The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	CS/SB 1318
INTRODUCER:	Judiciary Committee and Senator Peaden
SUBJECT:	Circuit Court/Jurisdiction
DATE:	April 8, 2009 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Daniell	Maclure	JU	**Fav/CS**
2.			EE	
3.			JA	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

This bill grants the circuit courts of Florida jurisdiction to hear actions for declaratory relief to determine whether provisions of the Florida Constitution are unconstitutional under the United States Constitution. If the court finds a provision unconstitutional, the court shall enter an order directing the Secretary of State to remove the provision. If the court finds, based on clear and convincing evidence, that there was voter confusion when adopting the unconstitutional provision, the court shall order that any other provision that was adopted along with the unconstitutional provision also be removed from the state constitution. Additionally, the court may enter an order directing the Secretary of State to remove any redundant provisions or provisions previously deemed unconstitutional from the constitution under certain circumstances. The bill provides party and venue requirements, as well as for appellate review.

This bill creates section 86.112, Florida Statutes.

II. Present Situation:

Declaratory Judgments

A declaratory judgment is a "binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement."[1] In 1934, Congress enacted the Declaratory Judgment Act in order to provide legal remedies to parties who were confronted with uncertain legal and business issues, but who had no cause of action prior to the act.[2] The federal Declaratory Judgment Act provides, in part:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.[3]

The purposes of declaratory judgment acts have been broadly described as:

- Promoting preventive justice;
- Serving the peace and good order of the community by settling rights to prevent litigation;
- Guiding parties in their future conduct to avoid litigation;
- Simplifying a procedural remedy for civil disputes; and
- Making the courts more serviceable to the people.[4]

Following shortly after the federal act, Florida enacted its own Declaratory Judgment Act, codified in ch. 86, F.S.[5] Section 86.011, F.S., provides that the circuit and county courts have jurisdiction to hear declaratory actions and to declare rights, status, and other equitable or legal relations. Declaratory judgments have been helpful in "settling controversies without the time and expense of traditional litigation."[6] The general rule for determining whether a declaratory action is appropriate is as follows:

> Before any proceeding for declaratory relief should be entertained *it should be clearly made to appear that there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts;* that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and

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[1] BLACK'S LAW DICTIONARY (8th ed. 2004).
[2] Michael Weinstein, *The Fate of Federal Court's "Reasonable Apprehension" Standard in Patent Suits for Declaratory Judgment Following Medimmune, Inc. v. Genentech, Inc., 127 S.Ct. 764 (2007)*, 76 U. CIN. L. REV. 681, 684 (2008).
[3] *Id*.; *see* 28 U.S.C. s. 2201.
[4] 26 C.J.S. *Declaratory Judgments* s. 8.
[5] *See* ch. 21820, Laws of Fla. (1943).
[6] Seann M. Frazier, *The Expanded Availability of Declaratory Statements in Administrative Law*, 74 Fla. B.J. 90, 90 (April 2000).

> adverse interest[s] are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity. These elements are necessary in order to maintain the status of the proceeding as being judicial in nature and therefore within the constitutional powers of the courts.[7]

In other words, although a plaintiff does not have to allege actual injury, he or she must make some showing of a real threat of immediate injury, rather than a general, speculative fear of harm that may or may not occur.[8] For example, in *State v. Fla. Consumer Action Network*, 830 So. 2d 148 (Fla. 1st DCA 2002), the plaintiffs failed to allege a justiciable controversy in a declaratory action against the state regarding the constitutionality of a statute because the plaintiffs failed to identify how the statute would directly affect or harm them, and the only doubt expressed was whether they had to obey the statute because, in their opinion, the legislation was unconstitutional.

A court will not issue a declaratory judgment that is in essence an advisory opinion; thus, "the court will refuse to render a judgment where no defendants are named and no process is issued, where the parties have not yet taken adverse positions, where the plaintiff is merely trying to satisfy his or her own curiosity, or where persons having a potential adverse interest have not in fact asserted their rights."[9]

Declaratory judgments are often used to resolve the constitutionality of a statute or ordinance or to determine matters relating to public officers or officials.[10] However, a declaratory judgment action is not appropriate where an administrative remedy is available.[11] When a plaintiff challenges the constitutionality of a rule of law, the proper defendant is the state official designated to enforce that rule, even if the state official has not made an attempt to enforce the rule.[12] Additionally, if a statute, charter, ordinance, or franchise is alleged to be unconstitutional, the Attorney General or the state attorney must be served with a copy of the complaint and be given the opportunity to be heard.[13]

Declaring a Constitutional Provision Invalid

In 1972, members of the Florida Legislature filed suit requesting a summary decree declaring article X, section 1 of the Florida Constitution unconstitutional.[14] The challenged section provided:

> **Section 1. Amendments to United States Constitution.**—The legislature shall not take action on any proposed amendment to the constitution of the United

[7] *State v. Fla. Consumer Action Network*, 830 So. 2d 148, 151 (Fla. 1st DCA 2002) (quoting *May v. Holley*, 59 So. 2d 636, 639 (Fla. 1952)) (emphasis in original).
[8] 19 FLA. JUR. 2D *Declaratory Judgments* s. 7.
[9] 19 FLA. JUR. 2D *Declaratory Judgments* s. 13 (internal citations omitted).
[10] 19 FLA. JUR. 2D *Declaratory Judgments* ss. 24-25.
[11] 19 FLA. JUR. 2D *Declaratory Judgments* s. 26.
[12] 19 FLA. JUR. 2D *Declaratory Judgments* s. 48.
[13] Section 86.091, F.S. The purpose of this statute is to provide the state notice that a plaintiff is challenging a form of legislation and to provide the state an opportunity to be heard.
[14] *Trombetta v. State of Florida*, 353 F.Supp. 575 (M.D. Fla. 1973).

> States unless a majority of the members thereof have been elected after the proposed amendment has been submitted for ratification.[15]

During its analysis, the court reviewed two U.S. Supreme Court cases. In *Hawke v. Smith*, 253 U.S. 221 (1920), the plaintiff sought to enjoin the Ohio Secretary of State from preparing a ballot allowing the citizens to vote on the Eighteenth Amendment (relating to prohibition of intoxicating liquors) based on a provision in the Ohio Constitution that required a referendum on any action of the legislature ratifying a proposed amendment to the U.S. Constitution. The Court held the provision in the Ohio Constitution unconstitutional. Two years later in *Leser v. Garnett*, 258 U.S. 130 (1922), the validity of the ratification of the Nineteenth Amendment (relating to women's right to vote) was attacked. The Court held:

> The second contention is that in the Constitutions of several of the 36 states named in the proclamation of the Secretary of State there are provisions which render inoperative the alleged ratifications by their Legislatures. The argument is that by reason of these specific provisions the Legislatures were without power to ratify. But the function of a state Legislature in ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal Constitution; and it transcends any limitations sought to be imposed by the people of a state.[16]

The Florida court felt bound by these two previous decisions and held article X, section 1 of the Florida Constitution unconstitutional.[17]

In 1992, the voters of Arkansas adopted an amendment to the state constitution proposed as a "Term Limitation Amendment," which essentially limited the terms of elected officials. Shortly after the amendment was adopted, Bobbie Hill (plaintiff) filed a lawsuit against the Governor and other state officers (defendants) in an Arkansas circuit court requesting a declaratory judgment that the amendment was unconstitutional. The circuit court found that the amendment was unconstitutional, and the Arkansas Supreme Court affirmed that decision. The State of Arkansas, by its Attorney General, appealed to the United States Supreme Court. In *U.S. Term Limits v. Thornton*, 515 U.S. 799 (1995), the United States Supreme Court held that the Arkansas amendment did violate the U.S. Constitution and held that states may not impose additional qualifications for federal office beyond those set by Article I of the U.S. Constitution.

Four years after *U.S. Term Limits* was decided, a case was brought in Florida for declaratory relief requesting the circuit court to strike article VI, section 4(b) of the Florida Constitution, which limits the number of consecutive terms of office for state and federal legislators, the Lieutenant Governor, and members of the Florida cabinet.[18] The plaintiffs argued that the entire amendment had to be removed from the constitution because the portion dealing with federal

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[15] FLA. CONST. art. X, s. 1. This provision was inspired by the Tennessee Constitution. In 1870, the Tennessee Legislature drafted a new state constitution, including article 2, section 32, which provided, in part: "No Convention or General Assembly of this State shall act upon any amendment of the Constitution of the United States proposed by Congress to the several States; unless such Convention or General Assembly shall have been elected after such amendment is submitted."
[16] *Leser*, 258 U.S. at 136-37.
[17] *Trombetta*, 353 F.Supp. at 578.
[18] *Ray v. Mortham*, 742 So. 2d 1276, 1280 (Fla. 1999).

term limits, which had been ruled unconstitutional in *U.S. Term Limits*, could not be severed from the remainder of the amendment. The circuit court granted summary judgment in favor of the Department of State (defendant), and the plaintiffs' appealed. In a case of first impression, the Florida Supreme Court was asked to determine whether the doctrine of severability applies to constitutional provisions. For its analysis, the Court adopted the general test for severability that is applied to legislative enactments:

> When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.[19]

The Court found that severing the unconstitutional provisions of the amendment relating to federal term limits was not fatal to the amendment, and held that "Florida's term limits amendment is viable and complete, even when the invalid portions are stricken."[20] Furthermore, the Court held:

> [W]e are also mindful that the initiative power of fully informed citizens to amend the Constitution must be respected as an important aspect of the democratic process. Therefore, just as we view the severability of laws with deference to the legislative prerogative to enact the law, we conclude that we must afford no less deference to constitutional amendments initiated by our citizens and uphold the amendment if, after striking the invalid provisions, the purpose of the amendment can still be accomplished.[21]

To date, although the provisions providing for federal term limits have been ruled unconstitutional, they are still found in article VI, section 4 of the Florida Constitution. Currently, if provisions of the constitution are found unconstitutional, they remain in the constitution, but are rendered invalid.

III. Effect of Proposed Changes:

This bill creates s. 86.112, F.S., granting a Florida circuit court jurisdiction to entertain actions for declaratory relief to determine whether provisions of the Florida Constitution are unconstitutional under the United States Constitution.

The bill specifies that the proper defendant in such an action is the Secretary of State and that the action must be brought in Leon County.

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[19] *Id*. at 1281 (quoting *Smith v. Dep't of Insurance*, 507 So. 2d 1080, 1089 (Fla. 1987)).
[20] *Id*. at 1284.
[21] *Id*. at 1281.

The bill provides that if a provision in the constitution is found to be unconstitutional, the circuit court shall enter an order directing the Secretary of State to remove the provision from the state constitution.[22] If the court concludes, based on clear and convincing evidence, that there was voter confusion when adopting the unconstitutional provision, the bill provides that the court may not apply principles of severability, but instead shall enter an order removing any other provision that was adopted along with the unconstitutional provision.

The bill also provides the circuit court jurisdiction to remove any redundant material or provisions previously deemed unconstitutional from the state constitution, if such a request is raised as part of the original request for declaratory relief.

The bill provides that any party adversely affected by the circuit court's order may appeal pursuant to Florida Rule of Appellate Procedure 9.110.

The bill shall take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Additionally, the bill provides that the court shall not apply principles of severability, but rather that the Secretary of State shall remove any other constitutional provisions that were adopted along with the invalid provision if the court finds there was voter confusion in adopting the invalid provision. In *Ray v. Mortham*, the Florida Supreme Court recognized that the initiative power of citizens should be respected and that the courts should uphold the remaining provisions of an amendment if the purpose of the amendment can still be accomplished after striking the invalid provisions.[23] Specifically, the Court held "that a severability analysis applies to constitutional amendments."[24] Because the Florida Supreme Court has already ruled on the issue of severability regarding constitutional provisions, the bill may face scrutiny by the courts.

[22] Section 97.012, F.S., establishes the Secretary of State as the chief election officer of the state. Additionally, s. 15.02, F.S., provides that the Secretary of the State shall have custody "of the laws of the state and books, papers, journals, and documents of the Legislature."
[23] *Ray*, 742 So. 2d at 1281.
[24] *Id*. at 1286.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

According to the Office of the State Courts Administrator, the bill applies to a narrow spectrum of cases and, therefore, is anticipated to have a minimal impact on the judicial or court workload.[25]

Under the bill, if a circuit court finds a provision of the state constitution unconstitutional or redundant, it will order the Secretary of State to remove the unconstitutional or redundant provision. There may be an increase in workload on the Department of State depending on the number of cases brought to the circuit court and how many provisions the court finds unconstitutional or redundant.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Under the bill, the circuit court shall enter an order directing the Secretary of State to remove unconstitutional or redundant provisions of the Florida Constitution. It is unclear whether a circuit court may direct the Secretary of State to remove the provisions, as well as whether the Secretary of State is the proper person to remove the provisions. Section 15.02, F.S., provides that the Secretary of State shall have custody "of the laws of the state," which could be interpreted to mean more than legislative documents since the statute also specifically provides that the Secretary of the State also has the custody of "books, papers, journals, and documents of the Legislature." This statute could be the basis for requiring the Secretary of State to remove the unconstitutional or redundant provisions of the Florida Constitution as provided for in the bill. It has also been established that the Florida Supreme Court may order the Secretary of State to remove provisions from a ballot. In *Fla. Dep't of State v. Slough*, 992 So. 2d 142, 149 (Fla. 2008), the Florida Supreme Court found that the ballot title and summary for proposed Amendment 5 were misleading and directed the Secretary of State to remove the amendment from the November 2008 general election ballot. However, Senate professional staff was unable to find a case on point for whether a circuit court may direct the Secretary of State to remove constitutional provisions.

[25] Office of the State Courts Administrator, *Judicial Impact Statement, SB 1318* (Feb. 13, 2009) (on file with the Senate Committee on Judiciary).

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on April 6, 2009:
The committee substitute:

- Specifies that the Secretary of State is the proper defendant;
- Provides a venue requirement;
- Establishes a clear and convincing evidence standard for determining whether there was voter confusion as grounds for removing provisions adopted with the unconstitutional provision;
- Provides the circuit court jurisdiction to remove from the state constitution redundant material or provisions of the constitution previously deemed unconstitutional, if raised as part of the original request for declaratory relief; and
- Provides for appellate review.

B. Amendments:

None.