

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HJR 1093 w/CS Basic Rights
SPONSOR(S): Green
TIED BILLS: None **IDEN./SIM. BILLS:** SJR 240

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Judiciary</u>	<u>18 Y, 0 N w/CS</u>	<u>Jaroslav</u>	<u>Havlicak</u>
2) <u>The Future of Florida's Families</u>	<u>16 Y, 0 N w/CS</u>	<u>Meyer</u>	<u>Liem</u>
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

The Florida Constitution currently provides that no person may be deprived of any right on the basis of physical disability. This joint resolution affords the same equal protection against discrimination on the basis of mental disabilities as is currently afforded to persons with physical disabilities, and allows for the term "mental disability" as defined by general law. There is no definition of mental disability in general law.

Were there to be a large number of cases brought testing the legality of a state or local government abrogating a basic right of a citizen based his or her mental disability, the joint resolution could require the expenditure of new money to defend against those cases.

If the House Joint Resolution is passed by the Legislature, the proposed constitutional amendment must be submitted to the electors at the next general election held more than 90 days after the joint resolution is filed with the custodian of state records. If approved by the electors, it becomes effective 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.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h1093c.fff.doc
DATE: April 22, 2003

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|--|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

This resolution expands rights protected by the state constitution, and consequently expands the power of the state to enforce such rights.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

Under the Florida Constitution’s Declaration of Rights, no person can be deprived of any right based on race, religion, national origin or physical disability.¹ Therefore, under the equal protection guarantees of this section, any law that abridges a fundamental right, such as the right to vote or free speech, or that adversely affects a suspect class such as persons with physical disabilities, is subject to strict scrutiny.²

The term “physical disability” was added to the Declaration of Rights in a 1998 ballot initiative.³ The existing phrase “physical disability” replaced the phrase “physical handicap.”⁴ The prohibition against discrimination based on “physical handicap” has been in the Florida Constitution since 1974. The change in phraseology to “physical disability” was recommended in part in recognition of established case law interpreting the Americans with Disabilities Act⁵ and in part in recognition of changing public

¹ Article I, s. 2, Fla. Const., provides:

All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability.

² See *Spencer v. State*, 545 So.2d 1352 (Fla. 1989); *Haber v. State*, 396 So.2d 707 (Fla. 1981). Otherwise, a challenge to a law is analyzed under a rational basis test, i.e., asking whether the law serves a legitimate governmental purpose and, if so, whether the Legislature could find that is rationally related to promoting that purpose. See *In re Advisory Opinion to the Governor*, 509 So.2d 292 (Fla. 1987); *Osterndorf v. Turner*, 426 So.2d 539 (Fla. 1983).

³ See Revision 9, 1997-98 Constitution Revision Commission. The constitutional amendment also added the phrase “female and male alike” to modify the term “natural persons,” for the purpose of securing the equality of women, and added the phrase “national origin” to the listing of protected classes.

⁴ The original proposal to the Constitution Revision Commission replaced the phrase “physical handicap” with the term “disability” but it was subsequently changed during redrafting.” See Constitution Revision Commission Meeting Proceedings, Transcripts (September 1997-March 1998).

⁵ See 42 U.S.C. §§ 12101 et seq. The Americans with Disabilities Act (“ADA”) gives civil rights protections to individuals with *disabilities* similar to those provided to individuals on the basis of race, color, sex, national origin, age, and religion. It guarantees equal opportunity for individuals with disabilities in public accommodations, employment, transportation, state and local government services, and telecommunications. An individual is considered to have a “disability” under ADA if he or she has a *physical or mental impairment* that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such impairment. Persons discriminated against because they have a known

perception and language usage when referring to persons with disabilities. Numerous federal statutes already prohibit discrimination against persons with a range of disabilities, including physical, hearing, speech, mental or developmental disabilities.⁶

The U.S. Department of Justice, Civil Rights Division: *Disability Rights Section* published the following guidance related to ADA and Governmental Activities:

ADA Title II: State and Local Government Activities

Title II covers all activities of State and local governments regardless of the government entity's size or receipt of Federal funding. Title II requires that State and local governments give people with disabilities an equal opportunity to benefit from all of their programs, services, and activities (e.g. public education, employment, transportation, recreation, health care, social services, courts, voting, and town meetings).

State and local governments are required to follow specific architectural standards in the new construction and alteration of their buildings. They also must relocate programs or otherwise provide access in inaccessible older buildings, and communicate effectively with people who have hearing, vision, or speech disabilities. Public entities are not required to take actions that would result in undue financial and administrative burdens. They are required to make reasonable modifications to policies, practices, and procedures where necessary to avoid discrimination, unless they can demonstrate that doing so would fundamentally alter the nature of the service, program, or activity being provided.

Complaints of title II violations may be filed with the Department of Justice within 180 days of the date of discrimination. In certain situations, cases may be referred to a mediation program sponsored by the department. The department may bring a lawsuit where it has investigated a matter and has been unable to resolve violations.

Amendment Process

This is a legislative joint resolution, which is one of the methods for proposing, approving or rejecting amendments to the Florida Constitution.⁷ The joint resolution requires passage by a three-fifths vote by each house of the Legislature. The proposed constitutional amendment must be submitted to the electors at the next general election held more than 90 days after the joint resolution is filed with the custodian of state records. If approved by the electors, it becomes effective on the first Tuesday after

association or relationship with an individual with a disability also are protected. An individual with epilepsy, paralysis, HIV infection, AIDS, a substantial hearing or visual impairment, mental retardation, or a specific learning disability is covered, but an individual with a minor, non-chronic condition of short duration, such as a sprain, broken limb, or the flu, generally would not be covered. The second part of the definition protecting individuals with a record of a disability would cover, for example, a person who has recovered from cancer or mental illness.

⁶ See *id.* See also "Air Carrier Access Act of 1986," 49 U.S.C. § 41705; "Architectural Barriers Act of 1968," 42 U.S.C. §§ 4151 et seq.; "Civil Rights of Institutionalized Persons Act," 42 U.S.C. §§ 1997 et seq.; "Fair Housing Amendments Act of 1988," 42 U.S.C. §§ 3601 et seq.; "Individuals with Disabilities Education Act," 20 U.S.C. §§ 1400 et seq.; "National Voter Registration Act of 1993," 42 U.S.C. §§ 1973gg et seq.; Sections 501, 503 and 504 of the "Rehabilitation Act of 1973," as amended, 29 U.S.C. §§ 791, 793 and 794.

⁷ See Art. XI, Fla. Const. (providing for amendment by legislative joint resolution, constitution revision commission proposal, citizen initiative, and constitutional budget or tax commission proposal).

the first Monday in January following the election, or on such other date as may be specified in the amendment.

Proposed Change

This joint resolution amends section 2 of Article I of the Florida Constitution to expand the protected class of persons with disabilities from only those persons with physical disabilities to those with mental disabilities, as the terms “physical disability” and “mental disability” may be defined by general law.

C. SECTION DIRECTORY:

N/A

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Application of strict scrutiny in the context of newfound discrimination claims based on mental disability would increase the government’s burden in proving a justification for the discrimination. Consequently, this joint resolution may impose an indeterminate negative fiscal impact on the state courts system and other governmental entities.

The Department of State’s Division of Elections estimates that the average cost to advertise the proposed constitutional amendment twice in a newspaper of general circulation in each county prior to the 2004 general election will be \$35,000.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

This joint resolution could generate litigation with respect to local ordinances or action in the same manner as state law; see above regarding impact on state government.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

While this joint resolution does not impose direct costs on the private sector, it may have a considerable indirect negative impact by increasing litigation based on non-physical disabilities.

Future of Florida’s Families Committee

The resolution as amended says, “physical or mental” and that “mental” is to be determined by general law. It is not clear that this would include “emotional and other non-physical disabilities” as the previous staff analysis considered in its evaluation of the fiscal impact on state government.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

By its own terms, the constitutional qualified prohibition against imposing legislative mandates to expend funds on local governments applies only to “general law,” not to resolutions proposing amendments to the Florida Constitution.⁸ However, even if the prohibition did apply, this joint resolution does not appear to require counties or municipalities to take an action requiring the expenditure of funds, does not appear to reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not appear to reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Future of Florida’s Families Committee

As the Judiciary committee pointed out in its analysis, if enacted, this joint resolution will expand the state constitution’s protection to disabled persons to include those who suffer from a mental as well as a physical disability. As to the practical effect that this will have, however, it is unclear. The federal American with Disabilities Act already provides broad legal protection for people who are *mentally or physically* disabled. It is difficult to imagine what right the Legislature would seek to abrogate based on mental disability which would then have to withstand strict judicial scrutiny.

Since this joint resolution expands the class of protected persons with disabilities to include those with mental disability, if it is adopted, discrimination claims based on non-physical disabilities would become subject to strict scrutiny review under state law (both by the state courts and by federal courts hearing state-law claims).

The equal protection provisions of the state and federal constitutions⁹ are designed to prevent any person or class of persons from being singled out as a target for arbitrary and unjust discrimination.¹⁰ These provisions do not require that all persons be treated identically but rather that the law apply equally to all persons who are similarly situated.¹¹ In most cases, a governmental classification must merely be rationally related to a legitimate state purpose, i.e., reasonable classifications other than those involving suspect classes of persons or fundamental rights are generally permissible, so long as the classifications are not arbitrary and are based on some difference in the classes having a substantial relation to the purpose of the legislation.¹²

⁸ See Art. VIII, s. 18, Fla. Const.

⁹ Amend. XIV, U.S. Const.; Art. I, s. 2, Fla. Const.

¹⁰ See *Washington v. Davis*, 426 U.S. 229 (1976); *Haber v. State*, 396 So.2d 707 (Fla. 1981).

¹¹ See *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quoting *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (“all persons similarly circumstanced shall be treated alike”)); *Duncan v. Moore*, 754 So.2d 708 (Fla. 2000).

¹² See, e.g., *Vacco v. Quill*, 521 U.S. 793 (1997); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Williams v. Pryor*, 229 F.3d 1331 (11th Cir. 2000); *State v. Muller*, 693 So.2d 976 (Fla. 1997); *Libertarian Party of Florida v. Smith*, 687 So.2d 1292 (Fla. 1996); *Lite v. State*, 617 So.2d 1058 (Fla. 1993).

However, if a classification does affect a fundamental right or suspect class, then courts apply a strict scrutiny standard.¹³ In order for a classification to be found permissible under this standard, it must be shown that the classification serves a compelling state interest and is narrowly tailored toward furthering that interest.¹⁴ Although it is possible to withstand strict scrutiny, it is extremely rare.¹⁵

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Future of Florida's Families Committee

One of the amendments adopted in the Judiciary committee seems to provide that the Constitutional protection of persons with a mental disability is contingent upon the definition of "mental disability" in the general laws of Florida. At this time, the general laws of Florida do not define "mental disability." The federal government defines it in the ADA and in relationship to Social Security disability benefits. The general laws do not define *race*, another protected class, nor does the Constitution requires its definition in the general laws.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

The Future of Florida's Families Committee adopted one amendment that provides that the terms physical and mental disability may be defined by general law.

On April 2, 2003, the House Committee on Judiciary adopted one amendment to this joint resolution. This amendment narrows the joint resolution's scope from any disability to "physical or mental disability" and provides that the term mental disability may be defined by general law. .

¹³ See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) and authorities cited therein; *Shriner's Hospital for Crippled Children v. Zrillic*, 563 So.2d 64 (Fla. 1990); *Spencer v. State*, 545 So.2d 1352 (Fla. 1989).

¹⁴ See *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274 (1986) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980) ("narrowly tailored") and *Palmore v. Sidoti*, 466 U.S. 429, 432(1984) ("compelling governmental interest")).

¹⁵ See, e.g., *Maine v. Taylor*, 477 U.S. 131 (1986) (allowing a state ban on importation of live baitfish to survive strict scrutiny under the Commerce Clause); *Buckley v. Valeo*, 424 U.S. 1 (1976) (allowing some campaign finance restrictions to survive strict scrutiny under the First Amendment but striking down others).