

STORAGE NAME: h0731.er

DATE: March 24, 1997

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
ELECTION REFORM
BILL ANALYSIS & ECONOMIC IMPACT STATEMENT**

BILL #: HB 731

RELATING TO: Political Advertisements

SPONSOR(S): Representative Andrews

STATUTE(S) AFFECTED: Creating s. 106.1433, F.S.

COMPANION BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) ELECTION REFORM (GRC)
- (2)
- (3)
- (4)
- (5)

I. SUMMARY:

HB 731 requires that political advertisements depicting "manipulated" pictures of candidates or elected public officials contain a statement that the picture has been manipulated and that the candidate or elected public official featured in the picture has both seen and approved of the picture for use in the advertisement. Any person who fails to include the statement of manipulation and approval is subject to a fine of \$2 per piece for advertisements distributed in print form, or up to \$5,000 if the advertisement is broadcast on television. In addition, HB 731 requires the candidate or elected public official depicted in a manipulated picture to provide a written statement of authorization to the communications medium responsible for publishing or displaying the advertisement. Any candidate or elected public official who fails to submit an authorization statement is subject to a fine of up to \$5,000.

The Florida Elections Commission is responsible for determining and assessing fines under this provision, with all fines being deposited in the Elections Commission Trust Fund.

This bill does not appear to have a significant fiscal impact on state or local governments.

HB 731 has an effective date of January 1, 1998.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Section 106.143, F.S., requires all political advertisements to contain certain information. The advertisement must identify that it is a paid political advertisement and must identify the sponsor. If the advertisement is for a candidate seeking the nomination of a political party, it must state the political party of which the candidate is seeking the nomination or is the nominee. Independent candidates must indicate that they are running as an independent. Currently, there is no requirement that the candidate, on whose behalf the advertisement is made, approve the content of the advertisement prior to its publication, nor is there any requirement that the advertisement identify whether the candidate has approved the ad. A person found in violation of s. 106.143, F.S., is subject to civil penalties imposed by the Florida Elections Commission (hereinafter referred to as "the Commission"). The Commission must determine that the provisions of this section were *willfully* violated in order for a violation to be found. [s. 106.25(3), F.S. (1995)].

Subsection (2) of s. 104.271, F.S., prohibits a candidate from making any statement about an opposing candidate if the statement is false and is made with "actual malice". This subsection provides that an aggrieved candidate may file a complaint with the Division of Elections (hereinafter referred to as the Division), pursuant to s. 106.25, F.S. The Commission has jurisdiction to hold an expedited hearing and to assess a civil penalty of up to \$5,000 against the candidate found in violation. [s. 104.271(2), F.S. (1995)].

Subsection (1) of s. 106.071, F.S., requires each political advertisement paid for by an independent expenditure to contain the name and address of the person paying for the advertisement and to carry the following disclaimer: "Paid political advertisement paid for by (name of person or committee paying for the advertisement) independently of any (candidate or committee). A person who fails to include the disclaimer, is guilty of a first degree misdemeanor. [s. 106.071(2), F.S. (1995)].

B. EFFECT OF PROPOSED CHANGES:

Under HB 731, any political advertisement that includes a picture of a candidate or elected public official that has been changed in any way from the original image must carry a disclaimer stating two things: (1) that the picture has been "manipulated" and (2) that the individual in the picture has both seen the picture and approved of its use in the advertisement. The bill also requires that the candidate or elected public official depicted in a manipulated picture must provide a written statement of authorization to the particular communications medium.

Any person who fails to include the statement of manipulation and approval is subject to a fine of \$2 per piece, if distributed in print form, or a fine of up to \$5,000 if broadcast on television. In addition, any candidate or elected public official who fails to submit the statement of authorization to the communications medium is subject to a fine of up to \$5,000.

This bill, as written, would apply to all political advertisements using manipulated pictures, regardless of whether the advertisement is made for, or against, the candidate or elected public official whose picture has been manipulated. While obtaining prior approval and authorization from a candidate or elected public official who is being supported in a political advertisement may not be difficult, obtaining prior approval and authorization from candidates or elected public officials being opposed in a political advertisement may prove to be difficult. Under this bill, any candidate or elected public official who fails to submit a statement of authorization of a manipulated picture may be subject to a civil fine of up to \$5,000, regardless of whether the advertisement was made in opposition to the individual.

HB 731 does not exempt political advertisements paid for by an independent expenditure. This may be problematic as the bill requires the sponsor of the advertisement to obtain prior authorization and approval from the person depicted in the advertisement. "Independent expenditure" is defined, in part, as "an expenditure by a person for the purpose of advocating the election or defeat of a candidate or the approval or rejection of an issue, which expenditure is not controlled by, coordinated with, or made upon consultation with, any candidate, political committee, or agent of such candidate or committee". [s. 106.011(5), F.S. (1995)]. Therefore, a political advertisement approved of or authorized by a candidate would not be an independent expenditure and would be subject to the contribution limitations set forth in s. 106.08, F.S. (1995).

This bill raises significant constitutional issues under the First Amendment. [See, Comments].

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

Yes. Under the provisions of this bill, the Commission would be responsible for determining and assessing all fines collected. Although the bill is silent as to the procedural aspects of investigating claims and adjudicating disputes under the new provision, s. 106.25(1), F.S. (1995) vests jurisdiction with the Division and the Commission for all alleged violations of Chapter 106. Therefore, the work load of both the Division and the Commission would increase with each complaint filed.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes. See above.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

Not applicable.

(2) what is the cost of such responsibility at the new level/agency?

Not applicable.

(3) how is the new agency accountable to the people governed?

Not applicable.

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

Not applicable.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

Not applicable.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

HB 731 does cover an aspect of political advertisement not currently regulated.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

Not applicable.

- (2) Who makes the decisions?

Not applicable.

- (3) Are private alternatives permitted?

Not applicable.

- (4) Are families required to participate in a program?

Not applicable.

(5) Are families penalized for not participating in a program?

Not applicable.

b. Does the bill directly affect the legal rights and obligations between family members?

No.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

Not applicable.

(2) service providers?

Not applicable.

(3) government employees/agencies?

Not applicable.

D. SECTION-BY-SECTION ANALYSIS:

This section need be completed only in the discretion of the Committee.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

Fines collected under the provisions of HB 731 are to be deposited in the Elections Commission Trust Fund. Although additional revenues may be realized, the amount is indeterminable at this time.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

Persons or organizations found in violation of the provisions of HB 731 could be subject to significant fines, depending on the particular circumstances.

2. Direct Private Sector Benefits:

None.

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill is exempt from the mandates provision of the Florida Constitution because it is an elections law.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

None.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

None.

V. COMMENTS:

HB 731 requires a political advertisement, in which a picture of a candidate or elected public official is manipulated, to have an "approved by" disclaimer. There is an apparent conflict in the federal courts regarding the constitutionality of "approved and authorized by" disclaimers. In Shrink Missouri Government PAC v. Maupin, 892 F.Supp. 1246 (E.D.Mo. 1995), a federal district court held that a Missouri state statute requiring an "approved and authorized by" disclaimer on negative advertising in addition to a "paid for by" disclaimer violated first amendment free speech guarantees.

The court stated:

It seems that to whatever extent the state wishes to impose accountability and lessen the opportunity for deniability, the "paid for by" requirement promotes that goal, without the need for "approved and authorized by" language.

Id. at 1256. Conversely, in Federal Elections Commission v. Survival Education Fund, Inc., 65 F.3d 285 (2nd Cir. 1995), the Second Circuit Court of Appeals upheld the constitutionality of an "authorized by" disclaimer in the context of the Federal Election Campaign Act.

Neither case is controlling in Florida, and it is not clear to what extent, if any, the cases would be looked to by a Florida court in resolving the constitutionality of the "approved by" disclaimers contained in HB 731.

When government regulates speech, it does so using two approaches: content-based regulation and conduct-based regulation. Content-based regulation seeks to restrict the subject matter, while conduct-based regulation seeks to regulate the time, place and manner of the speech. "Subject to a limited number of exceptions -- most notably, reasonable time, place and manner regulations -- political speech may not constitutionally be restricted in a public forum." Lebron v. Washington Metropolitan Area Transit Authority, 749 F.2d 893 (U.S.App.D.C., 1984).

In Lebron, the court was faced with a regulation, implemented by the Washington Metropolitan Area Transit Authority [hereinafter referred to as the "Transit Authority"], which stated, in part, that "[a]ll copy and artwork should avoid conveying derisive, exaggerated, distorted, deceptive or offensive impressions". The Transit Authority argued that the guideline simply prohibited deceptive advertising as a reasonable time, place and manner regulation. The court ruled that the guideline was not a permissible "context-based" regulation because the Transit Authority was judging the truth of the political statement. The

court held: “. . . to accept the [Transit Authority’s] argument is to destroy the distinction between content-neutral and content-based regulations”.

Like the regulation challenged in Lebron, the provisions of HB 731 could be challenged in court as being a content-based regulation, subject to exacting scrutiny. In addition, a challenge could also be made that the provisions of HB 731 are “overbroad” because, in addition to proscribing activities which may be constitutionally prohibited (for example, if the picture is manipulated to the point that it rises to the level of “libel”), it sweeps within its coverage speech or conduct otherwise protected by the Constitution. It should be noted that most overbroad statutes are also considered “vague”. An overbroad or vague statute will constitute a “prior restraint” in regulating the time, place, and manner of speech and will likely be held unconstitutional.

HB 731 is silent as to any burden of proof standard that a complainant under s. 106.1433, F.S., would have to meet in order to prevail. However, jurisdiction to investigate and determine violations of Chapter 106, F.S., is vested in the Division and the Commission. For purposes of the Commission’s jurisdiction, a violation under Chapter 106, F.S., means the “willful” performance, or the “willful” failure of performance, of an act either prohibited or required under the chapter. [s. 106.25(3), F.S. (1995)]. Therefore, s. 106.1433, F.S., would probably be subject to the “willful” standard.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

VII. SIGNATURES:

COMMITTEE ON ELECTION REFORM:

Prepared by:

Legislative Research Director:

Dawn Roberts

Clay Roberts