HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 1261 Election Ballots
SPONSOR(S): State Affairs Committee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: State Affairs Committee		Camechis	Hamby

SUMMARY ANALYSIS

The Florida Constitution (constitution) authorizes the Legislature to propose amendments or revisions to the constitution by a joint resolution approved by a 3/5 vote of the membership of each house. Joint resolutions may specify that the full text of a proposed amendment *or* a ballot summary describing the proposed amendment be printed on the ballot (this is referred to as "ballot language"). Typically, joint resolutions require placement of a title and ballot summary on the ballot. The ballot language of legislatively proposed amendments is subject to legal challenge in the courts. Generally, challengers' claim the ballot title or ballot summary proposed by the Legislature is inaccurate, misleading, or otherwise defective in violation of s. 101.161, F.S., or the implicit constitutional accuracy requirement applied by the Florida Supreme Court (Court) since 2000. From 2000 to date, 10 legislatively proposed amendments have been challenged and reviewed by the judiciary. Of those, the Court removed 5 from the ballot and invalidated one after the election, all due to defective ballot titles or summaries. On several occasions since 1982, Justices of the Court have asked the Legislature to amend the statute and create a process to address ballot deficiencies in order to avoid removal of legislative proposals from the ballot.

In summary, the bill amends s. 101.161, F.S., the statute governing the form of the ballot and manner in which the ballot is presented to the electors, in order to:

- Conform statutory terminology to actual practice and judicial decisions and consolidate requirements related to joint resolutions into one provision;
- Codify the implicit authority of the Legislature to specify inclusion of either a ballot summary or the full text of an amendment on the ballot;
- Codify the current judicial requirement that ballot summaries proposed by the Legislature describe the chief purpose of the amendment in clear and unambiguous language;
- Explicitly authorize joint resolutions to include more than one ballot summary for consideration by the courts in the event the first ballot summary is found deficient;
- Specify that, if a joint resolution specifies that the full text of an amendment must be printed on the ballot, and the text delineates current constitutional language that will be removed or replaced, the text must be considered a clear and unambiguous statement of the substance and effect of the proposal, providing fair notice to the voters;
- Require legal challenges to ballot language proposed by a joint resolution to be filed within 30 days after the joint resolution is submitted to the Secretary of State;
- Specify that the full text of the proposed amendment must be placed on the ballot if a court finds each proposed ballot summary defective, and if the full text of the amendment delineates current constitutional language that will be removed or replaced, the text must be considered a clear and unambiguous statement of the substance and effect of the proposal, providing fair notice to the voters
- Provide for retroactive application of the bill to joint resolutions passed during the 2011 regular session and provide a specific period of time within which to file legal challenges of joint resolutions passed during that session.

The bill does not:

- Alter the manner in which courts review ballot titles or ballot summaries to determine accuracy;
- Alter or eliminate the implicit accuracy requirement applied by the courts since the 2000 decision in the Armstrong case; or
- Alter the manner in which amendments are proposed by initiative petition, the Constitution Revision Commission, the Taxation and Budget Reform Commission, or a constitutional convention.

This bill may result in an indeterminate negative fiscal impact on the Department of State if multiple ballot summaries are published in newspapers throughout the state. The cost is $106.14 per word. The bill may also result in an indeterminate negative fiscal impact on local supervisors of elections, who will bear the cost of printing lengthier ballots if the full text of amendments must be included on the ballot.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

PRESENT SITUATION

Introduction

The ballot language of a legislatively proposed amendment is subject to legal challenge in the courts. Generally, challengers' claim the ballot title or ballot summary proposed by the Legislature is inaccurate, misleading, or otherwise defective in violation of s. 101.161, F.S., or the implicit constitutional accuracy requirement applied by the Florida Supreme Court (Court) since 2000. From 2000 to date, 10 legislatively proposed amendments have been challenged and reviewed by the judiciary. Of those, the Court permitted 4 to be placed on the ballot for a vote of the electors.[1] Of the remaining 6, the Court removed 5 from the ballot prior to the election and invalidated 1 following the election based upon the Court's finding that the ballot summaries or titles were defective.[2] In 2010, the Court removed 3 legislative proposals due to defective titles or ballot summaries, noting in one decision that, "we have previously asked the Legislature to establish a procedure that would avoid this problem."[3] The first suggestion for revising the process was made in 1982, when Justice Overton authored a concurring opinion in the Askew v. Firestone case, the first in which the Court removed a legislatively proposed amendment from the ballot due to a deficient ballot title and summary. In his opinion, Justice Overton said,

> Because of the defective ballot language, the public is now prohibited from voting on this amendment. Infringing on the people's right to vote on an amendment is a power this Court should use only where the record clearly and convincingly establishes that the public is being misled on material elements of the amendment. It concerns me that the public is being denied the opportunity to vote because no process has been established to correct misleading ballot language in sufficient time to change the language.
>
> To avoid future situations in which this Court may again have to exercise this extraordinary power of striking an amendment from the ballot due to misleading ballot language, the legislature and this Court should devise a process whereby misleading language can be challenged and corrected in sufficient time to allow a vote on the proposal.
>
> Since our constitution requires that amendments and revisions be filed with the secretary of state at least ninety days prior to the designated election date, I suggest that a process be established by the legislature to afford those who desire to challenge the ballot language to be able to do so within *thirty days* of the filing of the amendment or revision. This Court should then create an expedited process whereby such challenges can be settled within thirty days of the filing of the challenge. In this process a means should be provided for the correction of defective ballot language so that the election on the proposal may proceed.[4]

Since 1982, at least 7 decisions issued by the Court contained opinions suggesting the Legislature provide a remedial process for ballot summaries found defective by the courts.[5]

---

[1] Sancho v Smith, 830 So.2d 856 (1st DCA 2002); ACLU v. Hood, No. SC04-1671, 888 So.2d 621 (Fla. Sept. 2, 2004)(the court invalidated the ballot summary and ordered the full amendment text placed on the ballot); Fl. Hometown Democracy v Cobb, 953 So.2d 666 (1st DCA 2007); Fl. Education Assoc. v. State, 48 So.3d 694 (Fla. 2010).

[2] Armstrong v Harris, 773 So.2d 7 (Fla. 2000)(invalidated the amendment after the election); Fl. Assoc of Realtors v. Smith, 825 So.2d 532 (1st DCA 2002); State v. Slough, 992 So.2d 142 (Fla. 2008); Roberts v Doyle, 43 So.3d 654 (Fla. 2010); State v Mangat, 43 So.3d 642 (Fla. 2010); Fl. Dept. of State v. Fl. State Conference of NAACP Branches, 43 So.3d 662 (Fla. 2010).

[3] State v. Mangat, 43 So.3d 642, 651 (Fla. 2010).

[4] Askew, 421 So.2d at 157 (emphasis added).

[5] Askew v. Firestone, 421 So.2d 151, 157 (Fla. 1982)(Overton, J., concurring) (suggesting a process whereby misleading ballot language can be challenged and corrected in sufficient time to allow the people to vote on the proposal); Evans v. Firestone, 457 So.2d 1351 (Fla. 1984)(Overton, J., concurring); Fl. League of Cities v. Smith; 607 So.2d 397 (Fla. 1992)(Overton, J., concurring); Smith v. American Airlines, Inc., 606 So. 2d 618, 622 (Fla. 1992) ("In order to prevent this problem from recurring in the future, we urge the legislature to consider amending the statute to empower this Court to fix fatal problems with ballot summaries, at least with respect to those amendments proposed by revision commissions or the legislature."); Advisory Op. to the Att'y Gen. re Tax Limitation; 644 So.2d 486 (Fla.

Substantive changes to s. 101.161, F.S., the statute governing the form and manner in which proposed amendments are placed on the ballot, have been proposed since 1984, but the only relevant change was adopted in 2000 when the Legislature exempted legislatively proposed amendments from the statutory requirement for a 75-word limit ballot summary explaining the chief purpose of a proposed amendment.

State Constitution

Article XI of the Florida Constitution provides the following methods for amending the State Constitution:

1) Joint resolution passed by 3/5 of the membership of each house of the Legislature;
2) Initiative petition;
3) Proposal by the Constitution Revision Commission;
4) Proposal by the Taxation and Budget Reform Commission; or
5) Proposal by a constitutional convention.

A proposed amendment to or revision[6] of the constitution, or any part of it, must be submitted to the electors at the next general election held more than ninety days after the joint resolution or report of the revision commission, constitutional convention or taxation and budget reform commission proposing it is filed with the Secretary of State, unless, pursuant to law enacted by 3/4 of the membership of each house of the Legislature and limited to a single amendment, it is submitted at an earlier special election held more than ninety days after such filing.[7]

Once in the tenth week, and once in the sixth week immediately preceding the week in which the election is held, each proposed amendment, with notice of the date of election at which it will be submitted to the electors, must be published in one newspaper of general circulation in each county in which a newspaper is published.[8] The Department of State ensures compliance with this constitutional requirement by overseeing publication of the ballot title, ballot summary, and amendment text in newspapers throughout the state.

Unless otherwise specifically provided for elsewhere in the constitution, if the proposed amendment is approved by vote of at least 60% of the electors voting on the measure, it is effective as an amendment to the 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 or revision.[9]

With respect to joint resolutions of the Legislature that propose an amendment, the constitution:

1) Does not contain explicit requirements governing the form or manner in which amendments proposed by joint resolution appear on the ballot. Specifically, the constitution does not require a joint resolution proposing an amendment or revision to contain a title or ballot summary, nor does the constitution contain an explicit requirement regarding the accuracy or content of ballot titles, summaries, or the text of proposed amendments;
2) Does not limit proposed amendments to a single-subject;
3) Does not limit the subject matter of a proposed amendment;[10]
4) Does not authorize the Governor to approve or disapprove legislatively proposed amendments.

1994)(Overton, J., concurring); Armstrong, 773 So.2d at 24-26 (Fla. 2000), (Pariente, J., specially concurring) (agreeing with Justice Overton's concerns in Askew); State v. Mangat, 43 So.3d 642, 651 (Fla. 2010).

[6] An "amendment" amends one section of the constitution, while a "revision" amends one or more articles of the constitution. Art. IX, s. 1, Fla. Const. For ease of reading, this analysis will refer to "amendment" when referring to any proposed change to the constitution, including by a proposed revision. "The function of a section amendment is to alter, modify or change the substance of a single section of the Constitution containing particularized statements of organic law….The function of an article revision is to restructure an entire class of governmental powers or rights, such as legislative powers, taxation powers, or individual rights." Smathers v. Smith, 338 So. 2d 825, 829 (Fla. 1976)

[7] Art. IX, s. 5(a), Fla. Const.

[8] Art, IX, s. 5(d), Fla. Const.

[9] Art, IX, s. 5(e), Fla. Const.

[10] Collier v. Gray, 116 Fla. 845, 858 (Fla. 1934)(Constitutional provisions derive their force from people, who have inherent power, practically unlimited except by Federal Constitution, to make changes in the constitution when proposed in a prescribed manner.); Gray v. Golden, 89 So.2d 785, 790 (Fla. 1956)(The people have a right to change, abrogate, or modify the constitution in any manner they see fit, so long as they keep within the confines of the federal constitution).

State Statutes

The Florida Elections Code governs the manner in which proposed amendments are presented to the voters. Specifically, s. 101.161, F.S., establishes requirements regarding the form and manner in which amendments appear on the ballot.

Section 101.161, F.S., requires that whenever a constitutional amendment is submitted to the vote of the people, the "substance" of the amendment must be printed in clear and unambiguous language on the ballot after the list of candidates, followed by the word "yes" and also by the word "no," and must be styled in such a manner that a "yes" vote will indicate approval of the proposal and a "no" vote will indicate rejection. The wording of the substance of the amendment and the ballot title to appear on the ballot must be embodied in the joint resolution or other proposal.

The "substance" of the amendment must be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. In actual practice, the "explanatory statement" is commonly referred to as the "ballot summary." Amendments and ballot language proposed by joint resolution of the legislature are exempt from the requirement for a ballot summary of 75 or less words.

In addition, for every amendment proposed by initiative, the ballot must include, following the ballot summary, a separate financial impact statement concerning the measure prepared by the Financial Impact Estimating Conference. The ballot title must consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.

The ballot summary and ballot title of a constitutional amendment proposed by initiative must be prepared by the sponsor and approved by the Secretary of State. The Department of State (department) must give each proposed constitutional amendment a designating number for convenient reference, and this number must appear on the ballot. Designating numbers must be assigned in the order of filing or certification and in accordance with rules adopted by the department. The department must furnish the designating number, the ballot title, and the substance of each amendment to the supervisor of elections of each county in which such amendment is to be voted on.

EFFECT OF PROPOSED CHANGES

The bill amends s. 101.161, F.S., the statute governing the form of the ballot and manner in which the ballot is presented to the electors. The bill does not:

- Alter the manner in which courts review ballot titles or ballot summaries to determine accuracy;
- Alter or eliminate the implicit accuracy requirement applied by the courts since the 2000 decision in the Armstrong case; or
- Alter the manner in which amendments are proposed by initiative petition, the Constitution Revision Commission, the Taxation and Budget Reform Commission, or a constitutional convention.

Rather, the proposed committee bill:

- Revises terminology in s. 101.161(1) and (2), F.S., to replace references to "substance" with "ballot summary" so that statutory terminology is consistent with actual practice and judicial decisions;
- Transfers the requirements for amendments and revisions proposed by joint resolution from existing subsection (1) to a new subsection (4), so that the requirements for legislative proposals are separate from all other proposals for purposes of clarity and ease of application;
- Requires the Secretary of State to provide the designating number and*, as directed by joint resolution,* the ballot title, ballot summary, *or full text of an amendment* to the Supervisors of Elections. This is consistent with the Legislature's current implicit authority to include either a ballot summary or the full amendment text on the ballot;
- Requires each joint resolution to include a ballot title consisting of a caption, of 15 words or less, by which the proposal is commonly referred to or spoken of (this requirement is in current law);
- Specifies that a joint resolution *may* include a ballot summary or alternative ballot summaries that describe the chief purpose of the proposal in clear and unambiguous language;

- Requires the title and ballot summary, or title and amendment text, *whichever is required by the joint resolution*, to be printed on the ballot. This provision reiterates current implicit legislative discretion to include a ballot summary *or* the full text, and incorporates current technical language from subsection (1) regarding assignment of designating numbers by the Secretary of State and the style of the question.

- For joint resolutions specifying placement of the full text of the amendment on the ballot:

    - Specifies that, if a joint resolution requires placement on the ballot of the full text of a proposed amendment, and the full text of the proposed amendment delineates existing text in the constitution that will be removed or replaced if approved by the electors, the full text of the proposed amendment must be considered a clear and unambiguous statement of the proposal, providing fair notice to the electors of the content of the proposed amendment and sufficiently advising electors of the issue upon which they are voting.
    - Requires any judicial action challenging placement of the full text of an amendment on the ballot to be filed within 30 days after the joint resolution is submitted to the Secretary of State.

- For joint resolutions requiring placement of a ballot summary on the ballot:

    - Requires any legal action challenging a legislative ballot title or ballot summary based upon a claim that the title or summary is inaccurate, misleading, or otherwise defective to be filed within 30 days after the joint resolution is submitted to the Secretary of State.
    - Requires placement on the ballot of the full text of an amendment if the courts find each ballot summary in a joint resolution defective.
    - Specifies that if the full text of the proposed amendment delineates existing text in the constitution that will be removed or replaced if approved by the electors, the full text of the proposed amendment must be considered a clear and unambiguous statement of the proposal, providing fair notice to the electors of the content of the proposed amendment and sufficiently advising electors of the issue upon which they are voting.
    - If the courts find a ballot summary defective, and place the full text of the amendment on the ballot, subsequent legal challenges must be filed within 15 days after the final court order is issued.

- Requires the courts, including any appellate court, to accord cases challenging the ballot language in joint resolutions priority over other pending cases and render decisions as expeditiously as possible.

Lastly, the bill specifies that its provisions apply retroactively to joint resolutions passed during the 2011 regular session, and that legal challenges to ballot language in joint resolutions passed during the session must be filed within 30 days after this bill becomes law or within 30 days after the joint resolution being challenged is filed with the Secretary of State, whichever is later.

BACKGROUND

Federal Limitations on Legislative Ballot Language

In the early 1990s, a Georgia citizen and two organizations brought a legal action in federal court against Georgia and Georgia officials challenging the constitutionality of ballot language selected by Georgia's legislature for a proposed amendment to the Georgia Constitution affecting the ability of citizens to sue Georgia, its departments, agencies, officers, and employees. The challengers asked the federal courts to invalidate the outcome of a state referendum and alleged dilution of their right to vote on that one occasion, but did not allege systematically discriminatory election procedures. The federal Eleventh Circuit Court of Appeals, whose decisions are applicable in Florida, concluded that the challengers could

prevail only "if the election process itself reaches the point of *patent and fundamental unfairness*.... Such a situation must go well beyond the ordinary dispute over the counting and marking of ballots."[11]

In order for a court to invalidate a referendum due to a defective ballot summary, the court found that challengers must demonstrate that the state's choice of ballot language so upset the evenhandedness of the referendum that it worked a "patent and fundamental unfairness" on the voters. Such an exceptional case can arise only when the ballot language is so misleading that voters cannot recognize the subject of the amendment at issue. In such a case, the voters would be deceived, in a concrete and fundamental way, about "'what they are voting for or against.'"[12]

The court explained that, "[a]s long as citizens are afforded reasonable opportunity to examine the full text of the proposed amendment, broad-gauged unfairness is avoided if the ballot language identifies for the voter the amendment to be voted upon. Therefore, substantive due process requires no more than that the voter not be deceived about what amendment is at issue."

As to ballot summaries proposed by a state legislature, the court said,

> The question is complicated somewhat when a state chooses to identify an amendment on a ballot by briefly summarizing the amendment's text - the approach adopted by the state of Georgia here. The same analysis applies, however.
>
> When the ballot language purports to identify the proposed amendment by briefly summarizing its text, then substantive due process is satisfied - and the election is not 'patently and fundamentally unfair' - so long as the summary does not so plainly mislead voters about the text of the amendment that 'they do not know what they are voting for or against'; that is, they do not know which or what amendment is before them.
>
> We cannot accept the proposition that substantive due process imposes an affirmative obligation on states to explain - some might say speculate - in ballot language the potential legal effect of proposed amendments to the state constitution. Such future effects are almost impossible to predict with accuracy, and the constitutionality of a state referendum ought not to be contingent on events that may occur long after the referendum, such as, judicial decisions construing or applying the amendment at issue.
>
> * * *
>
> We see no "patent and fundamental unfairness" inherent in the state's failure, if any, to convey the legal effect of Amendment One - that is, to explain the current state of Georgia immunity law and the changes that Amendment One would likely bring about if adopted. The ballot language is intended only to identify for the voters the amendment to be passed upon; voters must inspect the text of the amendment itself to determine, for themselves, the legal effect of its passage. In this respect, the language identifying proposed constitutional amendments serves much the same role on the ballot as a candidate's name in an election for political office. In general, voters presumably do not select officials on the basis of their names, but on the policies and programs those names represent.
>
> So long as the election process is not so impaired that it is "patently and fundamentally unfair," substantive due process is satisfied. It is not for federal courts to decide whether the state General Assembly could have selected some other language, or some other approach, that might have better informed the voters of Amendment One's content. "[I]t is, by now, absolutely clear that the Due Process Clause does not empower the judiciary 'to sit as a superlegislature to weigh the wisdom of legislation.'"[13]

---

[11] Burton v. Georgia, 953 F. 2d. 1266, 1269 (emphasis added) (quoting Duncan v. Poythress, 657 F.2d 691, 703 (5th Cir. Unit B 1981)). "And, as we noted in Curry, 'there are no bright lines distinguishing 'patent and fundamental unfairness' from 'garden variety election disputes.' " Id. (citing Welch v. McKenzie, 765 F.2d 1311, 1317 (5th Cir.1985)).

[12] Id. at 1269.

[13] Id. at 1270-1271.

Current Status of Judicial Decisions Interpreting the State Constitution and Statutes

In a 2010 decision invalidating a legislative ballot summary, the Court acknowledged that the Legislature is not required to provide a ballot summary at all. Instead, the Legislature may resolve to place the exact text of a proposed amendment on a voter ballot.[14] However, if the Legislature chooses to include a ballot summary, it must be an "explanatory statement . . . of the chief purpose of the measure" consistent with s.101.161 (1), F.S. The Court further explained that, "[a]lthough the Legislature may place the full text of an amendment on a ballot without a ballot summary, the amendment text must still meet the accuracy requirements of article XI, section 5 of the Florida Constitution, as codified in section 101.161(1), Florida Statutes. Under these circumstances, the text of the amendment must serve the purpose of the ballot summary, i.e., advise the electorate of "the true meaning, and ramifications, of an amendment."[15] In a dissenting opinion, Chief Justice Canady, with Justice Polston concurring, opined that "[o]rdinarily, the text of a proposed amendment will necessarily contain the most direct and accurate expression of the substance and effect of the amendment. The [amendment] text itself may, however, be inadequate to sufficiently inform the voters if the text does not disclose that it will effect the repeal of an existing constitutional provision."[16]

"Although the constitution does not expressly authorize judicial review of amendments proposed by the Legislature, [the] Court long ago explained that the courts are the proper forum in which to litigate the validity of such amendments."[17] Specifically, the Court has stated:

> Under our system of constitutional government regulated by law, a determination of whether an amendment to the Constitution has been validly proposed and agreed to by the Legislature depends upon the fact of substantial compliance or noncompliance with the mandatory provisions of the existing Constitution as to how such amendments shall be proposed and agreed to, and such determination is necessarily required to be in a judicial forum where the Constitution provides no other means of authoritatively determining such questions.[18]

In 1956, the Court expressed the following view regarding the judiciary's role in reviewing legislative proposals:

> Another thing we should keep in mind is that we are dealing with a constitutional democracy in which sovereignty resides in the people. It is their Constitution that we are construing. They have a right to change, abrogate or modify it in any manner they see fit so long as they deep within the confines of the Federal Constitution. The legislature which approved and submitted the proposed amendment took the same oath to protect and defend the Constitution that we did and our first duty is to uphold their action if there is any reasonable theory under which it can be done. This is the first rule we are required to observe when considering acts of the legislature and it is even more impelling when considering a proposed constitutional amendment which goes to the people for their approval or disapproval.[19]

Today, judicial review of ballot language for proposed constitutional amendments is governed by the Florida Supreme Court's 2000 decision in the landmark case of Armstrong v. Harris, 773 So.2d 7 (Fla. 2000). In that case, the Court invalidated a legislatively proposed constitutional amendment after the amendment was approved by the voters. In doing so, the Court relied, for the first time, on an implicit constitutional accuracy requirement to find the ballot title and summary defective.

According to the Armstrong court, while the courts have traditionally "accorded a measure of deference to constitutional amendments proposed by the Legislature,"[20] that deference "is not boundless, for the constitution imposes strict minimum requirements that apply across-the-board to all constitutional

---

[14] Mangat, 43 So.3d at 649.
[15] Id. at 649 at FN 2 and 3, citing Askew, 421 So.2d at 156.
[16] Id. at 653 (Fla. 2010).
[17] Armstrong, 773 So.2d at 13-14.
[18] Id. at 14, citing Crawford v. Gilchrist, 59 So. 963, 966 (Fla. 1912).
[19] Gray v. Golden, 89 So.2d 785, 790 (Fla. 1956).
[20] Armstrong, 773 So.2d at 21.

amendments, including those arising in the Legislature."[21] With respect to the implicit constitutional accuracy requirement, the Court concluded that

> The accuracy requirement in article XI, section 5, imposes a strict minimum standard for ballot clarity. This requirement plays no favorites - it applies across-the-board to all constitutional amendments, including those proposed by the Legislature. The purpose of this requirement is above reproach - it is to ensure that each voter will cast a ballot based on the full truth. To function effectively - and to remain viable - a constitutional democracy must require no less."[22]

In reviewing legislatively proposed amendments, the courts have acknowledged that they "must act with extreme care, caution, and restraint before [they remove] a constitutional amendment from the vote of the people" and that courts "may declare a proposed constitutional amendment invalid only if the record shows that the proposal is clearly and conclusively defective…."[23] When asked to review ballot language, the courts do not consider or review the substantive merits or wisdom of a proposed amendment; rather, the courts consider their task to be determining whether the ballot language itself sets forth the substance of the amendment in clear and unambiguous language as required by s. 101.161, F.S., and by the implicit constitutional requirement that the proposed amendment be accurately represented on the ballot.[24]

According to the Court, s. 101.161(1), F.S., is a "codification of the accuracy requirement implicit in article XI, section 5 of the Florida Constitution,"[25] and requires the ballot language of every proposed amendment to state the amendment's chief purpose in clear and unambiguous language.[26] While the ballot title and summary must state in clear and unambiguous language the chief purpose of the measure, the Court has said that every detail or ramification of the proposed amendment need not be explained.[27] However, the Court has also said that a ballot title and summary must "provide fair notice of the content of the proposed amendment so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot."[28]

When assessing a ballot title and summary, the reviewing courts ask two questions: 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."[29] This evaluation also includes consideration of the amendment's "true meaning, and ramifications."[30] According to the Court, "lawmakers who are asked to consider constitutional changes, and the people who are asked to approve them, must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that it is neither less nor more extensive than it appears to be."[31] "A ballot title and summary cannot either 'fly under false colors' or 'hide the ball' as to the amendment's true effect,"[32] nor may the summary contain political rhetoric or editorial comment that invites an emotional response from the voter by materially misstating the substance of the amendment.[33]

In addition, the courts have said that:

- The accuracy requirement for ballot summaries is rooted in the Florida Constitution itself and does not depend on legislation.[34]

---

[21] Id at 14.
[22] Id at 21 (emphasis omitted).
[23] Fl. Dept. of State v. Fl. State Conference of NAACP Branches, 43 So.3d 662, 667 (Fla. 2010); Armstrong, 773 So.2d at 11.
[24] Id.
[25] Id. at 700 (Fla. 2010), citing Advisory Op. to Att'y Gen. re Referenda Required for Adoption & Amend. of Local Gov't Comprehensive Land Use Plans, 902 So.2d 763, 770 (Fla. 2005).
[26] Id.
[27] Id.
[28] Id.; Advisory Op. to the Att'y Gen. re Right of Citizens to Choose Health Care Providers, 705 So.2d 563, 566 (Fla. 1998) (quoting Advisory Op. to Att'y Gen.– Fee on Everglades Sugar Prod., 681 So. 2d 1124, 1127 (Fla. 1996)).
[29] Fl. Education Assoc. v. State at 701., citing State v. Slough, 992 So.2d 142, 147 (Fla. 2008) (quoting Advisory Op. to Att'y Gen. re Prohibiting State Spending for Experimentation that Involves the Destruction of a Live Human Embryo, 959 So. 2d 210, 213-14 (Fla. 2007)).
[30] Armstrong, 773 So.2d at 16, quoting Askew, 421 So. 2d at 156.
[31] Smathers v. Smith, 338 So. 2d 825, 829 (Fla. 1976); Fl. Education Assoc. v. State, 48 So.3d 694, 700 (Fla. 2010).
[32] Armstrong, 773 So.2d at 16.
[33] Advisory Op. to the Att'y Gen. re Additional Homestead Tax Exemption, 880 So. 2d 646, 653 (Fla. 2004); Evans v. Firestone, 457 So. 2d 1351, 1355 (Fla. 1984).
[34] Sancho v Smith, 830 So.2d 856, 861 (1st DCA 2002).

- Because voters will not have the actual text of the amendment before them in the voting booth when they enter their votes, the accuracy requirement is of paramount importance for the ballot title and summary.[35]
- When a defect goes to the very heart of the amendment, it is impossible to say with any certainty what the vote of the electorate would have been "if the voting public had been given the whole truth" instead of a part-truth.[36]
- A proposed amendment must be removed from the ballot when the title and summary do not accurately describe the scope of the text of the amendment, because it has failed in its purpose.[37]
- An unnecessary statement that is false or misleading might render a ballot summary invalid.[38]
- A proposed amendment "must stand on its own merits and not be disguised as something else."[39]
- The burden of informing the public should not fall only on the press and opponents of the measure - the ballot title and summary must do this.[40]
- Where a proposed constitutional revision results in the loss or restriction of an independent fundamental state right, the loss must be made known to each participating voter at the time of the general election. This is especially true if the ballot language gives the appearance of creating new rights or protections, when the actual effect is to reduce or eliminate rights or protections already in existence.[41]
- The court must look not to subjective criteria espoused by the amendment's sponsor but to objective criteria inherent in the amendment itself, such as the amendment's main effect.[42]
- The ballot summary should tell the voter the legal effect of the amendment.[43]
- Ballot summaries are misleading if they contain factual inaccuracies.[44]
- A ballot title and summary cannot "hide the ball" from the voter by giving "no hint of the radical change in state constitutional law that the text actually foments."[45]
- The ballot title and summary may not be read in isolation, but must be read together in determining whether the ballot information properly informs the voters."[46]

In a 2008 decision finding the ballot title and summary of a proposal by the Taxation and Budget Reform Commission misleading, the Court made the following observations:

> In recent years, advantageous but misleading "wordsmithing" has been employed in the crafting of ballot titles and summaries. Sponsors attempt to use phrases and wording techniques in an attempt to persuade voters to vote in favor of the proposal. When such wording selections render a ballot title and summary deceptive or misleading to voters, the law requires that such proposal be removed from the ballot - regardless of the substantive merit of the proposed changes. Indeed, the use or omission of words and phrases by sponsors, which become misleading, in an attempt to enhance the chance of passage, may actually cause the demise of proposed changes that might otherwise be of substantive merit. If a sponsor - whether it be a citizen-initiative group, commission, or otherwise-wishes to guard a proposed amendment from such a fate, it need only draft a ballot title and summary that is straightforward, direct, accurate and does not fail to disclose significant effects of the amendment merely because they may not be perceived by some voters as advantageous. The voters of Florida deserve nothing less than clarity when faced with the decision of whether to amend our state constitution, for it is the foundational document that embodies the fundamental principles through which organized government functions.[47]

---

[35] Armstrong, 773 So.2d at 13.
[36] Armstrong , 773 So.2d at 21.
[37] Roberts v Doyle, 43 So.3d 654, 659 (Fla. 2010).
[38] Sancho, 830 So.2d at 863.
[39] Askew, 421 So. 2d at 156.
[40] Id.
[41] Armstrong, 773 So.2d at 17.
[42] Armstrong, 773 So.2d at 18.
[43] Armstrong, 773 So.2d, citing Evans v. Firestone, 457 So.2d 1351, 1355 (Fla.1984).
[44] Armstrong, 773 So.2d at 21.
[45] Armstrong, 773 So.2d at 21.
[46] Advisory Opinion to the Attorney Gen. re Fla.'s Amendment to Reduce Class Size, 816 So.2d 580, 585 (Fla.2002).
[47] Slough, 992 So.2d at 149.

Justices of the Court have authored several dissents in decisions where the Court removed proposed legislative amendments from the ballot due to defective ballot titles or summaries. Of particular note is Chief Justice Wells' dissent in the 2000 Armstrong case.[48] In his dissent, Chief Justice Wells strongly disagreed with the Court's fundamental ruling, stating that in order for the court to exercise the extraordinary power of striking a legislatively proposed amendment from the ballot,

> the majority writes into article XI, section 5, an 'accuracy requirement' and then holds that the judicially-created requirement provides a basis for this Court to review legislatively-proposed amendments to the Constitution. Language to support this is simply nonexistent in the express language of article XI, section 5. Next, relying upon the created language, the majority finds that this judicially-grafted requirement is breached by coming to the subjective conclusion that the ballot summary (also unmentioned in article XI, section 5) does not meet this requirement.

Chief Justice Wells explained that there is not "any language in article XI, section 5, that gives the Court the power to make subjective judgments as to whether language appearing on a ballot is 'misleading' for the purposes of assuring accuracy," and that the majority opinion "appears to concede there is no express constitutional basis for this by saying that this is 'implicit in this provision.'" He also asserted that "it is illogical and contradictory for the Court to conclude that a legislatively proposed amendment fails because it violates a statute. Obviously, a legislatively proposed amendment would supersede a prior legislative enactment with which it did not comply." He further argued that "it is contrary to the separation of powers requirements of article II, section 3, for the Court to strike a provision from the Constitution because the Court concluded that the Legislature's presentation of the amendment to the voters was 'misleading.'"

Chief Justice Wells concluded that, if the Legislature misled the voters, the remedy is at the ballot box - not in the Court. "There is simply no constitutional authority for a judicial veto of a legislatively proposed amendment, just as there is no gubernatorial veto. I believe it is crucial to always keep in mind that the very first sentence of article 1, section 1, of the Florida Constitution is, 'All political power is inherent in the people.' I do not find in article V, which is the article of the Constitution which provides to the Court its power, any basis to conclude that the people have given to the Court the power to intercede between the people and their elected representatives when the Legislature proposes amending the Constitution by the constitutionally required supermajority."

In 2010, Chief Justice Canady and Justice Polston dissented in the three decisions of the Court that removed legislatively proposed amendments from the ballot; however, the dissents did not explicitly question the existence or propriety of the implicit constitutional accuracy requirement imposed by majority of the current court or by the Armstrong and subsequent courts. Rather, the Justices argued that the ballot summaries for two proposals, and the full text of one proposal, adequately informed the voters of the substance of the proposed amendments.[49]

B. SECTION DIRECTORY:

Section 1 amends s. 101.161, F.S., transferring and revising requirements applicable to ballot language for amendments or revisions proposed by joint resolution and establishing deadlines for filing legal challenges to those joint resolutions.

Section 2 provides applicability of the bill to joint resolutions passed during the 2011 regular session.

Section 3 provides an effective date of upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

[48] Armstrong, 773 So.2d at 26-27.

[49] Roberts v Doyle, 43 So.3d 654, 661 (Fla. 2010); State v Mangat, 43 So.3d 642, 653 (Fla. 2010); Fl. Dept. of State v. Fl. State Conference of NAACP Branches, 43 So.3d 662, 670 (Fla. 2010).

1. Revenues: None.

2. Expenditures: Section 5(d), Art. XI of the State 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 10th week and again in the 6th week immediately preceding the week the election is held. The Division of Elections within the Department of State estimated that the average cost to advertise an amendment to the State Constitution is $106.14 per word for this fiscal year.

If the Legislature provides multiple ballot summaries in future joint resolutions, the Department of State will incur additional expenditures due to the cost of publishing those multiple ballot summaries in newspapers throughout the state as required by the State Constitution.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: None.

2. Expenditures: The bill may result in an indeterminate negative fiscal impact on local supervisors of elections who bear the cost of printing ballots, and whose costs may increase if ballots are lengthier due to placement of the full text of amendments on the ballot.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None.

D. FISCAL COMMENTS: None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: The county/municipality mandates provision of Art. VII, section 18, of the Florida Constitution may apply because this bill may result in additional expenditures by the supervisors of elections; however, laws adopted to require funding of election laws are exempt from the requirements of the mandates provision.

2. Other: None.

B. RULE-MAKING AUTHORITY: None.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

N/A