

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HJR 1013

Guaranteeing the Right to Vote by Secret Ballot

SPONSOR(S): Hasner and others

TIED BILLS:

IDEN./SIM. BILLS: SJR 1908

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Governmental Affairs Policy Committee	8 Y, 4 N	McDonald	Williamson
2)	Policy Council	16 Y, 7 N, As CS	Phillips	Hogge
3)	Rules & Calendar Council	13 Y, 8 N	Hassell	Birtman
4)				
5)				

SUMMARY ANALYSIS

CS/HJR 1013 proposes an amendment to Article I of the Florida Constitution, declaring the right to vote by secret ballot a fundamental right. The amendment provides that the right of individuals to vote by secret ballot is guaranteed "where local, state, or federal law requires elections by the people for public office, requires public votes by the people on initiatives or referenda, or requires designations or authorizations of employee representation."

Article VI of the Florida Constitution addresses voting and elections. Section 1 provides that "all elections by the people shall be by direct and secret vote." The Florida Election Code defines the term "elections" and includes all of those referenced in HJR 1013, but does not include those related to designations or authorizations of employee representation.

The portion of the proposed constitutional amendment extending the right to vote by secret ballot where "local, state, or federal law requires designations or authorizations of employee representation" appears to be in direct response to the "Employee Free Choice Act," currently pending before the 111<sup>th</sup> Congress. The Employee Free Choice Act would amend the National Labor Relations Act (NLRA) by requiring the designation of an employee representative based on the submission of signed cards ("card check") from a majority of employees without having an election by secret ballot. Under current law, the employer could refuse to recognize the union as the employee representative in this circumstance and require an election by secret ballot.

The joint resolution must be approved by a three-fifths vote of the membership of each house of the Legislature. If enacted by such vote, the proposal will be presented to the electors of Florida at the November 2, 2010 general election. Approval requires a favorable vote from 60 percent or more of the electors voting on the measure.

Based upon the costs involved in the 2008 election for advertising a proposed constitutional amendment, the total cost for advertising this proposed constitutional amendment is estimated to be \$5,976.63. The cost is determined by multiplying the total number of words in the proposed amendment by the average per word cost of \$92.01.

If approved by Florida voters, the amendment would take effect January 4, 2011.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives:

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

CS/HJR 1013 proposes an amendment<sup>1</sup> to Article I of the Florida Constitution, declaring the right to vote by secret ballot a fundamental right. The amendment provides that the right of individuals to vote by secret ballot is guaranteed where local, state, or federal law:

- 1) requires elections by the people for public office; requires public votes on initiatives or referenda; or
- 2) requires designations or authorizations of employee representation.

**1) THE RIGHT OF INDIVIDUALS TO VOTE BY SECRET BALLOT WOULD BE GUARANTEED WHERE LOCAL, STATE, OR FEDERAL LAW REQUIRES ELECTIONS BY THE PEOPLE FOR PUBLIC OFFICE AND PUBLIC VOTES BY THE PEOPLE ON INITIATIVES OR REFERENDA.**

#### Present Situation:

##### Relevant Provisions of the Florida Constitution

Article I of the Florida Constitution, the Declaration of Rights, sets forth certain fundamental rights that are guaranteed to all persons.<sup>2</sup> Among these rights are such basic rights as the right to enjoy and defend life and liberty, pursue happiness, be rewarded for industry, and acquire, possess and protect property, the right of religious freedom, freedom of speech and press, the right to peaceably assemble, and the right to bear arms.<sup>3</sup> Article 1 also includes the right of persons to work without regard to

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<sup>1</sup> Article XI of the Florida Constitution sets forth various methods for proposing amendments to the constitution, along with the methods for approval or rejection of proposals. One method by which constitutional amendments maybe proposed is by joint resolution agreed to by three-fifths of the membership of each house of the Legislature. Any such proposal must be submitted to the electors, either at the next general election held more than 90 days after the joint resolution is filed with the Secretary of State, or, if pursuant to law enacted by the affirmative vote of three-fourths of the membership of each house of the Legislature and limited to a single amendment or revision, at an earlier special election held more than 90 days after such filing. If the proposed amendment is approved by a vote of a least 60 percent of the electors voting on the measure, it becomes effective as an amendment to the Florida Constitution on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment.

<sup>2</sup> Under the Florida Constitution, several rights are viewed as fundamental and worthy of protection under strict scrutiny analysis. The state must demonstrate that a regulation which infringes upon such rights advances a compelling state interest.

<sup>3</sup> Art. I, §2, 3, 4, 5, and 8, Fla. Const.

membership or non-membership in a labor union or labor organization, and the right of employees, by and through a labor organization, to bargain collectively.<sup>4</sup>

Article VI of the Florida Constitution sets forth provisions related to suffrage and elections. Section 1, relating to the regulation of elections, provides that "all elections by the people shall be by direct and secret vote."<sup>5</sup> This provision was adopted by the electorate in 1968. Until the revision in 1968, Article VI, Section 6 of the 1885 Constitution referred to "elections by the people," and required that "the vote shall be by ballot." The deletion of the term "ballot" was to avoid confusion when the word is applied to modern methods of voting.<sup>6</sup> The constitutional requirement for a "direct and secret vote" was added in 1968.<sup>7</sup> The guaranty of secrecy in exercising the right to vote is one personal to the voter; but the voter has the right to insist that knowledge of his decision at the polls remain his own. Since it is a personal privilege, the voter may waive the right.<sup>8</sup>

### Florida Elections Code

The Florida Election Code specifically defines "elections" to include an election called for the purpose of voting on a party nominee to fill a national, state, county or district office, or to fill such office, or voting on a constitutional amendment.<sup>9</sup> Under the Florida Election Code, the term "election" also includes any election held for the purpose of voting for a municipal office or municipal public measure.<sup>10</sup>

The Florida Election Code also imposes a secrecy requirement, requiring that all elections held on any subject that is submitted to a vote, and for all or any state, county, district, or municipal officers are "by secret, official ballot as provided by the code."<sup>11</sup> Additionally, no electronic or electromechanical voting system can be approved by the Department of State unless it is constructed so that, among other things, it "permits and requires voting in secrecy."<sup>12</sup>

Protections are provided for voters throughout the Florida Election Code. Some examples are: the prohibition against voter intimidation or suppression in the "Voter Protection Act"<sup>13</sup>; the prohibition against employers from trying to control votes of employees in elections governed by the code; and, in the special registration requirements for persons with special needs which prohibits the person's employer, the agent of the person's employer, or an officer or agent of the person's union from being a person who can be designated to give assistance in voting.<sup>14</sup>

### **Effect of Proposed Changes**

The joint resolution proposes the establishment of the fundamental right to vote by secret ballot where local, state, or federal law requires elections by the people for public office, requires public votes by the people on initiatives or referenda, or requires designations or authorizations of employee representation. The right to vote by secret ballot, therefore, would be accorded the same or similar level of scrutiny and protection from legislative and regulatory limitations or restrictions as other fundamental rights.

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<sup>4</sup> Art. I, §6, Fla. Const.

<sup>5</sup> It also states general elections shall be determined by a plurality of votes cast and provides that registration and elections shall, and political party functions may, be regulated by law. The remaining sections provide qualifications for electors; oath to be subscribed to by person registering; disqualifications for voting or holding office; primary, general, and special elections; municipal and district elections; and campaign spending limits and funding of campaigns for elective state-wide office.

<sup>6</sup> See Fla. Stat. Ann. pp. 333-334 (Supp. 1995).

<sup>7</sup> Ibid.

<sup>8</sup> *McDonald v. Miller*, 90 So.2d 124 (1956).

<sup>9</sup> See s. 97.021, F.S.

<sup>10</sup> See s. 100.3605, F.S.

<sup>11</sup> See s. 101.041, F.S.

<sup>12</sup> See s. 101.5606, F.S.

<sup>13</sup> See s. 104.0615, F.S.

<sup>14</sup> See s. 97.061(3), F.S.

**2) THE RIGHT OF INDIVIDUALS TO VOTE BY SECRET BALLOT WOULD BE GUARANTEED WHEN LOCAL, STATE, OR FEDERAL LAW REQUIRES DESIGNATIONS OR AUTHORIZATIONS OF EMPLOYEE REPRESENTATION.**

**Present Situation:**

Federal Law

The National Labor Relations Act (NLRA) states:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.<sup>15</sup>

The NLRA applies exclusively to private workplaces. Under the NLRA, private sector employees can achieve union representation either through an election process or through majority sign-up, commonly known as “card check.” When more than 30% of employees sign cards requesting employee representation, the employer may choose to recognize the union or require the NLRB to oversee an election. Once the union has majority support, an employer may choose to recognize the union without an election or require an election. The NLRB will designate a union as the representative of employees if the union is selected by a secret ballot. The NLRA establishes a procedure by which employees can exercise their choice at a secret ballot election conducted by the National Labor Relations Board.<sup>16</sup>

Currently, two competing proposals involving designation of employee representatives under the NLRA are pending before Congress. One is known as the Secret Ballot Protection Act.<sup>17</sup> This Act would amend the NLRA to require a secret ballot vote in order to have an employee representative designated; that is, to preclude the designation of an employee representative solely on the basis of a card check.<sup>18</sup>

The other proposal is known as “Employee Free Choice Act.”<sup>19</sup> It would amend the NLRA by requiring the designation of an employee representative based on the submission of signed cards (“card check”) from a majority of employees without having an election by secret ballot. Under current law, the

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<sup>15</sup> NLRA; 29 U.S.C. sec. 151.

<sup>16</sup> The NLRA is principally administered and enforced by the NLRB and the General Counsel acting through 52 regional and other field offices located in major cities in various parts of the country. The General Counsel and staff of the regional offices investigate and prosecute unfair labor practice cases and conduct elections to determine employee representatives. See <http://www.nlr.gov/shared-files/brochures/BasicGuide.html>; Last visited March 12, 2009.

<sup>17</sup> H.R. 1176 (Secret Ballot Protection Act) by Congressman John Kline and S. 478 (Secret Ballot Protection Act of 2009) by Senator Jim DeMint. H.R. 1176 was introduced and referred to the House Committee on Education and Labor on February 25, 2009. <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR1176:;> Last visited March 24, 2009; S. 478 was read a second time and placed on Senate Legislative Calendar under General Orders. Calendar No. 24 on February 26, 2009. <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN00478:;> Last visited March 24, 2009.

<sup>18</sup> The language of HJR 1013 is similar to that being proposed by SOS Ballot, Inc., for inclusion in revisions to state constitutions in other states.

<sup>19</sup> H.R. 1409 by Congressman George Miller and S. 560 by Senator Edward Kennedy. H.R. 1409 was introduced and referred to the House Committee on Education and Labor on March 10, 2009. <http://thomas.loc.gov/cgi-bin/bdquery/D?d111:1:./temp/~bdOifs:|/bss/111search.html>; Last visited March 24, 2009.; S. 560 was introduced and referred to Senate committee on March 10, 2009. S. 560 has been read twice and was referred to the Committee on Health, Education, Labor, and Pensions. <http://thomas.loc.gov/cgi-bin/bdquery/D?d111:2:./temp/~bdOifs:|/bss/111search.html>; Last visited March 24, 2009.

employer could refuse to recognize the union as the employee representative in this circumstance and require an election by secret ballot.

## State Law

There are three specific provisions in chapter 447, F.S., that reference the use of a secret ballot. The first is found in Part I of the chapter relating to union activity. Under s. 447.09(4), F.S., it is unlawful to conduct a vote to participate in a strike, walkout, or cease or continue work unless the election is a secret ballot election.

The other two references, which relate only to public employees, are found in Part II of chapter 447, F.S.:

- Under s. 447.307, F.S., relating to the certification of an employee organization for public employees, the Public Employees Relations Commission (PERC or commission) shall require an election by secret ballot of an employee organization to represent employees, if an employer has denied recognition of such organization.
- Under s. 447.308, F.S., relating to revocation of certification of an employee organization, the commission shall, after certain findings, order an election by secret ballot to continue the certification or decertify the employee organization as the exclusive bargaining agent of the employees.

The Public Employees Relations Commission (PERC) is responsible for issues relating to collective bargaining issues related to public employees.<sup>20</sup> There are approximately 400,000 public employees in bargaining units throughout the state. PERC holds hearings and resolves disputes about the composition of bargaining units and alleged unfair labor practices. PERC has an Election Division that conducts elections for public employees throughout the state.<sup>21</sup>

Currently, state law relating to public employees (Ch. 447, Part II) mirrors the NLRA relating to the right of public employees to organize and to bargain collectively with their employers. State law for public employees includes the same 30% requirement in federal law for triggering an election option; that is, if 30% or more of the public employees sign cards favoring a particular union, an election may be held. However, employee representatives typically seek signatures from more than a majority of employees before filing for designation as the collective bargaining agent. Once the union has majority support, an employer may choose to recognize the union without an election or require an election.

## **Effect of Proposed Changes**

### Private Workplaces

CS/HJR 1013 extends the right of individuals to vote by secret ballot to situations requiring "designations or authorizations of employee representation".<sup>22</sup> As a result, employees would have the right to a secret ballot election in order to select their union for purposes of collective bargaining. Designation could not occur solely on the basis of a card check. This portion of the proposed

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<sup>20</sup> "Public employees" mean employees of the state, counties, school boards, municipalities, and special taxing districts. This includes all fire, police, corrections, school teachers and support personnel, medical personnel, state troopers, toll collectors, sanitation employees, and clerical, etc. See <http://perc.myflorida.com/>; last visited March 12, 2009.

<sup>21</sup> The elections are held for a wide range of units including Police, Fire, School or University, Sheriff, Medical, and all other City and County units. Elections are conducted when a Representation Certification Petition or a Petition to Revoke Certification is filed. Petitions have to be accompanied by at least a 30 percent showing of interest of the proposed unit. All elections are conducted by secret ballot and by a designated agent of the Commission. The Election Division conducts an average of 65 elections a year with some elections being held for very small units and some for statewide units. Elections have been held for as small as two people in a unit to as many as 30,000.

<sup>22</sup> "Secret Ballot" is defined in Black's Law Dictionary, Seventh Edition, as "a vote cast in way that the person voting cannot be identified." "Vote" is defined in Black's as the "expression of one's preference or opinion by ballot, show of hands, or other type of communication."

constitutional amendment extending the right to vote by secret ballot when “local, state, or federal law requires designations or authorizations of employee representation” appears to be in direct response to the “Employee Free Choice Act.”

### Public Workplaces

This proposal would likely require public employers to proceed to an election in circumstances where they might otherwise choose to recognize the union based on signed cards.

#### B. SECTION DIRECTORY:

None.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

None.

##### 2. Expenditures:

Each constitutional amendment must be published in a newspaper of general circulation in each county, once in the sixth week and once in the tenth week preceding the general election.<sup>23</sup> Costs for advertising vary depending upon the length of the amendment. Based upon the costs involved in the 2008 election for advertising a proposed constitutional amendment, the total cost for advertising this proposed amendment is estimated at \$5,796.63. The cost is determined by multiplying the total number of words in the proposed amendment by the average per word cost of \$92.01.<sup>24</sup>

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

None.

##### 2. Expenditures:

There is an indeterminate fiscal impact on local governments for possible costs related to the printing of the ballot. There could be a cost if additional pages were needed to print the language that appears on the ballot.

#### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate. It is not known what, if any, additional cost or cost savings the requirement for a secret ballot as a fundamental right will have on employers, employees, or the employee bargaining unit.

#### D. FISCAL COMMENTS:

None.

## III. COMMENTS

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<sup>23</sup> Art. XI, §5(d), Fla. Const.

<sup>24</sup> The estimated cost is based on information and methodology received from staff of the Department of State. Based on the language in HJR 1013, the total number of words in the proposed amendment is 63.

## A. CONSTITUTIONAL ISSUES:

### 1. Applicability of Municipality/County Mandates Provision:

The mandates provisions of Article VII, section 18 of the Florida Constitution do not apply to House Joint Resolutions.

### 2. Other:

#### Supremacy Clause

CS/HJR 1013 provides an opportunity for voters to approve an amendment to Florida's Constitution that attempts to counter pending federal legislation that, if passed<sup>25</sup>, would dispense with the requirement of a secret ballot election to designate an employee representative. This situation implicates the Supremacy Clause of the federal constitution. The Supremacy Clause, Article VI, paragraph 2 states:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the contrary notwithstanding.<sup>26</sup>

Where a state law directly conflicts with a federal law or where Congress intends that the federal law completely "occupy the field," state law will be preempted to the extent it frustrates the federal scheme.<sup>27</sup> There are competing legal arguments concerning the outcome of a constitutional challenge based on the Supremacy Clause.

One argument is that the proposed constitutional amendment would conflict with some of the National Labor Relations Act's provisions regarding the formation of a union and, to that extent, would be preempted by federal law.<sup>28</sup> The federal law does not currently require a secret ballot if the employer agrees to recognize the union organized under the sign-up signature drive, or "card check," process. A conflict between the proposed constitutional amendment and the federal act may be heightened by passage of the proposed federal revision to the act, because it would require employers to recognize workers who organize via the majority sign-up process, while Florida law would necessitate a secret ballot.

Another argument is that the federal act would not preempt the proposed constitutional amendment to the extent that the constitutional amendment protects an important state interest. Under this argument, the state requirement for a secret ballot would not frustrate the federal scheme because the federal scheme, as amended under the proposed federal legislation, would not prohibit secret ballots. Further, under this analysis, the state interest in promoting voter rights and voter anonymity may be balanced against the interests protected under federal labor law.<sup>29</sup>

## B. RULE-MAKING AUTHORITY:

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<sup>25</sup> See *supra* notes 18 and 20.

<sup>26</sup> Art. VI, paragraph 2, Constitution of the United States.

<sup>27</sup> See generally, *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959).

<sup>28</sup> See, The American Federation of Labor and Congress of Industrial Organizations (AFLCIO), in a letter to Florida Legislators dated March 10, 2009 states that HJR 1013, "would rewrite federal labor law – the national Labor Relations Act ("NLRA") – which courts have consistently held states are legally preempted from doing."

<sup>29</sup> See Clint Bolick, *Assessing Legal Prospects For Protecting The Right To Secret Ballot In State Constitutions*. Mr. Bolick is the director of the Goldwater Institute's Scharf-Norton Center for Congressional Studies.

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The differences in the use of the terms "secret ballot" in the proposed amendment and "direct and secret vote" in Article VI, Section 1 of the Florida Constitution might create some confusion in how to interpret the two provisions and in determining what impact, if any, the differences might have on the current Election Code.

Procedural Requirements

In order for the Legislature to submit CS/HJR 1013 to the voters for approval, the joint resolution must be agreed to by three-fifths of the membership of each house.<sup>30</sup> If CS/HJR 1013 is agreed to by the Legislature, it will be submitted to the voters at the next general election held more than 90 days after the amendment is filed with the Department of State.<sup>31</sup> As such, CS/HJR 1013 would be submitted to the voters at the 2010 General Election. In order for CS/HJR 1013 to take effect, it must be approved by at least 60 percent of the voters voting on the measure.<sup>32</sup>

**IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

CS/HJR 1013, favorably reported by the Policy Council on March 18, 2009, differs from the originally filed version by providing that the "elections" to which this resolution applies are elections "by the people."

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<sup>30</sup> Art. XI, §1, Fla. Const.

<sup>31</sup> Art. XI, § 5(a), Fla. Const.

<sup>32</sup> Art. XI, §5(e), Fla. Const.