

STORAGE NAME: h0731s1a.er

DATE: February 23, 1998

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

BILL #: CS/HB 731(1st Engrossed)(as passed by the 1997 House of Representatives)

RELATING TO: Political Advertisements

SPONSOR(S): Committee on Election Reform and Representative(s) Andrews and others

COMPANION BILL(S): SB 886(s)

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

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I. SUMMARY:

CS/HB 731, as amended, requires that a political advertisement that includes a picture in which a political candidate's or elected official's physical appearance has been changed must obtain either the written authorization of the individual depicted therein, or the advertisement must contain a statement that the physical appearance of the person has been changed and that the candidate or the elected public official using the picture has seen the changed picture and approved its use. In addition, the person or organization using such a political advertisement must provide a written statement to the appropriate advertising medium authorizing the use of the picture in the advertisement from the individual depicted in the picture. In lieu of the written statement of authorization, the person or organization using the political advertisement at issue must provide a written statement to the appropriate advertising medium indicating that the candidate's or elected official's physical appearance has been changed. Definitions are provided.

Any person or organization that fails to comply is subject to a one-time fine of up to \$2,500. 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 will have a fiscal impact on state or local governments, although indeterminable at this time.

Provides an effective date.

II. SUBSTANTIVE RESEARCH:

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.

Political advertisements, other than independent expenditures, offered by or on behalf of a candidate must be approved in advance by the candidate. [s. 106.143(4)(a), F.S. (1997)]. Such advertisements must expressly state that the content of the advertisement was approved by the candidate and must state who paid for the advertisement. In addition, the candidate must provide a written statement of authorization to the appropriate advertising medium for each such advertisement submitted for publication, display, broadcast, or other distribution. [s. 106.143(4)(a), F.S. (1997)].

Under current law, any person who makes an independent expenditure for a political advertisement must provide a written statement to the appropriate advertising medium that no candidate has approved the advertisement. Additionally, the advertisement must contain a statement that no candidate has approved the advertisement. [s. 106.143(4)(b), F.S. (1997)].

Any person who willfully violates any provision found in section 106.143, F.S., is subject to civil penalties imposed by the Florida Elections Commission (hereinafter referred to as "the Commission"). [s. 106.143(8), F.S. (1997)]. The Commission is authorized upon the finding of a violation to impose civil penalties in the form of fines not to exceed \$1,000 per count. [s. 106.265(1), F.S. (1997)].

An "independent expenditure" is defined, in pertinent 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)(a), F.S. (1997)]. By law, an expenditure is not an "independent expenditure" if the committee or person communicates with the candidate, the candidate's campaign, or an agent of the candidate acting on behalf of the candidate, concerning the preparation of, use of, or payment for, the specific expenditure or advertising campaign at issue. [s. 106.011(5)(b)1, F.S. (1997)].

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. (1997)].

For those individuals or groups making an independent expenditure in excess of \$1,000, certain notice requirements are imposed. A written notice of the independent expenditure must be delivered to all candidates in the affected race, and to the

qualifying officer of such candidates, within 24 hours after obligating any funds for the expenditure. However, the notice of the obligation of the expenditure must be made at least 5 days prior to an election. The notice must contain a general description of the subject and content of the expenditure, the amount of the expenditure, and a detailed description of the media type or use of the expenditure. Also, the notice must specifically state the name of the candidate whom the independent expenditure is designed to support or oppose. [s. 106.085(1), F.S. (1997)].

If the political advertisement required to be noticed is to be broadcast over a television or radio station, a copy of the actual advertisement must be provided with the notification, along with a listing of stations airing the advertisement. [s. 106.085(2)(a), F.S. (1997)]. If the political advertisement required to be noticed is to be communicated through means other than the spoken word, a duplicate reproduced from the original advertisement must be provided with the notice. This duplicate must clearly depict the copy of pictures, artwork, and text used in the advertisement. [s. 106.085(2)(b), F.S. (1997)].

Any person who violates any provision of section 106.085, F.S. (1997) is liable for a civil fine of up to \$5,000 to be determined by the Florida Elections Commission or the entire amount of the expenditure not noticed, whichever is greater. [s. 106.085(3), F.S. (1997)].

B. EFFECT OF PROPOSED CHANGES:

Under CS/HB 731, a political advertisement that includes a picture in which a political candidate's or elected official's physical appearance has been changed must obtain either the written authorization of the individual depicted therein, or the advertisement must contain a statement that the physical appearance of the person has been changed and that the candidate or the elected public official using the picture has seen the changed picture and approved its use. In addition, the person or organization using such a political advertisement must provide a written statement to the appropriate advertising medium authorizing the use of the picture in the advertisement from the individual depicted in the picture. In lieu of the written statement of authorization, the person or organization using the political advertisement at issue must provide a written statement to the appropriate advertising medium indicating that the candidate's or elected official's physical appearance has been changed.

The term "picture" is defined as a photographic image, an image on motion picture film or videotape, or a digital image. The term "changed" is defined as changed from the original image, but does not include any reproduction, cropping, contrasting, or color correcting.

A penalty is provided. Any person or organization that fails to comply is subject to a one-time fine of up to \$2,500 to be determined and assessed by the Florida Elections Commission. All fines collected under this section are to be deposited in the Elections Commission Trust Fund.

CS/HB 731 does not differentiate between coordinated expenditures and independent expenditures made for such political advertisements. By the terms of this bill, if the

individual whose physical appearance has been changed withholds approval, the candidate or elected public official using the picture must approve its use, regardless of whether the advertisement in question is an independent expenditure. Therefore, it would appear that independent expenditures are precluded for such advertisements absent approval given by an individual depicted therein. To clarify, 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 section 106.08, F.S. (1997), as well as the provisions governing independent expenditures discussed under *Present Situation*. The constitutionality of this provision of the bill is questionable. In an effort to uphold the constitutionality of CS/HB 731, the courts could construe that the bill was only intended to reach advertisements made with coordinated expenditures. Nonetheless, if challenged in court, it is impossible to definitively predict the result.

This bill also raises 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, section 106.25, F.S. (1997) vests jurisdiction to investigate and determine violations of Chapter 106, F.S. with the Commission, but only after having received either a sworn complaint or information reported to it by the Division of Elections. 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?

CS/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. STATUTE(S) AFFECTED:

Creating s. 106.1433, F.S.

E. SECTION-BY-SECTION RESEARCH:

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

III. FISCAL RESEARCH & 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 CS/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 CS/HB 731 could be subject to fines of up to \$2,500.

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:

CS/HB 731 requires a political advertisement that includes a picture in which a candidate's or elected public official's physical appearance has been changed to either obtain the written authorization of the depicted individual or to have an "approved by" disclaimer. To the extent that a written authorization from the individual whose physical appearance has been changed is unable to be obtained, the advertisement in question would have to contain a disclaimer. The courts have consistently held that such disclaimers implicate the First Amendment right to free speech. See generally, McIntyre v. Ohio Elections Commission, 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995); Kentucky Right to Life, Inc. v. Terry, 108 F.3d 637 (6th Cir.) cert. denied, 118 S.Ct. 162 (1997); Shrink Missouri Government PAC v. Maupin, 892 F.Supp. 1246 (E.D.Mo. 1995), affirmed, 71 F.3d 1422; Federal Elections Commission v. Survival Education Fund, Inc., 65 F.3d 285 (2nd Cir. 1995); and Arkansas Right to Life State Political Action Committee v. Butler, ___ F.Supp. ___, 1997 WL 726036 (W.D.Ark., Nov. 18, 1997) (No. 97-5064). The United States Supreme Court has stated, "[w]hen a law burdens core political speech we apply exacting scrutiny, and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest". McIntyre, 514 U.S. at 347, 115 S.Ct. at 1519.

There is an apparent conflict in the federal courts regarding the constitutionality of "approved by" and "authorized by" disclaimers. In Kentucky Right to Life, Inc. v. Terry, the Sixth Circuit upheld a disclosure statute that requires identification of the sponsor to be placed upon every expenditure which advocates the support of or defeat of a candidate. The court recognized that Kentucky had a substantial interest in notifying the public of the sources of expenditures along with preventing actual and perceived corruption and concluded that the identification disclaimer was narrowly tailored to serve those goals. Similarly, in Federal Elections Commission v. Survival Education Fund, Inc. the Second Circuit Court of Appeals upheld the constitutionality of an "authorized by" disclaimer in the context of the Federal Election Campaign Act.

Conversely, in Shrink Missouri Government PAC v. Maupin 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 reasoned that to whatever extent the state wished to impose accountability and lessen the opportunity for deniability, the "paid for by" requirement promoted that goal, without the need for "approved and authorized by" language. 892 F.Supp. at 1256.

As these cases are not controlling in Florida, 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 CS/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 (D.C. Cir., 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 CS/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 CS/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.

CS/HB 731 is silent as to any burden of proof standard that a complainant under section 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 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. (1997)]. Therefore, section 106.1433, F.S., would probably be subject to the "willful" standard.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The committee substitute made two clarifying changes to the bill. In subsection (1), the committee substitute changed the language to more closely reflect the sponsor's intent which was to require accountability on the part of candidates or elected public officials who use political advertisements which contain manipulated pictures. In the original bill, the individual depicted in the picture had to approve its use whereas, in the committee substitute, the candidate or elected public official using the ad must approve the use of the picture.

Secondly, in subsection (1) the committee substitute requires that persons or organizations must submit a written statement to the communications medium that the candidate or elected public official depicted in a picture that has been manipulated has authorized the pictures use. The original bill put the responsibility to issue the statement of authorization on the person featured in the manipulated picture.

An amendment to "strike everything after the enacting clause" was offered and adopted. Originally, CS/HB 731 required that political advertisements that included a "manipulated" picture must contain a statement that the picture had been manipulated and that the candidate or elected public official using the picture had both seen and approved of the picture for use in the advertisement. Any person or organization who failed to include

the statement of manipulation and approval was subject to a fine of \$2 per piece for advertisements distributed in print form, or up to \$5,000 if the advertisement was broadcast on television. In addition, CS/HB 731 required that any person or organization using a manipulated picture of a candidate or elected public official in a political advertisement must provide a written statement to the communications medium responsible for publishing or displaying the advertisement indicating that the individual in the picture had authorized its use in that advertisement. Any person or organization who failed to submit an authorization statement was subject to a fine of up to \$5,000. Definitions were provided.

CS/HB 731, as amended, requires that a political advertisement that includes a picture in which a political candidate's or elected official's physical appearance has been changed must obtain either the written authorization of the individual depicted therein, or the advertisement must contain a statement that the physical appearance of the person has been changed and that the candidate or the elected public official using the picture has seen the changed picture and approved its use. In addition, the person or organization using such a political advertisement must provide a written statement to the appropriate advertising medium authorizing the use of the picture in the advertisement from the individual depicted in the picture. In lieu of the written statement of authorization, the person or organization using the political advertisement at issue must provide a written statement to the appropriate advertising medium indicating that the candidate's or elected official's physical appearance has been changed. Definitions are provided.

A penalty is also provided. Any person or organization that fails to comply is subject to a one-time fine of up to \$2,500 to be determined and assessed by the Florida Elections Commission. All fines collected under this section are to be deposited in the Elections Commission Trust Fund.

VII. SIGNATURES:

COMMITTEE ON ELECTION REFORM:

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