13, F.S., relating to the involuntary commitment of a defendant who is adjudicated incompetent, to provide that a defendant who is being discharged from a state treatment facility shall be provided with up to a seven day supply of the psychotropic medications he or she is receiving at the time of discharge. The defendant is to remain on the medications, to the extent it is deemed medically appropriate, in order to accommodate continuity of care and ensure the ongoing level of treatment that helped the defendant become competent. The bill requires that the most recent formulary approved by the department be used when filling prescriptions for psychotropic medications prescribed to defendants being discharged from state treatment facilities. The bill also amends s. 951.23, F.S., to require all county detention facilities, county residential probation centers, and municipal detention facilities filling prescriptions for psychotropic medications prescribed to defendants discharged from state treatment facilities to follow the formulary approved by DCF in order to conform to the changes made in s. 916.13, F.S.

Finally, the bill authorizes a county court to order the conditional release of a defendant for purposes of outpatient care and treatment only. The bill amends the definition of "court" in s. 916.106, F.S., to conform to this change.

The bill shall take effect July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill provides that the Forensic Hospital Diversion Pilot Program is to be implemented by the Department of Children and Family Services (DCF or department), in conjunction with the First, Eleventh, and Thirteenth Judicial Circuits in Escambia, Miami-Dade, and Hillsborough counties, "within available resources." The department is also authorized to reallocate resources from forensic mental health programs or other adult mental health programs serving individuals involved in the criminal justice system.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	CS/SB 828
INTRODUCER:	Community Affairs Committee and Senator Bogdanoff
SUBJECT:	Public Records/Local Government Inspector General
DATE:	April 1, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wolfgang	Yeatman	CA	**Fav/CS**
2.	O'Connor	Maclure	JU	**Pre-meeting**
3.			GO	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

This bill creates an exemption from statutory and constitutional public records requirements for information received as part of active investigations of the inspector general on behalf of a unit of local government.

The exemption is subject to legislative review and repeal under the provisions of the Open Government Sunset Review Act.[1]

Because this bill creates a new public records exemption, it requires a two-thirds vote of each house of the Legislature for passage.[2]

This bill substantially amends section 119.0713, Florida Statutes.

[1] Section 119.15, F.S.
[2] FLA. CONST. art. I, s. 24(c).

II. Present Situation:

Florida's Public Records Law

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892. In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.

Article I, section 24(a) of the State Constitution, provides that:

> Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

The Public Records Law is contained in ch. 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record[3] must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency[4] records are to be available for public inspection.

Section 119.011(12), F.S., defines the term "public records" to include all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency. The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are "intended to perpetuate, communicate, or formalize knowledge."[5]

Only the Legislature is authorized to create exemptions to open government requirements.[6] Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to

[3] Section 119.011(12), F.S.
[4] Section 119.011(2), F.S., defines "agency" as "…any state, county, district, authority, or municipal officer, department, division, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency."
[5] *Shevin v. Byron, Harless*
+, Shafer, Reid, and Assocs., Inc., 379 So. 2d 633, 640 (Fla. 1980).
[6] FLA. CONST. art. I, s. 24(c).

accomplish the stated purpose of the law.[7] A bill enacting an exemption[8] may not contain other substantive provisions although it may contain multiple exemptions relating to one subject.[9]

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.[10] If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[11]

Open Government Sunset Review Act

The Open Government Sunset Review Act established in s. 119.15, F.S., provides a review and repeal process for public records exemptions. In the fifth year after enactment of a new exemption or in the fifth year after substantial amendment of an existing exemption, the exemption is repealed on October 2, unless reenacted by the Legislature. Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

Local Government Auditing

Section 218.32 (1), F.S., requires that local governments submit to the Department of Financial Services (DFS) an Annual Financial Report covering their operations for the preceding fiscal year. The DFS makes available to local governments an electronic filing system that accumulates the financial information reported on the annual financial reports in a database. Section 218.39, F.S., provides that if a local government will not be audited by the Auditor General, the local government must provide for an annual financial audit to be completed within 12 months after the end of the fiscal year. The audit must be conducted by an independent certified public accountant retained by the entity and paid for from public funds.

Under s. 119.0713, F.S., the audit report of an internal auditor prepared for or on behalf of a unit of government becomes a public record when the audit becomes final. Audit work papers and notes related to the audit are confidential and exempt from s. 119.07(1) and article I, section 24(a) of the Florida Constitution until the audit report becomes final.

Local Government Investigations: Public Records

If certified pursuant to statute, an investigatory record of the Chief Inspector General within the Executive Office of the Governor or of the employee designated by an agency head as the

[7] *See Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999) (quoting FLA. CONST. art. I, s. 24(c)); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So. 2d 567 (Fla. 1999).
[8] Section 119.15(4)(b), F.S., provides that an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.
[9] FLA. CONST. art. I, s. 24(c).
[10] Op. Att'y Gen. Fla. 85-62 (1985).
[11] *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA), review denied, 589 So. 2d 289 (Fla. 1991).

agency inspector general (which would include local government entities)[12] has a public records exemption until the investigation ceases to be active, or a report detailing the investigation is provided to the Governor or the agency head, or 60 days from the inception of the investigation for which the record was made or received, whichever occurs first. Investigatory records are those records that are related to the investigation of an alleged, specific act or omission, or other wrongdoing, with respect to an identifiable person or group of persons, based on information compiled by the Chief Inspector General, or by an agency inspector general, as named under the provisions of s. 112.3189, F.S., in the course of an investigation. Under s. 112.31901, F.S., an investigation is active if it is continuing with a reasonable, good faith anticipation of resolution and with reasonable dispatch.[13] At the local government level, there is concern that 60 days is too little time to carry out an investigation, particularly if it is a criminal investigation. Additionally, the Palm Beach County Inspector General is an independent entity responsible for the county, 38 municipalities (by referendum), and the Solid Waste Authority (by interlocal agreement).[14] As a result, there is no single agency head to certify the investigation as exempt.

Section 112.3188, F.S., governs the confidentiality of information given to inspectors general in whistleblower cases. Certain specified information is confidential until the conclusion of an investigation when the investigation is related to whether an employee, or agent of an agency, or independent contractor:

- Has violated or is suspected of having violated any federal, state, or local law, rule, or regulation, thereby creating and presenting a substantial and specific danger to the public's health, safety, or welfare; or
- Has committed an act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, or gross neglect of duty.

Information, other than the name or identity of a person who discloses certain types of incriminating information about a public employee, may be disclosed when the investigation is no longer active. Section 112.3188, F.S., defines what constitutes an active investigation.

Section 112.324(2), F.S., (recently amended by ch. 2010-130, Laws of Florida) provides local governments with a public records exemption for ethics investigations.[15] A recent Florida Attorney General Opinion responded to the following question: "Do the public records and meeting exemptions provided for in ch. 2010-130, Laws of Florida, apply to the investigatory process of the Palm Beach County Inspector General?"[16] The opinion concluded that to the extent that the inspector general is investigating complaints involving the violation of ethics codes, the provisions of ch. 2010-130 would apply. Confidentiality under s. 112.324, F.S., does not extend beyond ethics investigations. However, the Attorney General Opinion did note that similar investigations would be covered under s. 112.3188, F.S., as discussed above.

[12] Section 112.312, F.S., defining "agency" as any state, regional, county, local, or municipal government entity of this state, whether executive, judicial, or legislative; any department, division, bureau, commission, authority, or political subdivision of this state therein; or any public school, community college, or state university.
[13] Section 112.31901, F.S.
[14] Email from the Palm Beach County Inspector General, on record with the Senate Committee on Community Affairs.
[15] *See also* s. 112.31901, F.S. (related to investigatory records of ethics violations).
[16] Op. Att'y Gen. Fla. 2010-39, September 16, 2010.

III. Effect of Proposed Changes:

Section 1 amends s. 119.0713, F.S., to expand the public records exemptions for audit records prepared by internal auditors for or on behalf of a local government. The bill revises the exemption to also include investigative reports of an inspector general until the investigation becomes final, and information received, produced, or derived from an investigation until the investigation is complete or when the investigation is no longer active. An investigation is active if it is continuing with a reasonable, good faith anticipation of resolution and with reasonable dispatch. This exemption for audits and investigations is subject to the Open Government Sunset Review Act and shall stand repealed on October 2, 2016, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2 provides a statement of public necessity required by the Florida Constitution. The bill states that the exemption is necessary because the release of such information could potentially be defamatory to an individual or entity under audit or investigation, causing unwarranted damage to the good name or reputation of an individual or company, or could significantly impair an administrative or criminal investigation.

Section 3 provides an effective date of October 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement: Article I, section 24(c) of the State Constitution requires a two-thirds vote of each house of the Legislature for passage of a newly created public records or public meetings exemption. Because this bill creates a new public records exemption, it requires a two-thirds vote for passage.

Subject Requirement: Article I, section 24(c) of the State Constitution requires the Legislature to create public records or public meetings exemptions in legislation separate from substantive law changes. This bill complies with that requirement.

Public Necessity Statement: Article I, section 24(c) of the State Constitution requires a public necessity statement for a newly created public records or public meetings exemption. Because this bill creates a new public records exemption, it includes a public necessity statement.

Breadth: A public records exemption must be no broader than necessary to accomplish the stated purpose of the law.[17] To survive constitutional scrutiny, the bill must be

[17] *Memorial Hospital-West Volusia v. News-Journal Corporation,* 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation,* 724 So. 2d 567 (Fla. 1999).

narrowly tailored to protect individuals or entities from the release of defamatory information.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Community Affairs on March 21, 2011:
Adds the definition of what constitutes an active investigation.

B. Amendments:

None.

895890

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Bogdanoff) recommended the following:

Senate Amendment (with title amendment)

Between lines 16 and 17

insert:

Section 1. Section 92.55, Florida Statutes, is amended to read:

92.55 Judicial or other proceedings involving victim or witness under the age of 16 or person with mental retardation; special protections; use of registered service or therapy animals.—

(1) Upon motion of any party, upon motion of a parent,

guardian, attorney, or guardian ad litem for a child under the age of 16 or person with mental retardation, or upon its own motion, the court may enter any order necessary to protect a child under the age of 16 or person with mental retardation who is a victim or witness in any judicial proceeding or other official proceeding from severe emotional or mental harm due to the presence of the defendant if the child or person with mental retardation is required to testify in open court. Such orders shall relate to the taking of testimony and shall include, but not be limited to:

(a) Interviewing or the taking of depositions as part of a civil or criminal proceeding.

(b) Examination and cross-examination for the purpose of qualifying as a witness or testifying in any proceeding.

(c) The use of testimony taken outside of the courtroom, including proceedings under ss. 92.53 and 92.54.

(2) In ruling upon the motion, the court shall take into consideration:

(a) The age of the child, the nature of the offense or act, the relationship of the child to the parties in the case or to the defendant in a criminal action, the degree of emotional trauma that will result to the child as a consequence of the defendant’s presence, and any other fact that the court deems relevant; or

(b) The age of the person with mental retardation, the functional capacity of the person with mental retardation, the nature of the offenses or act, the relationship of the person with mental retardation to the parties in the case or to the defendant in a criminal action, the degree of emotional trauma

that will result to the person with mental retardation as a consequence of the defendant's presence, and any other fact that the court deems relevant.

(3) In addition to such other relief as is provided by law, the court may enter orders limiting the number of times that a child or person with mental retardation may be interviewed, prohibiting depositions of a child or person with mental retardation, requiring the submission of questions prior to examination of a child or person with mental retardation, setting the place and conditions for interviewing a child or person with mental retardation or for conducting any other proceeding, or permitting or prohibiting the attendance of any person at any proceeding. The court shall enter any order necessary to protect the rights of all parties, including the defendant in any criminal action.

(4) The court may set any other conditions on the taking of testimony by children which it finds just and appropriate, including the use of a registered service or therapy animal. When deciding whether to permit a child to testify with the assistance of a registered service or therapy animal, the court shall take into consideration the age of the child, the interests of the child, the rights of the parties to the litigation, and any other relevant factor that would aid in the facilitation of testimony by the child. Such registered service or therapy animals shall be evaluated and registered according to national standards.

================ T I T L E A M E N D M E N T ================

And the title is amended as follows:


895890

Delete line 2

and insert:

An act relating to children; amending s. 92.55, F.S.; authorizing a court to use registered service or therapy animals to aid children in giving testimony in legal proceedings when appropriate; requiring the court to consider certain factors before permitting such testimony; requiring that such registered service or therapy animals be evaluated and registered according to national standards; amending s.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	CS/SB 504
INTRODUCER:	Children, Families, and Elder Affairs Committee and Senator Bogdanoff
SUBJECT:	Child Visitation
DATE:	April 1, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Daniell	Walsh	CF	**Fav/CS**
2.	O'Connor	Maclure	JU	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

This bill amends Florida's Keeping Children Safe Act to require probable cause of sexual abuse by a parent or caregiver in order to create a presumption of detriment to a child. The bill further provides that persons meeting specified criteria may not visit or have contact with a child without a hearing and order by the court, and in order to begin or resume contact with the child, there must be an evidentiary hearing to determine whether contact is appropriate. The bill provides that the court shall hold a hearing within seven business days of finding out that a person is attempting to influence the testimony of the child. The hearing is to determine whether visitation with the person who is alleged to have influenced the testimony of the child is in the best interest of the child.

This bill also amends the legislative intent of the Act to provide that it is the intent to protect children who have been sexually abused or exploited by a parent or caregiver by placing additional requirements on judicial determinations related to contact between a parent or caregiver who meets certain criteria and a child victim in any proceeding pursuant to ch. 39, F.S.

This bill substantially amends section 39.0139, Florida Statutes.

II. Present Situation:

Supervised Visitation

Children involved in custody and visitation disputes are often considered "high risk" and can present emotional and behavioral difficulties later in life.[1] Research has shown that a child's long-term behavioral and emotional adjustment will be more positive if he or she has contact with both parents.[2]

Supervised visitation programs "emerged as a service necessary for families experiencing separation and divorce, when conflict between the parents necessitates an 'outside resource' to allow the child contact with a noncustodial parent."[3] These programs provide parents who may pose a risk to their children or to another parent an opportunity to experience parent-child contact while in the presence of an appropriate third party.[4] Supervision is available in a variety of ways: on-site visitation, off-site visitation at a neutral location, off-site visitation at the home of a relative or foster parent, or supervision of telephone calls between the parent and child.[5]

In addition to enabling and building healthy relationships between parents and children, other purposes of supervised visitation programs include:

- Preventing child abuse;
- Reducing the potential for harm to victims of domestic violence and their children;
- Providing written factual information to the court regarding supervised contact;
- Reducing the risk of parental kidnapping;
- Assisting parents with juvenile dependency case plan compliance; and
- Facilitating reunification, where appropriate.[6]

The use of supervised visitation programs has grown throughout the years. In 1995, there were 56 documented programs throughout the United States and by 1998, 94 programs had been identified.[7] In January 2005, the Florida Clearinghouse on Supervised Visitation started collecting program and service data in a web-based database.[8] By 2006, Florida had more than 60 supervised visitation programs, and the database held information on 5,196 cases.[9]

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[1] Rachel Birnbaum and Ramona Alaggia, *Supervised Visitation: A Call for a Second Generation of Research*, 44 FAM. CT. REV. 119, 119 (Jan. 2006).
[2] *Id*.
[3] Wendy P. Crook et al., Institute for Family Violence Studies, Florida State University, *Florida's Supervised Visitation Programs: A Report from the Clearinghouse on Supervised Visitation*, 6 (Jan. 2007), *available at* http://familyvio.csw.fsu.edu/1996/BigDig1_2007.pdf (last visited Mar. 16, 2011).
[4] Nat Stern et al., *Visitation Decisions in Domestic Violence Cases: Seeking Lessons from One State's Experience*, 23 WIS. J.L. GENDER & SOC'Y 113, 114 (Spring 2008).
[5] Nancy Thoennes and Jessica Pearson, *Supervised Visitation: A Profile of Providers*, 37 FAM. & CONCILIATION COURTS REV. 460, 465 (Oct. 1999).
[6] Wendy P. Crook, *supra* note 3, at 6.
[7] *Id*.
[8] *Id*. at 7. The Clearinghouse on Supervised Visitation was created in 1996 to provide statewide technical assistance on issues related to the delivery of supervised visitation services to providers. *Id*. at 3.
[9] *Id*. at 7.

As of 2007, Florida was the only state that tracked the statewide usage of supervised visitation across all types of referrals, including domestic violence, child abuse and neglect, and separation or divorce cases.[10]

In an attempt to create program uniformity in certain areas, the Florida Supreme Court's Family Court Steering Committee began developing a minimum set of standards for supervised visitation programs in 1998. Chief Justice Harding endorsed the standards and issued an administrative order mandating that the chief judge of each circuit enter into an agreement with local programs that agreed to comply with the standards.[11] Seven years later, the Legislature amended ch. 753, F.S., to provide for the development of new standards, procedures for a certification process, and development of an advisory board, known as the Supervised Visitation Standards Committee (committee).[12] The committee prepared a report to the Legislature explaining the four overarching principles – safety, training, dignity and diversity, and community – and the standards through which the principles are implemented.

Keeping Children Safe Act

In 2007, the Legislature created the Keeping Children Safe Act (Act)[13] to keep children in the custody of the Department of Children and Family Services (DCF or department) or its contractors safe during visitation or other contact with an individual who is alleged to have committed sexual abuse or some related criminal conduct. The Act creates a rebuttable presumption that visitation with a parent or caregiver will be detrimental to the child if the parent or caregiver has been reported to the child abuse hotline for sexual abuse of a child or has been convicted of certain crimes involving children.[14] If the presumption is not rebutted, visitation must be prohibited or allowed only through a supervised visitation program.[15]

In *In re: Te Interest of Helen Potts*, the circuit court in Pasco County held that s. 39.0139(3)(a)(1), F.S., the section of law finding a presumption of detriment if a parent or caregiver has been reported to the child abuse hotline, was unconstitutional.[16] The court explained that because the statute impinges a fundamental liberty interest – the right to parent[17] – the statute must serve a compelling state interest and use the least intrusive means possible to achieve its compelling interest. Although the court found that s. 39.0139(3)(a)(1), F.S., serves a compelling state interest – to protect children from acts of sexual abuse and exploitation committed by a parent or caregiver – the statute did not do so in the least restrictive means possible. The statute does provide for an evidentiary hearing for those parents or caregivers who fall within the statute; however, those persons are deprived of visitation and contact with their child until the hearing is held. Additionally, the court stated that "there is no other place in the

[10] *Id*. at 6.
[11] Nat Stern et al., *supra* note 4, at 117. The Minimum Standards for Supervised Visitation Program Agreements can be found at http://www.flcourts.org/gen_public/family/bin/svnstandard.pdf (last visited Mar. 16, 2011).
[12] Nat Stern and Karen Oehme, *A Comprehensive Blueprint for a Crucial Service: Florida's New Supervised Visitation Strategy*, 12 J.L. & FAM. STUD. 199, 206 (2010).
[13] Chapter 2007-109, s. 1, Laws of Fla.
[14] Section 39.0139(3), F.S.
[15] Section 39.0139(5), F.S.
[16] *In re: The Interest of Helen Potts*, case no. 07-00742DPAWS (Fla. 6th Jud. Cir. 2007).
[17] *See Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Troxel v. Granville*, 530 U.S. 57, 72-73 (2000).

Florida Statutes that permits interference with a fundamental right based solely on an anonymous tip."[18] Accordingly, the court found s. 39.0139(3)(a)(1), F.S., unconstitutional because:

> The statute creates a rebuttable presumption that visitation of a dependent child by a parent or caregiver who has been reported to the child abuse hotline for sexual abuse, is detrimental to the child. The parent is not entitled to notice or entitled to be heard before his or her rights are eliminated. If a hearing is held at some future undetermined time, the onus is on the parent to rebut the presumption by clear and convincing evidence. Any and all evidence is permitted and the rules of evidence simply do not apply. . . . There is no other place in Chapter 39 that shifts the burden to the parent.[19]

The Keeping Children Safe Act also permits a court to immediately suspend visitation or other contact with a person who attempts to influence the testimony of a child.[20] Moreover, the Act requires a court to convene a hearing within seven business days to evaluate a report from the child's therapist that visitation is impeding the child's therapeutic process.[21]

III. Effect of Proposed Changes:

This bill amends s. 39.0139, F.S., the Keeping Children Safe Act, by requiring a court to find probable cause that a parent or caregiver has sexually abused a child before creating a rebuttable presumption of detriment to the child. The bill provides that if a person meets certain criteria as set out in law, that person may not visit or have contact with a child without a hearing and order by the court. If visitation or contact is denied and the person wishes to begin or resume contact with the child victim, there must be an evidentiary hearing to determine whether contact is appropriate. The bill clarifies that *prior* to the hearing, the court shall appoint a guardian ad litem or attorney ad litem for the child.

The bill also provides that at the hearing, the court may receive evidence, to the extent of its probative value, such as recommendations from the child protective team, the child's therapist, or the child's guardian ad litem or attorney ad litem, even if the evidence may not be admissible under the rules of evidence. Regardless of whether the court finds that the person did or did not rebut the presumption of detriment, the court must enter a written order setting forth findings of fact.

The bill provides that once a rebuttable presumption of detriment has arisen or if visitation has already been ordered and a party or participant informs the court that a person is attempting to influence the testimony of the child, the court must hold a hearing within seven business days to determine whether it is in the best interests of the child to prohibit or restrict visitation with the person who is alleged to have influenced the testimony of the child.

The bill also amends the legislative intent of the Act to provide that it is the intent to protect children who have been sexually abused or exploited by a parent or caregiver by placing

[18] *In re*, *supra* note 16, at 7.
[19] *Id*.
[20] Section 39.0139(6)(a), F.S.
[21] Section 39.0139(6)(b), F.S.

additional requirements on judicial determinations related to contact between a parent or caregiver who meets certain criteria and a child victim in any proceeding pursuant to ch. 39, F.S.

The bill makes technical and conforming changes.

The bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The Keeping Children Safe Act (Act) creates a rebuttable presumption that visitation with a parent or caregiver will be detrimental to the child if the parent or caregiver has been reported to the child abuse hotline for sexual abuse of a child or has been convicted of certain crimes involving children. If the person meets certain criteria, the person may not visit or have contact with the child until a hearing is held. At the hearing, all evidence is admissible, even if it is not generally admissible under the rules of evidence, and the person must try and overcome the presumption by clear and convincing evidence.

In *In re: The Interest of Helen Potts*,[22] the circuit court in Pasco County held that certain portions of the Act unconstitutionally infringed on the fundamental right to parent because the Act created a presumption of detriment based on an anonymous tip and did not provide notice or a time frame in which a hearing must be held. Also, the court raised issue with the fact that all evidence is permitted and the rules of evidence do not apply and that the burden is placed on the parent to rebut the presumption by clear and convincing evidence.

This bill addresses the issue that a presumption of detriment could arise based on an anonymous call. The bill also provides that "to the extent of its probative value" all evidence may be heard, regardless of whether it would be admissible under the rules of evidence. According to representatives from The Florida Bar, evidence in ch. 39, F.S., cases is usually allowed to be heard despite the rules of evidence, but in an attempt to address the possible constitutional concern raised by the court, the bill does limit

[22] *In re: The Interest of Helen Potts*, case no. 07-00742DPAWS (Fla. 6th Jud. Cir. 2007).

evidence "to the extent of its probative value."[23] It is unclear how a court will rule in the future.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

After the Keeping Children Safe Act (Act) was created, there was debate on whether it applied only to children with cases under ch. 39, F.S., or whether it applied to all judicial determinations relating to visitation and contact with children.[24] This bill amends the legislative intent of the Act to provide that it is the intent to protect children who have been sexually abused or exploited by a parent or caregiver by placing additional requirements on judicial determinations related to contact between a parent or caregiver who meets certain criteria and a child victim in any proceeding pursuant to ch. 39, F.S. This change makes it clear that the provisions of s. 39.0139, F.S., only apply in cases under ch. 39, F.S.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Children, Families, and Elder Affairs on March 22, 2011:
The committee substitute provides that it is the intent of the Legislature to protect children who have been sexually abused or exploited by a parent or caregiver by placing additional requirements on judicial determinations related to contact between a parent or caregiver who meets certain criteria and a child victim in *any proceeding pursuant to ch. 39, F.S.*, rather than in any proceeding under the laws of the state.

[23] Conversation with Thomas Duggar, Duggar & Duggar, P.A., representative of the Family Law Section of The Florida Bar (Mar. 21, 2011).
[24] *See* Alex Caballero and Ingrid Anderson, *Florida Statute Section 39.0139: Protecting Children from Sexual Abuse from Those Entrusted with Their Care*, 83 FLA. B.J. 59 (Mar. 2008); Judge Sue Robbins, *Florida Statute Section 39.0139: Limiting the Risk of Serious Harm to Children*, 82 FLA. B.J. 45 (May 2008).

B. Amendments:

None.

332504

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Bogdanoff) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. Sections 25.051, 26.21, 26.22, 26.23, 26.24, 26.25, 26.26, 26.27, 26.28, 26.29, 26.30, 26.31, 26.32, 26.33, 26.34, 26.35, 26.36, 26.361, 26.362, 26.363, 26.364, 26.365, 26.37, 26.38, 26.39, 26.40, 26.42, 35.10, 35.11, 907.05, and 907.055, Florida Statutes, are repealed.

Section 2. Section 26.46, Florida Statutes, is amended to read:

26.46 Jurisdiction of resident judge after assignment.—When

a circuit judge is assigned to another circuit, none of the circuit judges in such other circuit shall, because of such assignment, be deprived of or affected in his or her jurisdiction other than to the extent essential so as not to conflict with the authority of the temporarily assigned circuit judge as to the particular case or cases or class of cases~~, or in presiding at the particular term or part of term named or specified in the assignment~~.

Section 3. Section 27.04, Florida Statutes, is amended to read:

27.04 Summoning and examining witnesses for state.—The state attorney shall have summoned all witnesses required on behalf of the state; and he or she is allowed the process of his or her court to summon witnesses from throughout the state to appear before the state attorney ~~in or out of term time~~ at such convenient places in the state attorney's judicial circuit and at such convenient times as may be designated in the summons, to testify before him or her as to any violation of the law upon which they may be interrogated, and he or she is empowered to administer oaths to all witnesses summoned to testify by the process of his or her court or who may voluntarily appear before the state attorney to testify as to any violation or violations of the law.

Section 4. Section 30.12, Florida Statutes, is amended to read:

30.12 Power to appoint sheriff.—Whenever any sheriff in the state shall fail to attend, in person or by deputy, ~~any term of~~ the circuit court or county court of the county, from sickness, death, or other cause, the judge attending said court may

appoint an interim ~~a~~ sheriff, who shall assume all the responsibilities, perform all the duties, and receive the same compensation as if he or she had been duly appointed sheriff~~,~~ for only the ~~said~~ term of nonattendance ~~court~~ and no longer.

Section 5. Paragraph (c) of subsection (1) of section 30.15, Florida Statutes, is amended to read:

30.15 Powers, duties, and obligations.—

(1) Sheriffs, in their respective counties, in person or by deputy, shall:

(c) Attend all sessions ~~terms~~ of the circuit court and county court held in their counties.

Section 6. Subsection (2) of section 34.13, Florida Statutes, is amended to read:

34.13 Method of prosecution.—

(2) Upon the finding of indictments by the grand jury for crimes cognizable by the county court, the clerk of the court, without any order therefor, shall docket the same on the trial docket of the county court ~~on or before the first day of its next succeeding term~~.

Section 7. Subsection (2) of section 35.05, Florida Statutes, is amended to read:

35.05 Headquarters.—

(2) A district court of appeal may designate other locations within its district as branch headquarters for the conduct of the business of the court ~~in special or regular term~~ and as the official headquarters of its officers or employees pursuant to s. 112.061.

Section 8. Section 38.23, Florida Statutes, is amended to read:


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38.23 Contempt ~~Contempts~~ defined.—A refusal to obey any legal order, mandate or decree, made or given by any judge ~~either in term time or in vacation~~ relative to any of the business of said court, after due notice thereof, shall be considered a contempt, and punished accordingly. ~~But nothing said or written, or published, in vacation, to or of any judge, or of any decision made by a judge, shall in any case be construed to be a contempt.~~

Section 9. Section 43.43, Florida Statutes, is created to read:

43.43 Terms of courts.—The Supreme Court may establish terms of court for the Supreme Court, the district courts of appeal, and the circuit courts; may provide that district courts and circuit courts may establish their own terms of court; or may dispense with terms of court.

Section 10. Section 43.44, Florida Statutes, is created to read:

43.44 Mandate of an appeals court.—An appellate court has the jurisdiction and power, as the circumstances and justice of the case may require, to reconsider, revise, reform, or modify its own judgments for the purpose of making the same accord with law and justice. Accordingly, an appellate court has the power to recall its own mandate for the purpose of enabling it to exercise such jurisdiction and power in a proper case. A mandate may not be recalled more than 120 days after it is filed with the lower tribunal.

Section 11. Paragraph (b) of subsection (1) of section 112.19, Florida Statutes, is amended to read:

112.19 Law enforcement, correctional, and correctional

probation officers; death benefits.—

(1) Whenever used in this section, the term:

(b) "Law enforcement, correctional, or correctional probation officer" means any officer as defined in s. 943.10(14) or employee of the state or any political subdivision of the state, including any law enforcement officer, correctional officer, correctional probation officer, state attorney investigator, or public defender investigator, whose duties require such officer or employee to investigate, pursue, apprehend, arrest, transport, or maintain custody of persons who are charged with, suspected of committing, or convicted of a crime; and the term includes any member of a bomb disposal unit whose primary responsibility is the location, handling, and disposal of explosive devices. The term also includes any full-time officer or employee of the state or any political subdivision of the state, certified pursuant to chapter 943, whose duties require such officer to serve process or to attend session ~~terms~~ of a circuit or county court as bailiff.

Section 12. Subsection (2) of section 206.215, Florida Statutes, is amended to read:

206.215 Costs and expenses of proceedings.—

(2) The clerks of the courts performing duties under the provisions aforesaid shall receive the same fees as prescribed by the general law for the performance of similar duties, and witnesses attending any investigation pursuant to subpoena shall receive the same mileage and per diem as if attending as a witness before the circuit court ~~in term time~~.

Section 13. Subsection (4) of section 450.121, Florida Statutes, is amended to read:

450.121 Enforcement of Child Labor Law.—

(4) Grand juries shall have inquisitorial powers to investigate violations of this chapter; also, trial court judges shall specially charge the grand jury~~, at the beginning of each term of the court,~~ to investigate violations of this chapter.

Section 14. Section 831.10, Florida Statutes, is amended to read:

831.10 Second conviction of uttering forged bills.—Whoever, having been convicted of the offense mentioned in s. 831.09 is again convicted of the like offense committed after the former conviction~~, and whoever is at the same term of the court convicted upon three distinct charges of such offense,~~ shall be deemed a common utterer of counterfeit bills, and shall be punished as provided in s. 775.084.

Section 15. Section 831.17, Florida Statutes, is amended to read:

831.17 Violation of s. 831.16; second or subsequent conviction.—Whoever having been convicted of either of the offenses mentioned in s. 831.16, is again convicted of either of the same offenses, committed after the former conviction~~, and whoever is at the same term of the court convicted upon three distinct charges of said offenses,~~ commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 16. Subsection (4) of section 877.08, Florida Statutes, is amended to read:

877.08 Coin-operated vending machines and parking meters; defined; prohibited acts, penalties.—

(4) Whoever violates ~~the provisions of~~ subsection (3) a

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second or subsequent time commits~~, and is convicted of such second separate offense, either at the same term or a subsequent term of court, shall be guilty of~~ a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 17. Subsection (1) of section 902.19, Florida Statutes, is amended to read:

902.19 When prosecutor liable for costs.—

(1) When a person makes a complaint before a county court judge that a crime has been committed and is recognized by the county court judge to appear before ~~at the next term of~~ the court having jurisdiction to give evidence of the crime and fails to appear, the person shall be liable for all costs occasioned by his or her complaint, and the county court judge may enter ~~obtain~~ a judgment and execution for the costs as in other cases.

Section 18. Subsection (2) of section 903.32, Florida Statutes, is amended to read:

903.32 Defects in bond.—

(2) If no day, or an impossible day, is stated in a bond for the defendant's appearance before a trial court judge for a hearing or trial, the defendant shall be bound to appear 10 days after receipt of notice to appear by the defendant, the defendant's counsel, or any surety on the undertaking. ~~If no day, or an impossible day, is stated in a bond for the defendant's appearance for trial, the defendant shall be bound to appear on the first day of the next term of court that will commence more than 3 days after the undertaking is given.~~

Section 19. Section 905.01, Florida Statutes, is amended to read:

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905.01 Number and procurement of grand jury; replacement of member; term of grand jury.—

(1) The grand jury shall consist of not fewer than 15 nor more than 21 persons. The provisions of law governing the qualifications, disqualifications, excusals, drawing, summoning, supplying deficiencies, compensation, and procurement of petit jurors apply to grand jurors. In addition, an elected public official is not eligible for service on a grand jury.

(2) The chief judge of any circuit court may provide for the replacement of any grand juror who, for good cause, is unable to complete the term of the grand jury. Such replacement shall be made by appropriate order of the chief judge from the list of prospective jurors from which the grand juror to be replaced was selected.

(3) The chief judge of each ~~any~~ circuit court shall regularly order ~~may dispense with~~ the convening of the grand jury for a ~~at any~~ term of 6 months ~~court by filing a written order with the clerk of court directing that a grand jury not be summoned~~.

Section 20. Section 905.09, Florida Statutes, is amended to read:

905.09 Discharge and recall of grand jury.—A grand jury that has been dismissed may be recalled at any time during the ~~same~~ term of the grand jury ~~court~~.

Section 21. Section 905.095, Florida Statutes, is amended to read:

905.095 Extension of grand jury term.—Upon petition of the state attorney or the foreperson of the grand jury acting on behalf of a majority of the grand jurors, the circuit court may

extend the term of a grand jury impaneled under this chapter beyond the term ~~of court~~ in which it was originally impaneled. A grand jury whose term has been extended as provided herein shall have the same composition and the same powers and duties it had during its original term. In the event the term of the grand jury is extended under this section, it shall be extended for a time certain, not to exceed a total of 90 days, and only for the purpose of concluding one or more specified investigative matters initiated during its original term.

Section 22. Section 914.03, Florida Statutes, is amended to read:

914.03 Attendance of witnesses.—A witness summoned by a grand jury ~~or in a criminal case~~ shall remain in attendance until excused by the grand jury. A witness summoned in a criminal case shall remain in attendance until excused by the court. A witness who departs without permission of the court shall be in criminal contempt of court. ~~A witness shall attend each succeeding term of court until the case is terminated.~~

Section 23. Subsection (2) of section 924.065, Florida Statutes, is amended to read:

924.065 Denial of motion for new trial or arrest of judgment; appeal bond; supersedeas.—

(2) An appeal shall not be a supersedeas to the execution of the judgment, sentence, or order until the appellant has entered into a bond with at least two sureties to secure the payment of the judgment, fine, and any future costs that may be adjudged by the appellate court. The bond shall be conditioned on the appellant's personally answering and abiding by the final order, sentence, or judgment of the appellate court and, if the

action is remanded, on the appellant's appearing before ~~at the next term of~~ the court in which the case was originally determined and not departing without leave of court.

Section 24. Section 932.47, Florida Statutes, is amended to read:

932.47 Informations filed by prosecuting attorneys.—Informations may be filed by the prosecuting attorney of the circuit court with the clerk of the circuit court ~~in vacation or in term~~ without leave of the court first being obtained.

Section 25. This act shall take effect January 1, 2012.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to the judiciary; repealing s. 25.051, F.S., relating to regular terms of the Supreme Court; repealing s. 26.21, F.S., relating to terms of the circuit courts; repealing s. 26.22, F.S., relating to terms of the First Judicial Circuit; repealing s. 26.23, F.S., relating to terms of the Second Judicial Circuit; repealing s. 26.24, F.S., relating to terms of the Third Judicial Circuit; repealing s. 26.25, F.S., relating to terms of the Fourth Judicial Circuit; repealing s. 26.26, F.S., relating to terms of the Fifth Judicial Circuit; repealing s. 26.27, F.S., relating to terms of the Sixth Judicial Circuit; repealing s. 26.28, F.S., relating to terms of the

Seventh Judicial Circuit; repealing s. 26.29, F.S., relating to terms of the Eighth Judicial Circuit; repealing s. 26.30, F.S., relating to terms of the Ninth Judicial Circuit; repealing s. 26.31, F.S., relating to terms of the Tenth Judicial Circuit; repealing s. 26.32, F.S., relating to terms of the Eleventh Judicial Circuit; repealing s. 26.33, F.S., relating to terms of the Twelfth Judicial Circuit; repealing s. 26.34, F.S., relating to terms of the Thirteenth Judicial Circuit; repealing s. 26.35, F.S., relating to terms of the Fourteenth Judicial Circuit; repealing s. 26.36, F.S., relating to terms of the Fifteenth Judicial Circuit; repealing s. 26.361, F.S., relating to terms of the Sixteenth Judicial Circuit; repealing s. 26.362, F.S., relating to terms of the Seventeenth Judicial Circuit; repealing s. 26.363, F.S., relating to terms of the Eighteenth Judicial Circuit; repealing s. 26.364, F.S., relating to terms of the Nineteenth Judicial Circuit; repealing s. 26.365, F.S., relating to terms of the Twentieth Judicial Circuit; repealing s. 26.37, F.S., relating to requiring a judge to attend the first day of each term of the circuit court; repealing s. 26.38, F.S., relating to a requirement for a judge to state a reason for nonattendance; repealing s. 26.39, F.S., relating to penalty for nonattendance of judge; repealing s. 26.40, F.S., relating to adjournment of the circuit court upon nonattendance of the judge; repealing s. 26.42, F.S., relating to calling all

cases on the docket at the end of each term; repealing s. 35.10, F.S., relating to regular terms of the district courts of appeal; repealing s. 35.11, F.S., relating to special terms of the district courts of appeal; repealing s. 907.05, F.S., relating to a requirement that criminal trials be heard in the term of court prior to civil cases; repealing s. 907.055, F.S., relating to a requirement that persons in custody be arraigned and tried in the term of court unless good cause is shown; amending ss. 26.46, 27.04, 30.12, 30.15, 34.13, 35.05, and 38.23, F.S.; conforming provisions to changes made by the act; creating s. 43.43, F.S.; allowing the Supreme Court to set terms of court for the Supreme Court, district courts of appeal, and circuit courts; creating s. 43.44, F.S.; providing that appellate courts may withdraw a mandate within 120 days after its issuance; amending ss. 112.19, 206.215, 450.121, 831.10, 831.17, 877.08, 902.19, 903.32, 905.01, 905.09, 905.095, 914.03, 924.065, and 932.47, F.S.; conforming provisions to changes made by the act; providing an effective date.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 1398
INTRODUCER:	Senator Bogdanoff
SUBJECT:	Judiciary
DATE:	April 1, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Maclure	Maclure	JU	**Pre-meeting**
2.			BC	
3.				
4.				
5.				
6.				

I. Summary:

This bill repeals multiple provisions related to the judiciary which appear to be obsolete. The repealed provisions relate to:

- Regular terms of court for the Florida Supreme Court;
- Compensation of the Florida Supreme Court marshal;
- Commissions for taking a census of the population of judicial circuits;
- Term of the circuit courts;
- A judge's attendance at the first day of a term;
- A judge's stated reason for nonattendance;
- The penalty for nonattendance of a judge;
- Adjournment of court upon nonattendance of a judge;
- Calling the docket at end of a term;
- Identification of the sheriff as the executive officer of the circuit court;
- Requiring the clerk of circuit court, or his or her deputy clerk, to reside at the county seat or within two miles of the county seat;
- Regular terms of court for the district courts of appeal;
- Compensation of the marshals for the district courts of appeal; and
- Guardians of incapacitated world war veterans.

This bill repeals the following sections of the Florida Statutes: 25.051, 25.281, 26.011, 26.21, 26.22, 26.23, 26.24, 26.25, 26.26, 26.27, 26.28, 26.29, 26.30, 26.31, 26.32, 26.33, 26.34, 26.35, 26.36, 26.361, 26.362, 26.363, 26.364, 26.365, 26.37, 26.38, 26.39, 26.40, 26.42, 26.49, 28.08, 35.10, 35.27, and 744.103.

II. Present Situation:

Article V of the Florida Constitution establishes the judicial branch of government, including prescribing the various courts in which the judicial power is vested. The Florida State Courts System consists of all officers, employees, and divisions of the entities noted below.[1]

- The Supreme Court, the highest state appellate court, has seven justices and statewide jurisdiction. The Chief Justice is the administrator of the state courts system. The court also regulates admission of lawyers to The Florida Bar and the discipline of judges and lawyers.
- The district courts of appeal, the state appellate courts, have jurisdiction within the limits of their five geographic districts and are served by approximately 60 judges.
- The circuit courts, the highest level trial court in each of the 20 judicial circuits, are served by approximately 600 judges. The circuit courts hear, for example, felony cases, family law matters, and civil cases over $15,000.
- The county courts, the lowest level trial courts, with at least one judge in each county, are served by approximately 320 judges. The county courts hear, for example, misdemeanor cases, small claims cases, and civil cases under $15,000.

Some of the other entities that also have a role in the judicial system include:

- Office of the State Courts Administrator, created by the Supreme Court to assist in administering the state courts system;
- Judicial nominating commissions, which recommend persons to fill judicial vacancies;
- Judicial Qualifications Commission, which investigates and recommends discipline of judges;
- Clerks of court, who have multiple responsibilities, including keeping a docket for court cases, reporting case filings and dispositions, and collecting court costs and fees;
- State attorneys, who prosecute or defend on behalf of the state, all suits, applications, or motions, civil or criminal, in which the state is a party;
- Attorney General, who represents the state in criminal appeals and other issues related to state agency legal actions;
- Statewide Prosecutor, who prosecutes on behalf of the state for crimes that include multiple jurisdictions;
- Public defenders, who represent indigent persons charged with a felony or certain misdemeanors, alleged delinquents, and other persons, such as alleged mentally ill persons, who are being involuntarily placed (usually for health care reasons);
- Capital Collateral Regional Counsels, who represent indigent persons in death row appeals; and
- Sheriffs, who are responsible for executing all processes of the courts and for the provision of bailiffs.

[1] Office of Program Policy Analysis and Government Accountability, Fla. Legislature, Government Program Summaries, *State Courts System* (last updated Jan. 12, 2011), http://www.oppaga.state.fl.us/profiles/1072/ (last visited Mar. 30, 2011).

This bill repeals a number of statutory provisions related to the judiciary. The present situation for each of the relevant provisions is discussed in the "Effect of Proposed Changes" section of this bill analysis, below.

III. Effect of Proposed Changes:

Regular Terms of Supreme Court

Present Situation: Enacted in 1957, s. 25.051, F.S., requires the Supreme Court to hold two terms in each year, in the Supreme Court Building, commencing respectively on the first day of January and July, or the first day thereafter if that is a Sunday or holiday.

Effect of the Bill: Section 1 repeals s. 25.051, F.S.

Compensation of Supreme Court Marshal

Present Situation: Article V, subsection (3)(c) of the Florida Constitution requires that the Supreme Court appoint a marshal and provides that the salary of the marshal "shall be fixed by general law." Enacted in 1957, s. 5.281, F.S., requires that the compensation of the marshal "be provided by law."

Currently, a personnel schedule supporting preparation of the annual general appropriations act prescribes the salary associated with specific categories of state-employee positions, including the marshal of the Supreme Court.[2]

Effect of the Bill: Section 1 repeals s. 25.281, F.S. This bill does not affect the current constitutional requirement for the marshal's compensation to be fixed by general law.[3]

Census Commission; Judicial Circuits

Present Situation: Enacted in 1956, s. 26.011, F.S., provides the methods through which the Legislature can have the Governor appoint commissioners to take a census of the population of a judicial circuit and gives those findings, as proclaimed by the Governor, the force of law.

Effect of the Bill: Section 1 repeals s. 26.011, F.S.

Terms of Circuit Courts

Present Situation: Sections 26.21-26.365, F.S., require at least two regular terms of the circuit court to be held in each county each year and allow for special terms as needed. There is a separate statute for each of the 20 circuits which provides for the starting day of each term.

Effect of the Bill: Section 1 repeals ss. 26.21-26.365, F.S.

[2] The schedule, although not part of the general appropriations act, guides the Legislature in prescribing an annual appropriation of positions and salaries and benefits for the Supreme Court. Conversation with staff of the Senate Budget Subcommittee on Criminal and Civil Justice Appropriations (Mar. 19, 2011).
[3] FLA. CONST. art. V, s. 3(c).

Judge to Attend First Day of Term

Present Situation: Enacted in 1849, s. 26.37, F.S., requires every judge of a circuit court, unless prevented by sickness or other providential causes, to attend the first day of each term of the circuit court. If the judge fails to attend, he or she is subject to a $100 deduction from his or her salary.

Effect of the Bill: Section 1 repeals s. 26.37, F.S.

Judge's Reason for Nonattendance

Present Situation: Enacted in 1849, s. 26.38, F.S., requires a judge who misses the first day of each term to state the reasons of such failure in writing to be handed to the clerk of the court.

Effect of the Bill: Section 1 repeals s. 26.38, F.S.

Penalty for Nonattendance of Judge

Present Situation: Enacted in 1849, s. 26.39, F.S., requires the clerk of court to notify the Chief Financial Officer of the state when a judge fails to attend the first day of the term of court. The CFO is then directed to deduct $100 from the judge's pay for every such default.

Effect of the Bill: Section 1 repeals s. 26.39, F.S.

Adjournment of Court upon Nonattendance

Present Situation: Enacted in 1828, s. 26.40, F.S., requires that, whenever a judge does not attend on the first day of any term, the court shall stand adjourned until 12 o'clock on the second day. If the judge does not attend court at that time, the clerk must continue all causes and adjourn the court to such time as the judge may appoint or to the next regular term.

Effect of the Bill: Section 1 repeals s. 26.40, F.S.

Calling Docket at End of Term

Present Situation: Enacted in 1828, s. 26.42, F.S., requires a judge, after other court business of the term has been completed, to call the remaining cases on the docket and make such orders and entries as necessary.

Effect of the Bill: Section 1 repeals s. 26.42, F.S.

Executive Officer of Circuit Court

Present Situation: Enacted in 1845, s. 26.49, F.S., identifies the sheriff of the county as the executive officer of the circuit court of the county.

Effect of the Bill: Section 1 repeals s. 26.49, F.S.

Place of Residence

Present Situation: Enacted in 1851, s. 28.08, F.S., requires that the clerk of the circuit court or a deputy clerk must reside at the county seat or within two miles of the county seat.

Effect of the Bill: Section 1 repeals s. 28.08, F.S.

A candidate, at the time of qualifying as candidate for public office, must subscribe to an oath that he or she is a qualified elector of the county.[4] In order to be a qualified elector, one must be a resident of Florida and the county in which he or she registers to vote.[5] The Division of Elections has "opined that unless otherwise provided constitutionally, legislatively or judicially, the qualifications one must possess for public office, which would include residency, are effective at the commencement of the term of office."[6] Thus, according to the division opinion, a county constitutional officer must be a resident of the county at the time of assuming office.[7]

Regular Terms of District Courts of Appeal

Present Situation: Enacted in 1957, s. 35.10, F.S., requires the district courts of appeal to hold two regular terms each year at their headquarters. The terms shall commence on the second Tuesday in January and July.

Effect of the Bill: Section 1 repeals s. 35.10, F.S.

Compensation of District Court of Appeal Marshal

Present Situation: Article V, subsection 4(c) of the Florida Constitution requires that a district court of appeal appoint a marshal and provides that the compensation of the marshal "shall be fixed by general law." Enacted in 1957, s. 35.27, F.S., provides that the compensation of the marshal "shall be as provided by law."

Currently, a personnel schedule supporting preparation of the annual general appropriations act prescribes the salary associated with specific categories of state-employee positions, including the marshals of the district courts of appeal.[8]

Effect of the Bill: Section 1 repeals s. 35.27, F.S. This bill does not affect the current constitutional requirement for the marshal's compensation to be fixed by general law.[9]

[4] Section 99.021, F.S.
[5] Fla. Dept. of State, Div. of Elections, Advisory Opinion DE 94-04 (March 3, 1994).
[6] *Id.*
[7] *See id*.
[8] The schedule, although not part of the general appropriations act, guides the Legislature in prescribing an annual appropriation of positions and salaries and benefits for the district courts of appeal. Conversation with staff of the Senate Budget Subcommittee on Criminal and Civil Justice Appropriations (Mar. 19, 2011).
[9] FLA. CONST. art. V, s. 4(c).

Guardians of Incapacitated World War Veterans

Present Situation: Enacted in 1974, s. 744.103, F.S., provides that the provisions of the guardianship law shall extend to incapacitated world war veterans, provided for in chapters 293 and 294, F.S. The statute further provides that the provisions of this law are cumulative to those chapters. However, chapters 293 and 294, F.S., have both been repealed in previous legislative sessions or had provisions transferred to part VIII of chapter 744, F.S. (governing veterans' guardianship). Former s. 293.16, F.S., setting forth the procedure for placing veterans with a federal agency such as United States Department of Veterans Affairs, was transferred and renumbered as s. 394.4672, F.S.

Effect of the Bill: Section 1 repeals s. 744.103, F.S.

Effective Date

The bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

See "Related Issues" section, below, for possible impact on judicial workload.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill repeals provisions relating to terms of court. Reference to terms of court is still relevant today for two purposes: designating the terms of local grand juries and limiting withdrawal of an appellate mandate. Historically, although not explicitly required by statute, the terms of a grand jury coincide with the term of the court. In the appellate courts, the terms of court limit an appellate court's ability to withdraw a mandate, a rare procedure. Under current law, a mandate may only be withdrawn during the current term of the appellate court, which leads to the result of some appellate court opinions being subject to withdrawal for nearly six months while others may only be subject to withdrawal for a few days.

The Office of the State Courts Administrator (OSCA) noted that repeal of appellate terms of court "may impair the ability of appellate courts to finalize cases. Similarly, because grand juries are impaneled for specific terms of court, repeal of terms of court in the various judicial circuits will leave trial court chief judges without explicit authority to convene grand juries."[10] The OSCA also noted the potential for an increase in judicial workload related to "requests to reopen criminal appeals and other appellate matters for which mandates have already been issued."[11]

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[10] Fla. Office of the State Courts Administrator, *2011 Judicial Impact Statement: SB 1398*, Mar. 3, 2011 (on file with the Senate Committee on Judiciary).
[11] *Id*.

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LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Flores) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. The Division of Statutory Revision shall designate ss. 448.30 and 448.31, Florida Statutes, as created by this act, as part III of chapter 448, Florida Statutes, titled "UNAUTHORIZED IMMIGRANTS."

Section 2. Section 448.30, Florida Statutes, is created to read:

448.30 Definitions.—As used in this part, the term:

(1) "Agency" means a department, board, bureau, district, commission, authority, or other similar body of this state or a

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county, municipality, special district, or other political subdivision of this state which issues a license for purposes of operating a business in this state or in any jurisdiction within this state.

(2) "Employee" means any person, other than an independent contractor, who, for consideration, provides labor or services to an employer in this state.

(3) "Employer" means a person or agency that employs one or more employees in this state. In the case of an independent contractor, the term means the independent contractor and does not mean the person or agency that uses the contract labor.

(4) "E-Verify Program" means the program for electronic verification of employment eligibility which is operated by the United States Department of Homeland Security, or any successor program.

(5) "Independent contractor" means a person that carries on an independent business, contracts to do a piece of work according to its own means and methods, and is subject to control only as to results.

(6) "License" means any license, permit, certificate, approval, registration, charter, or similar form of authorization that is required by law and issued by any agency for the purpose of operating a business in this state. The term includes, but is not limited to, articles of incorporation, a certificate of partnership, a partnership registration, articles of organization, and a transaction privilege tax license.

Section 3. Section 448.31, Florida Statutes, is created to read:

448.31 Verification of employment eligibility.—

(1) An employer who hires a new employee on or after July 1, 2012, shall:

(a) Register with the E-Verify Program; use the program for all new hires, both United States citizens and noncitizens; and not use the program selectively.

(b) Upon acceptance on or after that date of an offer of employment by the new employee, verify the employment eligibility of the employee through, and in accordance with the time periods and other requirements of, the E-Verify Program; and

(c) Maintain a record of the verification for 3 years after the date of hire or 1 year after the date employment ends, whichever is longer.

(2)(a) An employer who hires a new employee on or after July 1, 2012, is exempt from the requirements of subsection (1) if the employer:

1. Requests and receives from the employee a valid driver's license or identification card that is issued by a state or outlying possession of the United States and that complies with the federal REAL ID Act of 2005 and the final rule promulgated by the United States Department of Homeland Security implementing that act;

2. Within 3 business days of the first day of work, swipes the common machine-readable zone on the driver's license or card using the highest standard of authentication equipment and software to:

a. To determine that the document is not fraudulent; and

b. Verify the physical description and other personal identifying information of the employee who presents the

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document against the data contained on the machine-readable zone;

3. Maintains, for 3 years after the date of hire or 1 year after the date employment ends, whichever is longer, a printed record of the results of the authentication conducted under this subsection and a photocopy of the document the employee presented. The employer shall retain the record and the photocopy with the federal Form I-9; and

4. Complies with the requirements of this subsection for every new employee, both United States citizens and noncitizens, unless and until the employer registers with the E-Verify Program, and does not implement the requirements of this subsection selectively.

(b) The Department of Highway Safety and Motor Vehicles shall:

1.Maintain on the website for the department a list of all states and outlying possessions of the United States that comply with the federal REAL ID Act of 2005 and the final rule promulgated by the United States Department of Homeland Security implementing that act. For each state or possession, the department shall specify the type of document that is in compliance and the date on which the state or possession began issuing the document that is in compliance.

2. Adopt rules pursuant to ss. 120.536(1) and 120.54 prescribing standards and requirements for the equipment and software used under paragraph (a).

(c) The procedures of this subsection are authorized for the purpose of authenticating a driver’s license or identification card presented by a new employee, combating

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fraud, and matching identifying information for the employee against the document. An employer may not use the procedures to discriminate on the basis of national origin or citizenship status, except against a person who is not authorized to work in the United States. Unless otherwise authorized by law, an employer may not use information obtained through these procedures for any purpose unrelated to verifying the identity and employment authorization of a new employee.

(3) An employer who fails to comply with this section is subject to the suspension of any license held by the employer through the period of noncompliance. The suspension of a license pursuant to this subsection by:

(a) An agency subject to chapter 120 must comply with the provisions of s. 120.60(5).

(b) An agency not subject to chapter 120 must comply with procedures substantially similar to the provisions of s. 120.60(5).

(4) An employer is not liable for wrongful termination if the employer terminates an employee:

(a) In accordance with federal regulations upon a final determination of ineligibility for employment through the E-Verify Program; or

(b) After complying with subsection (2) and reasonably concluding that the employee presented a fraudulent document or that the physical description or other personal identifying information of the employee who presents the document does not match the data contained on the machine-readable zone.

Section 4. Law enforcement and criminal justice agency coordination with Federal Government on unauthorized

immigration.—

(1) LEGISLATIVE INTENT.—It is the intent of the Legislature that law enforcement and criminal justice agencies in this state work cooperatively with the Federal Government in the identification of unauthorized immigrants and the enforcement of immigration laws. It further is the intent of the Legislature to maximize opportunities to transfer responsibility for the custody and detention of unauthorized immigrants who are accused or convicted of crimes from state and local governments to the Federal Government in order to ensure the safety of the residents of this state and to reduce costs to the criminal justice system, while also protecting the due process rights of individuals accused or convicted of crimes.

(2) DELEGATED ENFORCEMENT AUTHORITY.—

(a)1. The Department of Corrections shall request from the United States Department of Homeland Security approval to enter into a memorandum of agreement to have employees or contractors of the Department of Corrections trained by the Department of Homeland Security as jail enforcement officers under s. 287(g) of the federal Immigration and Nationality Act. The Department of Corrections shall perform all actions reasonably necessary to meet its obligations under the agreement.

2. The Department of Corrections shall report by November 1, 2011, to the Governor, the President of the Senate, and the Speaker of the House of Representatives on the status of implementation of this paragraph. If the department has not entered into a memorandum of agreement with the Department of Homeland Security by that date, the department shall identify in the report any barriers to full implementation of this

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paragraph.

3. By February 1 of each year, the Department of Corrections shall report to the Governor, the President of the Senate, and the Speaker of the House of Representatives on the enforcement activities conducted under this paragraph, including, but not limited to, the number of inmates identified as being unauthorized immigrants, placed in federal custody, or deported.

(b)1. The Department of Law Enforcement shall request from the United States Department of Homeland Security approval to enter into a memorandum of agreement to have employees of the Department of Law Enforcement trained by the Department of Homeland Security as task force officers under s. 287(g) of the federal Immigration and Nationality Act. The Department of Law Enforcement shall perform all actions reasonably necessary to meet its obligations under the agreement.

2. By February 1 of each year, the Department of Law Enforcement shall report to the Governor, the President of the Senate, and the Speaker of the House of Representatives on the enforcement activities conducted under this paragraph.

(c)1. The sheriff of each county shall evaluate the feasibility of entering into a memorandum of agreement with the United States Department of Homeland Security to have employees of the sheriff trained by the Department of Homeland Security as jail enforcement officers or task force officers under s. 287(g) of the federal Immigration and Nationality Act. The Department of Law Enforcement, upon request by a sheriff, shall share information on the department’s agreement with the United States Department of Homeland Security and experience in operating

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under the agreement.

2. The sheriff shall consider, at a minimum:

a. The potential fiscal impact on the office of the sheriff;

b. The potential impact on the workload and personnel needs of the office; and

c. The estimated presence of unauthorized immigrants in the geographic area served by the sheriff.

3. If the sheriff determines that entering into an agreement is feasible, the sheriff shall make an initial request for an agreement to the Department of Homeland Security. Nothing in this paragraph compels the sheriff to execute an agreement.

(3) IDENTIFICATION UPON ARREST AND CONFINEMENT.—

(a) When a person is confined in a jail, prison, or other criminal detention facility, the arresting agency shall make a reasonable effort to determine the nationality of the person and whether the person is present in the United States lawfully, including, but not limited to, participating in the submission of fingerprints pursuant to the agreement under paragraph (b). If the arresting agency establishes, independent of the submission of fingerprints, that the person is not lawfully present in the United States, the agency shall notify the United States Department of Homeland Security.

(b) The Department of Law Enforcement shall enter into, and perform all actions reasonably necessary to meet its obligations under, a memorandum of agreement with the Department of Homeland Security to implement a program through which fingerprints submitted by local law enforcement agencies during the arrest and booking process are checked against federal databases in

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order to assess the immigration status of individuals in custody.

(c) This subsection may not be construed to deny a person bond or to prevent release of a person from confinement if the person is otherwise eligible for release. However, for the purpose of the bail determination required by s. 903.046, Florida Statutes, a determination that the person is not present in the United States lawfully raises a presumption that there is a risk of flight to avoid prosecution. Upon receiving a detainer request from the Department of Homeland Security relating to a person not present in the United States lawfully, a jail, prison, or other criminal detention facility may detain the person for up to 48 additional hours after the person is otherwise entitled to be released.

Section 5. Section 945.80, Florida Statutes, is created to read:

945.80 Removal and deportation of criminal aliens.—

(1) Notwithstanding any law to the contrary, and pursuant to s. 241(a)(4)(B)(ii) of the federal Immigration and Nationality Act, the secretary of the department shall release a prisoner to the custody and control of the United States Immigration and Customs Enforcement if:

(a) The prisoner was convicted of a nonviolent offense;

(b) The department has received a final order of removal for the prisoner from the United States Immigration and Customs Enforcement; and

(c) The secretary determines that removal is appropriate and in the best interest of the state.

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A person is ineligible for release under this section if he or she would be ineligible for control release under s. 947.146(3)(a)-(m).

(2)(a) The department shall identify, during the inmate-reception process and among the existing inmate population, prisoners who are eligible for removal under this section and determine whether removal is appropriate and in the best interest of the state.

(b) The department shall coordinate with federal authorities to determine the eligibility of a prisoner for removal and to obtain a final order of removal.

(3) Upon approval for removal of the prisoner under this section, the department shall establish a release date for the prisoner to be transferred to federal custody. The department shall maintain exclusive control of and responsibility for the custody and transportation of the prisoner until the prisoner is physically transferred to federal custody.

(4)(a) If a prisoner who is released under this section returns unlawfully to the United States, upon notice from any state or federal law enforcement agency that the prisoner is incarcerated, the secretary shall revoke the release of the prisoner and seek the return of the prisoner to the custody of the department in order to serve the remainder of the sentence imposed by the court. The prisoner is not eligible for probation or community control with respect to any sentence affected by the release under this section.

(b) The department shall notify each prisoner who is eligible for removal of the provisions of this subsection.

(5) The secretary of the department may enter into an

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agreement with the United States Department of Homeland Security regarding the rapid repatriation of removable custodial aliens from the United States pursuant to this section.

(6) The department shall compile statistics on implementation of this section, including, but not limited to:

(a) The number of prisoners who are transferred to federal custody;

(b) The number of prisoners who reenter the United States; and

(c) The annual cost-avoidance achieved.

(7) To the extent practicable, this section applies to all prisoners actually in confinement on, and all prisoners taken into confinement after, July 1, 2011.

Section 6. (1) The Legislature finds that the costs incurred by the state related to unauthorized immigration are exacerbated by the failure of the Federal Government to enforce immigration laws adequately and to adopt and implement comprehensive reforms to immigration laws in order to control and contain unauthorized immigration more effectively.

(2)(a) The Agency for Workforce Innovation, in consultation with the Office of Economic and Demographic Research, shall prepare a report by December 1, 2011, quantifying the costs to the state which are attributable to unauthorized immigration. The agency shall submit the report to the Governor, the President of the Senate, and the Speaker of the House of Representatives by that date.

(b) Before January 1, 2012, the director of the Agency for Workforce Innovation shall, in consultation with the Office of the Governor, submit to the appropriate federal agency or

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official a request, based on the total costs quantified under paragraph (a), for reimbursement to the state of those costs or a corresponding reduction in or forgiveness of any debt, interest payments, or other moneys owed by the state to the Federal Government as a result of borrowing from the Federal Government to fund unemployment compensation claims.

Section 7. This act shall take effect July 1, 2011.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to unauthorized immigrants; directing the Division of Statutory Revision to designate specified new statutory sections as part III of ch. 448, F.S., and name the part "Unauthorized Immigrants"; creating s. 448.30, F.S.; defining terms; creating s. 448.31, F.S.; requiring every employer to use the federal program for electronic verification of employment eligibility in order to verify the employment eligibility of each employee hired on or after a specified date; providing an exception for employers who request and receive from the employee certain driver's licenses or identification cards; providing that an employer who does not comply with the employment requirements is subject to the suspension of any license held by the employer; providing that an employer is not liable for terminating an employee under certain conditions; providing legislative intent for law enforcement and criminal

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justice agencies to coordinate with the Federal Government on the identification of unauthorized immigrants and enforcement of immigration laws; directing the Department of Corrections and the Department of Law Enforcement to pursue and maintain agreements with the United States Department of Homeland Security for the training of certain personnel related to the enforcement of immigration laws; requiring reports on activity under the agreements; directing sheriffs to evaluate the feasibility of entering into such agreements; directing arresting agencies to make reasonable efforts to determine whether arrestees are present in the United States lawfully; requiring the Department of Law Enforcement to enter into and maintain an agreement with the United States Department of Homeland Security for checking fingerprints of arrestees against federal databases to determine immigration status; providing for a presumption as to risk of flight in order to avoid prosecution; authorizing detention of a person for up to 48 additional hours upon request from the United States Department of Homeland Security; creating s. 945.80, F.S.; requiring the Department of Corrections to release nonviolent inmates to the custody of the United States Immigration and Customs Enforcement under certain circumstances; requiring the department to identify inmates who are eligible for removal and deportation; establishing certain procedures for the transfer of an inmate to federal custody; providing for a released inmate to serve the remainder of his or her sentence upon unlawfully returning to the United States; authorizing the secretary of the department to enter into an agreement with the United States Department of Homeland Security regarding the rapid repatriation of removable

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custodial aliens; requiring the department to compile statistics; providing for applicability; providing legislative findings related to costs incurred by the state from unauthorized immigration; requiring the Agency for Workforce Innovation to prepare a report quantifying the costs; requiring the director of the agency to submit to the Federal Government a request for reimbursement of the costs or a reduction in moneys owed to the Federal Government as a result of borrowing to fund unemployment compensation claims; providing an effective date.

WHEREAS, under federal immigration law, employers must verify the identity and employment authorization of each person they hire, and

WHEREAS, in verifying the identity and employment authorization of new employees, employers must complete the federal Form I-9, and

WHEREAS, to improve the accuracy of this process, the federal government operates an electronic employment verification system called E-Verify, and

WHEREAS, requiring employers to use E-Verify for each new employee will promote the state’s interest in ensuring that only those who are authorized to work in the United States are employed in this state, and

WHEREAS, one of the recognized shortcomings of the E-Verify Program is the fact that unauthorized workers may attempt to obtain employment by committing identity fraud not detected by the E-Verify Program, and

WHEREAS, authentication equipment and software will help employers detect fraudulent driver’s licenses or identification

cards, and

WHEREAS, requiring employers to employ such equipment and software in the case of each new employee, as an alternative to registering with the E-Verify Program, will enhance the process of verifying identity and combating fraud, and

WHEREAS, the rapid removal and deportation of nonviolent criminal aliens who are in the state prison system will reduce fiscal costs for the state and promote public safety, and

WHEREAS, it is in the best interests of the state to seek reimbursement or other financial remuneration from the federal government for costs incurred by the state related to unauthorized immigration, NOW, THEREFORE,

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Richter) recommended the following:

Senate Amendment to Amendment (146138)

Delete line 24
and insert:

not mean the person or agency that uses the contract labor. The term does not include an employee leasing company licensed pursuant to part IX of chapter 468 which enters into a written agreement or understanding with its client company which places the primary obligation for compliance with this part upon its client company. In the absence of a written agreement or understanding, the contracting party, whether the licensed employee leasing company or client company that initially hires

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the leased employee, is responsible for the obligations set forth in this part. Such employee leasing company shall, at all times, remain an employer as otherwise specified by law.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 2040
INTRODUCER:	Judiciary Committee
SUBJECT:	Unauthorized Immigrants
DATE:	April 1, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Maclure	Maclure	JU	**Pre-meeting**
2.			CJ	
3.			BC	
4.				
5.				
6.				

I. Summary:

This bill prescribes multiple requirements relating to unauthorized immigrants, including:

- Requiring employers, effective July 1, 2012, to verify the employment eligibility of new employees using the federal E-Verify Program;
- Providing an exception to the requirement for an employer to use the E-Verify Program if the employee presents specified documents (e.g., a U.S. passport or a driver's license with a photo) as part of the federal I-9 process for verifying employment eligibility;
- Authorizing the suspension of an employer's license during the period of noncompliance with the verification requirements;
- Directing the Department of Corrections to pursue an agreement with the U.S. Department of Homeland Security for the training of department employees as jail enforcement officers to help enforce federal immigration law, pursuant to section 287(g) of the federal Immigration and Nationality Act ("287(g) agreement");
- Requiring the Department of Law Enforcement to take all steps necessary to maintain its 287(g) agreement with the U.S. Department of Homeland Security, under which department employees are trained as task force officers;
- Encouraging sheriffs to pursue 287(g) agreements;
- Codifying state and local law enforcement participation in a federal program (Secure Communities Program) in which the fingerprints of an arrested person are checked against federal databases to determine the person's immigration status;
- Authorizing the Department of Corrections to release certain criminal aliens convicted of nonviolent offenses to the custody of the federal government as part of the Rapid REPAT Program; and

- Requiring the Agency for Workforce Innovation to quantify the costs to the state related to unauthorized immigration and to seek financial renumeration from the federal government.

This bill creates the following sections of the Florida Statutes: 448.30, 448.31, and 945.80. The bill also creates an undesignated section of the Florida Statutes.

II. Present Situation:

Background on Unauthorized Immigration[1]

Immigration into the United States is largely governed by the Immigration and Nationality Act ("INA").[2] The INA utilizes several federal agencies, including the Department of Justice, Department of Homeland Security (DHS), and Department of State to administer and enforce federal immigration policies.[3] An alien is a person present in the United States who is not a citizen of the United States.[4] The INA provides for the conditions whereby an alien may be admitted to and remain in the United States[5] and provides a registration system to monitor the entry and movement of aliens in the United States.[6] An alien may be subject to removal for certain actions, including entering the United States without inspection, presenting fraudulent documents at a port of entry, health reasons, violating the conditions of admission, or engaging in certain other proscribed conduct.[7]

Various categories of legal immigration status exist that include students, workers, tourists, research professors, diplomats, and others.[8] These categories are based on the type and duration of permission granted to be present in the United States, and expire based on those conditions. All lawfully present aliens must have appropriate documentation based on status.[9]

It has been reported that an estimated 825,000 unauthorized immigrants were present in Florida in 2010, representing 4.5 percent of Florida's population of 18,492,000 – a decline from 1.05 million unauthorized immigrants in 2007.[10] Nevertheless, Florida continued to rank third among states in the size of its unauthorized immigrant population.[11] Of Florida's 9,064,000 total work force, 600,000 are unauthorized immigrants, which represents 6.6 percent of the work force (above the national average of 5.2 percent).[12]

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[1] Significant portions of the "Present Situation" section of this bill analysis are from the staff analysis of PCB JDC 11-01, prepared by the House Committee on Judiciary (Mar. 3, 2011; used with permission).
[2] 8 U.S.C. s. 1101, et seq.
[3] *See*, *e.g.*, *id* ss. 1103-1104.
[4] *Id.* s. 1101(a)(3).
[5] *Id*. ss. 1181-1182, 1184.
[6] *Id.* ss. 1201(b), 1301-1306.
[7] *Id*. ss. 1225, 1227, 1228, 1229, 1229c, 1231.
[8] *Id*. ss. 201- 210.
[9] *Id*. s. 221.
[10] Jeffrey S. Passel and D'Vera Cohn. "Unauthorized Immigrant Population: National and State Trends, 2010." Washington, DC: Pew Hispanic Center (February 1, 2011).
[11] *Id.*
[12] *Id.*

Enforcement of Immigration Laws

State and local law enforcement officers do not inherently have the authority to enforce federal immigration laws. The INA authorizes areas of cooperation in enforcement between federal, state, and local government authorities.[13]

The Secretary of DHS, acting through the Assistant Secretary of Immigration and Customs Enforcement ("ICE"), may enter into written agreements with a state or any political subdivision of a state so that qualified personnel can perform certain functions of an immigration officer.[14] ICE trains and cross-designates state and local officers to enforce immigration laws as authorized through section 287(g) of the Immigration and Nationality Act. An officer who is trained and cross-designated through the 287(g) program can interview and initiate removal proceedings of aliens processed through the officer's detention facility. Local law enforcement agencies without a 287(g) officer must notify ICE of a foreign-born detainee, and an ICE officer must conduct an interview to determine the alienage of the suspect and initiate removal proceedings, if appropriate. Since January 2006, the 287(g) program has been credited with identifying more than 79,000 individuals, mostly in jails, who are suspected of being in the country illegally.[15]

Florida currently has four law enforcement agencies that participate in the 287(g) program: the Florida Department of Law Enforcement (FDLE), and the sheriff's offices of Bay, Collier, and Duval counties.

Within the Department of Homeland Security is the Law Enforcement Support Center ("LESC"), administered by ICE, answering queries from state and local officials regarding immigration status. A law enforcement agency can check the immigration status of an arrestee or prisoner through LESC twenty-four hours a day, seven days a week. Significant statistics from LESC for FY 2008:

- The number of requests for information sent to LESC increased from 4,000 in FY 1996 to 807,106 in FY 2008.
- During FY 2008, special agents at LESC placed 16,423 detainers on foreign nationals wanted by ICE for criminal and immigration violations.
- The records of more than 250,000 previously deported aggravated felons, immigration fugitives and wanted criminals are now in the NCIC system.
- Special agents at LESC confirmed 8,440 NCIC hits during FY 2008.[16]

[13] *See id.* s. 1357(g)(1)-(9) (permitting the Department of Homeland Security to enter into agreements whereby appropriately trained and supervised state and local officials can perform certain immigration responsibilities); *id*. s. 1373 (establishing parameters for information-sharing between state and local officials and federal immigration officials); *id.* s. 1252c (authorizing state and local law enforcement officials to arrest aliens unlawfully present in the United States who have previously been convicted of a felony and deported).

[14] Section 287(g) of the Immigration and Nationality Act (INA), codified at 8 U.S.C. § 1357(g) (1996), as amended by the Homeland Security Act of 2002, Public Law 107-296.

[15] Details taken from information provided on the website of ICE, http://www.ice.gov/news/library/factsheets/287g.htm (last visited March 8, 2011).

[16] Details taken from information provided on the website of ICE, http://www.ice.gov/news/library/factsheets/lesc.htm (last visited March 8, 2011).

Employment & E-Verify

The federal Immigration Reform and Control Act of 1986 (IRCA)[17] made it illegal for any U.S. employer to knowingly:

- Hire, recruit or refer for a fee an alien knowing he or she is unauthorized to work;
- Continue to employ an alien knowing he or she has become unauthorized; or
- Hire, recruit or refer for a fee, any person (citizen or alien) without following the record keeping requirements of the Act.[18]

The law established a procedure that employers must follow to verify that employees are authorized to work in the United States.[19] The procedure requires employees to present documents that establish both the worker's identity and eligibility to work, and requires employers to complete an "I-9" form for each new employee hired.[20] The IRCA provides sanctions to be implemented against employers who knowingly employ aliens who are not authorized to work.[21] Federal law contains no criminal sanction for working without authorization, although document fraud is a civil violation.[22] The United States Citizenship and Immigration Services (USCIS – formerly the INS and now part of the Department of Homeland Security) enforces these provisions.[23]

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[24] which, among other things, created various employment eligibility verification programs, including the Basic Pilot program. Originally, the Basic Pilot program (now referred to as E-Verify) was available in five of the seven States that had the highest populations of unauthorized aliens and initially authorized for only four years. However, Congress has consistently extended the program's life. It expanded the program in 2003, making it available in all fifty States. In 2008, the federal government began requiring any entity that maintained or applied for federal contracts to use E-Verify.[25]

E-Verify allows employers to ensure that they are hiring authorized workers by electronically comparing the identification and authorization information that employees provide with information contained in federal Social Security Administration (SSA) and Department of Homeland Security (DHS) databases. To participate in E-Verify, the employer must sign a memorandum of understanding that governs the system's operation. After enrolling in E-Verify, employers must still complete the I-9 verification process.

[17] Public Law 99-603, 100 Stat. 3359.
[18] 8 U.S.C. s. 1324a.
[19] *Id*.
[20] *Id*.
[21] *Id*. s. 1324a(a)(1)-(2).
[22] *Id*. s. 1324c.
[23] *Id*. s. 1324a.
[24] Public Law 104-208.
[25] History taken from information provided on the website of the Department of Homeland Security, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=84979589cdb76210VgnVCM100000b92ca60aRCRD&vgnextchannel=84979589cdb76210VgnVCM100000b92ca60aRCRD (last visited March 8, 2011).

If the information that the employer submits matches the records in the federal databases, E-Verify immediately notifies the employer that the individual is employment authorized. If the information the employee has provided does not match the information in the federal databases, E-Verify issues a tentative nonconfirmation. Before issuing a tentative nonconfirmation, however, E-Verify will ask the employer to confirm that the information submitted is accurate to avoid inaccurate results based on typographical errors.

If a tentative nonconfirmation is issued, the employee is notified and given an opportunity to contact SSA or DHS to resolve any potential problem. Until there is a final determination, the employer may not terminate the employee for being unauthorized. Upon receipt of a final nonconfirmation, an employer must terminate the employee per the E-Verify memorandum of understanding. Other information regarding E-Verify:

- Free to employers; must register and agree to an MOU.
- Used by more than 243,000 employers.
- On average, 1,000 new employers enroll each week with the program.
- In FY 2010, the E-verify Program ran more than 16 million queries.[26]

E-Verify was the subject of an independent evaluation in 2009. This study concluded that E-Verify was 95.9 percent accurate in its initial determination regarding employment authorization.[27] E-Verify participants reported minimal costs to participate and were generally satisfied with the program.[28]

However, the study also found that:

> approximately 3.3 percent of all E-Verify findings are for unauthorized workers incorrectly found employment authorized and 2.9 percent of all findings are for unauthorized workers correctly not found employment authorized. Thus, almost half of all unauthorized workers are correctly not found to be employment authorized (2.9/6.2) and just over half are found to be employment authorized (3.3/6.2). Consequently, the *inaccuracy rate for unauthorized workers* is estimated to be approximately 54 percent with a plausible range of 37 percent to 64 percent. This finding is not surprising, given that since the inception of E-Verify it has been clear that many unauthorized workers obtain employment by committing identity fraud that cannot be detected by E-Verify.[29]

[26] Program description taken from information provided on the website of the Department of Homeland Security, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=a16988e60a405110VgnVCM1000004718190aRCRD&vgnextchannel=a16988e60a405110VgnVCM1000004718190aRCRD (last visited March 8, 2011).

[27] United States Citizenship and Immigration Services; 2009 Westat Report at 116, http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf (last visited March 8, 2011).

[28] 2009 Westat Report at 169.

[29] *Id*. at xxx-xxxi (Executive Summary) (emphasis in original).

Law Enforcement and Corrections

Unauthorized Aliens in Prisons

Information is not available to determine the total number of criminal aliens who are in jails and prisons in the United States. However, ICE estimates that 300,000 to 450,000 criminal aliens who are potentially removable are detained each year nationwide at federal, state, and local prisons and jails. These include illegal aliens in the United States who are convicted of any crime and lawful permanent residents who are convicted of a removable offense.

Unauthorized Aliens in Florida Prisons

Florida Model Jail Standard 4.01 provides in part "[w]hen a foreign citizen is received/admitted to a detention facility for any reason, the detention facility shall make notification using the guidelines as set forth by the U.S. Department of State."[30] Generally, when a person is booked into a local jail, jail officials use the information given by the detainee to help determine the person's citizenship status. If a detainee admits he or she is not a U.S. citizen, or if there is reason to believe a detainee is not a U.S. citizen, jail officials attempt to determine the detainee's citizenship status by submitting the detainee's identification information through LESC.

Immigration and Customs Enforcement (ICE) agents working in Florida prison reception centers investigate newly admitted inmates to identify those who may be aliens. If ICE notifies the Department of Corrections that they want to take an alien inmate into custody, the inmate is released into ICE custody when his or her sentence is completed. Immigration and Customs Enforcement (ICE) may refuse to take custody of an alien inmate in some cases, such as when the alien is from a country to which he or she cannot be deported. Most alien inmates who complete their sentences in Florida prisons are released to ICE for further immigration processing, including possible deportation. These inmates are deported promptly after release from prison if they have been ordered out of the country and have no further appeals of their final deportation order.

The chart below shows the number of alien inmates released from Florida custody to ICE from 2000 through 2007:

[30] http://www.flsheriffs.org/our_program/florida-model-jail-standards/?index.cfm/referer/content.contentList/ID/408/ (last visited March 8, 2011).

YEAR OF RELEASE	EXPIRATION OF SENTENCE	COMMUNITY SUPERVISION	TOTAL
2000	433	169	602
2001	730	326	1,056
2002	793	323	1,116
2003	798	383	1,181
2004	752	348	1,100
2005	746	326	1,072
2006	754	354	1,108
2007	799	321	1,120
2008	885	337	1,222
TOTAL	**6,690**	**2,887**	**9,577**

Confirmed Aliens in Florida Prisons as of November 30, 2010[31]

PRIMARY OFFENSE	NUMBER OF CONFIRMED ALIENS	Percent
MURDER/MANSLAUGHTER	1,278	22.66
SEXUAL/LEWD BEHAVIOR	1,000	17.73
ROBBERY	433	7.68
VIOLENT, OTHER	765	13.56
BURGLARY	733	12.99
PROPERTY THEFT/FRAUD/DAMAGE	220	3.90
DRUGS	976	17.30
WEAPONS	86	1.52
OTHER	150	2.66
TOTAL	**5,641**	**100.00**

ICE Cooperative Programs

Immigration and Customs Enforcement (ICE), which is the investigative arm of the Department of Homeland Security,[32] administers a number of programs that involve cooperation between federal immigration officers and state and local law enforcement. Florida currently participates in some of these programs aimed at identifying unauthorized immigrants in the state who have committed crimes.

The umbrella program that encompasses all other cooperative law enforcement programs is called ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS). ACCESS was developed to promote the various programs or tools that ICE offers to assist state, local, and tribal law enforcement agencies. Under this initiative, ICE works closely

[31] Supplied by the Florida Department of Corrections.
[32] U.S. Immigration and Customs Enforcement, *ICE Overview*, *available at* http://www.ice.gov/about/overview/ (last visited Mar. 11, 2011).

with other law enforcement agencies to identify an agency's specific needs or the local community's unique concerns. In developing an ACCESS partnership agreement, ICE representatives will meet with the requesting agency to assess local needs and draft appropriate plans of action. Based upon these assessments, ICE and the requesting agency will determine which type of partnership is most beneficial and sustainable before entering into an official agreement.[33]

The section 287(g) program, the Secure Communities Program,[34] the Criminal Alien Program,[35] and the Law Enforcement Support Center are all ACCESS initiatives currently operating in Florida.

Section 287(g)

For a discussion of s. 287(g) agreements, see the discussion of **Enforcement of Immigration Laws** above.

Secure Communities

The Secure Communities program assists in the identification and removal of criminal aliens held in local and state correctional facilities by using technology to share national, state, and local law enforcement data, such as fingerprint-based biometric information sharing, among agencies. Fingerprinting technology is used during the booking process to quickly and accurately determine the immigration status of individuals arrested. The program focuses first on those who have been charged with or convicted of the most dangerous crimes. Fingerprints for all arrested individuals are submitted during the booking process and are checked against FBI criminal history records and DHS records.[36] As of June 22, 2010, ICE was using this information sharing capability in all Florida jurisdictions.[37]

Criminal Alien Program

The Criminal Alien Program (CAP) identifies, processes and removes criminal aliens incarcerated in federal, state, and local prisons and jails throughout the U.S. and in Florida. It was created to prevent criminal aliens from being released into the general public. The program secures a final removal order, prior to the termination of criminal aliens' sentences whenever possible. CAP deports criminals after their sentence is served and applies to aliens who have

[33] U.S. Immigration and Customs Enforcement, *ICE ACCESS, available at* http://www.ice.gov/access/ (last visited Mar. 10, 2011).
[34] U.S. Immigration and Customs Enforcement, *Secure Communities Activated Jurisdictions, available at* http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf (last visited Mar. 10, 2011).
[35] Department of Homeland Security Office of Inspector General, *U.S. Immigration and Customs Enforcement Identification of Criminal Aliens in Federal and State Custody Eligible for Removal from the United States*, (Jan. 2009), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_11-26_Jan11.pdf (last visited Mar. 10, 2011).
[36] U.S. Immigration and Customs Enforcement, *Secure Communities, available at* http://www.ice.gov/secure_communities/ (last visited Mar. 10, 2011).
[37] U.S. Immigration and Customs Enforcement, *Secure Communities Activated Jurisdictions, available at* http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf (last visited Mar. 10, 2011).

been convicted of any crime.[38] The Criminal Alien Program (CAP) agents work in state field offices and screen removable criminals through an electronic records check and interview process. Correctional facilities are requested to contact ICE prior to release of a criminal alien to allow ICE time to assume custody.[39]

Law Enforcement Support Center

Also within the Department of Homeland Security is the Law Enforcement Support Center (LESC), administered by ICE, answering queries from state and local officials regarding immigration status. A law enforcement agency can check the immigration status of an arrestee or prisoner through LESC twenty-four hours a day, seven days a week. Significant statistics from LESC for FY 2008:

- The number of requests for information sent to LESC increased from 4,000 in FY 1996 to 807,106 in FY 2008.
- During FY 2008, special agents at LESC placed 16,423 detainers on foreign nationals wanted by ICE for criminal and immigration violations.
- The records of more than 250,000 previously deported aggravated felons, immigration fugitives and wanted criminals are now in the NCIC system.
- Special agents at LESC confirmed 8,440 NCIC hits during FY 2008.[40]

Rapid REPAT

The ICE Rapid Removal of Eligible Parolees Accepted for Transfer (REPAT) program, in which Florida does not currently participate, is designed to expedite the deportation process of criminal aliens by allowing selected criminal aliens incarcerated in U.S. prisons and jails to accept early release in exchange for voluntarily returning to their country of origin.[41]

Rapid REPAT is a law enforcement tool that ensures that all criminal aliens serving a time in prison are identified and processed for removal prior to their release. The identification and processing of incarcerated criminal aliens prior to release reduces the burden on the taxpayer and ensures that criminal aliens are promptly removed from the U.S. upon completion of their criminal sentence. This program allows ICE to more effectively identify and quickly remove criminal aliens from the United States. ICE Rapid REPAT also allows ICE and participating states to reduce costs associated with detention space.[42]

Key Elements of Rapid REPAT include:

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[38] U.S. Immigration and Customs Enforcement, *Criminal Alien Program, available at* http://www.ice.gov/criminal-alien-program/ (last visited Mar. 10, 2011).
[39] Department of Homeland Security Office of Inspector General, *U.S. Immigration and Customs Enforcement Identification of Criminal Aliens in Federal and State Custody Eligible for Removal from the United States*, 3 (Jan. 2009), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_11-26_Jan11.pdf (last visited Mar. 10, 2011).
[40] Details taken from information provided on the website of ICE, http://www.ice.gov/news/library/factsheets/lesc.htm (last visited Mar. 8, 2011).
[41] U.S. Immigration and Customs Enforcement, *Rapid REPAT, available at* http://www.ice.gov/rapid-repat/ (last visited Mar. 11, 2011).
[42] *Id.*

- In states where Rapid REPAT is implemented, certain aliens who are incarcerated in state prison and who have been convicted of non-violent offenses may receive conditional release if they have a final order of removal and agree not to return to the United States;
- Eligible aliens agree to waive appeal rights associated with their state conviction(s) and must have final removal orders; and
- If aliens re-enter the United States, state statutes must provide for revocation of parole and confinement for the remainder of the alien's original sentence. Additionally, aliens may be prosecuted under federal statutes that provide for up to 20 years in prison for illegally reentering the United States.[43]

III. Effect of Proposed Changes:

This bill prescribes multiple requirements relating to unauthorized immigrants.

Mandatory Participation by Employers in E-Verify; Exception (Sections 1-3)

The bill requires every employer who hires a new employee on or after July 1, 2012, to register with the federal E-Verify Program and to verify the employment eligibility of the newly hired employee. An "employer" includes any person or agency employing one or more employees in this state. The employer must maintain a record of the verification for the longer of three years or one year after the employment ends.

However, the bill specifies that the requirement to use the E-Verify Program does not apply if, during the federal I-9 process for verifying employment eligibility, the employee submits one of the following documents:

- An unexpired U.S. passport or U.S. passport card;
- An unexpired driver's license issued by a state or outlying possession which contains a photograph of the employee;
- An unexpired foreign passport that contains a U.S. visa evidencing applicable work authorization and a corresponding unexpired Form I-94; or
- A secure national identification card or similar document pursuant to federal law.

The employer shall maintain a record of the type of document presented, including a legible photocopy for the longer of three years or one year after the employment ends.

An employer who does not comply with the requirements is subject to having the employer's licenses suspended during the period of noncompliance. The bill specifies that suspension of a license must comply with a provision of the Administrative Procedure Act (APA), s. 120.60(5), F.S., which *requires notice to the licensee. The bill's definition of "license" includes licenses issued by agen*cies not subject to the APA (e.g., municipalities). Thus, the Legislature may wish to specify the manner in which licenses are to be suspended in those cases.

[43] *Id.*

Under the bill, if an employer terminates an employee upon a determination that the employee is not work-eligible, the employer is not liable for wrongful termination, provided the employer complies with the E-Verify regulations.

The bill directs the Attorney General to request quarterly from the federal government a list of Florida employers registered with the E-Verify Program and to make the list available on the Attorney General's website. However, the Attorney General must include a conspicuous notation regarding the bill's exception to the requirement to use E-Verify.

These E-Verify requirements are proposed for codification in a new section of the Florida Statutes, s. 448.31, F.S. The bill also creates a corresponding definitions section, s. 448.30, F.S. In addition, the bill directs the Division of Statutory Revision to publish the two new sections as part III of ch. 448, F.S., titled "Unauthorized Immigrants." Chapter 448, F.S., relates to general labor regulations.

Law Enforcement and Criminal Justice Cooperation with Federal Government (Section 4)

The bill expresses the intent of the Legislature that law enforcement and criminal justice agencies in the state work cooperatively with the Federal Government to:

- Identify unauthorized immigrants and enforce state and federal immigration laws, and
- To maximize opportunities to transfer custody and detention of unauthorized immigrants who are accused or convicted of crimes from state and local governments to the federal government.

Delegated Enforcement Authority (287(g) Agreements)

The bill calls for increased state participation in delegated authority from the federal government to enforce immigration laws under s. 287(g) of the federal Immigration and Nationality Act. Specifically, the bill:

- Directs the Department of Corrections to pursue an agreement with the Department of Homeland Security to have departmental employees or contractors trained as jail enforcement officers. If the department has not executed an agreement with the Department of Homeland Security by November 1, 2011, it must identify, in a report to the Governor, the President of the Senate, and the Speaker of the House of Representatives, the obstacles to entering into the agreement. The department also must report annually on activities taken under the agreement.
- Provides statutory guidance related to the Department of Law Enforcement's existing 287(g) agreement with the federal government to have employees trained as task force officers. The department must report annually on activities under the agreement.
- Requires county sheriffs to explore the feasibility of signing 287(g) agreements with the Department of Homeland Security to have employees trained as either jail enforcement officers or task force officers. The bill specifies that if a sheriff determines that an agreement is feasible, he or she shall make such a request to the department.

Identification of Unauthorized Immigrants upon Arrest (Secure Communities Program)

The bill codifies the current participation by the Department of Law Enforcement and all 67 county sheriffs in the Secure Communities Program operated by U.S. Immigration and Customs Enforcement (ICE). It does so by:

- Requiring the Department of Law Enforcement to take all steps necessary to maintain its agreement with ICE, under which fingerprints submitted to the department by local law enforcement agencies upon the arrest of any individual are automatically checked against federal databases to assess the immigration status of the arrested person.
- Requiring arresting agencies to participate in the submission of fingerprints through the program. Because the bill codifies this requirement, it appears that it would become a violation of state law if a sheriff, for example, refused to participate in the program.

Under the Secure Communities Program, ICE is automatically notified when fingerprint data establishes that a person is an unauthorized immigrant. The bill requires an arresting agency to affirmatively notify the U.S. Department of Homeland Security if the agency learns – independent of the fingerprint process – that an arrestee is not lawfully present in the United States (e.g., if an arrestee volunteered the information).

Removal and Deportation of Criminal Aliens (Section 5)

The bill authorizes the Department of Corrections to participate in the Rapid REPAT Program administered by U.S. Immigration and Customs Enforcement (ICE), under which nonviolent criminal aliens may be released from the state prison system to the custody and control of ICE. In addition to the prisoner being convicted of a nonviolent offense, the department must have received from ICE a final order of removal, and the secretary must determine that removal is appropriate. The bill specifies that a prisoner would not be eligible for release and repatriation if he or she would not meet the criteria for control release in Florida.[44] The bill does not require that the person have served a particular portion of his or her sentence.

Under the terms of the proposed statute, if the prisoner returns to the United States unlawfully, his or her release is revoked, and the department shall seek the prisoner's return to Florida to complete the remainder of his or her sentence. The department shall notify each prisoner who is eligible for removal of this condition.

Study on Costs of Unauthorized Immigration; Request for Federal Reimbursement (Section 6)

The bill directs the Agency for Workforce Innovation (AWI or agency) to conduct a study that quantifies the costs to the state attributable to unauthorized immigration. The agency shall prepare the report in consultation with the Legislature's Office of Economic and Demographic Research, and submit it to the Governor, the President of the Senate, and the Speaker of the

[44] Section 947.146, F.S., creates the Control Release Authority (CRA), which is composed of members of the Parole Commission. The CRA is required to implement a system for determining the number and type of inmates who must be released into the community under control release in order to maintain the state prison system between 99 and 100 percent of its total capacity. Section 947.146(3)(a)-(m), F.S., prescribes inmates who are not eligible for control release.

House of Representatives by December 1, 2011. Based on the quantified costs and within a month after submitting the report, AWI shall request from the appropriate federal agency or official:

- reimbursement to the state of the quantified costs; or
- a corresponding reduction or forgiveness of any moneys owed to the federal government by the state due to borrowing to fund unemployment compensation claims.

Due to the increasing unemployment rate in the state, the Unemployment Compensation Trust Fund has been paying out more funds than it has been collecting. The trust fund fell into deficit in August 2009, and since that time, the state has requested more than $2 billion in federal advances in order to continue to fund unemployment compensation claims.[45]

Effective Date (Section 7)

The bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

States are generally able to legislate in areas not controlled by federal law. "Congress has the power under the Supremacy Clause of Article VI of the [United States] Constitution to preempt state law."[46] Provisions comparable to those included in this proposed committee bill have been passed in other states and have faced legal challenges under the federal preemption doctrine. For instance, a challenge to the employment verification provision in Arizona's 2007 law is currently pending before the U.S. Supreme Court.[47]

[45] As of February 17, 2011. See U.S. Department of Treasury, Bureau of Public Debt, Treasury Direct, *Title XII Advance Activities Schedule*, http://www.treasurydirect.gov/govt/reports/tfmp/tfmp_advactivitiessched.htm (last visited Feb. 21, 2011).
[46] *Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 509 (1989).
[47] See *Chamber of Commerce of the United States, et. al. v. Whiting* (Case No. 09-115; argued before the U.S. Supreme Court on December 8, 2010).

In determining whether a state law is preempted, "the purpose of Congress is the ultimate touchstone."[48] In the Immigration Reform and Control Act of 1986, Congress provided, "[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."[49]

The provision in the bill requiring employers to register with E-Verify authorizes sanctions in the form of license suspension. The U.S. Court of Appeals for the Ninth Circuit upheld against a preemption challenge a similar portion of an Arizona law requiring employers to use the federal Internet verification and authorizing licensure sanctions.[50] The Ninth Circuit reasoned that Arizona's revocation of business licenses fits squarely within the exception under the Immigration Reform and Control Act. In addition, the court rejected the plaintiff's argument that the law was impliedly preempted because the federal statute created E-Verify as a voluntary pilot program and Arizona made it mandatory. The court explained that, although Congress did not mandate E-Verify, it plainly envisioned and endorsed its increased usage through expansion of the pilot program.[51] As noted, the U.S. Supreme Court granted certiorari to consider the question of preemption.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The mandatory use of E-Verify, effective July 1, 2012, by all employers may have an economic impact on private employers. However, there is no fee for the use of the E-Verify Program, and employers are currently required to verify the work-eligibility status of new employees through the existing federal I-9 process. In addition, The bill provides an exception to the requirement to use E-Verify if the employee presents one of a list of specified documents.

Employers who fail to comply with the bill's requirement relating to verifying employment eligibility are subject to suspension of their licenses.

C. Government Sector Impact:

The bill directs each county sheriff to explore the feasibility of entering into an agreement with the U.S. Department of Homeland Security to have law enforcement officers trained to help enforce federal immigration law. Costs related to evaluating the feasibility should not be significant. Although the bill requires the sheriff to request an agreement with the

[48] *Altria Group, Inc. v. Good*, 129 S.Ct. 538, 543 (2008).
[49] *See* 8 U.S.C. s. 1324a(h)(2) (unlawful employment of aliens).
[50] *Chicanos Por La Causa, Inc., v. Napolitano,* 558 F.3d 856 (9th Cir. 2009), *cert granted, Chamber of Commerce of U.S. v. Candelaria,* 130 S.Ct. 3498 (2010).
[51] *Chicanos Por La Causa*, 558 F.3d at 865-67.

federal government if the sheriff concludes that such a relationship is feasible, the bill does not specifically require the sheriff to execute an agreement, and U.S. Immigration and Customs Enforcement (ICE) may decline to participate. A sheriff's office that chooses to enter into such an agreement may experience workload costs while any participating officers are not performing regular assignments during the period they are being trained by ICE.

The Department of Corrections may experience some administrative costs in identifying new and existing inmates who are eligible for release and transfer to federal custody under the Rapid REPAT Program. However, these costs may likely be offset by savings to the state associated with reduced detention space and costs in the state prison system.

The bill requires the Agency for Workforce Innovation (AWI or the agency) to conduct a study of the fiscal impacts of unauthorized immigration on the state. In addition, the bill requires AWI to request from the federal government reimbursement of those quantified cost or corresponding relief from moneys owed to the federal government from borrowing related to the payment of unemployment compensation. The agency will incur costs related to preparation of the required study. To the extent the state is successful in securing federal reimbursement or other remuneration for costs related to unauthorized immigration, the state may benefit fiscally.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill requires employers, effective July 1, 2012, to verify the employment eligibility of new employees using the federal E-Verify Program. However, the bill also provides an exception to the requirement for employers to use the E-Verify Program if the employee presents specified documents (e.g., a U.S. passport or a driver's license with a photo) as part of the federal I-9 process for verifying employment eligibility. To the extent this exception language contemplates that an employer may use E-Verify in the case of one new employee but not in the case of another new employee, it may conflict with federal requirements related to E-Verify. According to program materials from U.S. Citizenship and Immigration Services, an employer who elects to participate in the E-Verify Program "must use E-Verify for *all* new hires, both U.S. citizens and noncitizens, and may not use the system selectively."[52]

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

[52] U.S. Citizenship and Immigration Services, *Handbook for Employers*, 35 (Rev. 01/05/11) (emphasis added), *available at* http://www.uscis.gov/files/form/m-274.pdf (last visited April 1, 2011).

B. Amendments:

None.


255324

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Braynon) recommended the following:

Senate Amendment (with title amendment)

Delete line 17
and insert:
(1) Beginning with the 2011 fall term, a

================ T I T L E A M E N D M E N T ================
And the title is amended as follows:
Delete line 6
and insert:
a student who meets specified

267468

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Braynon) recommended the following:

Senate Amendment

Delete line 29
and insert:
(d) In the case of a student without lawful immigration status, files an affidavit with the state university or the

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 318
INTRODUCER:	Senator Siplin
SUBJECT:	Postsecondary Student Fees
DATE:	March 11, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Connor	Maclure	JU	**Pre-meeting**
2.			HE	
3.			CJ	
4.			BC	
5.				
6.				

I. Summary:

This bill provides that beginning with the 2011 fall term, an undocumented student, other than a nonimmigrant alien, is exempt from paying nonresident tuition at a state university or Florida College System institution if the student meets the following requirements:

- Attended high school in Florida for 3 or more years;
- Graduated from a Florida high school or attained high school equivalency;
- Registered as an entering student or is currently enrolled at a state university or Florida College System institution;
- Files an affidavit stating that the student has filed an application to legalize his or her immigration status or will do so as soon as he or she is eligible.

The bill also directs the Board of Governors to adopt regulations and the State Board of Education to adopt rules to implement the nonresident tuition exemption.

This bill creates section 1009.215, Florida Statutes.

II. Present Situation:

Resident Status for Tuition Purposes

Section 1009.21, F.S., addresses the determination of residency status for tuition purposes at state universities and public colleges. The following definitions are provided in statute:

- Dependent child: any person, whether living with a parent or not, who is eligible to be claimed by a parent as a dependent pursuant to the federal income tax code;[1]
- Resident for tuition purposes: a person who qualifies for the in-state tuition rate;[2]
- Parent: the natural or adoptive parent or legal guardian of a dependent child;[3]
- Legal resident or resident: a person who has maintained his or her residence in this state for the preceding year, has bought and occupied a home as his or her residence, or has established a domicile.[4]

To meet the residency requirement, a person, or a dependent child's parent or parents, must have established and maintained legal residence in-state for at least 12 consecutive months immediately preceding the student's enrollment in an institution of higher education.[5] Additionally, the applicant is required to make a statement regarding length of residency in-state, and establish a bona fide domicile, for him or herself, or for a parent if the applicant is a dependent child.[6] The purpose of the statement is to demonstrate that the in-state residency is not intended to be temporary and for the sole purpose of qualifying for in-state tuition. The law also recognizes residency where a dependent child lives with an adult relative other than a parent in certain circumstances.[7]

Additionally, specific classes of military persons and their spouses and dependent children classified as qualifying for residents for tuition purposes include:

- Active duty members of the Armed Services or the Florida National Guard residing or stationed in-state who qualify for the tuition assistance program;[8]
- Active duty members of the Armed Services attending a public community college or state university within 50 miles of the military establishment where they are stationed, if the military establishment is within a county contiguous to Florida;[9]
- Active duty members of the Canadian military residing or stationed in-state under the North American Air Defense agreement attending a community college or state university within 50 miles of the military establishment where stationed;[10]
- Active duty members of a foreign nation's military who are serving as liaison officers residing or stationed in this state, attending a community college or state university within 50 miles of the military establishment where stationed.[11]

[1] Section 1009.21(1)(a), F.S.
[2] Section 1009.21(1)(g), F.S.
[3] Section 1009.21(1)(f), F.S.
[4] Section 1009.21(1)(d); Section222.17(1), F.S., provides a method for manifesting and evidencing domicile by filing with the circuit court clerk of the county of residence a sworn statement showing an intent to maintain a permanent home in that county.
[5] Section 1009.21(2)(a)1., F.S.
[6] Section 1009.21(2)(a)2., F.S.
[7] Section 1009.21(2)(b), F.S.
[8] Sections 250.10(7) and (8), F.S., authorizes the Adjutant General to establish education assistance and tuition exemption programs for members in good standing of the active Florida National Guard, provided that certain conditions are met.
[9] Section 1009.21(10)(b), F.S.
[10] Section 1009.21(10)(j), F.S.
[11] Section 1009.21(10)(k), F.S.

Undocumented Alien Students

Undocumented aliens, with certain exceptions as provided in federal law, may not establish legal residence in the state for tuition purposes because their residency in the state is in violation of federal law, as they have not been properly admitted into the United States. Undocumented aliens are accordingly classified as nonresidents for tuition purposes. The state may not bar undocumented aliens from attending elementary, middle, or secondary schools.[12]

Due to the undocumented status of these individuals, the state is unable to reliably estimate their numbers. Moreover, Florida school districts are precluded from collecting data on undocumented aliens who are attending public schools pursuant to a consent decree.[13]

Although the United States Supreme Court has held that states must provide public education to all students equally regardless of immigration status at the elementary, middle, and secondary levels,[14] the Court has not directly addressed the issue of undocumented immigrant access to higher education.[15] The Court has struck down a Maryland state policy on Supremacy Clause grounds because it denied in-state tuition to non-immigrant aliens holding G-4 visas even if such aliens were state residents who would have otherwise qualified for in-state tuition.[16] The Maryland law was preempted because it conflicted with federal law allowing G-4 aliens to establish residency in the United States[17] However, it is important to note that this case involved aliens who were lawfully present in the United States and thus may not extend to unauthorized student aliens.[18]

Nonimmigrant aliens, as defined in 8 U.S.C. s. 1101(a)(15), are aliens lawfully admitted into the United States but whose duration of stay is set forth in the applicable visa under which admittance is granted. Most nonimmigrant visas, but not all, require the holder of the visa to intend to return to the nonimmigrant's country of residence upon expiration of the visa. Students under an F visa or an M visa are required to intend to return to their country of residence. If a nonimmigrant stays beyond the limitation of the visa, the nonimmigrant is no longer lawfully within the U.S. and is subject to deportation.

Postsecondary Benefits

Federal law says that a state may provide that an undocumented alien is eligible for any state or local public benefit that he or she would not otherwise be eligible for only through the enactment of a state law that affirmatively provides for such eligibility.[19] However, federal law also

[12] *See Plyler v. Doe*, 457 U.S. 202 (1982), in which the U.S. Supreme Court held unconstitutional on equal protection grounds a Texas statute that withheld school funding for children who were not legally admitted into the United States and permitted local school districts to deny their enrollment.
[13] *See League of United Latin American Citizens v. Florida Board of Education*, Case No. 90-1913 (S.D. Fla. 1990).
[14] *Plyler*, 457 U.S. 202 (1982).
[15] Congressional Research Service, *Unauthorized Alien Students, Higher Education, and In-State Tuition Rates: A Legal Analysis*, 1 (2010).
[16] *Toll v. Moreno,* 458 U.S. 1 (1982).
[17] *Id.*
[18] Congressional Research Service, *Unauthorized Alien Students, Higher Education, and In-State Tuition Rates: A Legal Analysis*, 2 (2010).
[19] 8 U.S.C. s. 1621(d).

prohibits any alien who is unlawfully present in the United States from receiving any postsecondary education benefit on the basis of residence in a state unless a U.S. citizen or national is eligible for such benefit in the same amount, duration, and scope.[20] Over the years, a number of states have enacted laws providing postsecondary educational benefits to undocumented students. The U.S. Congress has also considered legislation promoting higher education for unauthorized aliens.

The DREAM Act

The Development, Relief, and Education for Alien Minors Act, also commonly referred to as the DREAM Act, was first introduced in Congress in 2001 and has been subsequently introduced in various forms.[21] The DREAM Act restores the state option to determine residency for purposes of higher education benefits. It also provides conditional legal status to an undocumented alien who meets certain criteria. Under the act there is a path to permanent citizenship for those going to college or serving in the military.[22] Versions of this legislation have been introduced for a number of years, but it has not become law.

State Laws Providing In-State Tuition for Undocumented Students

A number of states have passed legislation to provide in-state tuition to undocumented students, including Texas, California, Utah, New York, Washington, Oklahoma, Illinois, New Mexico, Kansas, Nebraska, and Wisconsin.[23] The laws in Kansas and California have been challenged based on the argument that they violate the federal law prohibiting educational benefits based on residency for undocumented students.[24]

In 2005, a federal court in Kansas considered whether a state law making undocumented students eligible for in-state tuition violated federal law and discriminated against U.S. citizens paying out- of-state tuition.[25] The Kansas law created an opportunity for undocumented aliens to be eligible for in-state tuition if they attended a Kansas high school for three years, received a diploma or equivalent, were not residents of another state, and signed an agreement to seek legal immigration status.[26] The Kansas law specified that it applied to "any individual" meeting the designated criteria "regardless of whether the person is or is not a citizen of the United States of America."[27] The plaintiffs in the case were students at Kansas universities who were U.S. citizens but were classified as nonresidents of Kansas for tuition purposes.[28] The court dismissed the case on the basis that the individuals bringing the suit did not have standing because the federal law in question did not provide for a private right of action[29] and because the Kansas law

[20] 8 U.S.C. s. 1623.
[21] National Immigration Law Center, *DREAM Act: Summary* (2010), *available at* http://www.nilc.org/immlawpolicy/dream/dream-bills-summary-2010-09-20.pdf (last visited Mar. 3, 2011).
[22] National Conference of State Legislatures, *In-State Tuition and Unauthorized Immigrant Students* (2010), *available at* http://www.ncsl.org/default.aspx?tabid=13100 (last visited Mar. 3, 2011).
[23] *Id.*
[24] 8 U.S.C. s. 1623.
[25] *Day v. Sebelius*, 376 F. Supp. 2d. 1022 (D. Kan. 2005).
[26] K.S.A. s. 76-731a.
[27] K.S.A. s. 76-731a(b)(2).
[28] *Day*, 376 F. Supp. 2d. at 1025.
[29] *Id.* at 1036-37.

was not discriminatory.[30] The dismissal was subsequently affirmed by the 10th Circuit,[31] and the U.S. Supreme Court denied certiorari.[32]

In 2010, the California Supreme Court decided a case challenging a similar state law.[33] Much like the Kansas case, the challenge to the California law was filed on the basis that it violated 8 U.S.C. s. 1623. The California law provided any student meeting the following criteria would be exempt from paying nonresident tuition: 1) three years of high school in the state; 2) graduation from state high school or equivalent; 3) enrollment at a state institution; and 4) an affidavit of intent to legalize immigration status if the student is undocumented.[34] The court held that the law was not preempted because it was not based on residency, but instead on other criteria that U.S. citizens who were not California residents could also meet.[35]

III. Effect of Proposed Changes:

This bill creates an exemption for an undocumented student who is currently unable to qualify as a resident for tuition purposes if he or she meets the following criteria:

- Attended high school in Florida for 3 or more years;
- Graduated from a Florida high school or attained high school equivalency;
- Registered as an entering student or is currently enrolled at a state university or Florida College System institution;
- Files an affidavit stating that the student has filed an application to legalize his or her immigration status or will do so as soon as he or she is eligible.

The bill also directs the Board of Governors to adopt regulations and the State Board of Education to adopt rules to implement the nonresident tuition exemption.

The bill provides and effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

[30] *Id.* at 1039.
[31] *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007).
[32] *Day v. Bond*, 554 U.S. 918 (2008).
[33] *Martinez v. Regents of the University of California*, 241 P.3d 855 (Cal. 2010).
[34] CAL. EDUCATION CODE ch. 814, s 2.
[35] *Martinez*, 241 P.3d at 863.

D. Other Constitutional Issues:

The supremacy clause of the U.S. Constitution preempts state laws that impermissibly interfere with federal law.[36] The two major categories of preemption are express preemption and implied preemption. Within implied preemption, there are also the subcategories of field preemption and conflict preemption.[37] Field preemption applies where the scheme of federal law is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[38] Conflict preemption occurs where "compliance with both federal and state regulations is a physical impossibility."[39]

The U.S. Supreme Court has held that the power to regulate immigration is unquestionably an exclusive federal power, but also noted that "the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted."[40] This bill does not appear to present a field preemption issue because although it deals with aliens, it does not regulate immigration. However, it could be argued that the bill conflicts with federal law prohibiting state postsecondary education benefits based on residency for undocumented students if the same benefits are not available to U.S. citizens who are not residents of that state.[41] The bill could be viewed as conflicting with the federal provision because it specifies that the nonresident exemption created by the bill only applies to undocumented students, thus making it unavailable to U.S. citizens who are not Florida residents. It could also be argued that it would not be preempted because citizens of other states who attend a Florida college or university can become residents for tuition purpose under other sections of Florida law.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Undocumented students who currently do not qualify as residents for tuition purposes will be eligible for the reduced in-state tuition rate if they meet the criteria specified in the bill to qualify for the exemption. Because of their undocumented status and the fact that Florida public schools are precluded from asking about immigration status, it is not clear how many students would potentially benefit from the exemption. The current average tuition rate for students attending state universities is $112.10 per credit hour for

[36] U.S. CONST. art. 5, cl. 2.
[37] Erwin Chemerinsky, CONSTITUTIONAL LAW, 367 (2d ed. 2005).
[38] *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).
[39] *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).
[40] *DeCanas v. Bica*, 424 U.S. 351, 355 (1976).
[41] 8 U.S.C. s. 1623.

residents and $581.13 for nonresidents.[42] Additionally, affected students may incur certain costs in order to meet the bill's affidavit requirements.

C. Government Sector Impact:

The fiscal impact of the bill is indeterminate, as the state does not have reliable figures indicating the number of students who would qualify for the exemption. Given the indeterminate number of eligible students, the fiscal impact and additional regulatory burden on community colleges and state universities in collecting and processing affidavits and confirming other eligibility requirements in not readily ascertainable.

The bill would result in the state foregoing the difference between resident and nonresident tuition for students who qualify for this exemption and would not have otherwise been eligible for the resident tuition rate.

The Board of Governors will be required to engage in cross-sector work with the State Board of Education and Department of Education staff in order to ensure that the regulations and rules required by the bill are similar.[43]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[42] State University System of Florida Board of Governors, *Tuition & Fees 2010-11, available at* http://www.flbog.edu/about/budget/current.php (last visited Mar. 3, 2011).
[43] Board of Governors, *Senate Bill 318 Legislative Bill Analysis* (Feb. 16, 2011) (on file with the Senate Committee on Judiciary).