The Constitution Revision Commission

COMMITTEE MEETING EXPANDED AGENDA

DECLARATION OF RIGHTS
Commissioner Carlton, Chair
Commissioner Stemberger, Vice Chair

MEETING DATE: Thursday, January 25, 2018
TIME: 8:00 a.m.—5:00 p.m.
PLACE: *Cabinet Meeting Room - Lower Level,* The Capitol, Tallahassee, Florida

MEMBERS: Commissioner Carlton, Chair; Commissioner Stemberger, Vice Chair; Commissioners Donalds, Gainey, Johnson, Joyner, and Lester

TAB	PROPOSAL NO. and INTRODUCER	PROPOSAL DESCRIPTION and COMMITTEE ACTIONS	COMMITTEE ACTION
1	**P 18** Donalds	DECLARATION OF RIGHTS, creates new section; a new section in Article I of the State Constitution to establish the inalienable right of all persons to pursue an honest trade, vocation, occupation, or career. DR 01/25/2018 Unfavorable LE	Unfavorable Yeas 1 Nays 6
2	Presentations on Representation for Dependent Children		Presented
3	**P 40** Keiser	DECLARATION OF RIGHTS, creates new section; a new section in Article I of the State Constitution to establish a right to counsel for children in dependency proceedings. DR 01/25/2018 Unfavorable JU	Unfavorable Yeas 2 Nays 5
4	**P 73** Coxe	DECLARATION OF RIGHTS, Prosecution for crime; offenses committed by children; Section 15 of Article I of the State Constitution to require circuit court review before a state attorney may pursue prosecution of a child as an adult in criminal court. DR 01/19/2018 Temporarily Postponed DR 01/25/2018 Temporarily Postponed EX	Temporarily Postponed
5	**P 22** Stemberger	DECLARATION OF RIGHTS, Right of privacy; Section 23 of Article I of the State Constitution to specify that a person has the right of privacy from governmental intrusion into the person's private life with respect to the privacy of information and the disclosure thereof. DR 01/25/2018 Favorable JU	Favorable Yeas 4 Nays 3

TAB	PROPOSAL NO. and INTRODUCER	PROPOSAL DESCRIPTION and COMMITTEE ACTIONS	COMMITTEE ACTION
6	**P 75** Martinez	DECLARATION OF RIGHTS, Prosecution for crime; offenses committed by children; restrictive confinement of children; Section 15 of Article I of the State Constitution to establish restrictions regarding the restrictive confinement of a child. DR 01/25/2018 Unfavorable EX	Unfavorable Yeas 2 Nays 5
7	Presentations on Disability Rights		Presented
8	**P 15** Gamez	DECLARATION OF RIGHTS, Basic rights; Section 2 of Article I of the State Constitution to remove a provision authorizing laws that regulate or prohibit the ownership, inheritance, disposition, and possession of real property by aliens ineligible for citizenship and to provide that a person may not be deprived of any right because of a cognitive disability. DR 11/29/2017 Temporarily Postponed DR 01/25/2018 Temporarily Postponed ED	Temporarily Postponed
9	**P 30** Martinez	DECLARATION OF RIGHTS, Basic rights; Section 2 of Article I of the State Constitution to provide that a person may not be deprived of any right because of any disability. DR 11/29/2017 Temporarily Postponed DR 01/25/2018 Favorable ED	Favorable Yeas 6 Nays 1
10	**P 36** Martinez	DECLARATION OF RIGHTS, Excessive punishments; Section 17 of Article I of the State Constitution to delete provisions authorizing the death penalty as a punishment for capital crimes designated by the Legislature and to provide for prospective application. DR 01/25/2018 Temporarily Postponed JU	Temporarily Postponed

Constitution Revision Commission
Declaration Of Rights Committee
Proposal Analysis

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

Proposal #: P 18

Relating to: DECLARATION OF RIGHTS, creates new section

Introducer(s): Commissioner Donalds

Article/Section affected: Article I, new section.

Date: January 24, 2018

	REFERENCE	ACTION
1.	DR	**Pre-meeting**
2.	LE	

I. SUMMARY:

The Florida Supreme Court has held that the right to work, earn a living, and acquire and possess property from the fruits of one's labor is an alienable right. However, the right to pursue a business, occupation, or profession is subject to the paramount right of the government, through the police power, to impose reasonable restrictions as may be required for the protection of the public. Pursuant to these constitutional principles, occupational regulations are reviewed by the courts for constitutionality using a "rational basis" test. The rational basis test requires only that the challenged law be rationally related to a legitimate government interest. Such regulations, referred to as "economic regulations" as well, may include:

- Occupational Regulations/Licensing;
- Zoning for certain business activities; and
- Disclosure requirements.

The proposal requires that the government demonstrate, through actual evidence, that the government's infringement of the inalienable right to pursue an honest trade, vocation, occupation, or career is necessary to advance an important governmental interest and that less restrictive alternatives have been sincerely considered. Thus, the proposal requires that occupational regulations passed by the Legislature and local governments be subject to a higher level of judicial scrutiny than is required under current law.

If approved by the Constitution Revision Commission, the proposal will be placed on the ballot at the November 6, 2018, General Election. Sixty percent voter approval is required for adoption. If approved by the voters, the proposal will take effect on January 8, 2019.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Through the exercise of its "police power" state and local government have broad powers to regulate businesses, trades, vocations, occupations, and careers to protect the public from harm and further public health, safety, and morals. Such regulations are commonly referred to as "economic regulations." These regulations may take the form of laws and ordinances relating to, but not limited to:

- Occupational licensing;
- Occupational regulation;
- Zoning for certain business activities; and
- Disclosure requirements concerning the business or occupation.

As an illustrative example, the following state agencies or entities regulate and license the indicated businesses, trades, vocations, occupations and careers:

- **Department of Business and Professional Regulation**: Cosmetologists, Certified Public Accountants, Geologists, Realtors, Veterinary Medicine, etc.
- **Department of Health**: Physicians, Nurses, Dentists, Dieticians, Pharmacists, Paramedics, etc.
- **Agency for Health Care Administration**: Hospitals, Nursing Homes, etc.
- **Department of Children and Families**: Child Care Facilities.
- **Supreme Court of Florida**: Attorneys and Paralegals.

Although the United States Constitution and the Florida Constitution recognize the right to pursue a lawful occupation or business, the right is not regarded as a "fundamental right" and is subject to reasonable regulation by the state and local government.

Police Power of the Government

The Tenth Amendment to the United States Constitution provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Thus, states have all powers that are not limited by the Federal Constitution or by the constitution of that state. One of the powers reserved to states is the "police power."

The "police power" of a state is said to be derived from its sovereign right to protect its citizens, and it was born with, and is a necessary concomitant of, civilized government.[1] Traditionally, a state's police power has been defined as the authority to provide for the public health, safety, and morals. Consequently, the state has the police power to enact laws reasonably construed as expedient for protections of the health, safety, general welfare, morals, lives, peace, order, quiet, prosperity, convenience and best interests of the public.[2] The police power embraces all manner of wholesome and reasonable laws not repugnant to the Constitution, either with or without

[1] 10A Fla. Jur 2d Constitutional Law § 191.
[2] 10A Fla. Jur. 2d Constitutional Law § 194.

penalties, as will be judged for the good of the public.[3] The police power is restricted only by the applicable provisions of the federal and state Constitutions designed to protect private rights from arbitrary and oppressive governmental action.[4]

Constitutional Standards for Regulation of Occupations

The Florida Supreme Court has held that the right to earn a livelihood by engaging in a lawful occupation or business is constitutionally protected, but it is also subject to the police power of the state to enact laws which advance the public health, safety moral or general welfare.[5] In reviewing claims that the right to pursue a lawful occupation or business has been infringed, the Court explained that the proper standard by which to evaluate the Legislature's exercise of the police power in [this area] is whether the means utilized bear a rational relationship to a legitimate state objective.[6] In determining whether the legislative act bears a rational relationship to a legitimate state objective, the Court explained:

> The legislature is vested with wide discretion to determine the public interest and the measures necessary for its achievement. The fact that the legislature may not have chosen the best possible means to eradicate the evils perceived is of no consequence to the courts provided that the means selected are not wholly unrelated to achievement of the legislative purpose. A more rigorous inquiry would amount to a determination of the wisdom of the legislation, and would usurp the legislative prerogative to establish policy.[7]

The Florida Supreme Court has expressly acknowledged that although the right to pursue a occupation or business is "a constitutional right, it is not the species of fundamental right which invokes the strict scrutiny standard."[8]

B. EFFECT OF PROPOSED CHANGES:

The proposal requires that the government demonstrate, through actual evidence, that the government's infringement of the inalienable right to pursue an honest trade, vocation, occupation, or career is necessary to advance an important governmental interest and that less restrictive alternatives have been sincerely considered. Thus, the proposal requires that occupational regulations (licensing, zoning, etc.) passed by the Legislature and local governments be subject to a higher level of judicial scrutiny than is required under current law.

If approved by the voters, the proposal will take effect on January 8, 2019.[9]

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[3] *Id.*
[4] *Id.*
[5] *Fraternal Order of Police, Metropolitan Dade County, Lodge No. 6 v. Department of State*, 392 So. 2d 1296, 1301 (Fla. 1980)
[6] *Id*. at 1302.
[7] *Id*. at 1303.
[8] *Id.*
[9] *See* Article XI, Sec. 5(e) of the Florida Constitution ("Unless otherwise specifically provided for elsewhere in this constitution, if the proposed amendment or revision is approved by vote of at least sixty percent of the electors voting on the measure, it shall be effective as an amendment to or revision of the constitution of the state 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.)

C. FISCAL IMPACT:

The fiscal impact is indeterminate.

III. Additional Information:

A. Statement of Changes:
(Summarizing differences between the current version and the prior version of the proposal.)

None.

B. Amendments:

None.

C. Technical Deficiencies:

None.

D. Related Issues:

None.

By Commissioner Donalds

donaldse-00040-17 201718__

A proposal to create a new section in Article I of the State Constitution to establish the inalienable right of all persons to pursue an honest trade, vocation, occupation, or career.

Be It Proposed by the Constitution Revision Commission of Florida:

A new section is added to Article I of the State Constitution to read:

ARTICLE I

DECLARATION OF RIGHTS

Right to earn an honest living.—All persons possess the inalienable right to pursue an honest trade, vocation, occupation, or career. The government may not infringe on this right unless it can demonstrate that there is actual evidence that such infringement is necessary to advance an important governmental interest and that less restrictive alternatives have been sincerely considered.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

Hillsborough County Florida
SM
COUNTY ATTORNEY
Chip Fletcher
PO Box 1110 Tampa, FL 33601-1110
(813) 272-5670 | Fax: (813) 272-5231

TO: Chip Fletcher, County Attorney

FROM: Robert E. Brazel, Chief Assistant County Attorney

DATE: January 23, 2018

RE: P 18: The Right to Earn an Honest Living

Proposed by Ari Bargil, an attorney for the Institute for Justice, PUB 700661 before the Constitutional Revision Commission, and it became P 18, which provides as follows:

> All persons possess the inalienable right to pursue an honest trade, vocation, occupation, or career. The government may not infringe on this right unless it can demonstrate that there is actual evidence that such infringement is necessary to advance an important governmental interest and that less restrictive alternatives have been sincerely considered.

This seemingly innocuous language contains within it the potential to bring state and local regulation of a variety of industries in Florida to a halt. First, this proposal raises the standard of review for industry regulations from rational basis to at least intermediate scrutiny, which is the standard of review applicable to classifications deemed quasi-suspect like those based on sexual orientation and gender. See Danskine v. Miami Dade Fire Dept., 253 F.3d 1288 (11th Cir. 2001). For decades, the law of Florida has been to review economic regulations over virtually every industry using the rational basis standard. This simply means that the government must show any rational basis for the regulation to meet the stated goal or goals of the government in order for the regulation to be upheld. Under this standard, great deference is provided to the government and the courts respect the separation of powers between the legislative and judicial branches. Under rational basis review, the court does not substitute its judgment for that of the legislative body.

The language contained in P 18 which requires "actual evidence that such infringement is necessary to advance an important governmental interest and that less restrictive alternatives have been sincerely considered" is the language of intermediate scrutiny, a standard never applied by Florida courts to economic regulations. Intermediate scrutiny is only applied to regulations that restrict, for example, sexual orientation or gender. Elevating business enterprises to the level of fundamental rights would greatly restrict the ability for any industry to be regulated because the industry itself could simply advance a "less restrictive alternative" or challenge the importance of the stated governmental interest and likely have the regulation struck down.

Second, the language in the proposal is so vague that it could be used to strike down local regulations in virtually all regulated industries, including tow truck drivers, taxis, ambulances, locksmiths, child care facilities, and many others. Zoning requirements for alcohol sales and vacation rentals would also be at risk. At the state level, this proposal would threaten most professional regulations, such as engineering and health care professionals.

The proposal requires "actual evidence" that a regulation is necessary, but does not define what would constitute "actual evidence". The proposal also requires a showing by the government that less restrictive alternatives have been "sincerely considered", but fails to define how the government would demonstrate "sincere consideration."

P 18 gives the appearance of protection to the typical Florida worker. In reality, it is a wolf in sheep's clothing because it strips Florida consumers of many protections from unscrupulous businesses by taking the unprecedented step of elevating economic regulations to the standard of judicial review previously reserved for quasi-suspect classifications.

REB/nj

P 18 Will Dramatically Change
Consumer Protection, Business Regulation and Professional Standards

Proposed Constitutional amendment P 18 provides as follows:

> All persons possess the inalienable right to pursue an honest trade, vocation, occupation, or career. The government may not infringe on this right unless it can demonstrate that there is actual evidence such infringement ***is necessary to advance an important governmental interest*** and that ***less restrictive alternatives*** have been sincerely considered.

- P18 would effectively require "intermediate" scrutiny of laws restricting access to any "trade, vocation, occupation, or career."

- This is the same level of court scrutiny applied to laws allowing gender discrimination - i.e., allowing women to be treated differently than men under the law.

- This heightened scrutiny will **allow judges to substitute their judgement** for the decisions of the elected Florida Legislature and local elected officials.

- Laws regulating businesses and professions in Florida have historically only needed to pass rational basis review, meaning that the law is presumed constitutional and is upheld if there is a rational basis to support it.

- P 18 could jeopardize virtually any consumer protections, business regulations, or professional standards that create a barrier to opening a business or entering a profession. This would include diverse professions such as construction contractors, realtors, locksmiths, and geologists; and businesses such as puppy mills, tow truck operators, and child care facilities which are presently regulated by state or local laws.

- While the medical professions and other professions clearly tied to public health and safety would likely survive the heightened scrutiny required by P 18, how these and all other professions are regulated will be changed by the "less restrictive alternatives" provision.

- P 18 could allow people subject to legally required business regulations or professional standards to quash existing or proposed laws by suggesting an alternative means to accomplish the same goals, but that had not been considered as part of the enactment of the law, ordinance, or regulation.

- How P 18 will impact local zoning laws regulating where businesses can locate and requiring compatibility with residential and other business uses is unclear.

- The attached memorandum outlines the legal issues raised by P18 in more detail.

For more information contact Rob Brazel, Chief Assistant County Attorney, Litigation Division, Hillsborough County Attorney's Office, at 813-272-5670

TESTIMONY OF ARI BARGIL

Attorney, Institute for Justice

FLORIDA CONSTITUTIONAL REVISION COMMISSION

Declaration of Rights Committee

January 25, 2018

Good morning, and thank you for the opportunity to testify in support of CRC Proposal 18. My name is Ari Bargil, and I am an attorney with the Institute for Justice. IJ is the nation's leading law firm for liberty, successfully litigating cases in the courts of law and public opinion nationwide. IJ litigates in four core areas: Property Rights, Free Speech, Educational Choice, and Economic Liberty. It is that last pillar that brought us to support CRC Proposal 18 here today. The proposal is 52 words. It is simple and straightforward:

> ***All persons possess the inalienable right to pursue an honest trade, vocation, occupation or career. The government may not infringe on this right unless it can demonstrate that there is actual evidence that such infringement is necessary to advance an important governmental interest and that less restrictive alternatives have been sincerely considered.***

Executive Summary:

As an initial matter, I would like to briefly summarize the proposal, before breaking it down and discussing what it does and does not do.

Simply put, the right to earn an honest living is a civil right. Accordingly, CRC Proposal 18 is a very simple amendment that begins with a single sentence providing explicit recognition of this right. The proposal further establishes modest safeguards of that right, by requiring that the government take an evidence-based approach to regulation, as opposed to regulating speculatively or—as it unfortunately does all too often—preferentially. The proposal also requires the state to sincerely consider less restrictive alternatives before passing a law that impairs the right to earn an honest living. Together, these provisions ensure that individuals—who are often disproportionately from low-income or minority backgrounds—cannot be so overly regulated as to be barred from practicing a given trade or occupation. An additional (and equally important) benefit of this proposal is that limits the extent to which special interests can secure legislation that benefits their constituents on the backs of entrepreneurs, workers and consumers.

This proposal does not prevent or unreasonably burden the government in its ability to regulate trade and commerce, and it does not allow judges to substitute their wisdom for that of the legislature.

The Importance of Safeguarding Economic Liberty

There are a lot of articulations of what the right to earn an honest living actually means, but nobody said it better than Frederick Douglass:

> To understand the emotion which swelled in my heart as I clasped this money, realizing that I had no master who could take it from me—*that it was mine—that my hands were my own*, and could earn more of the precious coin—one must have been in some sense himself a slave . . . . I was not only a free man but a free-

> working man, and no Master Hugh stood ready at the end of the week to seize my earnings.[1]

This right—which empowers people to take active steps to improve their station in life—is an element of the right to "pursue happiness" and lies at the core of the uniquely American ideal of gritty self-determination. And it is what has been described, fittingly, as "the most precious liberty that man possesses."[2] It is perfectly appropriate to include a constitutional provision specifically recognizing and protecting such a right.

What CRC Proposal 18 Means:

The purpose of Proposal 18 is to provide acknowledgment of, and safeguards for, economic liberty in Florida. To that end, it creates a series of modest, but meaningful obligations on the part of the government that, once met, allow the government to regulate as it sees fit in a given space. It makes sense to unpack those obligations by taking the language of the proposal itself.

First, the provision requires the government to have ***actual evidence*** that a given regulation is necessary to advance an important government interest. This means that the government cannot regulate to prevent hypothetical harm or defend against rank hyperbole. For a real-world example of how such an obligation would operate, take interior design: At one point, an advocate for interior design licensure baldly asserted that 88,000 people could *die* if the state did not license interior design.[3] If this provision existed at the time Florida went ahead and passed its interior design licensing law, it would have been required to engage in some level of inquiry to determine if that claim was even remotely credible. (It is not.)

Relatedly, the legislature would be required to consider whether the measure proposed is ***necessary*** to advance an ***important government interest***. This means exactly what it sounds like it means. Take the first part of that clause—that a law must be necessary. We can all accept, for example, that regulating for the benefit of public health and safety is a legitimate government purpose. But is a law which censors people from discussing their diet and providing advice on what to buy at the grocery store *necessary* to accomplish that end? Surely not. And yet, as you'll hear from IJ client Heather Del Castillo momentarily, such a law not only exists in Florida,[4] but it is putting qualified people *out of business*.

Additionally, by requiring an important government interest, this clause prevents the government from passing laws that accomplish only *illegitimate* ends. And while it really is as simple as it sounds, it is perhaps the most consequential component of this proposal. That is

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[1] Timothy Sandefur, *The Right to Earn a Living: Economic Freedom and the Law* 3 (Cato Inst. 2010).

[2] *Id*. at 5.

[3] Janet Zink, *House committee votes to cut oversight of about 30 professions*, Tampa Bay Times (Mar. 15, 2011), http://www.tampabay.com/news/business/house-committee-votes-to-cut-oversight-of-about-30-professions/1157490 (last visited on Dec. 23, 2013).

[4] Fla. Stat. § 461.501-.518 (2017)

because, in practice, this clause will operate as a virtual prohibition on overtly protectionist regulations, and other forms of what has come to be known as "rent seeking." For a real-world example of how such an obligation would operate, take the Hillsborough County Public Transportation Commission's minimum fare rule: Not long ago, a special district in Hillsborough County, the area's Public Transportation Commission, passed a law prohibiting limousine drivers from charging any less than $50 per ride, no matter how short the ride was. The reason? The Commission, at the behest of a large cab company, decided that the rule would help discourage people from taking limos instead of cabs. In other words, the unabashed purpose of the law was to benefit one segment of the industry at the expense of another. The rule drew numerous lawsuits, including one from IJ, forced Uber out of town (taking countless jobs with it) and it was ultimately revealed that the organization was in fact criminally corrupt. If this amendment were in place, the law could not have survived as long as it did because naked protectionism likely does not qualify an "important government interest."

Finally, the legislature must sincerely consider less restrictive alternatives. While occupational licensing is always at the forefront of this discussion, it is not the only overly used regulatory tool. Accordingly, this proposal imposes the very reasonable requirement that government sincerely consider whether less restrictive alternatives could accomplish the task just as easily. Of course, this should seem like common sense, because the government should always be in the habit of doing this anyway. But it doesn't. As a result, this final clause of the provision converts a long-standing "best practice"—doing less if possible—into a basic requirement. It does not require acute precision; just an earnest attempt to regulate less onerously.

What CRC Proposal 18 Does *Not* Mean:

Some of the criticisms of this proposal are the same criticisms that have been levied against similar efforts, without any evidence of their truth, for over a hundred years. In fact, many of those claims were provided in a memo to this committee earlier this week. Perhaps most notable is the age-old accusation that this proposal, if passed, would allow unelected judges to unilaterally substitute their judgment for that of the legislature.

That is patently false. The proposal does not empower judges to reweigh or reevaluate the evidence considered by the legislature. Rather, it simply requires that the state or its actors *actually consider* evidence before burdening individuals' right to earn a living. Once the legislature reviews evidence and makes its findings, the provision has done its job, and courts are not at liberty to disturb those findings or substitute their own thereafter. The only reason that a requirement for an evidence-based inquiry is included at all is because, all too often, regulations are formulated and passed in response to speculative or hypothetical harms. And these supposed harms frequently lack any real-world support and not experienced in other jurisdictions lacking similar regulations.

This is not, as one critic described it, a "wolf in sheep's clothing." It will not make it impossible for the state to regulate day care centers, nursery schools, retirement homes, puppy stores, or any other business or profession that deserves to be regulated. Nor does it divest local governments and localities of their authority to regulate. It does not herald a sea change in

constitutional law and it does not threaten the fabric of our state's democracy. This is a sensible proposal that introduces accountability and reason into economic liberty regulation in Florida.

Conclusion

Almost nowhere else does the government have the power to regulate so heavy-handedly, preferentially, and without any check from either of the two other co-equal branches of government. There are some who seem to argue that this unchecked ability to squash people's right to provide for themselves is a good thing. It isn't.

In the end, if there is an actual public need to license the person who arranges furniture in your home, then such a licensing regime will not run afoul of this proposal. If there is an actual public need to overcharge limo passengers in Tampa, then a resultant law to protect consumers from low prices will be allowed to stand. And if talking about nutrition with another adult poses a threat to public health, then a law requiring an individual to obtain a government license to give health advice could theoretically survive. Of course, we all know that such regulations are preposterous and unfairly impair the right to earn a living, and if this proposal passes, such regulations will be a thing of the past. Thank you.

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

P 18
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Economic regulations

***Name** Robert Brazel

Address P.O. Box 1110
Street

Phone 813-272-5670

Email brazelr@hillsboroughcounty.org

Tampa FL 33601
City *State* *Zip*

***Speaking:** ☐ For ☐ Against ☑ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☑ Yes ☐ No

If yes, who? Hillsborough County Attorney's Office

Are you a registered lobbyist? ☐ Yes ☑ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

***Required**

Information submitted on this form is public record.

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

P 18
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** P 18

***Name** Brian Sullivan

Address 100 S. Monroe St.
Street

Phone 810-335-0150

Tallahassee FL 32301
City *State* *Zip*

Email bsulliven@flcounties.com

***Speaking**: ☐ For ☑ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☑ Yes ☐ No

If yes, who? Florida Association of Counties

Are you a registered lobbyist? ☑ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

P18
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Honest Trade Amendment

***Name** Scott D. McCoy

Address P.O. Box 10788 Phone 850-521-3042
Street

Tally FL 32302 Email scott.mccoy@splcenter.org
City *State* *Zip*

***Speaking:** ☐ For ☑ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☑ Yes ☐ No

If yes, who? Southern Poverty Law Center

Are you a registered lobbyist? ☑ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record. ***Required***

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

18
Proposal Number (if applicable)

***Topic** CRC Proposal 18

Amendment Barcode (if applicable)

***Name** Ari Bargil

Address 2016 Bay Dr. #501 Phone 954-270-8931
Street

Miami Beach FL 33141 Email
City *State* *Zip*

***Speaking:** [X] For [ ] Against [ ] Information Only

Waive Speaking: [ ] In Support [ ] Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? [X] Yes [ ] No

If yes, who? Institute for Justice

Are you a registered lobbyist? [ ] Yes [X] No

Are you an elected official or judge? [ ] Yes [X] No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record. ****Required***

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

[redacted] 1/24/2018
Meeting Date

P. 18
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Trade, Vocation, & Occupation

***Name** Edward G. LaSrador

Address 115 S. Andrews Avenue
Street

Phone 954-357-7575

Fort Lauderdale FL 33301
City *State* *Zip*

Email elasrador@broward.org

***Speaking**: ☐ For ☑ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☐ No

If yes, who? Broward County

Are you a registered lobbyist? ☑ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/2018
Meeting Date

18
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** "Right to make an honest living"

***Name** MARCUS DIXON

Address 2881 Corporate Way
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Miramar FL 33025
City *State* *Zip*

Phone (305) 720-1627

Email Marcus.Dixon@seiufl.org

***Speaking:** ☐ For ☒ Against ☐ Information Only

Waive Speaking: ☐ In Support ☒ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☑ Yes ☐ No

If yes, who? SEIU Florida

Are you a registered lobbyist? ☑ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record. ***Required***

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

18
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Honest Living

***Name** Jon Harris Maurer

Address 201 E Park Avenue, Ste. 200
Street

Tallahassee FL 32301
City *State* *Zip*

Phone

Email jon.harris@equalityflorida.org

***Speaking:** ☐ For ☒ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☒ Yes ☐ No

If yes, who? Equality Florida

Are you a registered lobbyist? ☒ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/17
Meeting Date

P18
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** _____

***Name** Rich Templin

Address 135 S. Monroe
Street
Tallahassee FL 32301
City *State* *Zip*

Phone 224-6926

Email _____

***Speaking:** ☐ For ☒ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☒ Yes ☐ No

If yes, who? Florida AFL-CIO

Are you a registered lobbyist? ☒ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

18
Proposal Number (if applicable)

***Topic** Honest Living

Amendment Barcode (if applicable)

***Name** David Cruz

Address P.O. Box 1757 Phone 701-3676
Street

Tallahassee FL 32302 Email DCRUZ@FLCITIES.com
City *State* *Zip*

***Speaking:** ☐ For ☑ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☑ Yes ☐ No

If yes, who? Florida League of Cities

Are you a registered lobbyist? ☑ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** _____

***Name** Heather Del Castillo

Address 23 Driftwood Ave (*Street*) Phone 8312330224

Fort Walton Beach (*City*) FL (*State*) 32548 (*Zip*) Email hkokesch@gmail.com

***Speaking:** ☒ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☒ No

If yes, who? _____

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1-25-18
Meeting Date

18
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Right to Earn a Living

***Name** JAN RUBINO

Address 726 INGLESIDE AVE.
Street

TALLAHASSEE FL 32303
City *State* *Zip*

Phone 850-224-9262

Email rubinojan@yahoo.com

***Speaking**: ☐ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☒ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☒ Yes ☐ No

If yes, who? FLORIDA LEAGUE OF WOMEN VOTERS

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

The Constitution Revision Commission

COMMITTEE VOTE RECORD

COMMITTEE: Declaration of Rights
ITEM: P 18
FINAL ACTION: Unfavorable
MEETING DATE: Thursday, January 25, 2018
TIME: 8:00 a.m.—5:00 p.m.
PLACE: The Capitol, Tallahassee, Florida

FINAL VOTE								
Yea	**Nay**	**COMMISSIONERS**	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**
X		Donalds						
	X	Gainey						
	X	Johnson						
	X	Joyner						
	X	Lester						
	X	Stemberger, VICE CHAIR						
	X	Carlton, CHAIR						
1	6	**TOTALS**						
Yea	**Nay**		**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**

CODES: FAV=Favorable
UNF=Unfavorable
-R=Reconsidered
RCS=Replaced by Committee Substitute
RE=Replaced by Engrossed Amendment
RS=Replaced by Substitute Amendment
TP=Temporarily Postponed
VA=Vote After Roll Call
VC=Vote Change After Roll Call
WD=Withdrawn
OO=Out of Order
AV=Abstain from Voting

CONSTITUTION REVISION COMMISSION
2017 - 2018

PRESENTATIONS ON REPRESENTATION FOR DEPENDENT CHILDREN

DECLARATION OF RIGHTS COMMITTEE

January 25, 2018
8 AM – 5 PM
Cabinet Meeting Room – The Capitol Building
Tallahassee, Florida

Opening Remarks
Commissioner Belinda Keiser
Commissioner Hank Coxe

Judge Daniel P. Dawson
Ninth Judicial Circuit Court of Florida

Robin L. Rosenberg, Esq.

Florida Statewide Guardian ad Litem Program
Alan F. Abramowitz
Executive Director

Attorney Representation Models
Howard Talenfeld, Esq., Florida's Children First
Gerry Glynn, Esq., Community Based Care of Central Florida
Tim Stevens, Esq., Foster Children's Project of Palm Beach Legal Aid
Judge James Martz, Fifteenth Judicial Circuit Court of Florida
Destin Vega, Former Foster Youth

DAYS	DEPENDENCY TIME LINE
0	Removal
24 hrs.	Shelter Hearing (can be continued up to 72 hrs for additional evidence (39.402(8)(d)(2))
72 hrs.	Additional Evidence Hearing; Review of Non-Juvenile Judge shelter hearing within 2 working days by a Juvenile Judge (39.402(12)); Visitation (39.402(9)) within 72 hrs.
21 days	File Dependency Petition (or 7 days after demand) (39.501(4))
28 days	File Financial Information for child support (39.402(11)(a)) Arraignment (or 7 days after petition) (39.506(1))
30 days	Review Shelter (39.402(16)) (but see 28 days)
58 days	Adjudicatory Hearing (30 days from Arraignment) (39.507(1)(a))
60 days	Have Case Plan prepared (39.6011(6)(b)(2)) but no later than disposition Adjudication of Dependency (39.402(13))
88-90 days	Disposition (39.507(8))
118-120 days	Case Plan Hearing if not approved at Disposition (39.521(1)(a))
Between 172 & 180 days	First Judicial Review (39.521(1)(a)) Or 90 days from Disposition 90 days from case plan if before Disposition 6 months from removal
12 months	Permanency Hearing, if permanency not reached (or 30 days after a court finding that reasonable efforts not required) (39.621(1)) Court may order Termination of Parental Rights (TPR) Petition after findings (39.701(9)(d))
1 yr 60 days	TPR Petition (39.8055(1)) Service of Process (copy of petition) 72 hrs before Advisory Hearing (Rule 8.510(a)(1)
1 yr 63 days	TPR Advisory Hearing
1 yr 81 days	TPR Trial if based on voluntary surrender (39.808(4))
1 yr 108 days	TPR Trial, 45 days from Advisory Hearing (39.809(2))
1 yr 138 days	Appeal must be filed within 30 days of TPR Order (Rules of App. Proc. 9.110(b))

Constitution Proposal Analysis

PROPOSAL: 0040

SPONSOR: Belinda Keiser

SUBJECT: Establishes a right to counsel for children in dependency proceedings.

REFERENCES: Declaration of Rights, Judicial

Prepared by: Robin L. Rosenberg

I. SUMMARY

Commissioner Keiser proposes to add a new section to Article I of the Florida Constitution that will provide children in Chapter 39 dependency proceedings with the right to counsel. The proposal states:

> Right to counsel for children in dependency proceedings.
>
> Every child who has been removed from the custody of his or her parents or a legal guardian by the state due to abuse or neglect, or is otherwise placed in the jurisdiction of the dependency court, has a right to counsel.

Currently these children have party status in the legal proceedings that address their fundamental constitutional interests. Section 39.01(52), Florida Statutes. Children are permitted to have counsel appear for them, but they are not guaranteed the right to court-appointed counsel. The other parties to the proceeding, including indigent parents, have state-funded counsel. Given the fundamental liberty interests at stake when children are removed from their home, this proposal, if enacted, will promote their due process rights by giving them counsel.

This proposal has a net positive fiscal impact. It will require approximately $20 million in additional expenditures to provide counsel to the 90% of children who are currently without counsel. The state will save approximately $39 million in reduced payments for licensed out-of-home care. Moreover, the state can anticipate additional long-term savings to the state in areas such as child welfare, social services, health care, education and criminal justice.

II. CURRENT SITUATION

Overview of Florida Dependency Law

Chapter 39 of Florida Statutes directs the care and protection of minor children who may be victims of abuse or neglect.[1] It requires the dependency court to decide several issues that affect a child's life. The dependency judge first determines whether there is sufficient evidence of abuse or neglect to remove children from their parents. The judge then may decide to adjudicate the children "dependent" on the state and approve a case plan with services designed to remedy the causes for removal so that children may be safely reunified within a 12-month statutory timeframe. However, the judge may also decide that grounds for termination of parental rights exist, that the children cannot be safely returned and that adoption is in the best interests of the children.

Florida's dependency courts have an ongoing responsibility to ensure that the myriad of Florida's laws protect children's safety, ensure their well-being and speed them to permanency. The role of the court has been described as "judicial oversight by a judge who is not merely an unbiased judicial fact finder, but instead actively oversees the proceedings. . . ." *J.B. v. DCF*, SC 14-1990 (Fla. July 9, 2015) pg. 31 concurring opinion of J. Pariente quoting brief of the Guardian ad Litem Program.

There are four parties to a dependency case: the state, the parents, the children and the guardian ad litem.

- The state is represented by Department of Children and Families – Children's Legal Services or contracted providers. Fla. Stat. 39.013(12). Before 1990, the state was often represented by social workers, but that was deemed the unlicensed practice of law. *The Florida Bar Re: Advisory Opinion, HRS Non-lawyer Counselor*, 14 F.L.W. 253 (Fla. May 25, 1989).

- Indigent parents have a Florida constitutional right to counsel when facing termination of parental rights. That right was solidified in the 1980 Florida Supreme Court opinion in *In re D.B. and D.S.* 385 So. 2d 83 (Fla. 1980). In 1998 the Florida Legislature expanded parents' right to counsel by providing indigent parents with the right to counsel in all dependency proceedings. Section 39.013, Florida Statutes. (Laws of Florida Ch. 98-403).

- The statutes are silent on whether a guardian ad litem is required to be represented by counsel. The Guardian ad Litem Program is funded to employ attorneys and its guardians ad litem most often appear in court with an attorney employed by the Guardian ad Litem Program. Guardians ad litem

[1] The term "abuse, abandonment, and neglect" is often used in the child welfare arena. However, as abandonment is a form of neglect, and the term "abuse and neglect" is the language in the proposal, the shorter term is used herein.

are statutorily charged with representing the child in dependency proceedings. Section 39.822, Florida Statutes. The term "guardian ad litem" is defined as a program, volunteer, attorney "or a responsible adult who is appointed by the court to represent the best interests of the child in a proceeding as provided by law. . . who is a party to any judicial proceeding as a representative of the child. Section 39.820, Florida Statutes.

- Before 2014, Florida law did not require the court to appoint counsel to dependent children. That changed with the passage of Section 39.01305 Florida Statutes, and now children with statutorily defined special needs are entitled to be appointed counsel. Sources other than the state also fund counsel for children. Approximately 10% of children in out-of-home care are represented by counsel. [2]

Florida's History on the Provision of Representation to Dependent Children

Florida's representation history must be viewed in context of federal law. The importance of representation to children in child welfare cases was recognized in 1974 when Congress enacted the Child Abuse Prevention and Treatment Act, CAPTA. Pub. L. No. 93-247, § 1, 88 Stat. 4, 4(1974). CAPTA required states to create a plan that, among other things, described how the state would provide each child with a guardian ad litem to represent the child in court. At the time of enactment, CAPTA did not discuss how that requirement could be met. The law was subsequently amended to clarify that it can be met through the use of a trained layperson or by a lawyer. Child Abuse Prevention Treatment Act 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000) (amended by Keeping Children and Families Safe Act of 2003).

Florida chose to fulfill the CAPTA mandate through the use of its Guardian ad Litem Program.

Florida's Guardian ad Litem Program

In 1979 Florida began pilot projects designating non-lawyer volunteers to advocate on behalf of abused and neglected children following the model of the national Court Appointed Special Advocate (CASA) program. Florida called its non-lawyer volunteers "guardians ad litem" rather than using the term "CASA." In 1980, the Legislature provided funding to the Office of State Court Administrator to develop a pilot project using volunteers as guardians ad litem.

That pilot was then developed into Florida's Guardian ad Litem Program, making Florida the first state in the nation to undertake a comprehensive statewide program of volunteer guardians ad litem. See, The Florida Guardian ad Litem Program, 25

[2] The analysis that arrives at the 10% figure and other data provided herein is stated in "Cost of Providing Counsel to Unrepresented Children in Florida," attached to this analysis.

years of Child Advocacy, pg. 6 (herein "GAL at 25 Report.")[3] The 1985 Program Manual for the Guardian ad Litem Program stated, "Guardians...are officers of the court, who receive powers from the order of appointment to represent the best interests of the child."[4] The Guardian ad Litem had 5 major roles: "(1) investigator on behalf of the child; (2) monitor of the agencies and persons who provide services to the child to ensure that court orders are carried out and that services are provided to the family; (3) protector of the child from the harmful effects of court proceedings; (4) spokesperson for the best interests of the child; and (5) reporter to the court presenting information and helping the court to determine the child's best interests.[5]

In 1985, the Florida Supreme Court issued Standards of Operation to administer the Program. Those standards placed the Guardian ad Litem Program under the administration of the local circuit court, though the volunteer guardian ad litem was viewed as independent of the Guardian ad Litem Program. A 1994 law review article noted, "The guardian program itself does not participate in any dependency or termination proceedings and does not make decisions for appointed guardians. Nor does the program appear in court to exercise any power or to represent any person." H. Lila Hubert*, In the Child's Best Interests: The Role of the Guardian ad Litem in Termination of Parental Rights Proceedings,* 49 U. Miami L. Rev. 531, 553 (1994) (internal citations omitted).

In the 1990s the Guardian ad Litem Program added program attorneys as well as staff advocates to supplement their volunteer ranks. GAL at 25 Report, pg. 13. In 2004 the Guardian ad Litem Program was transferred from the judicial branch to the executive branch, where it was housed in the Justice Administrative Commission and renamed the Statewide Office of Guardian ad Litem. GAL at 25 Report, pg. 15.

The role of the volunteer guardian as an independent voice changed with the shift to a statewide office that employed substantially more staff and attorneys. The current Florida Guardian ad Litem Program Standards, issued in July 2015[6], describe the approach:

> **The Team Model.** Each GAL works within a team model of advocacy that is child centered and driven by the best interest of the child. It is a collaborative effort of the GAL, the assigned CAM, and the CBI Attorney with the child's voice considered to be an integral part of the team's decision making and advocacy. The GAL, CAM and CBI Attorney are equal partners, with each providing a unique perspective and knowledge gained through life experiences that complements the

[3] Available on the Guardian ad Litem website.
[4] H. Lila Hubert*, In the Child's Best Interests: The Role of the Guardian ad Litem in Termination of Parental Rights Proceedings,* 49 U. Miami L. Rev. 531, 553 (1994) (citing Ellen I. Hoffenberg et al. State of Florida Guardian ad Litem Program Manual, 20-21 (1985).
[5] *Id.* pg. 552.
[6] Available on the Guardian ad Litem website.

others and enhances the quality of the advocacy, leading to better outcomes for the child.

The 2015 Guardian ad Litem Standards define:

> **Guardian ad Litem (GAL)** refers to the representative of the Program who is advocating for the best interests of the child. This term refers to a volunteer Guardian ad Litem, or in cases where a volunteer GAL is not available, a paid staff member. A GAL is a member of a team that includes a Child's Best Interest (CBI) Attorney and a Child Advocate Manager (CAM).
>
> **Child's Best Interest (CBI) Attorney** refers to the attorney employed by the Program to protect a child's best interest either in the circuit dependency courts or the appellate courts. There is no attorney-client relationship between the CBI Attorney and the child; however, representing the best interest of the child is the sole purpose of their advocacy.

In 2003, when the Guardian ad Litem Program was transferred out of the Office of State Court Administrator, it had a budget of $16 million and provided a guardian ad litem in 63% cases to which it was appointed.[7]

The Guardian ad Litem Program's 2017-2018 budget is $50 million with a staff of 726[8], 158 of whom are attorneys.[9] Currently 10,600 volunteers work with staff to provide a guardian ad litem to approximately 80% of all children in the dependency system.[10]

Provision of Counsel to Children

Before the advent of the Guardian ad Litem Program some abused and neglected children were appointed attorneys serving as guardian ad litem. Responsibility for paying those attorneys was not clear, so litigation ensued.

In 1980, the Florida Supreme Court issued an opinion in *In the Interest of D.B. and D.S.*, 385 So. 2d 83 (Fla. 1980). In addition to establishing the constitutional right to counsel for parents who face termination of parental rights, it is also widely viewed as the case that establishes that children do not have a constitutional right to counsel in dependency proceedings. The *D.B. and D.S.* court reviewed the

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[7] *See* Staff Analysis for HB 439, issued March 20, 2003.

[8] The budget information is available at: http://www.floridafirstbudget.com/web%20forms/Budget/BudgetServiceIssueList.aspx?rid1=313902&rid2=&si=21310000&title=STATEWIDE%20GUARDIAN%20AD%20LITEM%20OFFICE%20(Program)&sf=1.

[9] *See* GAL budget narrative at http://guardianadlitem.org/wp-content/uploads/2017/07/Narrative-Salary-Adjustment-for-Guardian-ad-Litem-Staff.pdf.

[10] Statewide Guardian ad Litem Office Long Range Program Plan, August 15, 2017.

circumstances of two children who had been appointed counsel – attorneys serving as a guardian ad litem. It found counsel appropriately appointed for one child, and with regard to the second held:

> Finally, we find there is no constitutional right to counsel for the subject child in a juvenile dependency proceeding. By statute, counsel as guardian ad litem must be appointed in any child abuse judicial proceeding under section 827.07(16), Florida Statutes (1979). In all other instances, the appointment of counsel as guardian ad litem for the child is left to the traditional discretion of the trial court, and should be made only where warranted under Florida Rule of Juvenile Procedure 8.300.
> *In the Interest of D.B. and D.S,* 385 So. 2d 83, 91 (Fla. 1980).

Courts continued to appoint attorneys, sometimes at the request of the volunteer Guardian Ad Litem. These attorneys were sometimes appointed as guardian ad litem and then more often as "attorney ad litem," a term used more often after the term GAL became increasingly associated with laypeople. In the '80s and '90s several cases concerning payment of fees to those attorneys were litigated in Florida courts. The cases were resolved in three different ways, in some the county was required to pay; in others the Department of Health and Rehabilitative Services was required to pay; and in the third category, the attorney was denied compensation altogether.[11]

The Guardian ad Litem Program was eventually provided with funding to pay for some attorneys for children.[12] Some counties also funded court-appointed counsel, often called "special public defenders." The counties' ability to fund counsel ended in the early 2000s when Florida eliminated county funding for court functions and required the state pay for those functions.[13]

In the early 1990s The Florida Bar Foundation created the Children's Legal Services grant program, which funded local legal aid programs to represent children in a variety of settings, including dependency court. At its height, in fiscal year 2009 - 2010, The Florida Bar Foundation funded 10 grantees to represent children in

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[11] *See, for example, M.P. v. Lake County*, 453 So.2d 85 (Fla. 5th DCA 1984) (requiring H.R.S. to pay a fee and requiring the lawyer to accept a reduced fee); *H.R.S. v. Coskey*, 599 So.2d 153 (Fla. 5th DCA. 1992) (reversing trial court order requiring H.R.S. to pay the child's attorney fee, though appointment was requested by the volunteer guardian ad litem); *H.R.S. v. Rich*, 687 So.2d 923 (Fla. 4th DCA 1997) (neither the county nor H.R.S. was liable for the fee, so the attorney's work was performed pro bono).

[12] The Guardian ad Litem 2005 Annual Report notes that $309,338 was available for attorneys ad litem. The terms "attorney ad litem" and "child's attorney" are interchangable.

[13] *See e.g. Justification Review: Justice Administrative Commission, State Attorneys, Public Defenders.* Report no. 01-64, December 2001.

dependency proceedings with a total of $1 million.[14] In subsequent years, The Florida Bar Foundation made major cuts to its children's grants following a significant drop in its income due to the country's financial crisis. In fiscal year 2017-2018, three grantees were funded to represent children in dependency proceedings, with grant awards totaling $152,000.[15]

In 2001, the Palm Beach Children's Services Council became the first special taxing district to fund attorneys to represent dependent children. That children's services council has continued to fund the Foster Children Project at the Legal Aid Society of Palm Beach County in the intervening years and currently awards over $1 million for the representation of dependent children.[16] The children's services councils in Broward and Hillsborough Counties also fund legal aid programs to represent dependent children, and the one in Miami-Dade funds a pro bono project that provides attorneys for children in dependency proceedings.[17]

Efforts to Provide Florida's Children with Statutory Right to Counsel

In 1999 the Florida Legislature passed Section 39.4085, which established several goals for dependent children, including Subsection (20) "To have a guardian ad litem appointed to represent, within reason, their best interests and, where appropriate, an attorney ad litem appointed to represent their legal interests…."

In 2000, the Legislature created a three-year pilot program in the 9th Judicial Circuit, which came under the Office of State Court Administrator. Section 39.4086, Florida Statutes (2000). The Legal Aid Society of the Orange County Bar Association oversaw guardians ad litem who were attorneys. Barry University School of Law oversaw attorneys who directly represented children. The Osceola County Guardian ad Litem Program used a blended model of representation.[18] The pilot concluded at the end of its funding. The Legal Aid Society of the Orange County Bar continues to operate the Guardian ad Litem program in Orange County by having volunteer and staff attorneys, rather than laypeople, serve as guardians ad litem.

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[14] The Florida Bar Foundation 2009-10 Annual Report. That year the Legal Aid Society of the Orange County Bar was also awarded $138,000 for its Guardian ad Litem Program.
[15] The Florida Bar Foundation Children's Legal Services Grantee list can be viewed at https://thefloridabarfoundation.org/project/childrens-legal-services/.
[16] Palm Beach Children's Services Council funding information can be found on their website at http://www.cscpbc.org/funded-programs.
[17] *See* Broward: https://cscbrowardpublic.webauthor.com/pub/file.cfm?uuid=A9431460-7ACF-4ABB-86CD-8EEF69384C82&actionxm=Download&item_type=xm_file; Hillsborough: http://www.childrensboard.org/download/061917/CBHC-FY-2018-Budget-Packet.pdf; Miami-Dade: https://www.thechildrenstrust.org/content/financial-information.
[18] *See Staff Analysis of HB 439 creating Statewide Office of Guardian ad Litem.* March 20, 2004.

In March 2001, the Florida Supreme Court approved a new rule of Juvenile Procedure, 8.217 which specified the right of the court to appoint an attorney ad litem for a child alleged to be dependent.[19]

In 2002, The Florida Bar's Commission on the Legal Needs of Children issued a Final Report[20] stating: "After three years of extensive debate, a recommendation was unanimously approved by the full Commission for a comprehensive model of representation for children." (pg. 9.). Specifically with regard to children in dependency proceedings, the Commission recommended the creation of a Statewide Office of Children's Advocate, which would have a division of Legal Counsel and a Division of Guardian ad Litem. (pgs.11-12)

The Florida Bar ultimately created a Standing Committee on the Legal Needs of Children (LNOC) and charged it with implementing the Commission's recommendations. In 2009, the LNOC drafted legislation with input from a variety of stakeholders, including substantial input from the Guardian ad Litem Program. The draft bill provided counsel for several categories of children, most of which were specifically identified in the 2002 Commission Report. The Florida Bar took a legislative position in favor of the bill, and Senate Bill 1860 was filed in the 2010 Session of the Legislature. The bill died in committee.

The next legislative endeavor came in 2013, when a narrower bill, Senate Bill 1468 / House Bill 1241, was filed. That bill provided counsel for dependent children who were in, or at risk of placement in, nursing homes. While that bill also failed, the Legislature appropriated funds for the Guardian ad Litem Program to contract with attorneys to represent those children.

In 2014, proponents of children's right to counsel were successful in securing passage of House Bill 561 / Senate Bill 972, which created Section 39.01305, Florida Statutes - Appointment of Counsel for Dependent Children with Certain Special Needs. That law provides for five categories of children to be appointed counsel: those who reside in or are considered for placement in nursing homes; those who are prescribed psychotropic medications and do not assent to taking them; those who have developmental disabilities; those who are in or face placement in locked residential treatment facilities; and those who are victims of human trafficking.

The 2014 legislation specified that children had a right to counsel who were adequately compensated, though it recognized the importance of and promoted the continued use of pro bono attorneys and existing legal aid programs. One unfortunate consequence of the legislation was the interpretation by the Guardian ad

[19] *In re Amendments to Rules of Juvenile Procedure,* Case no. SC00-1699 (Fla. 2001).
[20] The Final Report is available at http://www4.floridabar.org/TFB/TFBResources.nsf/Attachments/0718346282810A0985256BEA00684438/%24FILE/finalLNCversionfromJan%20website%20file.pdf.

Litem Program that it could no longer fund the appointment of other counsel as it had done in previous years.

Although the Department of Children and Families cannot readily ascertain how many children currently have counsel, an analysis of available data leads to the conclusion that no more than 10% of children who are in out-of-home care are currently represented by counsel. See, "Cost of Providing Counsel to Unrepresented Children in Florida," attached to this analysis.

Evolving National Consensus on Dependent Children's Right to Counsel

Thirty-seven years ago, when it declined to find that all dependent children had a constitutional right to counsel, the Florida Supreme Court acknowledged that the right to counsel "is an evolving constitutional concern." *In re D.B.* at 89. Proponents of this proposal assert that circumstances have changed sufficiently to warrant a declaration that dependent children have a constitutional right to counsel.

Back in the early 1980s, when states began trying different mechanisms to fulfill CAPTA's representation requirements, Florida embraced the promising model of using specially trained lay volunteers. The Florida Guardian ad Litem Program and its proponents continue to believe that its model, as it has evolved over time, is sufficient to represent the best interest of most children in Florida.

In 2011, the American Bar Association capped three years of discussion and debate by adopting Model Legislation on Child Representation in Abuse and Neglect Cases, which features the provision of attorneys to children. Subsequent law review articles describe the shifting landscape as a majority of states move toward attorney representation.[21] In August 2017 the Conference of State Court Administrators issued its policy position supportive of appointment of counsel for children.

In 2017, the Children's Bureau, the federal agency that oversees child welfare, recommended that states provide counsel for children: "While CAPTA allows for the appointment of an attorney and/or a court appointed special advocate (CASA), there is widespread agreement in the field that children require legal representation in child welfare proceedings."[22] The report explains:

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[21] *See The Right to Counsel Landscape after Passage of the ABA Model Act – Implications for Reform*, Harfeld, 36 Nova LR 325, 326 (2012) and *Wanted: Forever Home, Achieving Permanent Outcomes for Nevada's Foster Children*. Meyer-Thompson, 14 Nevada LJ 268, 291 (Fall 2013).

[22] Memorandum on High Quality Legal Representation for All Parties in Child Welfare Proceedings issued by the Administration for Children and Families on January 17, 2017 pg. 3. Herein "High Quality Representation Memo." Available at: https://www.floridabar.org/wp-content/uploads/2017/09/High-Quality-Legal-Representation.pdf.

> This view is rooted in the reality that judicial proceedings are complex and that all parties, especially children, need an attorney to protect and advance their interests in court, provide legal counsel and help children understand the process and feel empowered. The confidential attorney-client privilege allows children to feel safe sharing information with attorneys that otherwise may go unvoiced.
>
> In addition to attorneys, children and youth also benefit from a lay guardian ad litem, such as a CASA. CASAs can make important contributions to child welfare proceedings through time spent getting to know the child's needs and reports to the court.
> High Quality Representation Memo, pgs. 3-4.

The report further asserts:

> There is evidence to support that legal representation for children, parents and youth contributes to or is associated with:
>
> - increases in party perceptions of fairness;
> - increases in party engagement in case planning, services and court hearings;
> - more personally tailored and specific case plans and services;
> - increases in visitation and parenting time;
> - expedited permanency; and
> - cost savings to state government due to reductions of time children and youth spend in care.
>
> High Quality Representation Memo, pg. 2.

III. EFFECT OF PROPOSED CHANGES

The proposal will require the state to provide counsel to all children in out-of-home care with open dependency cases. This includes both children who have been removed from a parent or guardian due to allegations of abuse and neglect and children who were "otherwise placed in the jurisdiction of the dependency court." The "otherwise placed" clause is needed to include children who are placed in out of home care for reasons other than parental abuse or neglect – for example because the parents are deceased or were unable to obtain services for their children without placing them in state care.

It is possible to interpret the "otherwise placed" clause to include children who are still at home with their parents and are receiving services under the supervision of the dependency court. Those children fall under the jurisdiction of the dependency court, though they have not been "placed." When children are home, parents retain

the capacity and responsibility to ensure their children's needs are met, therefore the liberty and due process rights that arise from placement in out-of-home care are not implicated. Those children are, however, at a far greater risk of removal than their peers.

Given the disparity between the number of children currently represented by counsel and those who would become eligible if the proposed amendment is enacted, Florida will need to undertake a major effort to recruit qualified attorneys needed to provide competent representation to newly eligible children.

IV. FISCAL IMPACT

A. Tax/Fee Issues

None.

B. Private Sector Impact

None

C. Government Sector Impact

The exact fiscal impact of this proposal cannot be ascertained because the Department of Children and Families cannot readily quantify the number of children who have counsel.[23] Informal research reveals that of the 30,000 children who are in out-of-home care in a year between 3,000 and 4,000 children are currently represented each year.[24] The lower number is used to provide a conservative calculation.

Two-thirds of the 27,000 unrepresented children are part of sibling groups, some of whom can be represented by the same attorney. It is estimated that 17,020 appointments need to be made to provide counsel to 27,000 unrepresented children. [25] At an average cost of $1,200 per child, the total cost to represent children is $20,240,000. The cost of providing counsel children who are living at home, but are under the jurisdiction of the dependency court is an additional $733,200.[26]

Savings to the state are estimated to be twice the cost of providing counsel.[27] The estimate of $40 million in savings is based on the reduction on payments for

[23] DCF-Children's Legal Services has requested that the agency revise its software in order to be able to capture that information.
[24] See "Cost of Providing Counsel to Unrepresented Children in Florida," Appendix A attached to this Analysis
[25] Id. Appendix B.
[26] Id. Appendix C.
[27] Id.

placement of children in licensed care.[28] Additional savings will be realized in the cost of providing care to children in unlicensed placements. Long-term savings will also result from the provision of counsel to dependent children by increasing the likelihood that they leave care with a family. Children who age out of care without a family are substantially more likely than their peers to become involved in the criminal justice system, be homeless, unemployed, and become young parents. The estimated cost to tax payers of youth aging out of care without a family is $300,000 per young adult.[29] In fiscal year 2016 – 2017 Florida had 957 youth age out of state care,[30] if lawyers facilitate permanency for only one-tenth of the population, tax payers will save an additional $28 million in future expenses for each co-hort of youth who exit state care.

[28] Id.

[29] Cost Avoidance: Bolstering the Economic Case for Investing in Youth Aging Out of Foster Care. Cutler Consulting, 2009. Available at: https://www.issuelab.org/resource/cost-avoidance-bolstering-the-economic-case-for-investing-in-youth-aging-out-of-foster-care.html

[30] Data from DCF's Child Welfare Dashboard on MyFloridaFamilies.com.

STATEWIDE GUARDIAN AD LITEM OFFICE
CONSTITUTIONAL AMENDMENT PROPOSAL ANALYSIS

DATE: December 5, 2017
CONTACT: Dennis Moore, General Counsel
Guardian ad Litem Program
850-922-7213

PROPOSAL NUMBER: 40
SPONSOR: Belinda Keiser

I. Overview

Constitutional Amendment Proposal 40 provides that "[e]very child who has been removed from the custody of his or her parents or a legal guardian by the state due to abuse or neglect, or is otherwise placed in the jurisdiction of the dependency court has a right to counsel." This presents the Commission and possibly Florida voters with the question of what kind of legal representation abused and neglected children should have: representation by an attorney in an attorney-client relationship as a matter or constitutional right, or representation by a guardian ad litem to represent a child's best interest.

Currently, Florida Statutes require all abused, abandoned, and neglected children to have a guardian ad litem (GAL) appointed to represent their best interest, and require children with certain special needs be appointed an attorney in an attorney-client relationship. Best interest representation is provided by the Guardian ad Litem Program which includes a Child's Best Interest Attorney to protect the legal interest of the child and advocate for the child's best interest.

Proposal 40 would give a constitutional right to an attorney to approximately 25,000 children in out-of-home care as well as about 12,000 children "otherwise placed in the jurisdiction of the dependency court" (but not removed from their parents' custody). The GAL Program submits the following as considerations for the Commission:

- No other state constitution contains a right to counsel for children in abuse and neglect proceedings, and Proposal 40 would create a constitutional right to counsel for children in dependency court that is greater than the right to counsel for parents.
- The right to counsel is not limited to dependency court proceedings, which presents the possibility that an attorney appointed in the abuse and neglect case could initiate or participate in other proceedings such as divorce or child support if allegations of abuse or neglect are made in those proceedings.
- Over 25,600 abused and neglected children are currently being represented by the GAL Program in every trial court and appellate court, and on statewide policy issues. Children with a GAL appointed are represented in court by a GAL Child's Best Interest Attorney, who works as part of a multi-disciplinary team that includes a trained, certified volunteer and a child advocate manager.
- The majority of states use a best interest model of representation for dependent children as their default model of representation.
- While national research demonstrates that quality representation of children - and all other parties in dependency court - improves outcomes, there is not evidence showing that children directing their own attorneys have better outcomes than children appointed a Guardian ad Litem with an attorneys representing the child's best interest.

- Consideration should be given to whether having dependent children direct their own attorney in abuse and neglect cases is developmentally appropriate, trauma-informed or consistent with the legislative philosophy of normalcy for youth in dependency, particularly given the nature and magnitude of decisions in dependency court.
- The fiscal impact of Proposal 40, although indeterminate, would likely require the investment of millions of dollars of additional revenue for a second child-representative in the dependency court and may result in defunding of best interest representation and by extension, the GAL Program.
- Members of the general public required to vote on Proposal 40 may not understand that abused, abandoned and neglected children already have a statutory right to representation by a GAL, that over 25,600 are currently represented, or the difference between best interest representation and expressed wishes representation.

Florida's current system where children have an advocate to protect and further their best interest (including their legal interests), and are given their own attorney in limited circumstances or when the judge determines it is necessary, has been the policy of the Florida legislature. A system where all children, regardless of their age, maturity, relationship with their parents, or mental condition, are given an attorney to represent their expressed wishes in a traditional attorney-client relationship has not been used in Florida except in those cases that qualify from the Special Needs Registry.

II. Present Situation:

A. Overview of dependency generally

In dependency court, the judge acts in the protective and provisional role of "*in loco parentis.*"
A child's natural parents are presumed to act in their children's best interest.[1] When abuse or neglect is alleged, the state exercises its police power to protect children under the common law doctrine of *parens patriae*[2] codified by the legislature in Chapter 39, Florida Statutes. If a child is removed from his or her parent's custody due to abuse, abandonment or neglect, the Department of Children and Families ("Department") files a shelter petition and the child comes under the jurisdiction of the dependency court.[3]

Once the state exercises its police power to protect the child, the parent loses the ability to unilaterally exercise his or her rights over the child, for example the right to custody, or the right to decide when or where the parent will visit the child. This power is vested with the court, which is charged with specific statutory responsibilities to protect and further the best interest of the child.

The dependency judge acts in the protective and provisional role of "*in loco parentis*" for the child.[4] In Florida's system, "[i]t is the dependency court which has been charged under Florida law with protecting the rights and interests of dependent children."[5]

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[1] *M.W. v. Davis*, 756 So. 2d 90, 97 (Fla. 2000)(citations omitted).
[2] *See In Interest of Ivey*, 319 So. 2d 53, 58 (Fla. 1st DCA 1975); *Gibbs v. Titlelman*, 39 F.Supp. 38, 54 (E.D. Pa. 1973), *rev'd on other grounds*, 502 F.2d 1107 (3d Cir. 1974); *Fontain v. Ravenel*, 58 U.S. 369, 392-93 (1894)(Taney, J. concurring)(citations omitted).
[3] Some children are not removed and the court obtains jurisdiction through a non-shelter petition.
[4] *See Buckner v. Fam. Servs. of Central Fla.*, 876 So. 2d 1285, 1288 (Fla. 5th DCA 2004).
[5] *Buckner v. Fam. Servs. of Central Fla,* at 1287.

The dependency court's obligation to protect the child's rights and interests makes it different from other courtrooms. Chapter 39 states the paramount concern of child protection proceedings is the health, safety and welfare of the child.[6] Unlike other court proceedings, the judge must actively protect the safety and well-being of the child, and make certain determinations based on best interests. The Florida Supreme Court explained the importance of the distinction in *In the Interest of D.B.*:

> To accurately characterize the proceeding involved, it should be recognized that juvenile dependency proceedings and juvenile delinquency proceedings have distinct and separate purposes. Dependency proceedings exist to protect and care for the child that has been neglected, abused, or abandoned. Delinquency proceedings, on the other hand, exist to remove children from the adult criminal justice system and punish them in a manner more suitable and appropriate for children.[7]

Dependency court judges must make decisions similar to those a parent makes. Some of these decisions are based upon the subjective opinions and recommendations of parties and participants in the case, including the GAL, foster parents, and children themselves. In multiple places, Chapter 39 expressly allows the judge to receive and rely on information that could not be used at an adjudicatory hearing.[8] This reflects the judge's unique role in dependency proceedings and the intent to retain some of the characteristics of equity courts as opposed to strict courts of law.

Historically, the GAL's role was to provide information to the court about the child. At its inception, a GAL was a lay volunteer and officer of the court, reporting information and making recommendations to assist the court. That role has been expanded by statute, rule, and in practice so that the GAL is now an independent advocate for the child's best interest. While the Program was once comprised exclusively of lay volunteers, it has been significantly professionalized by the addition of Child's Best Interest Attorneys and Child Advocate Managers who, along with a trained and certified volunteer, function as a multi-disciplinary team. The GAL Program's affiliation with the judicial branch, where GAL employees reported to the chief judge, ended in 2004, in part because the GAL could not be an independent advocate of the child as well as a court employee.[9]

B. Overview of the rights of the parties in dependency court.

Abused and neglected children have a right to representation under state and federal statutes. Unlike parents, who have a constitutional right to counsel in TPR proceedings,[10] children have no

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[6] § 39.001(1)(b)1.

[7] *In the Interest of D.B.*, 385 So. 2d 83, 90 (Fla. 1980).

[8] See § 39.701(2)(c).

[9] § 39.8296(1)(b) (The Legislature also finds that while the Guardian Ad Litem Program has been supervised by court administration within the circuit courts since the program's inception, there is a perceived conflict of interest created by the supervision of program staff by the judges before whom they appear.).

[10] Parents have a fundamental liberty interest in the care, custody and management of their children under the 14th Amendment to the United States Constitution. *Santosky v. Kramer,* 445 U.S. 745 (1982). In *Lassiter v. Department of Social Services*, the U.S. Supreme Court held whether parents are entitled to counsel in TPR proceedings under the federal constitution must be decided on a case by case basis by the trial court subject to appellate review. 452 U.S. 18 (1981). The Florida Supreme Court expressly rejected the parents' right to counsel in all abuse and neglect proceedings under either the federal or state constitution. *In the Interest of D.B.*, 385 So. 2d 83, 91 (Fla. 1980). However, in response to *Lassiter,* Florida enacted a statutory right to counsel in all TPR

constitutional right to counsel in dependency proceedings.[11] In fact, no constitutional right to counsel exists for children outside of those being prosecuted for commission of a crime for which incarceration or confinement is a possibility. Both federal and state law require the appointment of a GAL to represent all children in the dependency system.

All abused and neglected children have a statutory right to a GAL to represent their best interests. Under federal law, an appropriately trained GAL is required to "obtain first-hand, a clear understanding of the situation and needs of the child; and to make recommendations to the court concerning the best interest of the child."[12] Florida Statutes require the court to appoint a GAL for the child at the earliest possible time in abuse and neglect proceedings[13] to represent the best interests of the child.[14] Section 39.822 directs the GAL to review all disposition orders and changes in placement, and to be present at all stages of the proceedings or file a written report with the court containing the GAL's recommendations. The GAL files reports with the court at the disposition and judicial review hearings and in TPR proceedings.[15] The GAL must make recommendations at various points in the case and judges have to consider those recommendations before making certain decisions, for example whether TPR is in the child's best interest, or if a change of placement is advisable.[16]

The GAL is also required to report the wishes of the child,[17] for example in Rule 8.215, Florida Rules of Juvenile Procedure, the GAL's duties include:

> (1) To gather information concerning the allegations of the petition and any subsequent matters arising in the case and, unless excused by the court, to file a written report. This report shall include a summary of the guardian ad litem's findings, a statement of the wishes of the child, and the recommendations of the guardian ad litem and shall be provided to all parties and the court at least 72 hours before the hearing for which the report is prepared. (2) To be present at all court hearings unless excused by the court. (3) To represent the interests of the child until the jurisdiction of the court over the child terminates, or until excused by the court. (4) To perform such other duties as are consistent with the scope of the appointment.

Currently, approximately 25,600 children are represented by the GAL Program. When a judge appoints a GAL for the child, the order of appointment is given to the GAL Program which assigns a Child Advocate Manager, a Child's Best Interest Attorney and a trained and certified volunteer.[18] The

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and dependency proceedings. Therefore, in Florida, parents' right to counsel in dependency is derived from state statute not the constitution. § 39.013(1).

[11] *See In the Interest of D.B.,* 385 So. 2d at 90-91.

[12] 42 U.S.C. 5106(b)(2)(B)(xiii), Child Abuse Prevention and Treatment Act ("CAPTA").

[13] § 39.822(1).

[14] §§ 39.402, 39.807, 39.808.

[15] §§ 39.521, 39.701, 39.807; *see also* § 39.0139.

[16] §§ 39.621, 39.807, 39.810, 39.822; *see also* § 39.0139.

[17] § 39.807(2)(a).

[18] If a GAL volunteer is not available, the Child Advocate Manager performs the duties of the volunteer. GAL Standards of Operation, Program Mission, Vision and Values.

GAL visits the child every month to build a relationship and gathers information to allow the GAL to be the voice for the child in the courtroom and the proceedings generally.[19]

The GAL Best Interest Attorney is responsible for taking the legal action necessary to protect the child's interests within the context of the dependency proceedings. Guided by information gathered by GAL volunteers and Child Advocate Managers, GAL Best Interest Attorneys advocate in court and out-of-court for the child. Florida Statutes and the Rules of Juvenile Procedure give definition to what it means to advocate for the interests of the child. In section 39.4085, the Legislature articulated goals for children in shelter or foster care, which include, among other things, "individual dignity, liberty, pursuit of happiness, and the protection of their civil and legal rights as persons in the custody of the state."

Best Interest Attorneys focus on expediting permanency for children in accordance with statutory timeframes. They advocate for the proper access to psychotropic medication or against the administration of such medication if not warranted. GAL Best Interest Attorneys initiate and appear at administrative hearings regarding the denial of services for the child. The Program appeals decisions that are not favorable to the child's safety, welfare and best interest and can initiate TPR proceedings when appropriate or move to compel the Department to do so. On average, GAL Best Interest Attorneys represent 150 children, Child Advocate Managers oversee 38 volunteers, and volunteers work on behalf of two children each.

While representing the child's best interest is the sole purpose of the GAL Best Interest Attorney's advocacy, there is no attorney-client relationship between the Best Interest Attorney and the child. There are a number of reasons for this. First, by operation of law, children cannot engage counsel. Children are considered to have a "disability of non-age" and cannot enter contracts or initiate a legal action in their own right.[20] Second, the GAL has a statutory responsibility to report information to the judge so he or she can make determinations about the child's safety, well-being and best interest. This statutory responsibility conflicts with a traditional attorney-client relationship because the client (here, the child) could require his or her attorney keep information confidential. Third, the GAL's statutory obligation to act in the child's best interest would be in conflict with a traditional attorney-client relationship because the attorney must follow his or her client's direction, even if the attorney does not believe it is in the child client's best interest.

The Best Interest Attorney represents the child as a fiduciary. Despite the lack of attorney-client relationship, the GAL Best Interest Attorney's only objective is representation of the child through advocacy of the child's best interest. The representation of best interest by the GAL Program is similar to the representation of children in most other court proceedings which adheres to the long established law and public policy that an adult of reasonable judgement and integrity is required to conduct litigation for the child in judicial proceedings. One example is a guardianship under Chapter 744. Children in guardianship proceedings do not hire their own attorneys. Instead the child has a guardian who hires and directs an attorney to represent the child's interests. The Best Interest Attorney owes the same duty of care to children represented by the GAL Program as an attorney for a guardian owes to a ward in a guardianship proceeding. There are important differences in the role of the guardian in the two

[19] GAL Standards of Operation 2.A.
[20] *Kingsley v. Kingsley,* 623 So. 2d 780 (Fla. 5th DCA 1993).

proceedings,[21] but in each the child is the beneficiary of the representation provided by the attorney, though he or she is directed by the guardian. Another example is in adoption proceedings. An attorney retained by pre-adoptive parents owes a duty of care to the child. In this instance the reason for the duty of care owed is not only privity between the pre-adoptive parents and the attorney, but also because the adoption proceedings are to serve the best interest of the child.[22]

GAL Best Interest Attorneys sometimes request appointment of an attorney ad litem. While the GAL Best Interest Attorney's advocacy of best interest includes the child's legal interests, there are times when the child's best interest necessitates appointment of an attorney or an attorney ad litem ("AAL)". Appointment of an AAL differs from appointment of an attorney because an AAL appointment is limited to a specific matter.[23] This can happen if a child disagrees with the GAL's best interest recommendation, and/or if the child is of sufficient age and maturity to work with an attorney or AAL. GAL Best Interest Attorneys will also seek appointment of an AAL for a child if the child has legal issues not encompassed within the dependency case (e.g., social security) or if there is a conflict of interest (e.g., if the Program previously represented a child's parent when he or she was a minor).

Judges have inherent authority to appoint attorneys ad litem, and abused and neglected children are statutorily entitled to an attorney if they have certain special needs under section 39.01305. A dependency judge's inherent authority extends to the appointment of an attorney for the child. This authority is also codified in the Juvenile Rules of Procedure, Rule 8.217 which allows judges to appoint an AAL for a child at any point in the proceeding. Historically, AALs and attorneys have been appointed in cases on a transactional basis where children had particular issues that required specialized knowledge of the law. They have also been appointed when there is no GAL available due to lack of resources or a conflict between the GAL and the child.

The Legislature has allocated funding for attorneys for children with special needs. In 2014 the Legislature enacted section 39.01305, which created a right to appointment of an attorney for children with certain special needs in the dependency system if the child:

- currently lives in, or is being considered for placement in a skilled nursing facility or residential treatment center;
- is prescribed a psychotropic medication but does not assent to take it;
- has a developmental disability as defined in s. 393.063, F.S.; or
- is a victim of human trafficking.

The attorneys are appointed from a registry of attorneys maintained in each judicial circuit. The chief judge in the circuit determines the criteria attorneys must meet to be on the registry. Attorneys are paid by contract pursuant to the provisions of section 27.40 and 27.5304, in the same way other lawyers appointed to represent indigent individuals are compensated. Compensation is limited to $1,000 per year,[24] though there are circumstances when attorneys can seek court approval for additional compensation.

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[21] Under Chapter 744, a judge can give a guardian limited or plenary authority to make decisions for the child. This is very different than the GAL's role in dependency, where the GAL is not the ultimate decision-maker for the child but advocates for the child in matters encompassed within the dependency case.
[22] *Rushing v. Bosse,* 652 So. 2d 869 (Fla. 4th DCA 1995).
[23] The appointment of an attorney ad litem is a limited one — only for a specific lawsuit. Black's Law Dictionary (10th ed. 2014).
[24] § 39.01305(5).

Florida's model of representation is similar to most other states. Thirty-three states require the child's representative to advocate for best interests in abuse and neglect proceedings. There are approximately 950 GAL/Court Appointed Special Advocate programs conducting this representation nationally. Seven states require some combination of both best interests and expressed wishes, and ten require client-direction as the method of representation.[25] Some states requiring both expressed wishes and best interests may have a mandate for one form of representation, but other rules and statutes in the jurisdiction have exceptions. For example, Maryland mandates that a child in a dependency case be represented by counsel.[26] If the child has considered judgment, the attorney represents the child's expressed wishes; if the child lacks judgment, the attorney represents best interests.[27] In another example, Minnesota requires the court to appoint counsel for children ten and older, but the court has discretion about whether to appoint counsel for children under ten.[28]

The issue of whether best interest or expressed wishes representation is best is a national debate. Policy-makers have been examining the different models of representation for decades. The American Bar Association and the National Association of Counsel for Children maintain that appointment of counsel in a traditional-attorney client role is the preferred method of representation. However, others believe that attorneys are not capable of representing children in a traditional attorney-client relationship due to practical and ethical considerations.[29] For example, the American Academy of Matrimonial Lawyers rejects as fundamentally flawed any rule requiring lawyers to represent a child of diminished capacity in a traditional attorney-client relationship.[30]

Some sources of authority for the proposition that client-directed advocacy is superior to best interest advocacy are of limited use. For example, one often-cited authority called the *First Star* Report[31] rated the quality of a state's advocacy based exclusively on whether a child was statutorily entitled to an attorney in a traditional attorney-client relationship. The report gave no consideration to safety, well-being or any other outcome for children. States with some of the poorest outcomes like Oklahoma and Massachusetts received A+ grades.[32] Florida received an F, despite the fact that Florida had better

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[25] The nine states that provide attorneys or attorneys ad litem in a traditional attorney-client relationship with children, including California, Louisiana, Massachusetts, New Jersey, New York, Ohio, Oklahoma, West Virginia and Wisconsin. Child Welfare Information Gateway, Representation of Children in Child Abuse and Neglect Proceedings, available at https://www.childwelfare.gov/pubPDFs/represent.pdf (Last visited December 1, 2017).
[26] MD Cts & Jud. Pro. Code § 3-813(d).
[27] MD Guidelines for Attys Rep CINA.
[28] Minn. Stat. § 260C. 163(3)(a)-(b).
[29] Martin Guggenheim, A LAW GUARDIAN BY ANY OTHER NAME: A CRITIQUE OF THE REPORT OF THE MATRIMONIAL COMMISSION, 27 Pace L. Rev. 785.
[30] *AMERICAN ACADEMY OF MATRIMONIAL LAWYERS REPRESENTING CHILDREN: STANDARDS FOR ATTORNEYS FOR CHILDREN IN CUSTODY OR VISITATION PROCEEDINGS WITH COMMENTARY*, 22 J. Am. Acad. Matrim. Law. 227. (Approved by the Board of Governors of the American Academy of Matrimonial Lawyers on March 20, 2009).
[31] Children's Advocacy Inst. & First Star, A Child's Right to Counsel: A National Report Card on Legal Representation for Abused and Neglected Children 10 (3d ed. 2012).
[32] Oklahoma, Massachusetts and Connecticut were rated A+, and have some of the worst outcomes in child welfare in the nation. Regarding Connecticut *see* https://drive.google.com/file/d/0B291mw_hLAJsOXd2U0taYVF3Vkk/view (Last visited December 1, 2017); Oklahoma at http://www.childrensrights.org/press-release/child-welfare-experts-blast-oklahoma-department-of-human-services-in-new-reports-on-kids-safety-in-foster-care/' (Last visited December 1, 2017) ; Massachusetts at http://www.childrensrights.org/press-release/new-reports-show-massachusetts-failing-to-protect-children-in-foster-care/ (Last visited December 1, 2017).

outcomes and provides Child's Best Interest Attorneys to provide legal advocacy for the child. To underscore the limitations of the study as a benchmark for quality advocacy, the study expressly states that the grades awarded have no correlation between the requirements of a state's law and whether it is being enforced or complied with.[33]

The GAL Program is unaware of evidence proving that children directing their own attorneys have better outcomes than children with attorneys representing best interests. Some studies documenting the success of client-directed representation are based exclusively on self-reporting, and still others evaluate models with low caseloads that have not been replicated or evaluated on a statewide basis. For every study showing positive outcomes for the client-directed model,[34] there is a study that shows positive outcomes for best interest representation.[35] The conclusion to be drawn from national research is that high quality representation is critical and that a model of representation with more resources and lower caseloads will produce better outcomes than a model of representation with fewer resources.

III. Effect of Proposed Changes

Proposal 40 would give a right to counsel to all abused and neglected children under dependency court jurisdiction, regardless of whether they are in foster care or placed with their parents - whether they are 7 months or 17 years old. The proposal does not limit itself to dependency proceedings, thus a child appointed an attorney in dependency could direct that attorney to participate in or initiate other court proceedings. Because the child's right to counsel would be a constitutional right, this "to a great extent, place[s] the matter outside the arena of public debate and legislative action," limiting the ability of the legislature and the judiciary to restrict it.[36]

Like adults who engage an attorney, the child would direct the representation. What most children in dependency court want is to go home, but often, the abuse or neglect that brought them to court prevents that, at least for a time. An attorney appointed for a child has an ethical obligation to counsel the child, but if the child rejects the attorney's counsel, the attorney must still represent the child's position. The attorney is not allowed to substitute his or her judgment for that of the child. Under a client directed model, attorneys may not seek protective action to "protect the client from what the lawyer believes are errors in judgment."[37]

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[33] First Star Report 2012, p. 15.
[34] A.E. Zinn & J. Slowriver, Chapin Hall Ctr. for Children at the U. of Chicago, *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County* 1 (2008).
[35] Litzelfelner, "The Effectiveness of CASAs in Achieving Positive Outcomes for Children," Child Welfare 79(2): p. 179-193, 2000; Caliber Associates, National CASA Association Evaluation Project, Caliber Associates; Fairfax, Virginia, 2004; Gene C. Siegel, et al., Arizona CASA effectiveness study. Report to the Arizona Supreme Courts, Administrative Office of the Courts, Dependent Children's Services Division, by the National Center for Juvenile Justice, 2001; Office of the Inspector General, Audit Report 07-04, December, 2006; Davin Youngclarke, Kathleen Dyer Ramos, and Lorraine Granger-Merkle, "A Systematic Review of the Impact of Court Appointed Special Advocates" Journal of the Center for Families, Children and the Courts, 2004; Victoria Weisz and Nghi Thai, "The Court Appointed Special Advocate (CASA) Program: Bringing information to Child Abuse and Neglect Cases," Child Maltreatment 8(X), 2003.
[36] *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (internal citations omitted) (By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field....").
[37] ABA Comm. on Prof'l Ethics, Formal Op. 96-404, at 3 (1996). *See also* Restatement (Third) of the Law Governing Lawyers § 24 cmt. c (2000) (lawyers should not view as proof of diminished capacity client's insistence on position that lawyer considers unwise).

Attorneys can advocate for certain things Chapter 39 says a child is entitled to without specific direction from the child. However, nearly half the children in the child welfare system are infants and children under 5, who cannot direct attorneys. Further, it is likely many older children whose judgment or maturity is impaired should not direct their own attorney, especially those who suffered emotional or sexual abuse by the parent. Whether a child is "under a disability" such that he or she could not direct counsel would be up to the lawyer to decide.

Under the attorney-client privilege established in Proposal 40, children could omit or refuse to disclose information. Providing counsel to children creates a traditional-attorney client relationship, and anything the child tells his or her attorney is confidential unless the child authorizes the attorney to disclose it. The attorney-client relationship includes the attorney-client privilege, so that an attorney could not be compelled by a court or anyone else to override the child's wish to keep something secret. The privilege that exists between the child and an AAL or attorney may not be breached simply because the child is abused or neglected and in dependency court. The Rules Regulating The Florida Bar provide no exception to the privilege for either children under the jurisdiction of dependency court or for persons who are a danger to themselves generally.

This very scenario has already occurred in Miami in a case called *R.L.R. v. State.*[38] A child with a long history of running from DCF placements, had run away. DCF expressed concern for the child's placement and the trial court ordered the child's attorney to disclose the child's location "for the proper administration of justice."

Though the attorneys knew where the child was, they refused to tell the court the child's location or cell phone number because the child expressly told them not to disclose. On appeal, Third District Court of Appeal acknowledged the concern for the child's safety, but found no applicable exception to attorney-client privilege and stated:

> To find that there is a "dependency exception" or, as specifically put forth in this case, that there is an exception where the client may be a danger to himself, would require this court to carve out an altogether new exception to the attorney-client privilege. That, however, is the rule-making function of the legislature or, possibly, the Florida Bar—not of this Court.[39]

Not all children will choose to keep information from the court, but Proposal 40 will give abused and neglected children the ability to selectively disclose or refuse to disclose information to the judge making decisions about their safety. Even in cases where information is not being kept confidential, Proposal 40 will result in courts receiving less factual information about the child because unlike the GAL, the attorney cannot be obligated to report factual information on the child's situation. The attorney cannot be a witness in the case or make independent recommendations to the judge because that would impermissibly require the attorney to substitute his or her judgment for that of the child client.

Additionally, Proposal 40 will result in the need for a far greater number of attorneys due to the likelihood of conflicts of interests. Under the Rules Regulating The Florida Bar, an attorney may not represent clients whose interests are in conflict with each other. When there are multiple children in a

[38] 116 So. 3d 570, 574 (2013).
[39] *Id.*

case, there is a reasonable chance they may have different interests. This situation is not uncommon, when children are of different ages and their safety needs differ, or one child wants to live with some relatives and another child is best served with others. Currently, a GAL can represent the best interests of all, can report the wishes of each, and if a conflict becomes significant, request the appointment of an AAL. Under Proposal 40, if the interests of siblings conflicted, an attorney could not ethically represent all of them and would be required to seek discharge from the case under Florida Bar Rules.

These attorneys might be in addition to the child's GAL Best Interest Attorney. Proposal 40 does not say what its intended effect is on the child's statutory right to best interest representation. The Legislature could choose to fund both, and children would have an attorney to represent their expressed wishes and a GAL to represent their best interests. However, historically, there have been a number of factors making the GAL Program unable to represent 100% of the children in dependency court, including the dramatic increase in the number of children in out-of-home care since 2014. If the constitutional right is fully funded, and GAL is maintained at historical levels, this would likely result in a reverse of the current Florida framework, in which traditional attorneys would be the default representation and courts would appoint GALs on a discretionary basis.

If the constitutional right to counsel and the statutory right to best interest representation cannot both be funded, it is probable that children would have expressed wishes representation and not best interest representation. Given current economic realities and the fact that providing and attorney and a GAL may be duplicative in some respects, the state may not be able to fund both statutorily-required best interest representation as well as constitutionally-mandated expressed wishes representation. If both the constitutional mandate and the statutory mandate cannot be fulfilled, it is likely that the constitutional right will be funded first. This may result in the elimination of the best interest representation and by extension the GAL Program.

In the past when policy-makers have considered the possibility of expressed wishes representation supplanting or replacing best interest representation, they have expressly stated that should not be the policy in Florida. For example when enacting section 39.01305 for attorneys for children with special needs, the Legislature put intent language into the Florida Statutes:[40]

> [T]he statewide Guardian Ad Litem Program provides best interest representation for dependent children in every jurisdiction in accordance with state and federal law. The Legislature, therefore, does not intend that funding provided for representation under this section supplant proven and existing organizations representing children. Instead, the Legislature intends that funding provided for representation under this section be an additional resource for the representation of more children in these jurisdictions, to the extent necessary to meet the requirements of this chapter, with the cooperation of existing local organizations or through the expansion of those organizations.

Even the Florida Bar when taking positions to increase funding for attorneys for children have always been clear that "[r]ecognizing that the ability to create such discretionary representation depends on the amount of new dedicated revenue appropriated by the Florida Legislature and subject to the protection

[40] *See also* § 39.8296(1) (reciting findings from the Governor's Blue Ribbon Task Force concluding, "if there is an program that costs the least and benefits the most, this one is it," and that the guardian ad litem volunteer is an "indispensable intermediary between the child and the court, between the child and DCF."

of the current funding of the GAL program and funding for the courts." It is unclear whether this policy could be maintained if the right to an attorney were elevated to a constitutional right.

IV. Constitutional Issues:

Constitutional issues may arise when reconciling the constitutional right of parents to the care, custody and control of their children with the right to counsel created by Proposal 40. Additional issues may exist because all children under the jurisdiction of the dependency court will be given a constitutional right to counsel, and parents only have such a right when their parental rights are being terminated.

A. Municipality/County Mandates Restrictions: Unknown

B. Public Records/Open Meetings Issues: None.

C. Trust Funds Restrictions: None.

D. Other Constitutional Issues:

V. Economic Impact and Fiscal Note:

It is not possible to give an estimate of fiscal impact because the cost of providing counsel to children is dependent upon many policy decisions that would have to be made by the Legislature. Decisions that would dictate the fiscal impact include but are not limited to: the number of children each attorney would represent; due process costs; a structure for oversight of attorneys and staff; the ratio of support staff to attorneys, including whether paralegals would be funded; the number of physical offices, if any, and associated equipment; technology; legal resources; administrative support (i.e., purchasing, human resources); and an allocation for private attorneys to serve as conflict counsel. Though the fiscal impact is indeterminate, it is likely funding in the tens of millions of dollars will be required.

A. Tax/Fee Issues: None

B. Private Sector Impact: Additional attorneys will be needed to represent children as conflict counsel when children within sibling groups will have interests that diverge or different wishes that will require a child's attorney to seek discharge.

C. Government Sector Impact: To be determined by legislative implementation.

VI. Technical Deficiencies:

Citizens who are not familiar with dependency court may not understand that abused, abandoned and neglected children have an existing right to a GAL, that over 25,600 are currently represented or the difference between best interests representation and expressed wishes representation.

VII. Related Issues: None

VIII. Amendments: None

Recommendation:

Proposal 40, as written, is subject to interpretation inconsistent with best interest representation. If a constitutional proposal is included on the ballot, it should align with Florida policy on child advocacy and should be written in a way that cannot be misinterpreted.

- Best interest representation is consistent with the unique structure and goals of dependency court proceedings, where children and their parents are, in most cases, seeking to be reunited, the court stands in the shoes of the parent, and the best interests of children are a central feature of the proceeding.
- The Legislature's existing system to appoint attorneys for those children with certain special needs is relatively new and GAL is unaware of evidence that this system is deficient.
- Effectuating a right to counsel may result in judges getting less information regarding children, exacerbated by the existence of a right to confidentiality and attorney-client privilege, which will be to the detriment of children because judges will be making life-changing decisions for children without complete information.

For over 37 years, the GAL Program has paired hundreds of thousands of children with tens of thousands of volunteers. Some GALs have life-long relationships with children, including by adoption; others serve as mentors, educational advocates, and driving instructors; still others provide resources, paying for extracurricular activities, application fees, and travel to see family. While dependency proceedings are legal proceedings and children must have an advocate for his or her legal interests, it is equally important that children have people to identify and advocate for non-legal interests, to connect them to their communities, and to offer them a relationship with one person that they can count on through a tumultuous time.

The value of the connections children make with their GALs cannot be overstated. The Florida best interest model of representation serves children, their families, and the court system well. As stated throughout the document there are a litany of concerns with the proposal, however it is understood that this policy shift would be debated and discussed by the Commission.

Information on Attorney Representation Models

Need for Additional Representation

Howard Talenfeld
Managing Partner of Talenfeld Law
President of Florida's Children First

National Models & Ethics of Representation

Gerry Glynn

Chief Legal Officer of Community Based Care of Central Florida

Past President of National Association of Counsel of Children

National Models

- National Association of Counsel for Children
- American Bar Association
- US Department of Health and Human Servcies

HHS – Children's Bureau Statements

- "While CAPTA allows for the appointment of an attorney and/or a court appointed special advocate (CASA), there is widespread agreement in the field that children require legal representation in child welfare proceedings. This view is rooted in the reality that judicial proceedings are complex and that all parties, especially children, need an attorney to protect and advance their interests in court"
- "CB strongly encourages all jurisdictions to provide legal representation to all children and youth at all stages of child welfare proceedings."


Washington
Oregon
California
Idaho
Nevada
Montana
Wyoming
Utah
Arizona
Colorado
New Mexico
North Dakota
South Dakota
Nebraska
Kansas
Oklahoma
Texas
Minnesota
Iowa
Missouri
Arkansas
Louisiana
Wisconsin
Illinois
Michigan
Indiana
Ohio
Kentucky
Tennessee
Mississippi
Alabama
Georgia
Florida
South Carolina
North Carolina
Virginia
West Virginia
Pennsylvania
New York
Maryland
Delaware
New Jersey
Connecticut
Rhode Island
Massachusetts
Vermont
New Hampshire
Maine
Alaska
Hawaii

Ethical Issues

- Party Status
  - Reporting what the child wants
- Incompetent Clients
- Best Interest versus traditional Attorney Client role

Successful Local Efforts

Tim Stevens, Senior Staff Attorney, Foster Children's Project of Palm Beach Legal Aid

James Martz, Circuit Court Judge, 15th Judicial Circuit

Foster Children's Project

- Founded in 2001 in Palm Beach County
- Funded by Children's Services Council approved and paid for by the citizens of PBC
- Florida's only full service children's law office with 14 attorneys, 4 social workers and 6 paralegals.
- Holistic representation: educational, medical, immigration, therapeutic issues are addressed
- Primary legal goal of all kids is to achieve safe stable permanent homes within 12 month statutory timeframes

Foster Care = State Custody

- State makes a bad parent and the longer the child spends in state care the greater the physical and emotional trauma to the child and greater the long term costs for society.
- Ultimate goal of litigation – get child out of state custody and into a safe, stable and permanent home!
- **FCP Attorneys analyze facts within the boundaries of the law to create and implement a strategy for achieving permanency**

Guiding Representation Principles

- First do no harm – safety first!
- Develop a strategy for permanency within 12 months
- Plan concurrently
- Assess family's needs and advocate for only necessary services

Core Advocacy Components

- Filing of Motions
  - To compel compliance with case plan
  - Against both parents and agency
- Filing of Timely Termination Petitions/Recruitment of Adoptive Homes
- Attendance at staffings and case plan meetings
- Service advocacy – contact providers to ensure timely and meaningful services

Evidence Based Program

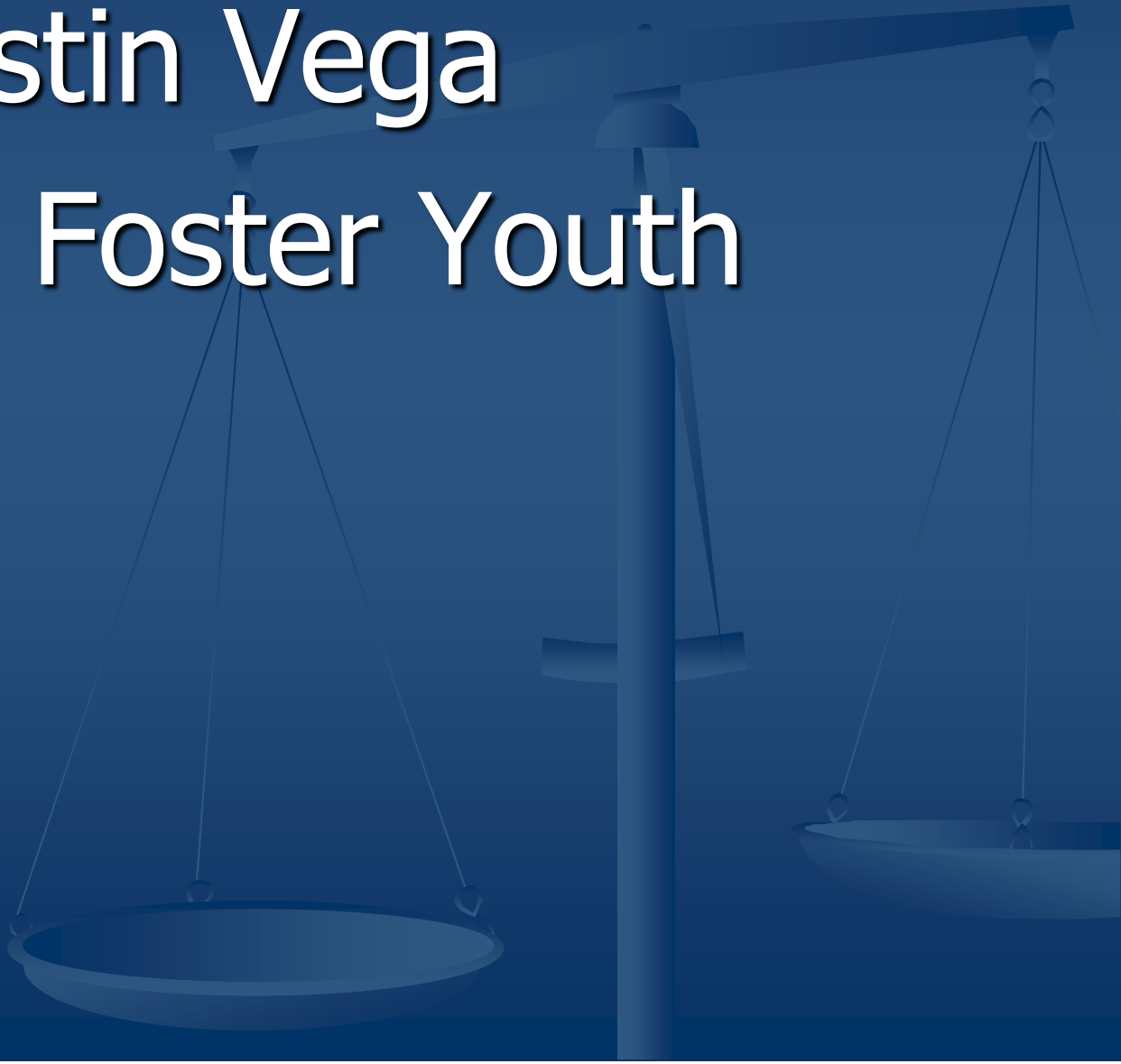
- **Good data management captures everything!**
- Length of stay
- Impediments to permanency (ICPC; parent refusing services, lack of reasonable efforts by DCF)
- Quarterly case reviews and visits
- Tracking recidivism
- Minimize Placement changes
- Timely & Meaningful Services
- Sibling placement and visits

University of Chicago Chapin Hall Study

- University of Chicago conducted an independent analysis of Foster Children's Project to conclude that FCP clients found expedited permanency 88 days faster than children without attorneys.
- The US Department of Health and Human Services cited the Chapin Hall Study of FCP when issuing it's national findings in 2017.

Voice of a Youth

Destin Vega
Former Foster Youth



Constitutional Amendment Proposal 40
Fact Sheet
Why Florida's Foster Children Need Counsel

Why Does Counsel for Foster Children Belong in the Florida Constitution?

Our Constitution enshrines the basic fundamental rights of our citizens.

Children have the most significant interests at stake in the court proceedings that govern every aspect of their lives.

> The decisions courts make in child welfare proceedings are serious and life changing. Parents stand the possibility of permanently losing custody and contact with their children. Children and youth are subject to court decisions that may forever change their family composition, as well as connections to culture and heritage.[1]

When courts make life-altering decisions that implicate fundamental rights, due process compels representation.

> The U.S. legal system is based on the premise that parties have a due process right to be heard and that competent legal representation and fair treatment produce just results.[2]

Our failure to provide all children counsel is based in part on a 1980 Florida Supreme Court opinion that is interpreted to mean that children do not have a constitutional right to counsel. [3] (The opinion actually upheld the appointment of counsel for one child and noted counsel was available to other children by statute and at the discretion of the trial court.)

"The right to counsel is an evolving constitutional concern." *In re D.B.* at 89. Much has changed in the child welfare landscape in the 37 years since *D.B.* opinion was issued. The evidence shows that children are best served with a combination of their own attorney providing direct representation and a volunteer guardian ad litem.

What Really Happens to Children in Foster Care?

They are Separated from their Siblings. Frightened, traumatized, separated from their home because something bad happened – yet not placed with brothers and sisters. 38% of sibling groups are split up. [4]

They are Sent Away from what is Familiar. The system places One-Third of Children out of their Home County. [4]

We Cannot Even Find them a Family to Live With. One-Quarter of the Children in Licensed Care live in Facilities, Not Families. That includes Two-thirds of teenagers in care and more than 100 children 5 and under. [4]

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[1] Memorandum on High Quality Legal Representation for All Parties in Child Welfare Proceedings issued by the Administration for Children and Families on January 17, 2017. Pg. 3. Herein "High Quality Representation Memo." Available at: https://www.floridabar.org/wp-content/uploads/2017/09/High-Quality-Legal-Representation.pdf.

[2] High Quality Representation Memo at pg. 2.

[3] *In re D.B. and D.S.*, 385 So.2d 83 (Fla. 1980)

> Finally, we find there is no constitutional right to counsel for the subject child in a juvenile dependency proceeding. By statute, counsel as guardian ad litem must be appointed in any child abuse judicial proceeding under section 827.07(16), Florida Statutes (1979). In all other instances, the appointment of counsel as guardian ad litem for the child is left to the traditional discretion of the trial court, and should be made only where warranted under Florida Rule of Juvenile Procedure 8.300

[4] DCF Child Welfare Key Indicators Monthly Report for October, 2017.

Constitutional Amendment Proposal 40
Fact Sheet
Why Florida's Foster Children Need Counsel

We Bounce Them from Placement to Placement. Almost 30% of children in care right now have had 3 or more placements. Nearly 12% have had 5 or more placement changes. Almost 700 children have had more than 10 placements! [5]

We Medicate them to Deal with Behaviors Often Caused by Traumatic Situations. One-Tenth of Children in state care are Prescribed Psychotropic Medications. [5]

They Languish. 17% of kids (4,214) have had their parental rights terminated – those children have been in care for an average of 31 months. There are more than 1,100 kids whose parents' rights were terminated who have been in care 3 years or longer. We have 530 kids in care for more than 3 years for whom no termination of parental rights motion has even been filed. [5]

They Fall Behind in their Education. 43% changed schools in the school year compared to 10% of their non-foster care peers. In third grade 37% of DCF involved students score a 3 or higher on English Language Arts statewide assessment, compared to 54% of their non-DCF peers. By the tenth grade, only 21% of DCF involved students scored a passing 3 or higher on the English Language Arts statewide assessment, compared to their non-DCF peers at 49%.[6]

Sometimes they are Injured in the System that is Supposed to Protect them from Harm. DCF's current rate of victimization in care is 10.17% representing 887 children. [1]

We Fail to Prepare them for Success as Adults. Few of the young adults who age out of foster care hold full time jobs: only 14% of youth surveyed had full time jobs, and another 29% had part time jobs. Housing is challenging: 20% report having been homeless in the last 2 years, and 25% report couch surfing. 18% report being a parent by age 22. 21% of 18 year olds reported having been jailed or detained within the last 2 years.[7]

Do Foster Children Really Need Lawyers?

The Evidence Is In, And It Is Clear – Foster Children Need Their Own Lawyers.

The Quality Improvement Center on the Representation of Children in the Child Welfare System - a federally funded multi-year research study, determined from its literature review that, "It is widely accepted that children require attorney representation in dependency proceedings. That report went on to explain:

The Practical Necessity of Attorney Representation

> [T]he weight of academic and practitioner opinion suggests that without the legal representation, a child has little prospect of successfully navigating the complexities of dependency proceedings. Clients need to know their legal options, what will happen next in their case, and the likelihood of prevailing—services which non-attorneys are unable to provide. Attorney's legal capabilities and expertise in negotiating systems are often critical to advocating for children's service needs. Lawyers also challenge the state to meet its legal burden when attempting to persuade the court to take measures such as removing the child from his home or terminating parental rights….

Needs Assessment, Literature Review, pg. 5

The federal agency responsible for child welfare recently issued a report urging states to provide high quality representation for all parties in dependency proceedings. That report explained that:

Legal Representation for Children, Parents and Youth Contributes to or is Associated With:[8]

[5] DCF point in time data provided to Florida's Children First on November 27, 2017

[6] Data provided by DCF for the 2015-16 school year.

[7] NYTD – Spring 2017 Florida's Survey of Former Foster youth 18-22.

[8] High Quality Representation Report, page 3.

- increases in party perceptions of fairness;
- increases in party engagement in case planning, services, and court hearings;
- more personally tailored and specific case plans and services;
- increases in visitation and parenting time;
- expedited permanency; and
- cost savings to state government due to reductions of time children and youth spend in care.

Early Appointment of a Well-Trained Attorney for Children Expedites Permanency.
Duquette et. al ., (2016) *Children's Justice: How to Improve Legal Representation of Children in the Child Welfare System*, ABA Publications. In fact, one study showed that children in Florida who were provided a legal aid attorney achieved permanency on average 88 days faster than children who did not have counsel. *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County*. Zinn, A.E. & Slowrover, J. (2008) Chicago: Chapin Hall Center for Children at the University of Chicago.

There is a National Shift Toward Providing Attorneys for Children, Evidenced by:

- American Bar Assoc. adoption of Model Legislation on Representation (2011)
- Conference of State Court Administrators Policy Position (August, 2017)
- Shift in scholarship and state practices on provision of representation to children.[9]

How Much Will It Cost to Give Every Child a Lawyer?

The cost of providing counsel to unrepresented children is approximately $20 million.

Florida already provides attorneys to 10% of children of the 30,000 children who will be in out-of-home care during a year. Of the 27,000 remaining children, two-thirds are in sibling groups, many of whom can be represented by the same attorney. Taking that into account, we estimate that 27,000 children can be represented by 17,200 attorneys.

At an average appointment cost of $1,200 per year, the total expense is $20,240,000.

How Much will it Save?

The cost savings for reduced time in care will exceed the cost of paying for counsel.

Research shows that attorneys speed children to permanency. A national study of the representation that Palm Beach Legal Aid provides to foster children shows that children exited the foster care system on average 88 days earlier than their unrepresented peers.
The cost of housing children in out of home care averages between $42 and $57 dollars a day.[10] Taking the low end of $42 – just one month saved in out of home care will pay the cost of an attorney. An additional $2,400 per child will be saved just in cost of care. (This does not include the other costs associated with a child's stay in foster care, such as salaries and administrative expenses for child welfare agencies and courts.)

[9] *See, The Right to Counsel Landscape after Passage of the ABA Model Act – Implications for Reform*, Harfeld, 36 Nova LR 325, 326 (2012) and *Wanted: Forever Home, Achieving Permanent Outcomes for Nevada's Foster Children*. Meyer-Thompson, 14 Nevada LJ 268, 291 (Fall 2013).
[10] Point in time data provided in November, 2017 showed the average cost of care for all children – was $42. That includes children with caregivers who receive no funds and children in group homes whose daily cost of care may be $125 a day or more.

Constitutional Amendment Proposal 40
Fact Sheet
Why Florida's Foster Children Need Counsel

Long-term savings will be realized when children achieve permanency sooner.

Studies tell us the longer children remain in foster care, the poorer the outlook for their health and well-being. They experience physical, mental health and developmental challenges at significantly higher rates than the general population of children, the longer they remain in foster care, the longer they are likely to continue waiting for a permanent family.[11]

The costs are greatest for children who age out of care without a family – they are more likely to be homeless, depend on welfare and become incarcerated.[12] They are less likely to complete high school, which comes with an estimated cost of $292,000 over a lifetime.[13]

Why Do Children Need Lawyers When They Already Have a GAL?
The roles of the Attorney and Guardian Ad Litem are Distinct and Both Important

Florida has always treasured its cadre of volunteers who step up to participate in the lives of our foster children. Those volunteers bring unique insight and enthusiasm to the children they serve, but because they do not bring legal skills,[14] children need lawyers too.

GAL Role

Volunteer GALS have the ability to establish meaningful relationships with children. They usually have only one child or sibling group for whom they are responsible. They get to know the people involved in the child's life, gather information, and report to the court about the child's needs. They are obligated to represent to the court what they believe is in the child's best interest. They are also obligated to tell the court what the child wants. They are not trained to ascertain the child's legal rights or spot legal issues.

In Florida, the GAL is also a party to the dependency case and has the ability to file motions and participate in hearings through attorneys employed by the GAL program. The GAL attorneys work with staff and volunteers. There is no expectation that the GAL attorney have a relationship with the child.

Child's Attorney Role

Attorneys are obligated under the Rules of Professional conduct to have a direct attorney/client relationship with their child clients. They owe children the same duties of confidentiality, competence, loyalty, counsel and zealous advocacy as adult clients. They are aided in this work with Guidelines for Practice and a myriad of advocacy tools that assist them in representing children, even non-verbal and pre-verbal children. This means that they have to get to know their clients, and speak with all of the people around their clients and engage experts sometimes in order to perform their job. The child's attorney has to determine what the child's rights are, talk with the child, counsel the child, and then zealously advocate for the child.

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[11] Legislative Strategies to Safely Reduce the Number of Children in Foster Care, Madelyn Freundlich, National Conference of State Legislatures. Pg. 1 (July 2010) (internal citations omitted).

[12] *The Human, Social, and Economic Cost of Aging out of Foster Care*, National Council for Adoption, May 2015. The report states: "Conservative studies fnd one in five will become homeless after 18; at 24, only half will be employed; less than 3% will have earned a college degree; 71% of women will be pregnant by 21; and one in four will have experienced post-traumatic stress disorder at twice the rate of United States war veterans. And too often, many are at risk of moving back into government systems — from juvenile centers to prison." (pg.4)

[13] *Id.* at pg. 6.

[14] Orange County is the exception as members of the Orange County Bar Assoc. serve as GALs.

Constitutional Amendment Proposal 40
Fact Sheet
Why Florida's Foster Children Need Counsel

Brief Comparison of the roles of the GAL and Child's Attorney

Volunteer Guardian Ad Litem	Child's Attorney
Personal relationship - may include mentoring or social activities.	Professional relationship requires attorneys to develop rapport and trust.
Communication with the child is not confidential.	Communication is covered by attorney-client privilege.
Duty to ascertain what the child needs and report to court.	Duty to ascertain the child's rights and advise the client.
Duty to ascertain the child's desires and report to court.	Duty to ascertain the child's desires and counsel the child.
Duty to advocate for what the GAL thinks is in the child's best interest.	Duty to advocate for what the child wants
Immune from liability if makes a mistake.	Can be sued for malpractice.

Best Practice is to Provide Children with both an Attorney and a Volunteer.

States that traditionally provide counsel see the benefit of adding volunteers finding that children who have both a volunteer and an attorney do better than those solely represented by an attorney.[15]

[15] *Systematic Review of the Impact of Court Appointed Special Advocates,* Youngclark, 5. J. Center for Families, Child & Cts., 109

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

40
Proposal Number (if applicable)

***Topic** Right to Counsel Dependent Children

Amendment Barcode (if applicable)

***Name** Judge Daniel P. Dawson

Address Ninth Judicial Circuit Court of FL
Street

Phone 407 836 9580

City *State* *Zip*

Email

***Speaking**: ☐ For ☐ Against ☒ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☒ No

If yes, who?

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☒ Yes ☐ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

January 24, 2018
Meeting Date

40
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Counsel for Dependent Children

***Name** Robin L. Rosenberg

Address 1001 W. Coral St
Street

Phone 813-625-3722

Tampa *City* FL *State* 33602 *Zip*

Email robin.rosenberg@floridaschildrenfirst.org

***Speaking:** ☐ For ☐ Against ☑ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☑ No

If yes, who? I prepared the analysis at the behest of the Florida Bar.

Are you a registered lobbyist? ☐ Yes ☑ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

***Required**

Information submitted on this form is public record.

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1-25-18
Meeting Date

40
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Prop. 40

***Name** Alan Abramowitz

Address 600 S. Calhoun St.
Street

Tallahassee FL 32399
City *State* *Zip*

Phone 850-922-7213

Email alan.abramowitz@gal.fl.gov

***Speaking**: ☐ For ☒ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☒ Yes ☐ No

If yes, who? Statewide Guardian ad Litem Office

Are you a registered lobbyist? ☒ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1-25-18
Meeting Date

40
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Proposal #4

***Name** Christine Meyer

Address 201 N. Hogan St., Ste. 6004
Street
Jacksonville, FL 32202
City *State* *Zip*

Phone (954) 483-9540

Email christine.meyer@gal-fl.gov

***Speaking:** ☐ For ☒ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☒ No

If yes, who? _____

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

WELCOME GUEST

CONSTITUTION REVISION COMMISSION
PUBLIC HEARING

Do you want to speak? Please fill out this card.

January 25, 2018
Date

*Topic/Issue Declaration of Rights Public Hearing on Amendment 40

*Name Howard Talenfeld

Address 1776 N Pine Island Road, Suite 222 Phone (754)888-5437
Street

Plantation Florida 33322 Email howard@justiceforkids.us
City *State* *Zip*

Are you representing someone other than yourself? [X] Yes [ ] No

If Yes, who? Florida's Children First

Are you a registered lobbyist? [ ] Yes [X] No

Are you an elected official or judge? [ ] Yes [X] No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record. ***Required***

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

40
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Workshop on Representation

***Name** Gerry Glynn

Address 503 Florida St
Street
Orlando FL 32806
City *State* *Zip*

Phone 407-234-0249

Email grordfglynn03@gmail.com

***Speaking**: ☑ For ☐ Against ☐ Information Only

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☑ No

If yes, who? _____

Are you a registered lobbyist? ☐ Yes ☑ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

40
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Attorney Representation

***Name** Tim Stevens

Address 12168 146th PL N
Street
Palm Beach Gardens FL 33418
City *State* *Zip*

Phone 561-386-3056

Email tstevens@legalaidpbc.org

***Speaking:** ☑ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☑ Yes ☐ No

If yes, who? Legal Aid Society Palm Beach County Foster Childrens Project

Are you a registered lobbyist? ☐ Yes ☑ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

_____
Meeting Date

40
Proposal Number (if applicable)

***Topic** _____

_____
Amendment Barcode (if applicable)

***Name** Judge James Martz

Address 205 N Dixie Hwy
Street

Phone 561 355 1156

WPB FL 33401
City *State* *Zip*

Email jmartz@PBCGOV.COM

***Speaking:** ☑ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☑ No

If yes, who? _____

Are you a registered lobbyist? ☐ Yes ☑ No

Are you an elected official or judge? ☑ Yes ☐ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

40
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Workshop on Representation

***Name** Destin Vegu

Address 15 Cherry Laurel Ct Apt 109 Phone 321-972-4059
Street

Winter Springs FL 32708 Email
City *State* *Zip*

***Speaking**: ☑ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☑ No

If yes, who?

Are you a registered lobbyist? ☐ Yes ☑ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

Constitution Revision Commission
Declaration Of Rights Committee
Proposal Analysis

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

Proposal #: P 40

Relating to: DECLARATION OF RIGHTS, creates new section

Introducer(s): Commissioners Keiser and Coxe

Article/Section affected: Article I, New Section

Date: January 24, 2018

	REFERENCE	ACTION
1.	DR	**Pre-meeting**
2.	JU	

I. SUMMARY:

Dependency proceedings are adversarial legal proceedings that are initiated by the state based upon probable cause to believe a child is, has been, or is at imminent risk of being abused, abandoned, or neglected. In dependency proceedings, the primary concern of the court is the interplay between the parents' constitutional rights to raise their children free from interference and the state's compelling interest to protect children from neglect or abuse.

All parents in dependency proceedings are constitutionally entitled to counsel, and indigent parents are entitled to appointed counsel. However, no provision in Florida law or rule requires appointment of counsel for dependent children unless the child has certain medical needs. Children in dependency proceedings are largely represented by Guardian ad Litems (GAL). GALs are trained volunteers who are supported by a GAL attorney and a child advocate; together the team represents the best interests of the child in the proceeding.

The proposal establishes a constitutional right to counsel for children in dependency proceedings.

If passed by the Constitution Revision Commission, the proposal will be placed on the ballot at the November 6, 2018, General Election. Sixty percent voter approval is required for adoption. If approved by the voters, the proposal will take effect on January 8, 2019.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Chapter 39, Florida Statutes, governs dependency proceedings in the State of Florida. Dependency proceedings are usually initiated upon a child being sheltered (i.e., removed from the parents' custody) based on probable cause to believe the child is, has been, or is at imminent risk of being abused, abandoned, or neglected. These are adversarial legal proceedings where the primary concern of the court is the interplay between the parents' constitutional rights to raise their children free from interference and the state's compelling interest to protect children from neglect or abuse.[1] The child is also a party to these proceedings[2] and is vested with rights under ch. 39, F.S., including the right to a permanent home.[3] Children, therefore, have a critical stake in the outcome of dependency proceedings.

Dependency Proceedings

The dependency process begins with an investigation into a report of child abuse, abandonment, or neglect.[4] The report is referred to a child protection investigator in the Department of Children and Families (DCF) who conducts an on-site investigation of the alleged abuse, neglect, or abandonment.[5] Based on the results of the investigation, a petition may be filed by DCF requesting the court place the child in shelter and seeking adjudication that the child is dependent and should be placed in the state's care[6] When a child is placed in the state's care, the state "acts in the protective and provisional role of in loco parentis" for the child.[7] Upon the filing of a petition for dependency, whether or not the child is taken into custody,[8] the circuit court assigned to hear dependency cases (dependency court) will schedule an adjudicatory hearing to determine whether the child is dependent, based on a preponderance of the evidence.[9]

A child is dependent if the child:

- Has been abandoned, abused, or neglected by the child's parent(s) or legal custodians(s);
- Has been surrendered to DCF or a licensed child-placing agency for adoption;
- Has been voluntarily placed with a licensed child-caring agency, licensed child-placing agency, an adult relative, or DCF, pursuant to an action under ch. 39 and the parent(s) or legal custodian(s) have substantially failed to comply with the case plan at the time of its expiration;

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[1] William A. Booth, *The Importance of Legal Representation of Children in Chapter 39 Proceedings*, THE FLORIDA BAR FAMILY LAW SECTION: COMMENTATOR (Fall 2010), p. 31, available at www.familylawfla.org/newsletter/pdfs/Fam-Fall-2010-web.pdf.
[2] s. 39.01(52), F.S.
[3] ss. 39.001(1)(h) and 39.0136(1), F.S.
[4] s. 39.301(1), F.S.
[5] *Id*.
[6] s. 39.501, F.S.
[7] *Buckner v. Family Services of Central Florida, Inc*., 876 So. 2d 1285 (Fla. 5th DCA 2004).
[8] s. 39.402, F.S.; A child may be taken into custody and placed in a shelter without a prior hearing if there is probable cause of imminent danger or injury to the child, the parent or legal custodian, responsible adult relative has materially violated a condition of placement, or the child has no parent, legal custodian, or responsible adult relative immediately known and able to provide supervision and care. If a child is taken into custody, a hearing is held within 24 hours.
[9] s. 39.507(1)(a) and (b), F.S.

- Has been voluntarily placed with a licensed child-placing agency for subsequent adoption with the parent(s) consent;
- Has no parent or legal guardian capable of providing supervision and care;
- Is at substantial risk of imminent abuse, abandonment, or neglect by the parent(s) or legal custodian(s); or
- Has been sexually exploited and has no parent, legal custodian, or responsible adult relative currently known and capable of providing for the care, maintenance, training, and education of a child.

If a court finds a child dependent, a disposition hearing is held to determine appropriate services and placement settings for the child.[10] At this hearing, the court also reviews and approves a case plan outlining services and desired goals, such as reunification with the family or another outcome, for the child.[11] The court holds periodic judicial reviews, generally every six months, until supervision is terminated, to determine the child's status, the progress in following the case plan, and the status of the goals and objectives of the case plan.[12] After twelve months, if the case plan goals have not been met, the court holds a permanency hearing to determine the child's permanent placement goal.[13]

Right to Counsel in Dependency Proceedings

In 1980, the Florida Supreme Court in *In Interest of D.B.,* 385 So. 2d 83 (Fla. 1980), held that there is no constitutional right to counsel for the child in a juvenile dependency proceeding. In general, the federal[14] and state approach to represent the needs of children in the dependency system relies upon the appointment of Guardian ad Litems (GAL).[15] There are approximately 25,600 children currently represented by the Statewide Guardian ad Litem Program.[16] Section 39.822(1), F.S. requires the court to appoint a GAL at the earliest possible time to represent a child in any child abuse, abandonment, or neglect judicial proceeding, whether civil or criminal. A child represented by the Statewide Guardian Ad Litem Office is assigned a volunteer who is supported by an attorney and a child advocate; together this team represents the best interests of the child in dependency proceedings.

[10] s. 39.521(1), F.S.
[11] s. 39.521(1)(a), F.S.
[12] s. 39.521(1)(c), F.S.
[13] s. 39.621(1), F.S.
[14] The Federal Child Abuse Prevention and Treatment Act (CAPTA) requires states to document in their case plans provisions for appointing guardian ad litem to represent the child's best interest in every case of child abuse or neglect which results in a judicial proceeding. 42 U.S.C. ss. 5101 *et seq*
[15] "Guardian ad litem" as referred to in any civil or criminal proceeding includes the following: a certified guardian ad litem program, a duly certified volunteer, a staff attorney, contract attorney, or certified pro bono attorney working on behalf of a guardian ad litem or the program; staff members of a program office; a court-appointed attorney; or a responsible adult who is appointed by the court to represent the best interests of a child in a proceeding as provided for by law, including, but not limited to, this chapter, who is a party to any judicial proceeding as a representative of the child, and who serves until discharged by the court. s. 39.820(1), F.S.
[16] Statewide Guardian Ad Litem Program, Analysis of CRC Proposal 40, Dec. 5, 2017, pg. 4 (on file with the Declaration of Rights Committee).

Children with Special Needs

In 2014, the legislature established a right to counsel for a limited class of dependent[17]children with special needs. Section 39.01305, F.S., requires a court to appoint an attorney for a dependent child who:[18]

- Resides in a skilled nursing facility or is being considered for placement in a skilled nursing home;
- Is prescribed a psychotropic medication but declines assent to the psychotropic medication;
- Has a diagnosis of a developmental disability;[19]
- Is being placed in a residential treatment center or being considered for placement in a residential treatment center; or
- Is a victim of human trafficking.[20]

An attorney who is appointed under s. 39.01305, F.S., must provide the dependent child with the complete range of legal services, from the removal from home or from the initial appointment through all available appellate proceedings.[21] However, with the court's permission, the attorney may arrange for supplemental or separate counsel to represent the child in appellate proceedings. The appointment of the attorney continues in effect until the attorney is allowed to withdraw, is discharged by the court, or the case is dismissed.

Before making an appointment under s. 39.01305, F.S., the court must first consult the Statewide Guardian Ad Litem Office to determine if an attorney is available and willing to represent the child pro bono. If such an attorney is available within 15 days of the court's request, the court must appoint a pro bono attorney.[22] If unavailable, the court must appoint and compensate an attorney or organization and provide the attorney or organization with access to funding for expert witnesses, depositions, and other costs of litigation. Appointments of compensated counsel must be made through a court registry.[23] Fees (does not include due process costs) for appointed attorneys may not exceed $1,000 per child, per year .[24] Compensation is paid irrespective of the number of case numbers that may be assigned or the number of children involved.[25]

B. EFFECT OF PROPOSED CHANGES:

The proposal establishes a constitutional right to counsel for every child who has been removed from the custody of his or her parents or a legal guardian by the state due to abuse or neglect, or is otherwise placed in the jurisdiction of the dependency court.

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[17] For purposes of s. 39.01305, F.S., "dependent child" means a child who is subject to any proceeding under ch. 39, F.S. The term does not require that a child be adjudicated dependent.
[18] s. 39.01305, F.S.
[19] "Developmental disability" means a disorder or syndrome that is attributable to intellectual disability, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely. s. 393.063(9), F.S.
[20] "Human trafficking" means transporting, soliciting, recruiting, harboring, providing, enticing, maintaining, or obtaining another person for the purpose of exploitation of that person. s. 787.06(2)(d), F.S.
[21] s. 39.01305, F.S.
[22] s. 39.01305(4)(a), F.S.
[23] s. 27.40, F.S.
[24] s. 39.01305(5), F.S.
[25] s. 27.5304(6)(a), F.S.

If approved by the voters, the proposal will take effect on January 8, 2019.[26]

C. FISCAL IMPACT:

The bill has an indeterminate but perhaps significant recurring negative impact on state expenditures. The expansion of the right to counsel for dependent children may result in a significant increase in court-appointed attorneys and, correspondingly, costs for fees. The Department of Children and Families reports that in FY 2016-17, 53,661 children had active dependency court cases.[27] If counsel had been appointed for each of these children and the counsel had been compensated at the rate of $1,000 per child per year established in s. 39.01305, F.S., the fiscal impact of the proposal for FY 2016-17 would have been $53,661,000.[28]

In Fiscal Years 2014-2017, approximately 3,084 attorneys were appointed to represent dependent children with special needs pursuant to s. 39.01305, F.S. During these years, approximately $3,532,917 was paid in attorney fees and $26,842 in due process costs for this case type.[29]

III. Additional Information:

A. Statement of Changes:
(Summarizing differences between the current version and the prior version of the proposal.)

None.

B. Amendments:

None.

C. Technical Deficiencies:

Section 39.01305, F.S., which establishes a statutory right to counsel for children with special needs, contemplates that the counsel will represent the dependent child in proceedings under Chapter 39, F.S., fair hearings, and appellate proceedings. The proposed revision to the State Constitution does not contain a similar definition of the types of proceedings in which the appointed counsel will represent the child.

D. Related Issues:

None.

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[26] *See* FLA. CONST. ART XI, S. 5(E) (1968) ("Unless otherwise specifically provided for elsewhere in this constitution, if the proposed amendment or revision is approved by vote of at least sixty percent of the electors voting on the measure, it shall be effective as an amendment to or revision of the constitution of the state 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.)

[27] Department of Children and Families, Analysis of CRC Proposal 40, Nov. 27, 2017 (on file with Declaration of Rights Committee).

[28] *Id.*

[29] Justice Administrative Commission, Analysis of CRC Proposal 40, Jan. 8, 2018, pg. 7 (on file with Declaration of Rights Committee).

By Commissioner Keiser

keiserb-00058-17 201740__

A proposal to create
a new section in Article I of the State Constitution
to establish a right to counsel for children in
dependency proceedings.

Be It Proposed by the Constitution Revision Commission of Florida:

A new section is added to Article I of the State Constitution to read:

ARTICLE I
DECLARATION OF RIGHTS

Right to counsel for children in dependency proceedings.—Every child who has been removed from the custody of his or her parents or a legal guardian by the state due to abuse or neglect, or is otherwise placed in the jurisdiction of the dependency court, has a right to counsel.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

CONSTITUTION REVISION COMMISSION
2017 - 2018

COMMISSIONER BELINDA KEISER

COMMITTEES:
Legislative, *Vice Chair*
Education, *Commissioner*
Executive, *Commissioner*

Declaration of Rights

January 25, 2018

Presentation of Proposal 40

Sponsored by Commissioner Belinda Keiser / Co-Introducer Commissioner Hank Coxe

Article I Constitutional Rights at Issue:

SECTION 9. **Due process —**No person shall be deprived of life, liberty or property without due process of law….

SECTION 21. **Access to Courts —**The courts shall be open to every person for redress of any injury and justice shall be administered without sale, denial or delay.

SECTION 23. **Right of Privacy —**Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein….

Establishes the Child's Right to Appointed Counsel in Dependency Proceedings

- The removal of children from their parents is the most intrusive and potentially damaging action the State can take in a person's private life.
- As devastating as that can be for parents, it is the children who physically live with that decision.
- Yet children are the only party **not** represented by counsel in those proceedings.

Proposal 40 Remedies the Due Process Defect for Florida's Foster Children

Right to counsel for children in dependency proceedings –

Every child who has been removed from the custody of his or her parents or a legal guardian by the state due to abuse or neglect, or is otherwise placed in the jurisdiction of the dependency court, has a right to counsel.

Children in Out-of-Home Care Face a Significant Loss of Liberty

Removal from parents may address an immediate risk of harm, but placement in state care is traumatic and sometimes harmful.

- Children lose their liberty for up to 1 year if all goes well, and often for many more, they are in care more than 3 years.
- Children immediately lose their home, possessions, neighborhood, friends, and often their school.
- **If they are in foster care they no longer live with their parents and** the system places 1/3 of children (35.72% as of 9/30/17) out of their home County.
- They live with the uncertainty and instability of multiple placements.
  - 30% have had 3 or more placements
  - Nearly 12% have had 5 or more placement changes
  - Almost 700 children have had more than 10 placements.
- 948 children aged out of care in 2018 without ever having a permanent caregiver.

Children in Out of Home Care Face a Significant Loss of Liberty

Removal from parents may address an immediate risk of harm, but placement in state care is traumatic and sometimes harmful.

- They lose the daily presence and support of their siblings (38%)
- Teens lose a family life and are sent to live in institutions (-66%)
- They fall behind in school
  - 43% change school during the school year
- 1,072 children who were abused and neglected are now being served in Florida's delinquency system as of 12/31/17
- DCF's current rate of victimization in care is 10.17% representing 887 children

Why Lawyers in Addition to Guardians?

- **Clients need their own lawyer:**
  - One who is experienced and understands the complexity of the dependency system
    - Assist children in obtaining necessary services
    - Help with their education
    - Get them safely home, to relatives or adoptive families as soon as possible.
- **Clients need a counselor:**
  - To speak to confidentially (attorney-client privilege)
  - Who can advise them if they are making the right decisions
  - To counsel them against making unwise personal choices.
- **Clients need to know their legal options:**
  - What will happen next in their case, and the likelihood of prevailing—services which non-attorneys are unable to provide.
- **Lawyers also challenge the state** to meet its legal burden when attempting to persuade the court to take measures such as removing the child from his home or terminating parental rights.

Due Process Compels Protection of Children's Rights by Counsel

- The decisions courts make in child welfare proceedings are serious and life changing. Parents stand the possibility of permanently losing custody and contact with their children. **Children and youth are subject to court decisions that may forever change their family composition, as well as connections to culture and heritage.**

- The U.S. legal system is based on the premise that parties have a due process right to be heard and that **competent legal representation and fair treatment produce just results.**

Memorandum on High Quality Legal Representation for All Parties in Child Welfare Proceedings issued by the Administration for Children and Families, January 2017.

Attorneys and Guardians Working Together in Broward and Palm Beach Counties Makes a Difference for Children

- For over 15 years, Palm Beach County's Foster Children's Project has demonstrated that **providing lawyers for children results in tailored and specific case plans and services, increases in visitation and parenting time, expedited permanency, and cost savings to state government due to reductions of time children and youth spend in care**.

- The independent University of Chicago Chapin Hall study of the foster children project settles once and for all that **providing lawyers for child victims of abuse, abandonment, and neglect gets children out of state custody and into safe stable and forever homes 88 days faster.** Broward County is also having a positive experience with its recently funded program.

- Children who face a loss of liberty deserve the best practice approach, which is to have both a lawyer and a Guardian Ad Litem. **Our support for this proposal is to add attorneys for children and not eliminate Guardian ad litem representation.**

Florida SHOULD NOT be 1 of 10 States that do not provide direct attorney representation for abused and neglected children

In summary, Proposal 40 serves to **Protect Florida's Foster Children:**

- It will require the state to provide counsel to children who were removed from their parents and placed into dependency court proceedings.
- **Providing** high quality counsel for children reduces the time to permanency, thereby reducing the harm caused to children and the expense to the state.
- It will ensure that **they will have a lawyer in addition to their statutory right to have a Guardian ad Litem appointed**, giving abused and neglected children the best protections.

Florida's Costs Can Be Expected to be $20,973,000

The Cost to represent the 90% of children in Out-of-Home Care (27,000 children) Who Are Not Currently Represented:

17,820 Appointments of Counsel Required
x
$1,200 per appointment
= **$20,240,000**

If children who are under court supervision (965 children), but have never been removed are included:

611 Attorney Appointments would cost at $1,200 per appointment
=$733,200

The Short-term Savings that Can be Expected from Providing Children with High Quality Counsel is double that – almost $40 million.

- The short-term savings using the shortened length of stay as published in the Chapin Hall report shows an 88.3 day reduction in length of stay in care.
  - ✓ The cost of licensed care alone costs an average of $42.61 per day. With 40% of 26,000 children in licensed care the savings are expected to be $39,926,000.00

- The longer term savings to society could be estimated at $28 million per year.
  - ✓ $300,000 per young adult who leaves care without a family is the estimated amount of future societal costs per the report commissioned by the Jim Casey Foundation.
  - ✓ Over 957 kids age out of care in Florida each year. If only 10% each year reached permanency because of a lawyer's help, savings would be $28 million for each year.

In Closing…

Imagine you are a child who was abused or neglected, separated from your parents, your siblings and then taken into a courtroom where the most important questions in your life were going to be determined.

Please consider whether you would take the risk of going to court without a lawyer when the decision could be the most significant of your life.

If you wouldn't go to court without a lawyer, why is it fair to deprive abused and neglected children of that fundamental assistance?

Locally funded programs in Palm Beach and Broward Counties have proven that lawyers and guardians do make a huge difference working together.

Please pass this amendment of Florida's Constitution out of this Committee. The right for abused and neglected children to have their own attorney in court proceedings will determine their future and their fate.

Thank You

Q & A

Thomas M. Susman
Director
Governmental Affairs Office

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January 24, 2018

The Honorable Lisa Carlton
Chair, Constitution Revision Commission
Declaration of Rights Committee
The Capitol
400 S. Monroe St.
Tallahassee, FL 32399

The Honorable John Stemberger
Vice Chair, Constitution Revision Commission
Declaration of Rights Committee
The Capitol
400 S. Monroe St.
Tallahassee, FL 32399

Dear Commission Chair Carlton and Vice Chair Stemberger:

I write on behalf of the American Bar Association (ABA) to express our support for the Florida Constitutional Amendment Proposal 40, establishing a right to counsel for all children in foster care in the State of Florida.

The ABA is one of the world's largest voluntary professional organizations, with nearly 420,000 members (over 23,000 in Florida), including attorneys in private firms, corporations, nonprofit organizations, and government agencies, as well as judges, prosecutors, defense attorneys and public defenders, legislators, and law professors and law students. The ABA is committed to advancing the rule of law and improving the administration of justice, and for over a century the ABA has advocated for the ethical and effective representation of all clients, including children.

The ABA has long recognized that children need and deserve legal representation in dependency court proceedings. In 1996, the ABA approved the *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*.[1] These Standards state "[a]ll children subject to court proceedings involving allegations of child abuse and neglect should have legal representation as long as the court jurisdiction continues."[2]

The ABA reaffirmed these principles in 2011 by adopting the *ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings* (ABA Model Act).[3] The ABA Model Act explicitly supports the appointment of a lawyer for every child involved in

[1] AM. BAR ASS'N, STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (1996), *available at* http://www.americanbar.org/content/dam/aba/migrated/family/reports/standards_abuseneglect.authcheckdam.pdf.

[2] *Id.* at 1.

[3] AM. BAR ASS'N, MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS (2011) [hereinafter ABA Model Act], *available at* https://apps.americanbar.org/litigation/committees/childrights/docs/aba_model_act_2011.pdf.

an abuse and neglect proceeding and states that appointment should take place as soon "as practicable to ensure effective representation of the child."[4]

Florida's proposed Constitutional Amendment Proposal 40 aligns directly with the ABA Standards and Model Act by ensuring "every child who has been removed from the custody of his or her parents or a legal guardian by the state due to abuse or neglect, or is otherwise placed in the jurisdiction of the dependency court, has a right to counsel."[5]

We commend you for considering this Proposal, which reflects the recommendations of children's law experts in Florida and throughout the country. Proposal 40 would also be consistent with federal guidance, which recognizes that child welfare court proceedings are complex and "all parties, especially children, need an attorney to protect and advance their interests in court."[6] Adopting Proposal 40 would also be consistent with most other states where children are provided with counsel in their dependency proceedings.[7]

As the report accompanying the ABA Model Act explains: "An abuse and neglect case that results in removal of the child from the home may immediately or ultimately result in the child being thrust into an array of confusing and frightening situations wherein the State moves the child from placement to placement with total strangers, puts the child in a group home, commits the child to an institution, or even locks the child up in detention for running away or otherwise violating a court order."[8] Although Florida's children in foster care currently receive support from lay guardian ad litems (GALs) such as Court Appointed Special Advocates, that support is not the same as representation by counsel in a complex legal system where children's most fundamental interests are at issue.[9]

In addition to the important legal grounds for providing counsel for children in child welfare proceedings, there is also evidence that representation has a positive impact on case outcomes by decreasing the amount of time children spend in foster care. Indeed, a 2008 study conducted in

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[4] ABA Model Act, § 3(a). The Report accompanying the Model Act explains that "[o]ur notion of basic civil rights, and ABA Policy and Standards, demand that children and youth have a trained legal advocate to speak on their behalf and to protect their legal rights." Report, *in* Model Act 18.

[5] Proposed Constitutional Amendment 40, Keiserb-00058-17; 201740.

[6] See U.S. Department of Health and Human Services Administration for Children, Youth and Families Information Memo, ACYF-CB-IM-17-02, January 17, 2017 at 11, which "strongly encourages all jurisdictions to provide legal representation to all children and youth at all stages of child welfare proceedings."

[7] *A Child's Right to Counsel: A National Report Card on Legal Representation for Abused & Neglected Children (3d ed. 2012)*, published by the Children's Advocacy Institute, First Star and University of San Diego. This report identifies thirty-one states and the District of Columbia where children already have an automatic right to legal counsel in dependency proceedings. Florida and nine other states receive an "F" rating for supporting children's access to legal representation in child welfare cases.

[8] Report, *in* ABA Model Act 18.

[9] *See* Richard Ducote, *Guardians ad Litem in Private Custody Litigation: The Case for Abolition,* 3 Loy. J. Pub. Int. L. 106 (2002) explaining that a GAL cannot possibly replace the role of counsel. *See also* U.S. Department of Health and Human Services Information Memo ACYF-CB-IM-17-02 at 4, noting that distinct from counsel who can navigate a complex legal system and represent a child's rights, CASAs contribute to child welfare proceedings by getting to know the child's needs and providing updates to the court.

Florida demonstrated that children represented by counsel in dependency hearings "had a significantly higher rate of exit to permanency" than children who lacked counsel.[10] At a time when the number of children in foster care in Florida has been steadily rising (with an increase of 31% from 18,076 to 23,810 between 2013-2016 alone),[11] it is especially important to recognize and invest in methods such as legal services that work to minimize unnecessary time in care so that the state can continue to devote limited resources to the cases that require the greatest attention.

The American Bar Association urges the Florida Constitution Revision Commission's Declaration of Rights Committee to support Proposal 40 to ensure that all Florida children in foster care have a right to counsel in their dependency proceedings. Should you have any questions or want additional information, please contact Prudence Beidler Carr, Director, ABA Center on Children and the Law (202-662-1740, prudence.beidlercarr@americanbar.org) or David Eppstein, Legislative Counsel, ABA Governmental Affairs Office (202-662-1766, David.Eppstein@americanbar.org). Thank you for your consideration of these comments.

Sincerely,

Thomas M. Susman

---

[10] A.E. Zinn & J. Slowriver, *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County*, Chapin Hall Ctr. For Child. At the U. of Chicago 1 (2008), *available at and* http://www.chapinhall.org/sites/default/files/old_reports/428.pdf.

[11] Children's Defense Fund State Fact Sheets for 2017 and 2015 available at http://www.childrensdefense.org/library/state-of-americas-children/fact-sheets/2017-florida-soac-factsheet.pdf and http://www.childrensdefense.org/library/data/state-data-repository/cits/2015/2015-florida-children-in-the-states.pdf

WELCOME GUEST

CONSTITUTION REVISION COMMISSION
PUBLIC HEARING

Do you want to speak? Please fill out this card.

1-25-18
Date

*Topic/Issue Proposal 40 - Waive IN OPPOSED

*Name Deborah Moore

Address 5494 Charles Samuel Dr. Phone 850-566-4440
Street

Tall Fl 32309 Email
City *State* *Zip*

Are you representing someone other than yourself? ☐ Yes ☑ ~~No~~

If Yes, who? _____

Are you a registered lobbyist? ☐ Yes ☑ ~~No~~

Are you an elected official or judge? ☐ Yes ☑ ~~No~~

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record. ***Required***

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

_____ 4D
Meeting Date *Proposal Number (if applicable)*

_____
Amendment Barcode (if applicable)

***Topic** Proposal 4D

***Name** LaSharonté Williams-Potts

Address _____ Phone (561) 449-1765
Street

_____ Email lasharonte.williams@gmail.com
City *State* *Zip*

***Speaking:** ☐ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☑ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☑ No

If yes, who? _____

Are you a registered lobbyist? ☐ Yes ☑ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record. ***Required***

WELCOME GUEST

CONSTITUTION REVISION COMMISSION
PUBLIC HEARING

Do you want to speak? Please fill out this card.

1·25·2018
Date

*Topic/Issue PROPOSAL 40 - RIGHT TO COUNSEL

NO!!

*Name ROBIN BARROW - Guardian ad Litem

Address 734 N GADSDEN ST APT 1 Phone 850·728·0542
Street

TALLAHASSEE FL 32303 Email rbarrow@irbsearch.com
City *State* *Zip*

Are you representing someone other than yourself? ☐ Yes ☒ No

If Yes, who? _____

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

I OPPOSE!
I WAIVE SPEAKING

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record. ***Required***

WELCOME GUEST

CONSTITUTION REVISION COMMISSION
PUBLIC HEARING

Do you want to speak? Please fill out this card.

01-25-2018
Date

*Topic/Issue RIGHT TO COUNSEL FOR CHILDREN – PROPOSAL 40

*Name STACEY BURNS

Address 1211 ATHENS CT. (*Street*)

Phone 850-320-0816

TALLAHASSEE (*City*) FL (*State*) 32305 (*Zip*)

Email stacey_burns@comcast.net

Are you representing someone other than yourself? ☐ Yes ☑ No

If Yes, who? _____

Are you a registered lobbyist? ☐ Yes ☑ No

Are you an elected official or judge? ☐ Yes ☑ No

Waive speaking – Opposed to this proposal.

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

_____ _____

Meeting Date *Proposal Number (if applicable)*

_____

Amendment Barcode (if applicable)

***Topic** Proposal #40

***Name** Mary K. Winn

Address 1006 Brookwood Dr. Phone (850) 766-2612

Street

Tallahassee FL 32308 Email kathy.winnclan@embarqmail.com

City *State* *Zip*

***Speaking:** ☐ For ☐ Against ☐ Information Only Waive Speaking: ☐ In Support ☒ Against

(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☒ Yes ☐ No

If yes, who? Guardian ad Litem Program, Second Judicial Circuit

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record. ****Required***

WELCOME GUEST

CONSTITUTION REVISION COMMISSION
PUBLIC HEARING

Do you want to speak? Please fill out this card.

1-25-18
Date

*Topic/Issue Proposal 40 - Opposition to - Waiving right to speak

*Name Patricia Sanzone

Address 1933 Lawson Road
Street

Phone 850-510-0354

Tallahassee, FL 32308
City *State* *Zip*

Email pattis@nettally.com

Are you representing someone other than yourself? ☐ Yes ☒ No

If Yes, who? —

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

11/25/18
Meeting Date

40
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Representation for Dependent Children

***Name** Janelle Batta

Address 310 Blount Street #102
Street
Tallahassee, FL 32301
City *State* *Zip*

Phone 508-868-0238

Email janelle.batta@gmail.com

***Speaking:** ☐ For ☐ Against ☐ Information Only

Waive Speaking: ☒ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☒ No

If yes, who? _____

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/2018
Meeting Date

4/0
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Proposal 40 Comm. for Dyfunct Children

***Name** Dennis Munroe

Address 849 Santa Rosa Dr.
Street

Phone (407) 257-1431

Tallahassee FL 32301
City *State* *Zip*

Email Dmunroe.esq@gmail.com

***Speaking:** ☐ For ☑ Against ☐ Information Only

Waive Speaking: ☐ In Support ☑ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☑ No

If yes, who? _____

Are you a registered lobbyist? ☐ Yes ☑ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

WELCOME GUEST

CONSTITUTION REVISION COMMISSION
PUBLIC HEARING

Do you want to speak? Please fill out this card. No / Opposed

January 25, 2018
Date

*Topic/Issue Right to Counsel for children, Proposal 40

*Name Daniel Alsentzer

Address 715 N. Calhoun Street, Unit 5
Street

Tallahassee Florida 32303
City *State* *Zip*

Phone (850) 339-5414

Email alsentzer@gmail.com

Are you representing someone other than yourself? ☐ Yes ☒ No

If Yes, who? ~

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

WELCOME GUEST

CONSTITUTION REVISION COMMISSION
PUBLIC HEARING

Do you want to speak? Please fill out this card.

10/25/18
Date

*Topic/Issue Right to Counsel For Children Proposal 40

*Name Jennifer West-Kantor

Address 7012 Greniville Rd
Street

Phone 850-933-8514

Tallahassee FL 32309
City State Zip

Email jenwestkan@gmail.com

Are you representing someone other than yourself? ☐ Yes ☒ No

If Yes, who? _____

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

11/25/18
Meeting Date

40
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Representation for Dependent Children

***Name** Dr. Saralyn Grass

Address 199 Mill Branch Rd.
Street

Phone 904-651-5959

Tallahassee FL 32312
City *State* *Zip*

Email sgrass@live.com

***Speaking:** ☐ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☒ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☒ Yes ☐ No

If yes, who? Florida State Foster/Adoptive Parent Association

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1-25-18
Meeting Date

4o
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Right to Council for children #4o NO

***Name** Lynda Giordano

Address 184 Sugar Plum Dr
Street
Tallahassee Fl. 32312
City *State* *Zip*

Phone (850) 443-6060

Email

***Speaking:** ☐ For ☐ Against ☑ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☑ No

If yes, who?

Are you a registered lobbyist? ☐ Yes ☑ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

WELCOME GUEST

CONSTITUTION REVISION COMMISSION
PUBLIC HEARING

Do you want to speak? Please fill out this card.

1-25-2018
Date

*Topic/Issue Right to Counsel #40

*Name Sandra Stevens

Address 263 B S. Villas Ct. (*Street*)

Phone 850 329-0228

Tallahassee (*City*) FL (*State*) 32303 (*Zip*)

Email

Are you representing someone other than yourself? [X] Yes [X] No

If Yes, who? GAL

Are you a registered lobbyist? [ ] Yes [✓] No

Are you an elected official or judge? [ ] Yes [✓] No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25
Meeting Date

40
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Proposal 40

***Name** Joseph Whealdon

Address PO Box 507
Street
Marianna FL 32447
City *State* *Zip*

Phone

Email

***Speaking:** ☐ For ☑ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☑ No

If yes, who?

Are you a registered lobbyist? ☐ Yes ☑ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

WELCOME GUEST

CONSTITUTION REVISION COMMISSION
PUBLIC HEARING

Do you want to speak? Please fill out this card.

1·25-18
Date

*Topic/Issue Right to Counsel #40 — OPPOSE

*Name Julie Cousins

Address 7816 Broomsage Place
Street
Tallahassee FL 32309
City *State* *Zip*

Phone 850-445-1785

Email jbug1917@live.com

Are you representing someone other than yourself? ☐ Yes ☒ No

If Yes, who? _____

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

****Required***

WELCOME GUEST

CONSTITUTION REVISION COMMISSION
PUBLIC HEARING

Do you want to speak? Please fill out this card.

1/25/2018
Date

*Topic/Issue NO to PROPOSAL 40 Right to Counsel for Dependent Children

*Name Elizabeth Purdum

Address 4130 Forsythe Way
Street
TALLAHASSEE FL 32309
City State Zip

Phone 850-294-3467

Email bekypurdum@gmail.com

Are you representing someone other than yourself? ☐ Yes ☑ No

If Yes, who? _____

Are you a registered lobbyist? ☐ Yes ☑ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

**Required*

WELCOME GUEST

CONSTITUTION REVISION COMMISSION
PUBLIC HEARING

Do you want to speak? Please fill out this card.

1/24/18
Date

*Topic/Issue Right To Counsel / Vote No Proposal 40

*Name Mattie A. Johnson

Address 8890 Megans Lane (Street)
Tallahassee (City) FL (State) 32309 (Zip)

Phone (305) 733-0429

Email Mjrattler@comcast.net

Are you representing someone other than yourself? ☐ Yes ☒ No

If Yes, who? _____

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

WELCOME GUEST

CONSTITUTION REVISION COMMISSION
PUBLIC HEARING

Do you want to speak? Please fill out this card.

JAN. 25, 2018
Date

*Topic/Issue RIGHT TO COUNSEL for Children #40 (OPPOSE - No to 40)

*Name LARRY L. CARMICHAEL

Address 1407 DEVILS DIP
Street
TALLAHASSEE FL 32308
City *State* *Zip*

Phone 850-765-6493

Email l_lcarmichael@hotmail.com

Are you representing someone other than yourself? ☐ Yes ☒ No

If Yes, who? _____

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

Waive right to speak in opposition.

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Larry Carmichael
*Required

Information submitted on this form is public record.

WELCOME GUEST

CONSTITUTION REVISION COMMISSION
PUBLIC HEARING

Do you want to speak? Please fill out this card.

1/25/18
Date

*Topic/Issue RIGHT TO COUNSEL (PROPOSAL 40) → NO!!

*Name BERNARD PARKER

Address 535 SW 35th ST. Phone 727-242-0871
Street

OCALA FL 34471 Email PARKERABILITY@HOTMAIL.COM
City *State* *Zip*

Are you representing someone other than yourself? ☐ Yes ☒ No

If Yes, who? _____

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

****Required***

WELCOME GUEST

CONSTITUTION REVISION COMMISSION
PUBLIC HEARING

Do you want to speak? Please fill out this card.

Jan 25, 2018
Date

*Topic/Issue Right to Council - Vote NO on 40

*Name Thomas J. Holt

Address 120 Glenhaven Terrace
Street
Tallahassee Florida 32312
City *State* *Zip*

Phone 85

Email tomholt48@gmail.com

Are you representing someone other than yourself? ☐ Yes ☒ No

If Yes, who? _____

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

****Required***

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

40
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Right to Counsel for Children in Dependency

***Name** TOM POWELL

Address 803 N. CALHOUN ST.
Street

Phone (850) 224-1452

TALLAHASSEE FL 32303
City *State* *Zip*

Email tom@powellforthedefense.com

***Speaking**: ☐ For ☑ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☑ No

If yes, who? _____

Are you a registered lobbyist? ☐ Yes ☑ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1-25-18
Meeting Date

40
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Proposition 40

***Name** Ashley Kalifeh

Address _____ Phone 222-4693
Street

Tallahassee FL 32399
City *State* *Zip*

Email AKalifeh@capcityconsult.com

***Speaking**: ☐ For ☒ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☒ No

If yes, who? _____

Are you a registered lobbyist? ☒ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

WELCOME GUEST

CONSTITUTION REVISION COMMISSION
PUBLIC HEARING

Do you want to speak? Please fill out this card.

1-25-18
Date

*Topic/Issue #40 RIGHT TO COUNSEL

*Name LINDA AMPOL

Address 3150 WINDSONG DR APT 1213 Phone 772-263-3463
Street

TALLAHASSEE FL 32308 Email amp240@gmail.com
City *State* *Zip*

Are you representing someone other than yourself? ☐ Yes ☒ No

If Yes, who? "NO"

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

****Required***

WELCOME GUEST

CONSTITUTION REVISION COMMISSION
PUBLIC HEARING

1/25/18
Date

Do you want to speak? Please fill out this card.

NO

*Topic/Issue Right to Counsel for Children - Prop. 40

*Name Sonia R. Crockett

Address 1818 Chowkeebin Nene
Street

Tallahassee, FL 32301
City State Zip

Phone (850) 571-8037

Email soniac1955@aol.com

Are you representing someone other than yourself? ☐ Yes ☒ No

If Yes, who? _____

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

WELCOME GUEST

CONSTITUTION REVISION COMMISSION
PUBLIC HEARING

Do you want to speak? Please fill out this card.

1/26/2018
Date

*Topic/Issue Proposal 40 RIGHT TO COUNSEL FOR CHILDREN

*Name KRISTINE LAMONT

Address 12033 CEDAR BLUFF TRAIL Phone (850) 893-6427
Street

TALLAHASSEE FL 32312 Email lamontk@hotmail.com
City *State* *Zip*

Are you representing someone other than yourself? ☐ Yes ☑ No

If Yes, who? _____

Are you a registered lobbyist? ☐ Yes ☑ No

PLEASE VOTE "NO"

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/19
Meeting Date

Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Amendment 40

***Name** Eric Clark

Address 9139 McDougal Court
Street
Tallahassee FL 32312
City *State* *Zip*

Phone 850-363-7457

Email drewclark1419@gmail.com

***Speaking**: ☐ For ☒ Against ☐ Information Only

Waive Speaking: ☐ In Support ☒ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☐ No

If yes, who? _____

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record. ***Required***

WELCOME GUEST

CONSTITUTION REVISION COMMISSION
PUBLIC HEARING

Do you want to speak? Please fill out this card.

1/25/18
Date

*Topic/Issue Proposal 46

*Name Dorothy Binger

Address 1601 Rea Avenue
Street

Tallahassee FL 32303
City *State* *Zip*

Phone 850.385.9677

Email dotbinger@comcast.net

Are you representing someone other than yourself? ☐ Yes ☒ No

If Yes, who? _____

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1.25.18
Meeting Date

40
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Proposition 40

***Name** Deborah Lacombe

Address 8090 Archer Cir.
Street
Tallahassee, FL 32309
City *State* *Zip*

Phone 850-545-5432

Email dalacombe@yahoo.com

***Speaking**: ☐ For ☒ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☒ No

If yes, who? _____

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

***Required**

Information submitted on this form is public record.

WELCOME GUEST

CONSTITUTION REVISION COMMISSION
PUBLIC HEARING

Do you want to speak? Please fill out this card.

1-25-18
Date

*Topic/Issue RIGHT TO Counsel # Proposal # 40

*Name Ralph E. Ferrell

Address 1016 Leafwood Dr. (Street)

Phone 850-509-6126

Tallahassee (City) Florida (State) 32312 (Zip)

Email rferrell85@embarqmail.com

Are you representing someone other than yourself? [/] Yes [X] No

If Yes, who? _____

Are you a registered lobbyist? [ ] Yes [X] No

Are you an elected official or judge? [ ] Yes [X] No

NO

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

WELCOME GUEST

CONSTITUTION REVISION COMMISSION
PUBLIC HEARING

1/25/18
Date

Do you want to speak? Please fill out this card.

*Topic/Issue RIGHT TO COUNSEL - Proposal #40

*Name Lillie Ferrell

Address 10016 Leafwood Dr. Phone (850) 509-0192
Street

Tallahassee FL 32312 Email lferrell88@centurylink.com
City State Zip

Are you representing someone other than yourself? ☐ Yes ☒ No

If Yes, who? _____

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

NO

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

WELCOME GUEST

CONSTITUTION REVISION COMMISSION
PUBLIC HEARING

Do you want to speak? Please fill out this card.

1-25-2018
Date

*Topic/Issue Proposal 40 - Right to Council - OPPOSED !!

*Name Lisa Peerson

Address 5736 Braveheart Way
Street
Tallahassee FL. 32317
City *State* *Zip*

Phone 850-877-4082

Email LPeerson@aol.com

Are you representing someone other than yourself? ☐ Yes ■ No

If Yes, who? _____

Are you a registered lobbyist? ☐ Yes ■ No

Are you an elected official or judge? ☐ Yes ■ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

****Required***

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1-25-18
Meeting Date

40
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Declaration of Rights - Right to Counsel for children in dependency

***Name** Ke'Onda Johnson

Address 1324 Alpha Street
Street
West Palm Beach, FL 33401
City *State* *Zip*

Phone

Email

***Speaking:** ☑ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☑ Yes ☐ No

If yes, who? Florida Youth SHINE, youth advocacy organization of current and former foster youth.

Are you a registered lobbyist? ☐ Yes ☑ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

WELCOME GUEST

CONSTITUTION REVISION COMMISSION
PUBLIC HEARING

Do you want to speak? Please fill out this card.

1/25/18
Date

*Topic/Issue Prop 4.0 — Opposed to this amendment

*Name Marcia Hilty

Address 12812 Lake Dora Cir Phone 352 671-5757
Street

Tavares Fl. 32778 Email Marcia.Hilty@gal.Fl.gov
City State Zip

Are you representing someone other than yourself? ☐ Yes ☒ No

If Yes, who? _____

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

WELCOME GUEST

CONSTITUTION REVISION COMMISSION
PUBLIC HEARING

Do you want to speak? Please fill out this card.

1-25-17
Date

*Topic/Issue Right to Counsel Proposal #40

*Name Anne Martin

Address 1212 Greensward
Street

Phone 850 591 5360

Tallahassee FL 32312
City *State* *Zip*

Email galmartin@comcast.net

Are you representing someone other than yourself? ☐ Yes ☒ No

If Yes, who? _____

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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WELCOME GUEST

CONSTITUTION REVISION COMMISSION
PUBLIC HEARING

Do you want to speak? Please fill out this card.

1-25-2018
Date

*Topic/Issue Right to Counsel #40 No!!

*Name Maria Augustyniak

Address 3612 Greens Battery Ct
Street
Tallahassee FL 32308
City State Zip

Phone 850-559-3061

Email maugustyniak77@gmail.com

Are you representing someone other than yourself? ☐ Yes ☒ No

If Yes, who? /

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

WELCOME GUEST

CONSTITUTION REVISION COMMISSION
PUBLIC HEARING

Do you want to speak? Please fill out this card.

1-25-18
Date

*Topic/Issue Amendment 40

*Name Wendy Cox

Address 2501 Bayshore Rd
Street

Phone 941-416-4220

Norcomis FL 34275
City *State* *Zip*

Email Wendy@wendycoxlaw.com

Are you representing someone other than yourself? [X] Yes [ ] No

If Yes, who? Florida's Children First

Are you a registered lobbyist? [ ] Yes [X] No

Are you an elected official or judge? [ ] Yes [X] No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record. ****Required***

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1-25-18
Meeting Date

Amendment 40
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Amendment 40

***Name** Dr. Sara Wood

Address 1519 Marion Ave
Street

Phone (229) 886-9989

Tallahassee FL 32301
City *State* *Zip*

Email teachsb@aol.com

***Speaking:** ☑ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☑ No

If yes, who? _____

Are you a registered lobbyist? ☐ Yes ☑ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

01/25/18
Meeting Date

40
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** PROPOSAL 40

***Name** AMANDA BALLARD

Address 5675 25TH ST. CIR. E. Phone 864 992 9844
Street

BRADENTON FL 34203 Email AMANDABROOKEBALLARD@GMAIL.COM
City *State* *Zip*

***Speaking:** ☐ For ☒ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☒ No

If yes, who? _____

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1-25-18
Meeting Date

Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Proposal 40

***Name** Barbara Busharis

Address 2033 Atascadero Ct
Street
Tallahassee FL 32317
City *State* *Zip*

Phone 850-877-6291

Email bbusharis@hotmail.com

***Speaking:** ☐ For ☑ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☑ No

If yes, who? _____

Are you a registered lobbyist? ☐ Yes ☑ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

40
Proposal Number (if applicable)

***Topic** Attorney Representation: Dependent Children

Amendment Barcode (if applicable)

***Name** WALTER HOLTZMAN

Address 491 N. State Rd 7
Street

Phone 954-257-9717

Plantation FL 33317
City *State* *Zip*

Email

***Speaking:** [X] For [ ] Against [ ] Information Only

Waive Speaking: [ ] In Support [ ] Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? [X] Yes [ ] No

If yes, who? Legal Aid Service of Broward County

Are you a registered lobbyist? [ ] Yes [X] No

Are you an elected official or judge? [ ] Yes [X] No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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WELCOME GUEST

CONSTITUTION REVISION COMMISSION
PUBLIC HEARING

Do you want to speak? Please fill out this card.

1/25/2018
Date

*Topic/Issue Right to Counsel for Children - Prop 40

*Name Sean Ruane

Address 3607 Altoona Drive
Street
Tallahassee FL 32309
City *State* *Zip*

Phone 850 510-8900

Email seanruane@hotmail.com

Are you representing someone other than yourself? ☐ Yes ☑ No

If Yes, who? _____

Are you a registered lobbyist? ☐ Yes ☑ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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****Required***

WELCOME GUEST

CONSTITUTION REVISION COMMISSION
PUBLIC HEARING

Do you want to speak? Please fill out this card.

01/25/18
Date

*Topic/Issue Right to Counsel on Children / Proposal #40

*Name Emma Henderson

Address P.O. Box 20243 (1104 Clay St. Tallahassee, FL 32304) Phone 850-545-3121
Street

Tallahassee, FL 32316 Email jeanhamp01@yahoo.com
City State Zip

Are you representing someone other than yourself? ☐ Yes ☒ No

If Yes, who? _____

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1-25-18
Meeting Date

40
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Prop 40

***Name** Debra Ervin

Address 1500 Cristobal Dr. (Street)
Tallahassee FL 32303
City *State* *Zip*

Phone 850-508-3557

Email ervind@comcast.net

***Speaking:** ☐ For ☒ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☒ No

If yes, who? _____

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

40
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Prop. 40

***Name** John Walsh

Address 423 Fern St
Street

West Palm Beach FL 33401
City *State* *Zip*

Phone 561 302 6038

Email jwalsh@legalaidpbc.org

***Speaking**: ☑ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☑ No

If yes, who? _____

Are you a registered lobbyist? ☐ Yes ☑ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

40
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Proposal 40 - Const. Right to Counsel

***Name** Thomasina Moore

Address* [redacted]
Street

[redacted]
City *State* *Zip*

Phone [redacted]

Email themoores84@hotmail.com

***Speaking**: ☐ For ☒ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☒ No

If yes, who? _____

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

*exempt from public record under 119 as GAL who took steps to keep confidential

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

Jan. 25, 2017
Meeting Date

40
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Right to Counsel

***Name** J Nicole Fried

Address 3980 W. Broward Blvd
Street
Ft. Pl. 33312
City *State* *Zip*

Phone 954-734-3799

Email nikki@ignitingflorida.com

***Speaking**: ☑ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☑ Yes ☐ No

If yes, who? Fla. Bar Legal Needs of Children & Public Interest Law Section

Are you a registered lobbyist? ☑ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record. ***Required***

WELCOME GUEST

CONSTITUTION REVISION COMMISSION
PUBLIC HEARING

Do you want to speak? Please fill out this card.

1/25/18
Date

*Topic/Issue Right to Counsel - Proposal 40

*Name Gwynn Cochran Virostek

Address 1599 Old Fort Drive Phone 954-629-1184
Street

Tallahassee FL 32301 Email
City *State* *Zip*

Are you representing someone other than yourself? ☐ Yes ☑ No

If Yes, who?

Are you a registered lobbyist? ☐ Yes ☑ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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***Required**

WELCOME GUEST

CONSTITUTION REVISION COMMISSION
PUBLIC HEARING

Do you want to speak? Please fill out this card.

Jan 25
Date

*Topic/Issue Right to Counsel for Children - proposal 40

*Name Jill Walker

Address [redacted]
Street

Phone _____

[redacted]
City *State* *Zip*

Email _____

Are you representing someone other than yourself? ☐ Yes ☒ No

If Yes, who? _____

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☒ Yes ☐ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

****Required***

The Constitution Revision Commission

COMMITTEE VOTE RECORD

COMMITTEE: Declaration of Rights
ITEM: P 40
FINAL ACTION: Unfavorable
MEETING DATE: Thursday, January 25, 2018
TIME: 8:00 a.m.—5:00 p.m.
PLACE: The Capitol, Tallahassee, Florida

FINAL VOTE								
Yea	**Nay**	**COMMISSIONERS**	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**
	X	Donalds						
X		Gainey						
X		Johnson						
	X	Joyner						
	X	Lester						
	X	Stemberger, VICE CHAIR						
	X	Carlton, CHAIR						
2	5	**TOTALS**						
Yea	**Nay**		**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**

CODES: FAV=Favorable
UNF=Unfavorable
-R=Reconsidered
RCS=Replaced by Committee Substitute
RE=Replaced by Engrossed Amendment
RS=Replaced by Substitute Amendment
TP=Temporarily Postponed
VA=Vote After Roll Call
VC=Vote Change After Roll Call
WD=Withdrawn
OO=Out of Order
AV=Abstain from Voting

Constitution Revision Commission
Declaration Of Rights Committee
Proposal Analysis

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

Proposal #: P 73

Relating to: DECLARATION OF RIGHTS, Prosecution for crime; offenses committed by children

Introducer(s): Commissioner Coxe

Article/Section affected: Article I, Section 15.

Date: January 18, 2018

	REFERENCE	ACTION
1.	DR	**Pre-meeting**
2.	EX	

I. SUMMARY:

Article I, Section 15(b) of the Florida Constitution authorizes the Florida Legislature to charge violations of law committed by juveniles as an act of delinquency rather than a crime. Pursuant to this power, the Florida Legislature has established a system of juvenile justice wherein juveniles charged with a crime may be adjudicated delinquent and receive criminal sanctions in the juvenile justice system rather than as an adult.

However, a juvenile has the right to be treated as a juvenile delinquent only to the extent provided by the Legislature, and the Florida Legislature has authorized the prosecution of juveniles in adult court for certain law violations. There are several mechanisms by which juveniles may be transferred from the juvenile justice system for adult prosecution including:

- Voluntary Waiver (does not require court approval if waiver is voluntary);
- Grand Jury Indictment (does not require court approval);
- Judicial Waiver (requires court approval);
- Direct File by a State Attorney (Discretionary or Mandatory)(does not require court approval);

The proposal requires state attorneys to petition the circuit court for approval if he or she decides to pursue prosecution of a child as an adult in a criminal court rather than in juvenile court. The court must consider the differences between children and adults in determining whether to approve the transfer request. In essence, the proposal requires a judicial waiver process for all transfers from juvenile court to adult court, abrogating transfer by direct file, voluntary waiver, and grand jury indictment.

If approved by the Constitution Revision Commission, the proposal will be placed on the ballot at the November 6, 2018, General Election. Sixty percent voter approval is required for adoption. If approved by the voters, the proposal will take effect on January 8, 2019. The proposal is silent with regard to retroactivity or applicability to pending cases.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

At common law, juvenile criminal offenders were treated the same as adult criminal offenders. In the late 19th and early 20th centuries, recognizing that children were different from adults in terms of criminal culpability and needs, every state moved to establish a separate system of justice, commonly known today as juvenile justice systems. Juvenile justice systems treat crimes committed by juveniles as delinquent acts with the goal of diverting youth from potentially harsher punishments in criminal courts and encouraging rehabilitation based on the juvenile's individual needs.

Article I, Section 15(b) of the Florida Constitution authorizes the Legislature to establish a system of juvenile justice in Florida wherein children,[1] as defined by the Legislature, may be charged with a violation of law as an act of delinquency instead of crime and tried without a jury or other requirements applicable to criminal cases. Pursuant to this power, the Legislature has established a comprehensive juvenile justice system governed by the provisions of ch. 985, F.S. However, a juvenile charged in the juvenile justice system has a constitutional right to be tried in an appropriate court as an adult if a demand is made prior to an adjudicatory hearing in the juvenile court.

Of greatest constitutional import, as noted in *State v. Cain*, 381 So.2d 1361 (Fla. 1980), a juvenile has the right to be treated as a juvenile delinquent *only* to the extent provided by the Legislature, and in some circumstances the Legislature has authorized the treatment of juvenile criminal offenders as adults. Under such circumstances, a juvenile criminal offender may be transferred to adult court for prosecution.

History of the Juvenile Justice System

Generally

Prior to the the 20th Century, juvenile criminal offenders were generally treated the same as adult criminal offenders.[2] America's juvenile justice system emerged in the late 1890s in response to dissatisfaction with a criminal court system that detained, tried, and punished children in the same manner as adults.[3] Early juvenile law generally grew from citizen concern for children who, lacking parental control, discipline, and supervision, were coming before the criminal court for truancy, begging, homelessness, and petty criminal activity.[4] Several states recognized the need for the government and courts to step in for the absent parent and control the behavior of children that, although not illegal, was considered undesirable by society.[5]

In 1899, Illinois created the first statewide system of juvenile courts through the Cook County Circuit Court with jurisdiction over cases of dependency, neglect, and delinquency. It took several

[1] "Child" has been defined by the Legislature as any person under the age of 18 or any person who is alleged to have committed a violation of law occurring prior to the time that person reached the age of 18 years. s. 985.03(7), F.S.

[2] Except that children age 6 and younger could not be held liable for their actions, but all others were not distinguished from adults. *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, *Adolescent Development & Competency: Juvenile Justice Guide Book for Legislators*, http://www.ncsl.org/documents/cj/jjguidebook-adolescent.pdf (last visited January 17, 2018).

[3] William W. Booth, "History and Philosophy of the Juvenile Court," *Florida Juvenile Law and Practice*, THE FLORIDA BAR, § 1.6: Origins of Concept, (14th ed.).

[4] *Id.*

[5] *Id.*

decades for every state to enact legislation establishing a juvenile justice system, but by the mid-1900s, it had become widely accepted that children were inherently different from adults and should not be subject to the harsh treatment of the criminal justice system.[6] By 1945, juvenile court legislation had been enacted by all states and for use in the federal courts.[7]

Early juvenile courts implemented benevolent and paternalistic policies. The mere existence of the courts represented the belief that children should not be held solely and fully responsible for their actions. Instead, the courts acted to protect children and to maintain their best interests. The underlying goal of juvenile courts was to rehabilitate offenders through individualized justice, with the ultimate belief that children have greater capacity for rehabilitation. Dispositions reflected the preference for treatment over punitive measures. Juveniles rarely were transferred to criminal courts, although that option was possible.[8]

Development in Florida

In Florida, the Florida Constitution of 1885 embodied for the first time public concern about the separation of juveniles and adults in the criminal justice context. Article XIII, Section 2 of the 1885 Constitution provided:

> A State Prison shall be established and maintained in such manner as may be prescribed by law. ***Provision may be made by law for the establishment and maintenance of a house of refuge for juvenile offenders***; and the Legislature shall have power to establish a home and work-house for common vagrants.

However, the Florida Constitution of 1885 did not create juvenile courts, instead vesting jurisdiction in other courts to try alleged law violators without regard to age. In 1911, the Legislature attempted to create a juvenile court through the use of county judges acting in an ex officio capacity in limited cases – those involving behavior problems of children that *did not* constitute law violations.[9] It was not until 1914, after an amendment to the 1885 Constitution, that separate juvenile courts were created.[10] However, the 1914 amendment did not affect the constitutional allocation of criminal jurisdiction, and thus neither the juvenile jurisdiction of the county court nor the jurisdiction of the separate juvenile court included cases of children accused of law violations.[11]

In 1950, the Florida Constitution was amended to define violations of law committed by children as "acts of delinquency" rather than as crimes. Article I, Section 15(b), delegated to the Florida Legislature the power to define which children would be subject to the jurisdiction of the court.[12] The Florida Juvenile Court Act of 1951 gave to the juvenile court exclusive original jurisdiction of proceedings in which a child was alleged to be dependent or delinquent. The principal effect

[6] *Supra* note 2.
[7] *Supra* note 3.
[8] *Supra* note 2.
[9] William W. Booth, "History and Philosophy of the Juvenile Court," Florida Juvenile Law and Practice, THE FLORIDA BAR, § 1.7: In General, (14th ed.).
[10] *Id*.
[11] *Id*.
[12] *Id*.

was to give to the juvenile court authority to hear all types of children's cases, including law violations, entirely outside of the adult system. The juvenile court's philosophy and purpose were, in part, "to protect society more effectively by substituting for retributive punishment methods of training and treatment directed toward the correction and rehabilitation of children who violate the laws…"[13]

Shift in Focus of Juvenile Justice Systems

Public sentiment regarding juvenile crime shifted drastically beginning in the 1980s due to rising crime rates, especially for homicides.[14] The increase in juvenile crime, accompanied by heightened media attention, prompted a shift from a sympathetic view of juveniles. Rehabilitative policies were considered inadequate due to high recidivism rates, and some serious offenders were viewed as unreceptive to treatment-oriented sentences.

Consequently, more punitive criminal justice policies began to replace rehabilitative goals, and the transfer of juveniles to adult courts became more common. Several states lowered the age at which juveniles could be within criminal court jurisdiction; many states eased the methods for transferring juveniles; and some states expanded the list of offenses for which a transfer is possible.[15]

In Florida, high-profile juvenile gun homicides gave impetus to many of the get-tough reforms in the Florida Juvenile Justice system during the 1990s. The 1994 Juvenile Justice Act[16] broadened the ability of state attorneys to direct file juveniles to adult court, and was further expanded in 2000 to mandate adult sentencing for some children as young as 14.[17]

Juvenile Transfers to Adult Court

Virtually every state has created processes in which juveniles can be transferred to adult court. While these processes vary, the National Conference of State Legislatures generally categorizes such processes into three groups:[18]

- Judicial Waiver (Judicially Controlled Transfer) - Judicial waiver laws allow juvenile courts to waive jurisdiction to adult court on a case-by-case basis. Cases in judicial waiver jurisdictions are originally filed in juvenile court, but may be transferred to adult court after the court holds a waiver hearing and finds the transfer is appropriate using statutory standards.[19]

- Mandatory Direct File (Statutory Exclusion) - Mandatory direct file laws grant adult courts exclusive jurisdiction over certain categories of cases involving juveniles. If a case falls

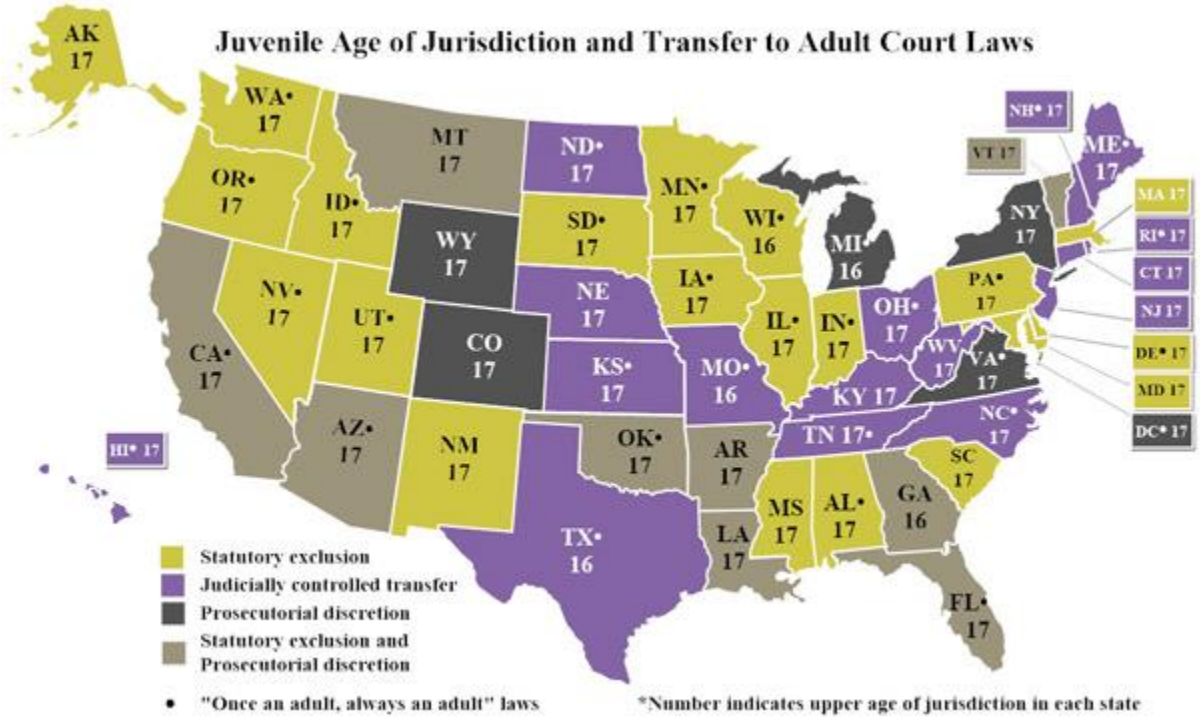
[13] Section 39.20, F.S. (1951).
[14] *Supra* note 2.
[15] *Id.*
[16] Ch. 94-249, Laws of Fla.
[17] Ch. 2000-119, Laws of Fla.
[18] *Infra* note 23.
[19] States that utilize judicial waiver solely include: Connecticut; Hawaii; Kansas; Kentucky; Maine; Missouri; Nebraska; New Hampshire; New Jersey; North Carolina; North Dakota; Ohio; Rhode Island; Tennessee; Texas; and West Virginia.

within a statutory exclusion category, it must be filed in adult court. Murder and serious violent felony cases are most commonly "excluded" from juvenile court.[20]

- Discretionary Direct File (Prosecutorial Discretion Transfer) - Discretionary direct file laws allow the prosecutor to bring a case into adult court without a waiver hearing. The filing of these cases is entirely entrusted to the prosecutor and may or may not have any statutorily articulated standards that the prosecutor has to use in making their decision.[21]

Jurisdictions may combine or use any of the transfer methods exclusively. Additionally, many states also have one or more of the following:

- "Once an adult, always an adult" policies, which require a juvenile's case to be transferred to adult court if the juvenile has had a prior case transferred to adult court;
- Reverse waiver hearings, which allow a juvenile to petition for a transfer of their case back to juvenile court;[22] and
- Blended sentencing laws, which allow adult courts to impose juvenile sanctions and vice versa.



Source: National Conference of State Legislatures[23]

[20] States that utilize statutory exclusion solely include: Alabama; Alaska; Delaware; Idaho; Illinois; Indiana; Iowa; Maryland; Massachusetts; Minnesota; Mississippi; Nevada; New Mexico; Oregon; Pennsylvania; South Carolina; South Dakota; Utah; Washington; and Wisconsin.

[21] Jurisdictions that utilize prosecutorial discretion solely include: Colorado; Michigan; New York; Virginia; Washington, D.C.; and Wyoming.

[22] States that provide for reverse waiver hearings include: Arizona; Arkansas; California; Colorado; Connecticut; Delaware; Georgia; Iowa; Kentucky; Maryland; Mississippi; Montana; Nebraska; Nevada; New York; Oklahoma; Oregon; Pennsylvania; South Dakota; Tennessee; Vermont; Virginia; Wisconsin; and Wyoming.

[23] Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws,* NATIONAL CONFERENCE OF STATE LEGISLATURES, Apr. 17, 2017, available at http://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx (last visited Jan. 15, 2018).

Florida Transfer Process
In Florida, there are several methods for transferring a child to adult court for prosecution:

- Voluntary waiver;
- Judicial waiver;
- Indictment by a grand jury; or
- Direct filing an information, commonly known as "direct file."

This section provides a detailed description of each transfer method.

Voluntary Waiver (1.5% of annual transfers[24])
Pursuant to Article I, Section 15(b) of the Florida Constitution, a juvenile ***of any age*** charged as a delinquent has the right to be tried in an adult court upon his or her demand if the request is made prior to the commencement of the adjudicatory hearing in the juvenile court. The juvenile may voluntarily request a transfer for a variety of reasons, including to avail themselves of procedural rights which are unavailable in the juvenile court, such as a jury trial. Section 985.556(1), F.S., requires the juvenile court to transfer and certify the child's criminal case for trial as an adult pursuant to his or her voluntary exercise of this right.

A juvenile transferred to adult court for prosecution pursuant to a voluntary waiver and found to have committed the charged offense, or a lesser included offense, is thereafter treated as an adult for any subsequent violation of law unless the court imposed juvenile sanctions.

Indictment (.5% of annual transfers)
Section 985.56, F.S., provides that a juvenile ***of any age*** who is charged with an offense punishable by death or life imprisonment is subject to the jurisdiction of the juvenile courts unless and until an indictment is returned on the charge by a grand jury. If the grand jury returns an indictment on the charge, the juvenile must be transferred to adult court and treated as an adult in every respect.[25]

The decision to seek indictment rests entirely with the state attorney. If the juvenile is found to have committed the offense, the court must sentence the juvenile as an adult.[26] If the juvenile is found not to have committed the indictable offense, but is found to have committed a lesser included offense or any other offense for which he or she was indicted as part of the criminal episode, the court may sentence the juvenile as an adult, as a youthful offenders, or as a juvenile.[27] Over the past 5 years, there has been an average of 7 such transfers each year.[28]

[24] This percentage represents the total of voluntary and judicial waivers combined.
[25] s. 985.56(1), F.S. The charge punishable by death or life imprisonment must be transferred, as well as all other felonies or misdemeanors charged in the indictment which are based on the same act or transaction as the offense punishable by death or life imprisonment.
[26] s. 985.565(4)(a)1., F.S.
[27] *Id.*
[28] Department of Juvenile Justice, Agency Analysis of 2017-2018 CRC Proposal 73, p. 2 (Nov. 20, 2017)(on file with Declaration of Rights Committee)

Judicial Waiver (1.5% of annual transfers[29])

The judicial waiver process allows juvenile courts to waive jurisdiction to adult court on a case-by case basis for juveniles ***14 years of age or older*** at the request of a state attorney. Section 985.556, F.S., provides for two types of waiver requests by state attorneys: discretionary and mandatory.

- Involuntary Discretionary Waiver –A state may file a motion requesting that the juvenile court transfer any case where the juvenile is 14 years of age or older;[30] and
- Involuntary Mandatory Waiver – A state attorney must request the transfer of a juvenile 14 years of age or older if the juvenile was:
    - Previously adjudicated delinquent for a specified felony and he or she is currently charged with a second or subsequent violent crime against a person; or
    - 14 years of age or older at the time of commission of a fourth or subsequent felony offense and he or she was previously adjudicated delinquent or had adjudication withheld for three felony offenses, and one or more of such felony offenses involved the use or possession of a firearm or violence against a person.[31]

If the state attorney files a motion to transfer a juvenile to adult court, the court must hold a hearing to determine whether the juvenile should be transferred.[32] The court must consider a variety of statutorily articulated factors when determining whether transfer is appropriate (e.g., the seriousness of the offense, the sophistication and maturity of the juvenile, the record and previous history of the juvenile, whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner, etc.).[33] The court must also provide an order specifying the reasons for its decision to impose adult sanctions.[34]

If a juvenile transferred to adult court pursuant to a voluntary or involuntary discretionary waiver is found to have committed the offense or a lesser included offense, the court may sentence the juvenile as an adult, as a youthful offender, or as a juvenile.[35] If the transfer was pursuant to an involuntary mandatory waiver, the court must impose adult sanctions.[36]

Direct File (98% of annual transfers)

While judicial waiver and indictment are both available transfer tools, they are rarely used as s. 985.557, F.S., provides a state attorney with the power to directly file certain cases in adult court without the necessity of judicial approval or grand jury indictment. Direct file accounts for 98% of the juvenile cases transferred to adult court. "Discretionary direct file" is generally the most controversial of the transfer processes.

- *Discretionary Direct File* – Section 985.557(1), F.S., establishes Florida's discretionary direct file method. This subsection *permits* a state attorney to file an information on certain juveniles' cases in adult court, without a judicial waiver hearing, when, in the state

[29] This percentage represents the total of voluntary and judicial waivers combined.
[30] s. 985.556(2), F.S.
[31] s. 985.556(3), F.S.
[32] s. 985.556(4), F.S.
[33] s. 985.556(4)(c), F.S.
[34] s. 985.556(4)(e), F.S.
[35] s. 985.565(4)(a)2., F.S.
[36] s. 985.565(4)(a)3., F.S.

attorney's judgment, the public interest requires that adult sanctions be imposed. Specifically, a state attorney may file an information[37] in adult court when a juvenile who is:

- ***14 or 15 years old*** is charged with one of the following felony offenses:
  - Arson; sexual battery; robbery; kidnapping; aggravated child abuse; aggravated assault; aggravated stalking; murder; manslaughter; unlawful throwing, placing, or discharging of a destructive device or bomb; armed burglary; specified burglary of a dwelling or structure; burglary with an assault or battery; aggravated battery; any lewd or lascivious offense committed upon or in the presence of a person less than 16; carrying, displaying, using, threatening, or attempting to use a weapon or firearm during the commission of a felony; grand theft; possessing or discharging any weapon or firearm on school property; home invasion robbery; carjacking; grand theft of a motor vehicle; or grand theft of a motor vehicle valued at $20,000 or more if the child has a previous adjudication for grand theft of a motor vehicle.[38]
- ***16 or 17 years old*** is charged with any felony offense;[39] and
- ***16 or 17 years old*** is charged with any misdemeanor, provided the juvenile has had at least two previous adjudications or adjudications withheld for delinquent acts, one of which is a felony.[40]

Current law does not provide any standards that a state attorney must consider or use when determining whether to file a juvenile's case in adult court pursuant to the discretionary direct file power.

If a juvenile transferred to adult court pursuant to the discretionary direct file process is found to have committed the offense or a lesser included offense, the court may sentence the juvenile as an adult, as a youthful offender, or as a juvenile.[41]

- *Mandatory Direct File* - Section 985.557(2), F.S., establishes Florida's mandatory direct file method. The subsection *requires* that a state attorney file a juvenile's case in adult court when a juvenile who is:
  - ***16 or 17 years old*** at the time of the alleged offense:
    - Has been previously adjudicated delinquent for an enumerated felony[42] and is currently charged with a second or subsequent violent crime against a person;

[37] An "information" is the charging document that initiates prosecution. Any information filed pursuant to the direct file statute may include all charges that are based on the same act, criminal episode, or transaction as the primary offenses. s. 985.557(3), F.S.
[38] s. 985.557(1)(a), F.S.
[39] s. 985.557(1)(b), F.S.
[40] *Id.*
[41] s. 985.565(4)(a)2. and (b), F.S.
[42] The enumerated felonies listed in this subsection include the commission of, attempt to commit, or conspiracy to commit: murder; sexual battery; armed or strong-armed robbery; carjacking; home-invasion robbery; aggravated battery; or aggravated assault.

- Is currently charged with a forcible felony[43] and has been previously adjudicated delinquent or had adjudication withheld for three felonies that each occurred within 45 days of each other;[44] or
- Is charged with committing or attempting to commit an offense enumerated in s. 775.087(2)(a)1.a.-q., F.S.,[45] and, during the commission of the offense, actually possessed or discharged a firearm or destructive device.[46]

- ***Any age*** who is alleged to have committed an act that involves stealing a vehicle where the juvenile caused serious bodily injury or death to a person who was not involved in the underlying offense while possessing the vehicle.[47]

The court has discretion to sentence a child transferred to adult court by mandatory direct file as an adult, a youthful offender, or a juvenile if:

- The child was 16 or 17 years old at the time of the offense, the charged offense is listed in s. 775.087(2)(a)1.a.-p., F.S., and during the commission of the offense the child actually possessed or discharged a firearm or destructive device; or
- The charged offense involves stealing a vehicle in which the child, while possessing the vehicle, caused serious bodily injury or death to a person who was not involved in the underlying offense.[48]

The court must impose adult sanctions on a child transferred to adult court by mandatory direct file who was 16 or 17 years old at the time of the offense and:

- Is charged with committing a second or subsequent violent crime against a person and has been previously adjudicated delinquent for an enumerated felony; or
- Is charged with committing a forcible felony and has been previously adjudicated delinquent or had adjudication withheld for three felonies that each occurred at least 45 days apart from each other.[49]

<u>Imposition of Adult or Juvenile Sanctions in Adult Court</u>

As noted above, unless specifically required to sentence a transferred child as an adult, judges have discretion to impose adult or juvenile sanctions under certain circumstances. In such instances, the

[43] Section 776.08, F.S., defines "forcible felony" to mean treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual.

[44] Section 985.557(2)(b), F.S., also states that this paragraph does not apply when the state attorney has good cause to believe that exceptional circumstances exist which preclude the just prosecution of the juvenile in adult court.

[45] This list includes: murder; sexual battery; robbery; burglary; arson; aggravated assault; aggravated battery; kidnapping; escape; aircraft piracy; aggravated child abuse; aggravated abuse of an elderly person or disabled adult; unlawful throwing, placing, or discharging of a destructive device or bomb; carjacking; home-invasion robbery; aggravated stalking; trafficking in cannabis, trafficking in cocaine, capital importation of cocaine, trafficking in illegal drugs, capital importation of illegal drugs, trafficking in phencyclidine, capital importation of phencyclidine, trafficking in methaqualone, capital importation of methaqualone, trafficking in amphetamine, capital importation of amphetamine, trafficking in flunitrazepam, trafficking in gamma-hydroxybutyric acid (GHB), trafficking in 1,4-Butanediol, trafficking in Phenethylamines, or other violation of s. 893.135(1), F.S.

[46] The terms "firearm" and "destructive device" are defined in s. 790.001, F.S.

[47] s. 985.557(2)(c), F.S.

[48] s. 985.565(4)(a)2., F.S.

[49] s. 985.565(4)(a)3., F.S.

judge must consider a number of statutorily enumerated factors in determining whether adult or juvenile sanctions are appropriate for the child. Such factors include:

- The seriousness of the offense to the community and whether the community would best be protected by juvenile or adult sanctions;
- Whether the offense was committed in an aggressive, violent, premeditated, or willful manner;
- Whether the offense was against persons or against property;[50]
- The sophistication and maturity of the offender;
- The record and previous history of the offender;
- The prospects for adequate protection of the public and the likelihood of deterrence and reasonable rehabilitation of the offender if assigned to DJJ services and facilities;
- Whether DJJ has appropriate programs, facilities, and services immediately available; and
- Whether adult sanctions would provide more appropriate punishment and deterrence to further violations of law than juvenile sanctions.[51]

A pre-sentence investigation report (PSI) is prepared by the Department of Corrections (DOC) regarding the suitability of a juvenile for disposition as an adult or juvenile to assist the judge in his sentencing determination.[52] The PSI report must include a comments section prepared by DJJ, with its recommendations as to disposition.[53] The court must give all parties[54] present at the disposition hearing an opportunity to comment on the issue of sentence and any proposed rehabilitative plan, and may receive and consider any other relevant and material evidence.[55]

If the court imposes juvenile sanctions, the court must adjudge the child to have committed a delinquent act.[56] Upon adjudicating a child delinquent, the court may:

- Place the juvenile in a probation program under the supervision of DJJ for an indeterminate period of time until the child reaches the age of 19 years or sooner if discharged by order of the court;
- Commit the juvenile to DJJ for treatment in an appropriate program for an indeterminate period of time until the child is 21 or sooner if discharged by DJJ;[57] or
- Order, if the court determines not to impose youthful offender or adult sanctions, any of the following: [58]
    - Probation and post commitment probation or community service under s. 985.435, F.S.;
    - Restitution under s. 985.437, F.S.;

[50] Greater weight is given to offenses against persons, especially if personal injury resulted.
[51] s. 985.565(1)(b), F.S.
[52] s. 985.565(3), F.S. This report requirement may be waived by the offender.
[53] *Id.*
[54] This includes the parent, guardian, or legal custodian of the offender; the offender's counsel; the State; representatives of DOC and DJJ; the victim or victim's representative; representatives of the school system; and LEOs involved in the case.
[55] *Id.* Other relevant evidence may include other reports, written or oral, in its effort to determine the action to be taken with regard to the child. This evidence may be relied upon by the court to the extent of its probative value even if the evidence would not be competent in an adjudicatory hearing.
[56] s. 985.565(4)(b), F.S. Adjudication of delinquency is not deemed a conviction, nor does it operate to impose any of the civil disabilities ordinarily resulting from a conviction.
[57] DJJ must notify the court of its intent to discharge the juvenile from the commitment program no later than 14 days prior to discharge. Failure of the court to timely respond to the department's notice shall be considered approval for discharge.
[58] s. 985.565(4)(b), F.S.

- Violation of probation or post commitment probation under s. 985.439, F.S.;
- Commitment under s. 985.441, F.S.;
- Work program liability and remuneration under s. 985.45, F.S.; and
- Other dispositions under s. 985.455, F.S.

In cases in which the court has imposed juvenile sanctions, if DJJ determines that the sanction is unsuitable for the juvenile, DJJ must return custody of the juvenile to the sentencing court for further proceedings, including the imposition of adult sanctions.[59]

Any sentence imposing adult sanctions is presumed appropriate, and the court is not required to set forth specific findings or list the criteria used as any basis for its decision to impose adult sanctions.[60]

A court may not sentence a child to a combination of adult and juvenile sanctions.[61]

Effect of Transferring a Child to Adult Court on Contemporaneous or Subsequent Law Violations
If a child transferred to adult court is found to have committed the offense, or a lesser included offense, the child must thereafter be treated as an adult in all respects for any subsequent law violations.[62] The court must also immediately transfer and certify all unresolved[63] felony cases pertaining to the child to adult court for prosecution.[64]

Florida Transfer Statistics
Since FY 12-13, there has been a significant reduction (-31 percent) in children transferred to adult court, as well as a significant reduction in the overall incidence of juvenile arrests (-24%).[65] The most recent fiscal year data available, FY 16-17, shows there were a total of 1,101 youth statewide that were transferred to adult court, mostly for felony offenses (98%).[66] The majority of transferred youth were 17 years of age or older (67%) and overwhelming male (96%).[67] The ten most common offenses that resulted in youth being transferred to adult court in FY 16-17 included:[68]

- Burglary (247 youth, 22%[69])
- Armed Robbery (227, 21%)
- Aggravated Assault/Battery (154, 14%)

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[59] *Id.* DJJ also has recourse if the judge imposes a juvenile sanction and the child proves not to be suitable to the sanction. In such instances, DJJ must provide the sentencing court a written report outlining the basis for its objections to the juvenile sanction and schedule a hearing. Upon hearing, the court may revoke the previous adjudication, impose an adjudication of guilt, and impose any adult sanction it may have originally lawfully imposed. s. 985.565(4)(c), F.S.
[60] s. 985.565(4)(a)4., F.S.
[61] *Id.*
[62] ss. 985.556(5), 985.56(4), and 985.557(3), F.S. This provision does not apply if the adult court imposes juvenile sanctions under s. 985.565, F.S.
[63] Unresolved cases include those which have not yet resulted in a plea of guilty or nolo contendere or in which a finding of guilt has not been made. s. 985.557(3), F.S.
[64] ss. 985.556(5), 985.56(4), and 985.557(3), F.S.
[65] Department of Juvenile Justice Delinquency Profile 2017, http://www.djj.state.fl.us/research/reports/reports-and-data/interactive-data-reports/delinquency-profile/delinquency-profile-dashboard (last visited Jan. 15, 2018).
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] All percentages rounded to the next whole number.

- Weapon/Firearm (96, 9%)
- Murder/Manslaughter (55, 5%)
- Felony Drug (48, 4%)
- Auto Theft (43, 4%)
- Sexual Battery (36, 3%)
- Attempted Murder/Manslaughter (34, 3%)
- Other Robbery (28, 3%)

Additional DJJ statistical data relating to the transfer of youth to adult court is provided in **Appendix "A."**

Recent Public Policy Debates Related to Juvenile Transfers to Adult Court
In recent years, public policy debates have emerged regarding the appropriateness of adult prosecution of juveniles due to their emotional and developmental differences from adults as well as the breadth of prosecutorial discretion to pursue cases against juveniles in adult court.

Opponents of juvenile transfers point to a body of research which shows that adolescent brains are not fully developed until about age 25, and the immature, emotional, and impulsive nature that is characteristic of adolescents makes them more susceptible to commit crimes.[70] Some studies have shown that juveniles who do commit crimes or otherwise engage in socially deviant behavior are not necessarily destined to be criminals as adults.[71]

Relying on similar types of studies, the U.S. Supreme Court in recent years has found in multiple cases that the differences between children and adults require separate consideration and treatment under the law. In *Roper v. Simmons*, 543 U.S. 551 (2005), in which the court prohibited the execution of any person for a crime committed before age 18, the court pointed out that juveniles' susceptibility to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult. The Court also found that because juveniles are still struggling to define their identity, it is less supportable to conclude that even the commission of a heinous crime is evidence of an irretrievably depraved character. The Supreme Court would go on to prohibit mandatory life sentences without the possibility of parole for juvenile offenders[72] and prohibit life imprisonment without parole for non-homicide offenses[73] based on similar concerns in subsequent cases and the recognition of the diminished culpability of juveniles as compared to adults.

Recent Legislative Efforts
In each of the past five years, legislation has been filed that attempted to modify Florida's direct file system.[74] While there were variations in each years' bills, the bills generally attempted to:

- Repeal mandatory direct file;

[70] *Supra* note 2.
[71] *Supra* note 2.
[72] *Miller v. Alabama*, 567 U.S. 460 (2012).
[73] *Graham v. Florida*, 560 U.S. 48 (2010).
[74] SB 392 (2018), SB 192 (2017), HB 129 (2016), SB 314 (2016), HB 195 (2015), HB 783 (2015), SB 980 (2014), SB 280 (2013).

- Establish statutory criteria for use by state attorneys when deciding whether to exercise the discretion to transfer a case to adult court;
- Require a state attorney to file a written explanation with the court as to why transfer was appropriate; and
- Create a reverse waiver process.

Prior to 2011, state attorneys were required to develop written policies to govern discretionary direct file determinations.[75] These policies had to be submitted to the Governor, Senate, and House of Representatives annually. In 2011, this requirement was repealed by the Legislature.[76]

B. EFFECT OF PROPOSED CHANGES:

The proposal requires that state attorneys petition the circuit court for approval if the state attorney "decides to pursue prosecution" of a child as an adult in criminal court rather than in juvenile court. This provision appears to require a judicial waiver process for all juvenile transfers to adult court, abrogating transfer by voluntary waiver, grand jury indictment or discretionary direct file. It is unclear if mandatory direct file is affected by the proposal as state attorneys have no discretion to "decide to pursue prosecution" in cases that are subject to mandatory direct file unless they do not pursue charges at all.

The proposal also requires that the circuit court consider the differences in the development of adults and children in determining whether to approve a state attorney's petition to prosecute a child as an adult in criminal court. It is unclear if factors specified in the current judicial waiver process satisfy this requirement, or if courts must rely on the type of medical, psychological, or other similar research considered by the U.S. Supreme Court in the *Roper, Graham,* and *Miller* cases.

If approved by the voters, the proposal will take effect on January 8, 2019.[77] The proposal is silent with regard to retroactivity or applicability to pending cases.

See "Technical Deficiencies" for additional discussion of proposal impacts.

C. FISCAL IMPACT:

If passage of the proposal results in the reduction of youth who are transferred to adult court, it could be expected that at least a portion of such youth would be served by the Department of Juvenile Justice (DJJ) instead of the Department of Corrections. To the extent this shift of juveniles to the juvenile justice system occurs, the proposal will likely result in a negative prison bed impact on the Department of Corrections and a positive residential bed impact on DJJ.

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[75] *See* s. 985.557(4), F.S. (2010).
[76] Ch. 2011-200, Laws of Fla.
[77] *See* FLA. CONST. ART XI, S. 5(E) (1968) ("Unless otherwise specifically provided for elsewhere in this constitution, if the proposed amendment or revision is approved by vote of at least sixty percent of the electors voting on the measure, it shall be effective as an amendment to or revision of the constitution of the state 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.)

DJJ estimates that such youth would likely be served through secure detention, commitment to a residential program, and/or community probation, all which would have a fiscal impact to DJJ.[78] Local governments, which are partially responsible for the funding of local detention centers, may also be impacted by the retention of such youth who would likely spend time in secure detention.[79]

III. Additional Information:

A. Statement of Changes:

(Summarizing differences between the current version and the prior version of the proposal.)

None.

B. Amendments:

None.

C. Technical Deficiencies:

The proposal repeals the current constitutional provision relating to the juvenile justice system and replaces it with the language of the proposal. Article I, Section 15(b), the current constitutional provision governing the juvenile justice system, provides:

> "When authorized by law, a child as therein defined may be charged with a violation of law as an act of delinquency instead of crime and tried without a jury or other requirements applicable to criminal cases. Any child so charged shall, upon demand made as provided by law before a trial in a juvenile proceeding, be tried in an appropriate court as an adult. A child found delinquent shall be disciplined as provided by law."

Unless the current language of Article I, Section 15(b) is retained in conjunction with the proposed amendment, there no longer appears to be an organic source for the creation of a juvenile justice system. In other words, the proposal would repeal the Legislature's authority to create a juvenile justice system and to define children that may be treated as juvenile delinquents. The meaning of the term "child" would be subject to judicial interpretation.

The repeal of the current language also removes a child's right to demand adult prosecution instead of prosecution in juvenile court, thereby availing themselves of procedural rights, such as the right to a trial by jury, which are unavailable in the juvenile court. This may implicate the child's right to due process.

Additionally, the proposal provides that the state attorney must petition "the circuit court" to try a child (however defined) in adult court, but does not specify whether the petition

[78] *Supra* note 28.
[79] *Supra* note 28.

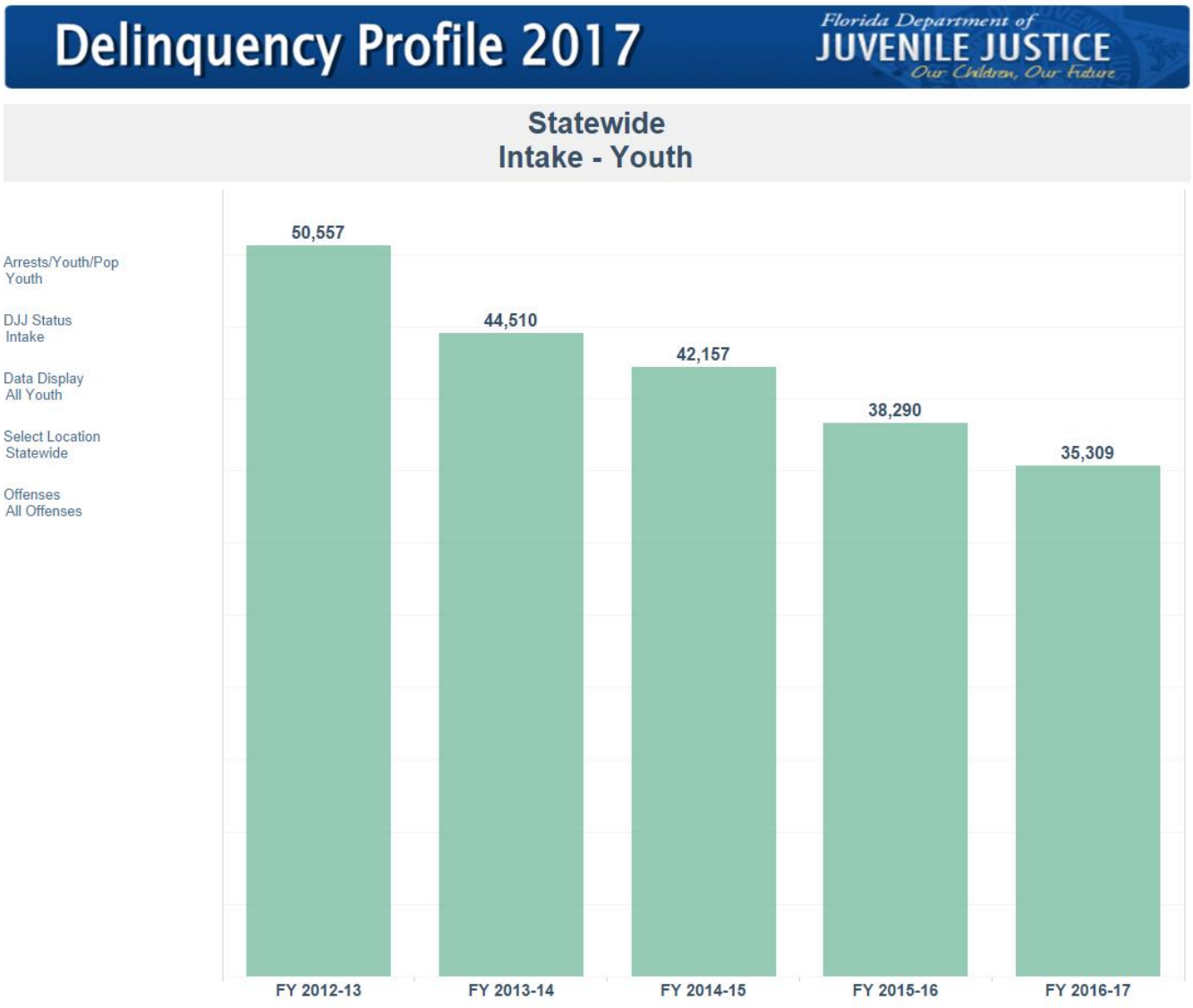
must be filed in the juvenile division or the adult criminal division. Thus, it is unclear whether the proposal contemplates a waiver process (state attorney files in the juvenile division and transferred to adult court) or a reverse waiver process (state attorney may file in the adult criminal division, but court may transfer to juvenile division).

D. Related Issues:

None.

Appendix "A"

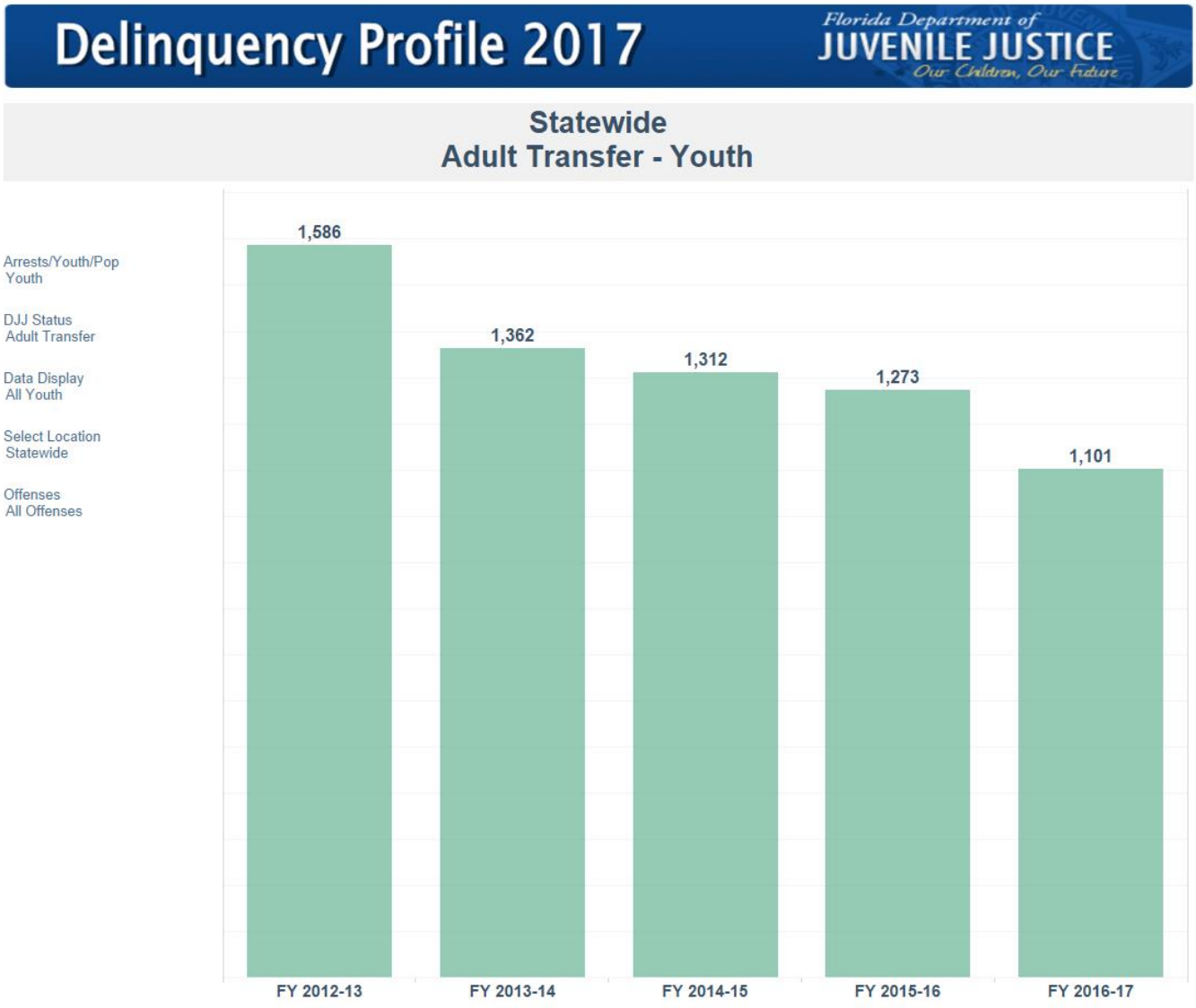
Fig. 1



Arrests/Youth	50,557	44,510	42,157	38,290	35,309
% Difference From Previous		-12%	-5%	-9%	-8%
% Difference from FY 2012-13	0%	-12%	-17%	-24%	-30%

This report was compiled using data from the Juvenile Justice Information System (JJIS). For more information, visit http://www.djj.state.fl.us

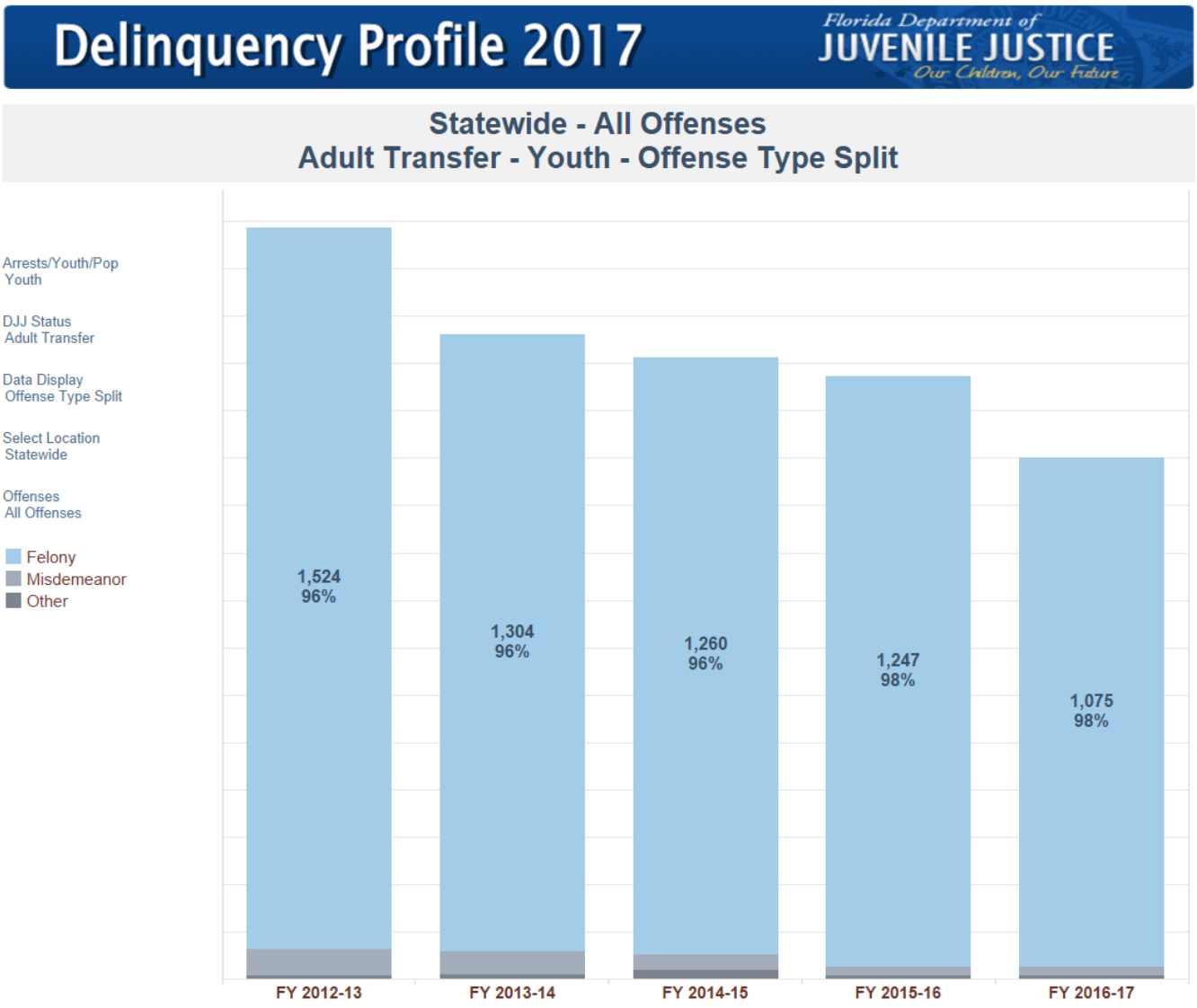
Fig 2.



Arrests/Youth	1,586	1,362	1,312	1,273	1,101
% Difference From Previous		-14%	-4%	-3%	-14%
% Difference from FY 2012-13	0%	-14%	-17%	-20%	-31%

This report was compiled using data from the Juvenile Justice Information System (JJIS). For more information, visit http://www.djj.state.fl.us

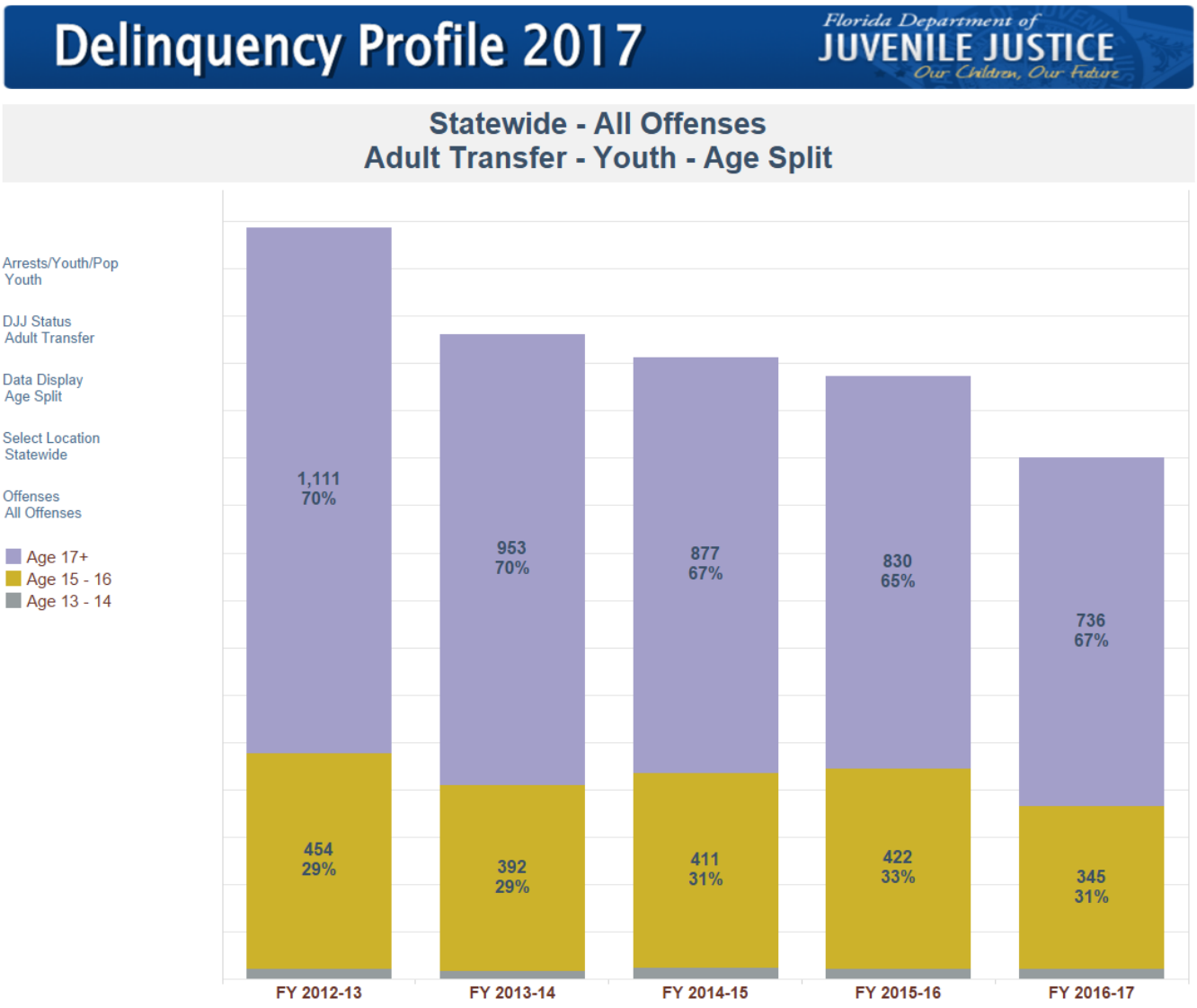
Fig. 3



Felony	1,524	1,304	1,260	1,247	1,075
Misdemeanor	54	49	34	20	18
Other	8	9	18	6	8

This report was compiled using data from the Juvenile Justice Information System (JJIS). For more information, visit http://www.djj.state.fl.us

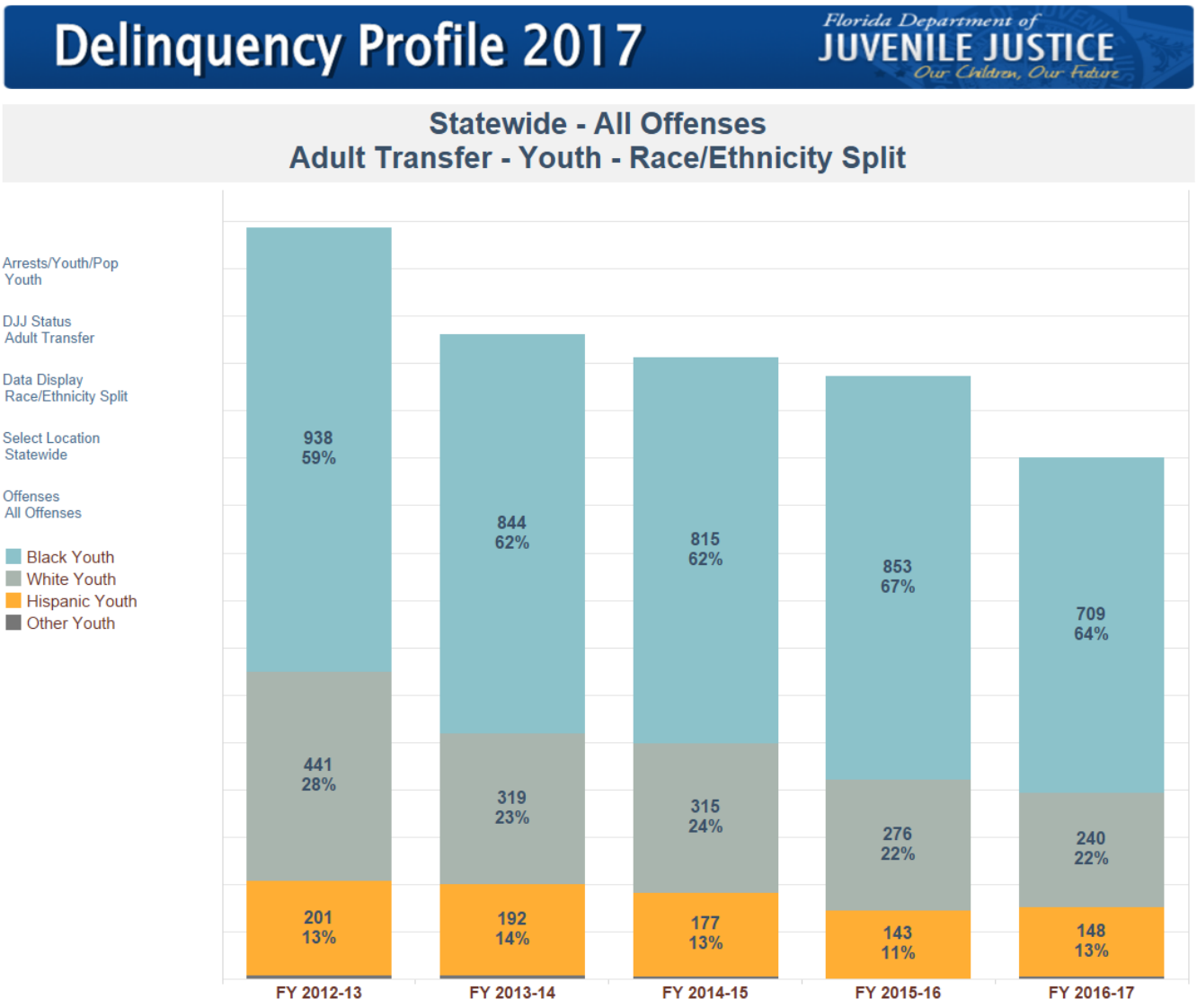
Fig. 4



Age 17+	1,111	953	877	830	736
Age 15 - 16	454	392	411	422	345
Age 13 - 14	21	17	24	21	20

This report was compiled using data from the Juvenile Justice Information System (JJIS). For more information, visit http://www.djj.state.fl.us

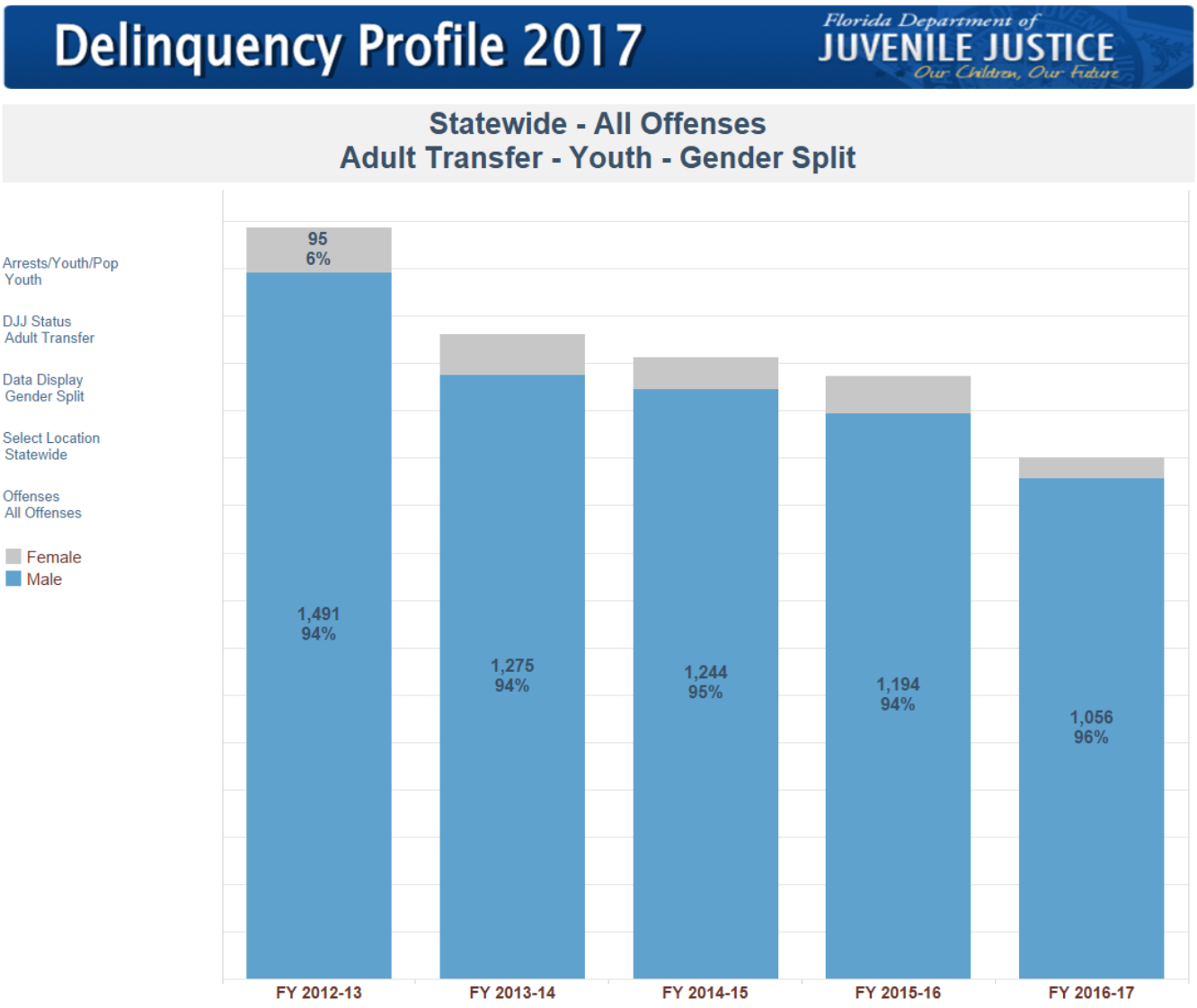
Fig. 5



Black Youth	938	844	815	853	709
White Youth	441	319	315	276	240
Hispanic Youth	201	192	177	143	148
Other Youth	6	7	5	1	4

This report was compiled using data from the Juvenile Justice Information System (JJIS). For more information, visit http://www.djj.state.fl.us

Fig. 6



	FY 2012-13	FY 2013-14	FY 2014-15	FY 2015-16	FY 2016-17
Female	95	87	68	79	45
Male	1,491	1,275	1,244	1,194	1,056

This report was compiled using data from the Juvenile Justice Information System (JJIS). For more information, visit http://www.djj.state.fl.us

Fig. 7

Delinquency Profile 2017

Florida Department of JUVENILE JUSTICE
Our Children, Our Future

Statewide - All Offenses
Adult Transfer - Youth - Felony

Select Offense from table to filter chart >>

Arrests/Youth/Pop
Youth

DJJ Status
Adult Transfer

Data Display
Felony Table

Select Location
Statewide

Offenses
All Offenses

	FY 2012-13	FY 2013-14	FY 2014-15	FY 2015-16	FY 2016-17
Burglary	485	342	317	280	247
Armed Robbery	261	231	247	268	227
Agg Assault/Battery	188	207	166	186	154
Weapon/Firearm	102	84	105	106	96
Other Robbery	74	78	62	44	28
Sexual Battery	60	62	72	50	36
Felony Drug	79	55	45	35	48
Murder/Manslaughter	37	37	51	69	55
Auto Theft	47	32	43	47	43
Att Murder/Manslaughter	30	25	20	37	34
Kidnapping	34	27	25	33	27
Grand Larceny(excl auto)	36	36	32	19	12
"Other" Felony	22	14	15	15	21
Other Fel Sex Offense	15	10	19	23	14
Obstruct Justice	16	11	7	11	12
Obstruct Justice Violent	12	13	14	9	7
Felony Vandalism	6	21	5	2	3
Arson	4	7	11	4	5
Fraud Forgery Counterfeit	9	6	2	1	2
Stolen Property	7	4	2	4	1
Escape		2	0	4	3

This report was compiled using data from the Juvenile Justice Information System (JJIS). For more information, visit http://www.djj.state.fl.us

331232

CRC ACTION

Commissioner .
Comm: WD .
01/25/2018 .
.
.
.

The Committee on Declaration of Rights (Donalds) recommended the following:

CRC Amendment (with title amendment)

Delete lines 22 - 37
and insert:
(b) When authorized by law, a child as therein defined may be charged with a violation of law as an act of delinquency instead of crime and tried without a jury or other requirements applicable to criminal cases. Any child so charged shall, upon demand made as provided by law before a trial in a juvenile

331232

proceeding, be tried in an appropriate court as an adult. A child found delinquent shall be disciplined as provided by law.

(c) It is the policy of this state that, because children are more neurologically, psychologically, and emotionally underdeveloped than adults, in order to prosecute any child in adult criminal court, the state attorney must consider the level of development of the child and conclude based on that level of development that public safety would best be served by prosecuting the child as an adult. The factors to be considered shall be as provided by law.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete lines 3 - 5

and insert:

require a state attorney to consider a child's level of development before prosecuting the child as an adult.

260656

CRC ACTION

Commissioner .
Comm: UNFAV .
01/25/2018 .
.
.
.

The Committee on Declaration of Rights (Donalds) recommended the following:

CRC Amendment (with title amendment)

Delete lines 22 - 37
and insert:
(b) When authorized by law, a child as therein defined may be charged with a violation of law as an act of delinquency instead of crime and tried without a jury or other requirements applicable to criminal cases. Any child so charged shall, upon demand made as provided by law before a trial in a juvenile

260656

proceeding, be tried in an appropriate court as an adult. A child found delinquent shall be disciplined as provided by law.

(c) It is the policy of this state that, because children are more neurologically, psychologically, and emotionally underdeveloped than adults, in order to prosecute a child in adult criminal court, the state attorney must consider the level of development of the child and conclude based on that level of development that public safety would best be served by prosecuting the child as an adult. The factors to be considered shall be as provided by law. The decision to prosecute a child in adult criminal court may be reviewed by the circuit court.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete lines 3 - 5

and insert:

require that a state attorney consider a child's level of development before prosecuting the child as an adult and authorizing the circuit court to review the state attorney's prosecution decision.

By Commissioner Coxe

coxeh-00096-17 201773__

A proposal to amend
Section 15 of Article I of the State Constitution to require circuit court review before a state attorney may pursue prosecution of a child as an adult in criminal court.

Be It Proposed by the Constitution Revision Commission of Florida:

Section 15 of Article I of the State Constitution is amended to read:

ARTICLE I
DECLARATION OF RIGHTS

SECTION 15. Prosecution for crime; offenses committed by children.—

(a) No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial.

(b) It is the policy of this state that, because children are more neurologically, psychologically, and emotionally underdeveloped than adults, the state attorney must petition the circuit court for approval if he or she decides to pursue prosecution of a child as an adult in criminal court rather than in juvenile court. The circuit court must consider the differences in the development of adults and children in determining whether to approve a state attorney's decision to prosecute a child as an adult in criminal court. ~~When authorized by law, a child as therein defined may be charged with a violation of law as an act of delinquency instead of crime and~~

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

coxeh-00096-17 201773__

~~tried without a jury or other requirements applicable to criminal cases. Any child so charged shall, upon demand made as provided by law before a trial in a juvenile proceeding, be tried in an appropriate court as an adult. A child found delinquent shall be disciplined as provided by law.~~

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

January 17, 2018 DELIVERED VIA EMAIL

Florida Constitution Revision Commission
The Capitol
400 S. Monroe Street
Tallahassee, FL 32399

Re: Vote Yes on Proposal 73, Amending Art. 1, Section 15
Judicial Approval When Prosecuting Children as Adults

Dear Chair Carlton and Declaration of Rights Committee Commissioners:

ACLU Florida

4343 W. Flagler St.
Miami, FL
(786) 363-2700
aclufl.org

Kirk Bailey
Political Director

On behalf of more than 130,000 members and supporters state-wide, the American Civil Liberties Union (ACLU) of Florida submits this testimony urging the Constitution Revision Commission to adopt Commissioner Coxe's Proposal to require judicial approval for the criminal prosecution of youth as adults (Proposal 73).

Judicial Approval of Prosecuting Youth as Adults

We urge the Commission to vote Yes on Proposal 73, requiring judicial approval as a prerequisite to the criminal prosecution of youth as adults.

Commissioner Coxe's proposal would require judicial approval when a state attorney decides to prosecute a youth as an adult – a decision which is currently unilateral and not subject to judicial review. Proposal 73 recognizes the widely accepted scientific notion that youth are developmentally different than adults and comports to recent developments in U.S. Supreme Court jurisprudence that they must be treated differently under the law. It also reflects the will of Floridians, the majority of whom believe this decision is best left to judges.

Passage of this amendment would ensure that youth receive their rightful due process and would be a step toward redeeming Florida's unfortunate reputation as a leader in incarcerating children in adult prisons. If adopted, Florida will join the many states that have recognized the importance of judicial involvement in determining whether a child should be prosecuted as an adult.

Florida is a Leader in Prosecuting Children as Adults

Florida has sent more than 8,600 youth to adult court since 2011 at a disproportionately high rate compared to other states.[i] About 98% of Florida kids are transferred at the sole, unreviewable discretion of a prosecutor.[ii] Only two other states (Louisiana and Michigan) and the District of Columbia similarly don't allow for any judicial involvement in the decision to prosecute children as adults. This is also at odds with Floridians' values. A recent poll found that 70% of voters trusted judges more than prosecutors to decide whether a child should be charged as an adult.[iii]

In Florida, there are no statutorily required standards for this decision – no aggravating or mitigating factors that must be considered; no reporting or transparency requirements – and no opportunity for the child to weigh in. Many assume that only the worst offenders are moved from a system designed to rehabilitate (juvenile detention) to a system designed to punish (adult prisons), yet this assumption is not supported by the evidence. More than 70 percent of youth convicted in adult courts are sentenced to probation, not prison.[iv] Moreover, the majority receive this probation via plea agreement.[v] If these children truly are the worst of the worst, beyond redemption and only fit for adult prison, then why are so many of them only receiving probation? Furthermore, significant racial disparities exist and are exacerbated by this system: black youth, who are 3.6 times as likely to be arrested as their white peers, are 6.7 times as likely to be charged as adults.[vi]

ACLU Florida

Adoption of this proposal would allow for a neutral decision-maker, a judge, to be involved in this crucial life-altering decision, and would help to bring Florida's rate of charging youth as adults in line with national trends.

Age is More than a Number

Parents, scientists and legal scholars agree that "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage."[vii] The U.S. Supreme Court has recognized that youth are neurologically different from adults – less mature, wired for impulsive recklessness, more vulnerable to outside pressures and influences, and thus more malleable. These differences ultimately make them less culpable.[viii] This proposal would ensure these factors would be considered before a child was transferred to the more punitive adult criminal justice system.

The Adult Criminal Justice System Puts Youth at Risk of Further Criminal Behavior and Other Harms

All kids who are prosecuted in adult court in Florida go to adult jails pending their trial. Some stay for more than a year. If they are in a small county – or if they are the rare girl charged as an adult – they are held in isolation throughout this time with minimal educational services.

This is clearly not an environment that supports their maturation or improves their chances of aging out of criminal behavior. Youth prosecuted in adult court are more likely to reoffend than their peers facing the same charges in juvenile court.[ix] Moreover, youth in adult prisons and jails are 36 times as likely to commit suicide as those in juvenile facilities.[x]

As the U.S. Supreme Court has recognized, "the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings."[xi] The juvenile justice system was developed to address juvenile delinquency in an

atmosphere that better accommodated these features and was more appropriate to rehabilitation. The focus of the juvenile justice system is on supporting the youth's maturation and prioritizing rehabilitation.

Floridians agree: three quarters of voters believe minors charged with adult crimes should stay in the juvenile system. Furthermore, 86 percent of voters recognize that adult jails are no place for minors awaiting trial as adults.[xii]

While adult court judges sentencing youth may issue juvenile sanctions, the U.S. Supreme Court has recognized that the "key moment for the exercise of discretion is the transfer" of youth to adult court.[xiii] This proposal would ensure that judges have that opportunity to be involved at this critical stage.

ACLU Florida

Conclusion

Teens are not adults – no matter how severe their criminal behavior. Prosecuting them as adults is often counterproductive and harmful. The decision to do so must be deliberate, transparent, standardized, and must be approved by a neutral decision-maker. Judicial involvement is necessary for such a decision that will forever change a youth's life.

Thank you for your consideration of the above and we look forward to working with you as this process moves forward. Please do not hesitate to contact me at (786) 363-2713 or kbailey@aclufl.org if you have any questions or would like any additional information.

Sincerely,

Kirk Bailey

Kirk Bailey
Political Director

Cc: Michelle Morton
Juvenile Justice Policy Coordinator

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[i] Patrick Griffin, Sean Addie, Benjamin Adams, and Kathy Firestine, Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting. Office of Juvenile Justice and Delinquency Prevention, Juvenile Offenders and Victims National Report Series Bulletin. (2011).

[ii] Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute, Human Rights Watch, 19 (2014).

[iii] Fabrizio, Lee & Assoc., Right on Crime Florida Registered Voters Survey (2017), *available at* http://rightoncrime.com/2017/11/florida-poll-reveals-strong-support-for-criminal-justice-reform.

[iv] Deborrah Brodsky & Sal Nuzzo, No Place for a Child: Direct File of Juveniles Comes at a High Cost. James Madison Institute Policy Brief (2016).

[v] *Id.*

[vi] Fla. Dept. of Juvenile Justice Juvenile Delinquency Profile (2017).
[vii] Eddings v. Oklahoma, 455 U.S. 104, 115 (1982).
[viii] Roper v. Simmons, 543 U.S. 551, 569 (2005).
[ix] No Place for a Child, *supra* n. iv.
[x] Jailing Juveniles, Campaign for Youth Justice (2007).
[xi] Miller v. Alabama, 567 U.S. 460, 478, 132 S. Ct. 2455, 2468, 183 L. Ed. 2d 407 (2012)
[xii] Right on Crime Florida Survey, *supra* n. iii
[xiii] Miller v. Alabama, 567 U.S. 460, 488 (2012).

ACLU Florida

Florida Public Defender Association, Inc.

TO: Constitution Revision Commission re Proposed Amendment 73

FROM: Florida Public Defender Association, President Bob Dillinger

DATE: November 30,2017

Amending Section 15 of Article I of the State Constitution to require circuit court review before a state attorney may pursue prosecution of a child as an adult in criminal court.

(b) It is the policy of this state that, because children are more neurologically, psychologically, and emotionally underdeveloped than adults, the state attorney must petition the circuit court for approval if he or she decides to pursue prosecution of a child as an adult in criminal court rather than in juvenile court. The circuit court must consider the differences in the development of adults and children in determining whether to approve a state attorney's decision to prosecute a child as an adult in criminal court.

Florida's Public Defenders, attorneys who practice in Florida's juvenile courts around the state, believe that the development and protection of Florida's children, including those charged with criminal offenses, must be an imperative of the State of Florida and therefore a part of the Florida Constitution. Currently, Florida's children are not adequately protected. Prosecutors can unilaterally send children into adult court without oversight by the courts. The proposed amendment would recognize the

103 North Gadsden Street · Tallahassee, Florida 32301
(850) 488-6850 · (850) 488-4720 (fax) · www.flpda.org

fundamental developmental differences between children and adults, and require the court system to recognize these differences in the evaluation of children charged with a crime by the state. This amendment would create checks and balances and require review before a child could be treated as an adult in the courts. The judicial review mandated by this amendment would protect the interests of the most vulnerable citizens of our state, greatly improving our current system

The children of Florida are not small adults. They are mentally, emotionally and developmentally different than adults. Extensive brain research has confirmed that these differences are both profound and complex. This research has led the United States Supreme Court to find in multiple cases that the differences between children and adults require separate treatment under the law. In coming to this conclusion, the Supreme Court considered the testimony of health care professionals and organizations regarding adolescent brain development. The first of these Supreme Court cases was a dozen years ago in Roper v. Simmons, 543 U.S. 551 (2005). The Supreme Court found that there was an "evolving standard of decency" for children. Basing its decision on research, the court found that juveniles had diminished culpability due to their immaturity and susceptibility to outside pressures and influences. Roper was followed in 2010 by Graham v. Florida, 130 S. Ct. 2011 (2010) which found again that juveniles are different than adults. In 2012, the Supreme Court in Miller v. Alabama and Jackson v. Hobbs, 132 S. Ct. 2455 (2012) emphasized that "transient rashness, proclivity for risk, and inability to assess consequences," are inherent in being a juvenile, and required sentencing courts to consider these factors. The Court recognized that children displayed "immaturity, impetuosity, and failure to appreciate risks and consequences." Subsequently, in Montgomery v. Louisiana, the Court found unequivocally that "children are constitutionally different from adults in their level of culpability." and that the extreme punishment must be reserved "for the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." Under these authorities, the use of adult sanctions against juveniles should be reserved for the rarest of children, and only after petition by the state and review by the courts.

The children of Florida are at a distinct disadvantage compared to adults when trying to understand and navigate the court system. As the Supreme Court found, children have difficulty assisting in their own defenses. Children are more susceptible than adults to the high pressures of interrogation. Children are not able to comprehend the adult system and therefore should only be exposed to its dangers in the most extreme cases.

Despite these realities, our current system allows state attorneys to send children to adult court without consistent standards. This system does not provide the protection of an impartial court. Furthermore, it is not in tune with the growing recognition of the diminished capacity and culpability of children. Allowing state attorneys sole discretion creates unequal justice depending on the individual prosecutor. It allows an unequal use of the discretion based on the circuit the child resides in, and creates pressure on children in some circuits to give up their right to trial in juvenile court in order to avoid the adult system. It allows prosecutors to charge children as adults even when they have been found incompetent by the juvenile court. It allows children to be direct filed in adult court even when there are more intense juvenile sanctions available. It allows children to be direct filed when the child is not considered a physical threat to anyone.

The proposed amendment would recognize the essential differences between children and adults. It would allow the child a significant protection- review by an impartial judge- before the State of Florida could take the extreme step of charging that child as an adult. Therefore, the Florida Public Defender Association strongly recommends the adoption of Amendment 73.

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(850) 488-6850 · (850) 488-4720 (fax) · www.flpda.org

Testimony of Dr. Pradeep Bhide
Provided to Members of the Constitutional Revision Commission
In Support of Proposal 73
January 25, 2018

My name is Pradeep Bhide. I am a Professor of Biomedical Sciences and the Rodgers Eminent Scholar Chair in Developmental Neuroscience at Florida State University College of Medicine.

I received my PhD degree in neuroscience from the University of Aberdeen, Scotland, and postdoctoral training in developmental neuroscience at University College, London, Yale University School of Medicine, New Haven, CT, and Harvard Medical School and Massachusetts General Hospital in Boston, MA.

I was the Vice Chair of Neurology Research at the Massachusetts General Hospital and Associate Professor of Neurology at Harvard Medical School prior to taking up my current position at FSU.

My expertise is in developmental neuroscience – the neuroscience of brain development. I study children's brain and behavior.

I am here today in support of Proposal 73.

Let me begin by stating the obvious. As individuals and as a society, we treat our children differently from the way we treat adults. We do so in every aspect of our lives. We think twice before even considering assigning serious responsibility to a child – even our own child. All human societies and cultures throughout history have treated children differently from adults.

Why? Because it is common sense. Children are not adults. Not yet. They are on their way to becoming adults. If it is common sense, why are we here today? Why is there a discussion about treating children as children in our judicial system?

I am here today as a neuroscientist to lend my voice to this debate based on evidence from neuroscience.

I feel especially privileged to speak to you today in favor of Proposal 73 because I am an editor of a book published recently describing research findings on teenager's brains and behaviors, and why they differ so much from the brains and behaviors of adults.

You might ask – why was there a need for this book if all this is common sense? For starters, that children must be treated differently may not be common knowledge, especially when it comes to the law. Otherwise we would not be here.

Scientists raise questions, doubts and contrary views, even on subject matters long settled. Debate is the medium of science. Teenage brains and behavior is no different. It continues to spawn much scientific debate at regular intervals. I can tell you, however, that every

study, every research project, every experiment that was done and that I know about has consistently shown that children's brains are different.

Let me put it another way. There is no scientific study that has shown that children's brains and behavior are the same as the brains and behavior of adults.

The interesting thing about science is that it does not merely say that something looks different from something else. It tries to tell you exactly what is different, how many things are different, how long do they remain different, what makes them different and finally, does the fact that two things are different make those two things work differently?

Neuroscience today with its modern methods of structural and functional neuroimaging that we know as MRI, and modern methods of molecular biology and molecular genetics has done precisely that for our understanding of the brain, especially the brain of a child or a teenager. Neuroscience has expanded upon the age-old wisdom that children are not adults and it shows us why children and youth think differently, act differently and react differently.

We all know that the human brain grows in size and complexity all the time. We now know that during teenage years the changes that occur in the brain are more remarkable than perhaps even the changes that occur in the brain of a newborn or a toddler. For example, during teenage years not all parts of the brain grow bigger. Some parts do and some do not. The frontal lobes of the brain, the brain regions that help control our emotions, impulses, inhibitions, personality, our responses to situations subtle to threatening, continue to grow during teenage years. It has not yet attained its mature size, mature structure or mature function yet.

A teenager's brain is different from the brain of an adult. It looks different. A brain that looks different likely functions differently. In fact, studies show that a young person confronted with the same situation faced by an adult reacts or responds differently. Young people behave differently in the face of danger, provocation, threat or even inducement. Neuroscience is beginning to show us brain mechanisms that predispose teenagers, especially teenage boys, to risky behaviors and an unhealthy disregard for disincentives and punishment.

I am here to reiterate that it is not merely a phenomenon or merely an observation or merely words of wisdom that young people behave differently from adults. It is a fact. It is a fact based on evidence about brain mechanisms that control behavior. Children and youth do not perceive many of the things in this world in the same way as do adults. The essence of youth is its difference, its uniqueness – made possible by the teenage brain.

On the one hand, young brains endow young people with incredible passion for life, curiosity about the unknown. It fills them with a sense of immortality, invincibility, and indestructibility. The teenage brain is the engine that drives the fountain of youth, which I am sure all of us adults here wish we still had. It propels our youth to heights of emotional and physical accomplishments unparalleled at any other time in the life cycle.

At the same time, unfortunately, the young brain exposes our children to risks unlike at any other time in their life. The risks are numerous. In some cases, the young brain can drive its owner to the outskirts of adult societies.

Now that I have told you all this, the next question is what do we do with this knowledge? We can and we must use this knowledge to make this world a better place for our children, and therefore for all of us.

Being a child in a world run by adults entails special risks. That a child's brain is different from the brain of adult, although a fact, is not an excuse. It is a fact that should be understood by adults, acted upon by adults, and used by adults to help the child accommodate to the rules of the society – the very rules that the young brain may be reluctant to accept or understand.

As I said before, the young brain is a double-edged sword – its numerous benefits can be dampened by its drawbacks and special vulnerabilities.

But, we have an opportunity here. We can capitalize upon the benefits to mitigate the drawbacks. Perhaps nowhere else is this notion more relevant than in our judicial system. Children's brains give us a window of opportunity to mend the weaknesses and the drawbacks and set the child on a road to fulfilling his or her enormous potential. The science tells us that the window of opportunity is literally a once in a lifetime opportunity. Once in each person's life, when the person is young. We must act during this short period of time. If we used the same rules, same guidelines and same corrective measures that are designed for adults to rehabilitate a child, we will squander this opportunity.

I am here to urge you that we can use scientific knowledge to understand and accept that our children and our youth are inherently different from adults. They perceive the world differently and react to it differently from adults. Youth is not only a gift to the young but also a gift to us adults, because it offers an opportunity for highly effective course corrections prescribed by adults and needed by some of our children. But it must be done right. Our children must be treated appropriately and differently from adults, when they exceed our expectations and when they let us down, especially when they let us down, because children respond differently to reward and punishment than do adults.

I believe that all of us here have a common goal – to make this world a better place for everyone by making it the best place there can be for our children. I would like to conclude with a quote by a fellow neuroscientist, who is also a psychiatrist: "We are only as happy as our unhappiest child".

History will judge us by the successes of our children.

Young minds not only carry the most potent seeds for success we have ever known but they also are eager and fertile grounds for assimilating rehabilitation, course correction and remediation. We must capitalize on both these opportunities.

Testimony of Kim Lawrance (Winter Haven)
Provided to Members of the Constitutional Revision Commission
In Support of Proposal 73
January 25, 2018

Thank you for giving me this opportunity to share my story.

My name is Kim Lawrance and I'm the mom of a 17-year-old girl serving a 10-year prison sentence in an adult prison followed by 10 years' probation.

No one was hurt in her crime and this was her first arrest.

She was just 15 years old when she made the mistake of a lifetime. I say mistake because at the age of 15, that's what it is. She should have been held accountable for her actions, but she did not deserve 10 years in an adult prison and a ruined future.

I read the Victim's impact statement which said, "To come up with such a plan at such young ages, how can they be rehabilitated?" She couldn't be more wrong. Children are the most rehabilitative of all.

Throughout the court process, there was no input from the judge, no evaluations, no interviews from teachers or even the teachers in the jail, or the Correction officers in the jail. Why not? Instead, on the 21st day, a decision was made by the state attorney's office who knows nothing about my daughter or anyone else's child to move the case to an adult court. No questions, no explanations. They re-booked her in the middle of the night, gave her a different color uniform, and told her she was now no longer considered a juvenile and was now being charged as an adult. She didn't really know what that would all mean. What it really meant was that she was about to also lose her mental, physical and social development that all juveniles need.

The plea bargain felt one-sided like a scare tactic. There was no negotiation and we were left feeling like all it is to them is to close a case and get a win. They completely controlled the court room. This is not what the forefathers of the Juvenile Justice system started over a century ago would have wanted.

The United States Supreme Court 2005 stated in *Roper vs Simmons* that **"From a Moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."**

It's a fact, not an opinion, that children's brains are not fully developed in the area that views consequences and risk-taking. Teens, unlike adults, do not understand yet the ramifications of their actions.

It is why they can't vote, go to war, serve on a jury, enter legal contracts, or live on their own. So why are we picking and choosing punishments as if they are adults?

The Bureau of Justice Statistics provided a bulletin for 2016, and out of all the states, Florida housed the most children in adult prisons, 143 of them, ages 17 and under. Out of that 143, 5 were females. Out of that 5, one is my daughter Taylor.

I can tell you that right now there are 3 girls.

This small percentage leads to solitary conditions. They are left isolated in their dorm, which is the only way to keep them separated from adults. Quite honestly, the prison doesn't know what to do with them especially when there is such a small number of them. My daughter spent a lot of time in solitary. How does this benefit these juveniles or society? They've been sent to the devil's playground and most will come home as young adults.

Adult prisons do not rehabilitate and cannot meet the growing psychological or physical needs of kids. Juvenile facilities do have these resources.

Taylor did graduate as Valedictorian with her GED the first year she was in Lowell. She is also one of the lucky ones. I pay for her to have a college correspondence course mailed to her. Otherwise, there is no program for her to join now. She is a minor and was told she still has too much time left on her sentence. Not all have the option I give to my daughter. Many sit there with nothing to do to develop themselves.

My daughter was a gifted, straight A student and competitive cheerleader who found her way to an adult prison for 10 years. So, if anyone thinks this can't happen to their child, think again!!

It can happen to anyone's child from just one wrong decision.

Instead of aggressively direct-filing children, make it only a very last resort, one for the most heinous of crimes. We need to take direct-filing more seriously and not left for only the State to decide. Children have the most hope. Let's give them just that.

Every child matters.

Every voice matters.

Let's make each one count.

I hope I've encouraged you to support Proposal 73.

Thank you again for your time.

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

73
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** PROSECUTING CHILDREN AS ADULTS

***Name** CARLOS J. MARTINEZ

Address 1320 NW 14TH STREET
Street

Phone 305-545-1900

MIAMI FL 33125
City *State* *Zip*

Email CMartinez@pdmiami.com

***Speaking:** [X] For [ ] Against [ ] Information Only

Waive Speaking: [ ] In Support [ ] Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? [X] Yes [ ] No

If yes, who? FLORIDA PUBLIC DEFENDER ASSOCIATION

Are you a registered lobbyist? [ ] Yes [X] No

Are you an elected official or judge? [X] Yes [ ] No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

11/25/18
Meeting Date

P73
Proposal Number (if applicable)

220
Amendment Barcode (if applicable)

***Topic** Direct File

***Name** Scott D. McCoy

Address P.O. Box 10788 Phone 850-521-3042
Street

Tally FL 32302 Email Scott.McCoy@splcenter.org
City *State* *Zip*

***Speaking:** ☑ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☑ Yes ☐ No

If yes, who? Southern Poverty Law Center

Are you a registered lobbyist? ☑ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Direct File, Juvenile Cases

***Name** Jack Campbell, State Attorney 2nd Circuit

Address 301 Monroe Street
Street
Tallahassee FL 32399
City *State* *Zip*

Phone 850-606-6012

Email CampbellJ@leoncountyfl.gov

***Speaking**: ☐ For ☒ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☒ Yes ☐ No

If yes, who? Florida Prosecuting Attorneys Association

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☒ Yes ☐ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

73
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Prosecution of Children as Adults

***Name** Ingrid Delgado

Address 201 N Park Ave
Street

Phone

Tallahassee FL 32301
City *State* *Zip*

Email

***Speaking:** ☐ For ☐ Against ☐ Information Only

Waive Speaking: ☒ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☒ Yes ☐ No

If yes, who? Florida Conference of Catholic Bishops

Are you a registered lobbyist? ☒ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

73
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Juvenile Transfers

***Name** Paolo Annino

Address _____ Phone _____
Street

Tallahassee, FL Email _____
City *State* *Zip*

***Speaking:** ☒ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☒ Yes ☐ No

If yes, who? Public Interest Law Center

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

P73
Proposal Number (if applicable)

amendment
Amendment Barcode (if applicable)

***Topic** Direct file

***Name** Scott McCoy

Address P.O. Box 10788 Phone 850-521-3042
Street

Tally FL 32302 Email Scott.mccoy@splcenter.org
City *State* *Zip*

***Speaking:** ☑ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☑ Yes ☐ No

If yes, who? Southern Poverty Law

Are you a registered lobbyist? ☑ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record. ***Required***

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

73
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Judicial Involvement in Prosecuting Children as Adults

***Name** Kara Gross

Address PO Box 10788
Street

Tallahassee FL 32302
City *State* *Zip*

Phone 850-347-6994

Email kgross@aclufl.org

***Speaking:** ☐ For ☐ Against ☐ Information Only

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☑ Yes ☐ No

If yes, who? American Civil Liberties Union of Florida

Are you a registered lobbyist? ☑ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1-25-18
Meeting Date

P 73
Proposal Number (if applicable)

~~Amend #~~ 220
Amendment Barcode (if applicable)

~~220~~

***Topic** Direct File

***Name** DAWN Steward

Address 2130 Blossom Lane
Street
Winter Park Fl 32789
City *State* *Zip*

Phone 407-645-0273

Email stu2130@Aol.com

***Speaking**: ☐ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☒ Yes ☐ No

If yes, who? Florida PTA

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1-25-16
Meeting Date

73
Proposal Number (if applicable)

260656
Amendment Barcode (if applicable)

***Topic** Transfers of Children

***Name** Daniel Clibban

Address _____
Street

_____
City *State* *Zip*

Phone 386 847 4739

Email doc11c@my.fsu.edu

***Speaking**: [X] For [ ] Against [ ] Information Only

Waive Speaking: [ ] In Support [ ] Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? [Y] Yes [ ] No

If yes, who? Public Interest Law Center

Are you a registered lobbyist? [ ] Yes [X] No

Are you an elected official or judge? [ ] Yes [X] No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

The Constitution Revision Commission

COMMITTEE VOTE RECORD

COMMITTEE: Declaration of Rights
ITEM: P 73
FINAL ACTION:
MEETING DATE: Thursday, January 25, 2018
TIME: 8:00 a.m.—5:00 p.m.
PLACE: The Capitol, Tallahassee, Florida

FINAL VOTE			1/19/2018 1 Motion to Temporarily Postpone Carlton		1/25/2018 2 Amendment 331232 Donalds		1/25/2018 3 Amendment 260656 Donalds	
Yea	**Nay**	**COMMISSIONERS**	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**
		Donalds					X	
		Gainey						X
		Johnson					X	
		Joyner					X	
		Lester						X
		Stemberger, VICE CHAIR						X
		Carlton, CHAIR						X
		TOTALS	FAV	-	-	WD	-	UNF
Yea	**Nay**		**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**

CODES: FAV=Favorable
UNF=Unfavorable
-R=Reconsidered
RCS=Replaced by Committee Substitute
RE=Replaced by Engrossed Amendment
RS=Replaced by Substitute Amendment
TP=Temporarily Postponed
VA=Vote After Roll Call
VC=Vote Change After Roll Call
WD=Withdrawn
OO=Out of Order
AV=Abstain from Voting

The Constitution Revision Commission

COMMITTEE VOTE RECORD

COMMITTEE: Declaration of Rights
ITEM: P 73
FINAL ACTION:
MEETING DATE: Thursday, January 25, 2018
TIME: 8:00 a.m.—5:00 p.m.
PLACE: The Capitol, Tallahassee, Florida

	1/25/2018 4 Motion to Temporarily Postpone Donalds							
SENATORS	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**
Donalds								
Gainey								
Johnson								
Joyner								
Lester								
Stemberger, VICE CHAIR								
Carlton, CHAIR								
TOTALS	FAV	-						
	Yea	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**

CODES: FAV=Favorable
UNF=Unfavorable
-R=Reconsidered
RCS=Replaced by Committee Substitute
RE=Replaced by Engrossed Amendment
RS=Replaced by Substitute Amendment
TP=Temporarily Postponed
VA=Vote After Roll Call
VC=Vote Change After Roll Call
WD=Withdrawn
OO=Out of Order
AV=Abstain from Voting

Constitution Revision Commission
Declaration Of Rights Committee
Proposal Analysis

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

Proposal #: P 22

Relating to: DECLARATION OF RIGHTS, Right of privacy

Introducer(s): Commissioner Stemberger

Article/Section affected: Article I, Section 23 – Right of privacy.

Date: January 24, 2018

	REFERENCE	ACTION
1.	DR	**Pre-meeting**
2.	JU	

I. SUMMARY:

Article I, Section 23 of the Florida Constitution establishes the right of every person "to be let alone and free from governmental intrusion into the person's private life." The Florida Supreme Court has interpreted this express "right of privacy" to embrace more privacy interests, and extend more protection to the individual in those interests, such as abortion and parental rights, than the implicit "right of privacy" under the U.S. Constitution.

This proposal narrows the applicability of Article I, Section 23 to protect a person's privacy with respect to privacy of information and the disclosure of that information, from protection from intrusion into the person's private life.

If approved by the Constitution Revision Commission, the proposal will be placed on the ballot at the November 6, 2018, General Election. Sixty percent voter approval is required for adoption. If approved by the voters, the proposal will take effect on January 8, 2019.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

"Privacy" in General

The concept of individual "privacy" has been described as a "physical and psychological zone within which an individual has the right to be free from intrusion or coercion, whether by the

government or the by the society at large."[1] This "right to be let alone" was first described more than a century ago by Thomas M. Cooley in the 1880 edition of his *Treatise on the Law of Torts.*[2] Samuel Warren and Louis Brandeis seized on this concept of a "right to be let alone" as the basis for one of the most influential law review articles in modern legal history, *The Right to Privacy*.[3] Warren and Brandeis advanced the concept of a "right to privacy" by re-conceptualizing existing common law decisions prohibiting the publication of an individual's personal information without the subject's consent. Such decisions had rested primarily on theories of invasion of a property interest or a breach of contract or trust.[4] They suggested that in such cases, the court had simply stretched property and contract rules to protect what was in fact an individual's privacy interests.[5] Thus, Warren and Brandeis argued a "right of privacy" was an existing principle of common law that should be explicitly recognized separate from other articulable interests:

> The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise.[6]

From these auspicious beginnings, jurisprudence relating to the "right of privacy" has developed along two separate tracks. One track – constitutional privacy – relates to the effort to assert a right of privacy against governmental intrusion. The second track – the tort law of privacy- relates to efforts to assert a right of privacy against intrusion by other private citizens.[7]

The "right of privacy" implicated by this proposal concerns the constitutional right of privacy asserted by individuals against intrusions by the government.

Privacy Rights under the U.S. Constitution

There is no express right to privacy under the United States Constitution. However, several provisions of the Bill of Rights reflects the concerns of the framers with protecting certain aspects of individual affairs from intrusion by the government:

- **1st Amendment:** Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.[8]

- **2nd Amendment:** A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.[9]

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[1] Gerald B. Cope, Jr., *To Be Let Alone: Florida's Proposed Right of Privacy*, 6 Fla. St. U. L. Rev. 671, 677 (2014) available at http://ir.law.fsu.edu/lr/vol6/iss3/8 (last visited Jan. 8, 2018).
[2] *Id.*
[3] Samuel Warren and Louis Brandeis, *The Right to Privacy,* 4 Harv. L. Rev. 193 (1890).
[4] Gerald B. Cope, Jr., *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 Fla. St. U. L. Rev. 631, 648 (2014) available at http://ir.law.fsu.edu/lr/vol5/iss4/4 (last visited Jan. 8, 2018).
[5] *Id.*
[6] *Supra* note 3 at 213.
[7] *Supra* note 1 at 678.
[8] U.S. Constitution Amendment I.
[9] U.S. Constitution Amendment II.

- **3rd Amendment:** No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.[10]

- **4th Amendment:** The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[11]

In 1886, the U.S. Supreme Court noted for the first time that the U.S. Constitution, through the Fourth and Fifth Amendments, protects the "privacies of life."[12] However, it was not until 1965, in the seminal opinion of *Griswold v. Connecticut*,[13] that the United States Supreme Court recognized an implicit right of privacy in the Constitution. In the court's opinion, authored by Justice Douglas, the Court stated that the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy."[14] Over the next decade the Court would extend these "zones of privacy" to marriage, the possession of obscene materials in the privacy of one's home, and the use of contraceptives.[15]

The court limited this continuing expansion of the "zones of privacy" in *Roe v. Wade.*[16] Contrary to *Griswold*, the Court in *Roe* concluded that the right of privacy was founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action.[17] The Court explained that "only personal rights that can be deemed 'fundamental' or 'implicit' in the concept of ordered liberty are included in this guarantee of personal privacy."[18] The court listed five such areas of fundamental rights: marriage, procreation, contraception, family relationships, and child rearing and education. Generally, these protected autonomy rights may only be restricted if a state establishes a compelling interest for which the restriction is narrowly drawn. Thus the Supreme Court has established a number of privacy rights in the following areas:

A Parent's Rights over the care, control and custody of children:

- A teacher's right to teach and the right of parents to engage a teacher to instruct their children are within the liberty guaranteed under U.S. Const. amend. XIV.[19]
- Legislation may not unreasonably interfere with the liberty of parents and guardians to direct the upbringing and education of children under their control. Rights guaranteed by the U.S. Constitution may not be abridged by legislation

[10] U.S. Constitution Amendment III.
[11] U.S. Constitution Amendment IV.
[12] *Boyd v. United States,* 116 US 616, 630 (1886).
[13] 381 U.S. 479 (1965).
[14] *Id*. at 484-486.
[15] B. Harding, Mark J. Criser & Michael R. Ufferman, *Right to Be Let Alone - Has the Adoption of Article I, Section 23 in the Florida Constitution, Which Explicitly Provides for a State Right of Privacy, Resulted in Greater Privacy Protection for Florida Citizens*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 945, 948-49 (2000).
[16] 410 U.S. 113 (1973).
[17] 410 U.S. 113, 153 (1973).
[18] 410 U.S. 113, 152 (1973).
[19] *Meyer v. Nebraska*, 262 U.S. 390 (1923).

which has no reasonable relation to some purpose within the competency of the state.[20]

- Rights guaranteed by the United States Constitution may not be abridged by legislation that has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations. The duty to prepare the child for "additional obligations" must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship.[21]
- The family is not beyond regulation. But when the government intrudes on choices concerning family living arrangements, the U.S. Supreme Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.[22]
- The liberty protected by the Due Process Clause of the United States Constitution includes the right of parents to establish a home and bring up children and to control the education of their own.[23]

Rights to refuse unwanted medical treatment:

- No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. The right to one's person may be said to be a right of complete immunity: to be let alone. In a civil action for an injury to the person, the court, on application of the defendant, and in advance of the trial, may not order the plaintiff, without his or her consent, to submit to a surgical examination as to the extent of the injury sued for.[24]
- Prison may not require an inmate with a diagnosed mental illness to take psychotropic medication against their will without due process afforded by the Fourteenth Amendment of the United States Constitution.[25]
- The United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition, but Missouri's requirement that those wishes be proven by clear and convincing evidence when the person is in a persistent vegetative state is not a violation of the due process clause of the Fourteenth Amendment.[26]

[20] *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).
[21] *Wisconsin v. Yoder*, 406 U.S. 205 (1971).
[22] *Moore v. City of East Cleveland*, 431 US. 494 (1977) (striking down municipal ordinance restricting extended family living arrangements).
[23] *Troxel v. Granville*, 530 U.S. 57 (2000)
[24] *Union Pacific Railroad Co. v. Botsford*, 141 US. 250 (1891).
[25] *Washington v. Harper*, 494 U.S. 210 (1990).
[26] *Cruzan v. Director, Missouri Dep't of Health*, 497 US. 261 (1990).

Rights to abortion:

- Only personal rights that can be deemed "fundamental" or implicit in the concept of ordered liberty are included in this guarantee of personal privacy. The right has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education. This right of privacy, whether it be founded in the U.S. Const. amend. XIV concept of personal liberty and restrictions upon state action, as the court feels it is, or, in the U.S. Const. amend. IX reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[27]
- The Court reaffirms Roe v. Wade's essential holding, which has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another.[28]

Nevertheless, the Supreme Court has generally refused to expand the federal right of privacy beyond the areas articulated in *Roe* or to recognize a general right to privacy under the federal constitution touching on all aspects of private life. Rather, the U.S. Supreme Court has found that the "protection of a person's *general* right to privacy – his right to be let alone by other people – is, like the protection of his property and of his very life, left largely to the law of the individual states."[29] Thus, outside of the marriage-procreation-childrearing area, any protection of privacy against governmental intrusion must be done by the states.[30] The crucial position of the states was underlined by the 1977 report of the Federal Privacy Protection Study Commission, when it concluded:

> The States have been active in privacy protection, and in many cases innovative, but neither they nor the Federal governmental have taken full advantage of each other's experimentation.[31]

In response to the emerging limitations of the federal privacy right, several states between 1968 and 1980, began to adopt explicit privacy clauses to their own state constitutions.

Privacy Rights under the Florida Constitution

History

[27] *Roe v. Wade*, 410 U.S. 113 (1973).
[28] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
[29] *Katz v. United States*, 389 U.S. 347, 350-351 (1967).
[30] *Supra* note 1 at 681.
[31] Privacy Protection Study Commission, *Personal Privacy In An Information Society* 489 (1977).

Given the limits of the privacy right under the federal constitution, states have taken advantage of opportunities to afford additional privacy protection under state constitutions. Florida is one of ten states that has expanded constitutional privacy protection beyond its federally defined boundaries (See **Appendix "A"**).[32]

The road to adoption of a general privacy amendment in Florida began with the 1977-1978 Constitution Revision Commission (CRC). Just prior to the opening of the 1977-1978 CRC, the Florida Supreme Court[33] issued its decision *Laird v. Florida*, 342 So. 2d 962, 965 (Fla. 1977). In *Laird*, the Court expressly rejected the argument that a general "right of privacy" existed under the Florida Constitution that protected privacy interests beyond the scope of those protected under the federal constitution.[34] The Court noted that it did not find a decision of the Alaska Supreme Court recognizing a general privacy right on similar facts to be persuasive as the Alaska Supreme Court based its decision on the express privacy provision of the Alaska Constitution[35] which had no analogue in Florida. [36] Later, when addressing the CRC at the opening session, Florida Supreme Court Chief Justice Ben Overton, who also served as a member of the CRC, strongly urged the CRC to address developing privacy issues:

> The subject of individual privacy and privacy law is in a developing stage. [A number of] states have adopted some form of privacy legislation, and many appellate courts in this nation now have substantial right of privacy issues before them for consideration. It is a new problem that should be addressed.

The commission, responding these emerging concerns, about the privacy of information and other transformative issues in society and law, eventually proposed the following amendment to the Florida Constitution:

> Section 23. Right of privacy. – Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein.

The last portion of the first sentence of the constitutional provision, "except as otherwise provided herein," was added to ensure there would be no adverse effect on law enforcement activities and the police power of the state. For example, it would not modify the search and seizure provision of Article I, Section 12.[37] The proposed privacy amendment was placed on the November 7, 1978

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[32] NATIONAL CONFERENCE OF STATE LEGISLATURES, *Privacy Protections in State Constitutions,* May 5, 2017, available at http://www.ncsl.org/research/telecommunications-and-information-technology/privacy-protections-in-state-constitutions.aspx (last visited Jan. 21, 2018)

[33] Members of the Supreme Court in 1977 included James C. Adkins, Joseph A. Boyd, Jr., Ben F. Overton (CJ), Arthur J. England, Alan C. Sundberg, Joseph W. Hatchett, and Frederick B. Karl.

[34] *Laird v. Florida*, 342 So. 2d 962, 965 (Fla. 1977).

[35] An express right of privacy was added to the Alaska Constitution in 1972. *See* **Appendix "A".**

[36] *Laird v. Florida*, 342 So.2d 962, 965(Fla. 1977) (rejecting as persuasive a decision on the Supreme Court of Alaska finding a constitutional right of privacy with regard to personal possession and ingestion of marijuana in the home because the decision was based on a provision of the Alaska State Constitution which had no analogue in Florida).

[37] Justice Ben F. Overton & Katherine E. Giddings, *The Right of Privacy in Florida in the Age of Technology and the Twenty-First Century: A Need for Protection from Private and Commercial Intrusion*, 25 FLA. ST. U. L. REV. 25, 36 (1997) available at http://ir.law.fsu.edu/lr/vol25/iss1/3 (last visited Jan. 8, 2018).

General Election ballot with a number of other CRC amendments, but was not adopted by Florida voters.

Two years later, another decision of the Florida Supreme Court decision would prompt the Florida Legislature to re-examine the privacy issue. In *Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.*, 379 So. 2d 633 (Fla. 1980), the Court overturned a First District Court of Appeal decision recognizing a constitutionally protected right of "personhood," which included the right of disclosural privacy as to personal information given by public job seekers to a recruiter.[38] The Court concluded that "under the federal constitution a person's right of disclosural privacy is not as broad as was found by the district court and that under [the Florida] constitution no broader right is granted."[39]

In 1980, largely as a result of that decision, the Legislature passed a joint resolution placing another privacy amendment on the ballot for consideration by the electorate.[40] Legislative staff analyses framed the issue under consideration as the lack of a "***general [emphasis added]*** state constitutional right of privacy."[41] Efforts to qualify the scope of the proposed privacy amendment to only "unwarranted" or "unreasonable" government intrusions were debated and soundly defeated in the Legislature.[42] The resulting proposed amendment was identical to the previous CRC privacy amendment with the addition of one sentence relating to public records and meetings:

> Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.[43]

The single revision to the language of the CRC privacy amendment sentence addressed concerns that the amendment could be construed to limit existing statutory Sunshine laws.[44] The privacy amendment was adopted by a margin of 60.6% to 39.4% of voters.[45] In 1998, as the result of a proposal submitted to electors by the 1997-1998 Constitution Revision Commission, the privacy provision was amended to make its language gender neutral, replacing the term "his private life" with "the person's private life."[46]

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[38] 379 So.2d 633, 635-636 (Fla. 1980).
[39] *Id.* at 634.
[40] B. Harding, Mark J. Criser & Michael R. Ufferman, *Right to Be Let Alone - Has the Adoption of Article I, Section 23 in the Florida Constitution, Which Explicitly Provides for a State Right of Privacy, Resulted in Greater Privacy Protection for Florida Citizens*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 945, 953 (2000).
[41] *See* Florida House of Representatives Committee on Governmental Operations, Staff Analysis of CS/HJR 387, Feb. 7, 1980; Senate Committee on Rules and Calendar, Senate Staff Analysis and Economic Impact Statement of SJR 935, May 6, 1980.
[42] *Supra* note 32.
[43] HJR 387 (1980).
[44] *Supra* note 29 at pg. 36; *See also* Senate Committee on Rules and Calendar, Senate Staff Analysis and Economic Impact Statement of SJR 935, May 6, 1980, pg. 2.
[45] Florida Department of State, Division of Elections, Election Results, Constitutional Amendment Right of Privacy, https://results.elections.myflorida.com/Index.asp?ElectionDate=11/4/1980&DATAMODE= (last visited Jan. 3, 2018).
[46] 1997-1998 Constitution Revision Commission, *Nine Proposed Revisions for the 1998 Ballot*, available at http://fall.fsulawrc.com/crc/ballot.html (last visited Jan. 19, 2018).

Nature of Florida Privacy Right

The adoption of the privacy amendment to the Florida Constitution subsequent to the U.S. Supreme Court decisions in *Griswold v. Connecticut* and *Roe v. Wade,* has led the Florida Supreme Court to conclude that the amendment encompasses, at a minimum, all privacy rights protected by the U.S. Supreme Court under federal law as it existed in 1980.[47] As a result, post-1980 federal cases cannot erode the floor of privacy established in Florida by Article I, Section 23, even though the U.S. Supreme Court has in subsequent cases signaled a retreat from its previous vigorous protection of privacy rights.[48]

The Florida Supreme Court has explained the difference in the legal vitality and breadth of Article I, Section 23, in relation to the, by comparison, limited general privacy right under the U.S. Constitution:

> The citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23, of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.
>
> In other words, the amendment embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution.[49]

The amendment provides an explicit textual foundation for those privacy interests inherent in the concept of liberty, which may not otherwise be protected by specific constitutional provisions.[50]

The Florida Supreme Court has declared that the right of privacy under Article I, Section 23 is a fundamental right. Any law that implicates the fundamental right of privacy, regardless of the activity, is subject to the “compelling interest” test (strict scrutiny) and, therefore, presumptively unconstitutional.[51] The compelling interest test shifts the burden of proof to the state to justify an

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[47] Michael J. Minerva, Jr., Grandparent Visitation: The Parental Privacy Right to Raise Their "Bundle of Joy", 18 FLA. ST. U. L. REV. 533, 541 (2017), available at http://ir.law.fsu.edu/lr/vol18/iss2/11 (last visited Jan. 8, 2018).
[48] *See e.g. Webster v. Reproductive Health Services*, 492 U.S. 490 (1989); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).
[49] *In re TW*, 551 So. 2d 1186 (Fla. 1989).
[50] *Rasmussen v. South Florida Blood Service,* 500 So. 2d 533 (Fla. 1987).
[51] *Gainesville Woman Care v. Florida*, 210 So. 3d 1243, 1245 (Fla. 2017).

intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.[52] However, the right of privacy is not absolute, and before the right will attach, a reasonable expectation of privacy must exist.[53]

The express right of privacy articulated by Article I, Section 23 of the Florida Constitution has been interpreted by both Florida and federal courts to touch on a wide range subjects dealing with a person's exercise of their autonomy, government intrusion and disclosure of personal information. These include:

Disclosure of Information

- Florida Constitution did not prevent the Department of Business Regulation from subpoenaing a Florida citizen's bank records without notice. The right to privacy yielded to compelling governmental interests such as the state's interest in conducting effective investigations in the pari-mutuel industry.[54]
- A principal aim of Fla. Const. art. I, § 23, is to afford individuals some protection against the increasing collection, retention, and use of information relating to all facets of an individual's life.[55]
- Under Fla. Const. art. I, § 23, privacy interests of blood donors, blood service, and society in maintaining a strong volunteer blood donation system outweighed individual's interest in discovering donor information in attempting to discover from whom the individual contracted Acquired Immune Deficiency Syndrome (AIDS).[56]
- Nonpublic employees may have a privacy interest in certain information contained in their personnel files, which they may assert as intervenors in the litigation; moreover, in the appropriate case, the trial court should fully consider the employees' alleged privacy interest — in the context of determining the relevancy of any discovery request which implicates it — regardless of whether the subject employees have intervened or not.[57]
- Privacy provision in article I, section 23, of the Florida Constitution, providing that citizens of this state shall have the "right to be let alone from government intrusion," is inapplicable to civil dissolution proceeding. [58]
- Under appropriate circumstances, the constitutional right of privacy established in Florida by the adoption of Fla. Const. art. I, § 23 could form a constitutional basis for closure of civil proceedings to avoid substantial injury to innocent third parties or to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of civil proceeding sought to be closed.[59]

[52] *Winfield v. Div. of Pari-Mutuel Wagering*, 477 So. 2d 544 (Fla. 1985).
[53] *Id.*
[54] *Id.*
[55] *Rasmussen v. South Florida Blood Service*, 500 So. 2d 533 (Fla. 1987).
[56] *Id.*
[57] *Alterra Healthcare Corp. v. Estate of Shelley*, 827 So. 2d 936 (Fla. 2002).
[58] *Barron v. Florida Freedom Newspapers*, 531 So. 2d 113 (Fla. 1988).
[59] *Id.*

- The Florida Board of Bar Examiners' decision to refuse to complete applicant's request for admission to the Florida Bar was affirmed because the information sought regarding applicant's history of mental health was the least intrusive means to achieve a compelling governmental interest.[60]
- No legitimate expectation of privacy in revealing smoker status to government employer.[61]
- Plaintiff, whose husband had drowned in a hotel pool, was not entitled to discovery of non-party identification information in surveys completed by hotel guests, as the names and contact information of the non-party guests who completed the surveys were constitutionally protected, private details, the guests had not waived their right to privacy by providing the information to the hotel when they made reservations, and plaintiff had not shown any compelling interest in disclosure of the names and contact information.[62]
- Article I section 23 specifically does not apply to public records.[63]
- Fla. Const. art. I, § 23 did not protect third parties from public disclosure of their names and addresses on state's witness list as former clients of defendant charged with prostitution.[64]

Decisional Autonomy

- Natural parent's fundamental right to privacy in rearing one's own child, a right this Court found to exist under article I, section 23 of the Florida Constitution.[65]
- Arbitration provision in a commercial travel contract for an African safari was valid and enforceable in a wrongful death action involving a minor child who died on the safari because the child's mother had authority, under U.S. Const. amend. XIV and Fla. Const. art. I, § 23, to enter into the contract on behalf of her child.[66]
- Under Fla. Const. art. I, § 23, the state may not intrude upon parents' fundamental right to raise their children except in cases where a child is threatened with harm; a best interest test without an explicit requirement of harm cannot pass constitutional muster.[67]
- Putative father's privacy interests permits refusal of blood test under certain circumstances.[68]
- Public notice provisions of Fla. Stat. § 63.088 were unconstitutional under Fla. Const. art. I, § 23 because the provisions violated the mother's right to privacy, independence in choosing adoption as an alternative to giving birth and with the right not to disclose the intimate personal information that is required when the father is unknown.[69]

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[60] *Florida Bd. of Bar Examiners re: Applicant*, 443 So.2d 71 (Fla. 1983).
[61] *City of North Miami v. Kurtz*, 653 So. 2d 1025 (Fla. 1995).
[62] *Mishko Josifov v. Iman Kamal-Hashmat*, 217 So. 3d 1085, (Fla. 3rd DCA 2017).
[63] *Fosberg. v. Miami Housing*, 455 So. 2d 373 (Fla. 1984).
[64] *Post-Newsweek Stations, Florida, Inc. v. Doe*, 612 So. 2d 549 (Fla. 1992).
[65] *Richardson v. Richardson*, 766 So. 2d 1036 (Fla. 2000).
[66] *Global Travel Mktg., Inc. v. Shea*, 908 So. 2d 392, 2005 Fla. LEXIS 1454 (Fla. 2005).
[67] *Beagle v. Beagle*, 678 So. 2d 1271, (Fla. 1996).
[68] *Dept. of Health & Rehab Services v. Privette*, 617 So. 2d 305 (Fla. 1993).
[69] *G.P. v. State,* 842 So. 2d 1059, 2003 Fla. App. LEXIS 5743 (Fla. 4th DCA 2003).

- Surrogate or proxy may exercise the constitutional right of privacy for an incompetent person who, while competent, expressed his or her wishes to discontinue artificial life-prolonging procedures.[70]
- In ordering a pregnant woman to submit to treatment deemed necessary by her obstetrician, the trial court applied the wrong test. The case relied upon by the trial court did not involve the privacy rights of a pregnant woman; the test to overcome a woman's right to refuse medical intervention in her pregnancy was whether the State's compelling state interest was sufficient to override the pregnant woman's constitutional right to the control of her person, including her right to refuse medical treatment.[71]
- Since a privacy section as adopted, Fla. Const. art. I, § 23, contains no textual standard of review, it is important for courts to identify an explicit standard to be applied in order to give proper force and effect to an amendment. The right of privacy is a fundamental right which demands the compelling state interest standard. The test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means. [72]
- Since the curfew ordinances applicable to minors involved a right of privacy and were not "narrowly tailored," and the statistical data failed to establish the necessary nexus between the governmental interest and the classification created by the ordinances, they were unconstitutional under a strict scrutiny analysis.[73]
- Supreme court reversed a lower court's holding that the Parental Notice Act was constitutional; the Act's requirement that a minor must notify a parent of her decision to have an abortion was a significant intrusion on a minor's privacy right.[74]
- As the state presented no evidence that the Mandatory Delay Law, which imposed a 24-hour waiting period on women seeking abortions, served any compelling state interest, much less through least restrictive means, the trial court correctly found a substantial likelihood that it was facially unconstitutional for imposing a significant restriction on women's fundamental right of privacy, which was a sufficient basis for it to issue a temporary injunction barring application of the Law in its entirety.[75]
- Statute prohibiting sex with a minor violated the state constitution's privacy provisions as applied to a 15 year old minor with another 15 year old minor, because the purpose of the statute was to protect minors from the sexual acts of adults, and a minor could not be prosecuted under it.[76]
- Whatever privacy interest, under Fla. Const. art. I, § 23, a 15-year-old minor has in sexual intercourse is clearly outweighed by the State's interest in protecting 12-

[70] *Bush v. Schiavo*, 861 So. 2d 506, 2003 Fla. App. LEXIS 18702 (Fla. 2nd DCA 2003).
[71] *Burton v. State*, 49 So. 3d 263, 2010 Fla. App. LEXIS 11754 (Fla. 1st DCA 2010).
[72] *In re TW*, 551 So. 2d 1186 (1989) (stronger than under U.S. Constitution because Florida uses strict scrutiny in abortion cases, federal courts use "undue burden test") *See also Gainesville Woman's Care v. Florida*, 210 So. 3d 1243 (Fla. 2017).
[73] *State v. J.P.*, 2004 Fla. LEXIS 2101 (Fla. Nov. 18, 2004), modified, 907 So. 2d 1101, 2004 Fla. LEXIS 2529 (Fla. 2004).
[74] *N. Fla. Women's Health & Counseling Servs. v. State*, 866 So. 2d 612, (Fla. 2003).
[75] *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 2017 Fla. LEXIS 340 (Fla. 2017).
[76] *BB v. State*, 659 So. 2d 256 (Fla. 1995).

year-old children from harmful sexual conduct, under Fla. Stat. § 800.04, irrespective of whether the 12-year-old consented to the sexual activity.[77]

- Statue requiring parental consent before a minor could obtain an abortion violated the minors right to privacy under Article I Section 23 of the Florida Constitution because it could not survive strict scrutiny as the statute lacked procedural safeguards.[78]
- In Re Guardianship of Browning, 568 So. 2d 4; Public Health Trust v. Wons, 541 So.2d 96 (Fla. 1989) (refusal of blood transfusion that is necessary to sustain life).

Government Intrusion

- Under Fla. Const. art. I, § 23, an individual's privacy interest is implicated when the government gathers telephone numbers through the use of a pen register; however, upon a showing of a compelling government interest as well as a showing that the government used the least intrusive means, suppression of the evidence is not warranted.[79]
- While the statute and rule banning sexual conduct between a psychologist and a former client serve a compelling state interest, the perpetuity clause fails the least-intrusive means test, is on its face over-broad, and, for this reason, violates Florida's Privacy Amendment, Fla. Const. art. I, § 23.[80]
- When an arresting officer plainly stated that he had no actual consent to open a suitcase found in defendant's automobile's trunk, defendant's general consent to look in the trunk did not constitute permission to pry open the locked piece of luggage found inside; therefore Fla. Const. art. I, § 23 was violated when the suitcase was pried open.[81]
- Evidence of randomly intercepted private conversations emanating from defendants' home over a cordless telephone could not be used by the State of Florida, as such conversations were protected by Fla. Const. art. I, § 12, which provided for a strong right of privacy and specifically included protection for private communications; under Fla. Const. art. I, § 23, an explicit right of privacy was created and together, Fla. Const. art. I, §§ 12 and 23 provided a very high degree of protection of private communications from governmental intrusion; a person's private conversations over a cordless telephone were presumptively protected from government interception.[82]
- No privacy right to use land regardless of environmental interests of state.[83]

[77] *J.A.S. v. State*, 705 So. 2d 1381 (Fla. 1998).
[78] *In re TW*, 551 So. 2d 1186 (Fla. 1989).
[79] *Shaktman v. State*, 553 So. 2d 148 (Fla. 1989)
[80] *Caddy v. Department of Health, Bd. of Psychology*, 764 So. 2d 625, (Fla. 1st DCA 2000).
[81] *State v. Wells*, 539 So. 2d 464, 1989 Fla. LEXIS 181 (Fla. 1989), aff'd, 495 U.S. 1, 110 S. Ct. 1632, 109 L. Ed. 2d 1, 1990 U.S. LEXIS 2035 (U.S. 1990).
[82] *Mozo v. State*, 632 So. 2d 623, (Fla. 4th DCA 1994).
[83] *Department of Community Affairs v. Moorman*, 664 So. 2d 930 (Fla. 1995)

B. EFFECT OF PROPOSED CHANGES:

This proposal narrows the applicability of Florida's broader "right of privacy" to protect only a person's information and the disclosure of such information from government intrusion. The term "information" is undefined by the proposal.

The narrowing of the state "right of privacy" may require that the court decisions related to personal autonomy and government intrusion be relitigated in response to the narrowing of the language of Article I, Section 23 and there could be a limitation of the precedential value of those decisions subject to the federal privacy rights articulated above. Decisions related to disclosure of information may avoid the courts having to reexamine their precedents.

If approved by the voters, the proposal will take effect on January 8, 2019.[84]

C. FISCAL IMPACT:

The fiscal impact is indeterminate.

III. Additional Information:

A. Statement of Changes:
(Summarizing differences between the current version and the prior version of the proposal.)

None.

B. Amendments:

None.

C. Technical Deficiencies:

None.

D. Related Issues:

None.

[84] *See* Article XI, Sec. 5(e) of the Florida Constitution ("Unless otherwise specifically provided for elsewhere in this constitution, if the proposed amendment or revision is approved by vote of at least sixty percent of the electors voting on the measure, it shall be effective as an amendment to or revision of the constitution of the state 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.)

APPENDIX "A"

STATE CONSTITUTIONS WITH EXPRESS PRIVACY PROVISIONS

ALASKA
ARTICLE I: DECLARATION OF RIGHTS
SECTION 22: RIGHT OF PRIVACY
Added by voter amendment in 1972.[85]

The right of the people to **privacy** is recognized and shall not be infringed. The legislature shall implement this section.

ARIZONA
ARTICLE 2: DECLARATION OF RIGHTS
SECTION 8: RIGHT TO PRIVACY
Established in Arizona Constitution of 1910.[86]

No person shall be disturbed in his **private affairs**, or his home invaded, without authority of law.

CALIFORNIA
ARTICLE I: DECLARATION OF RIGHTS
SECTION 1
Added by citizen initiative in 1972.[87]

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and **privacy**.

FLORIDA
ARTICLE I: DECLARATION OF RIGHTS
SECTION 23: RIGHT OF PRIVACY
Added by voter adoption of joint resolution in 1980.[88]

Every natural person has the right to be let alone and free from governmental intrusion into the person's **private life** except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

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[85] Gordon Harrison, Alaska Legislative Affairs Agency, *Alaska's Constitution: A Citizen's Guide (5th ed.)*, available at http://w3.legis.state.ak.us/docs/pdf/citizens_guide.pdf (last visited December 28, 2017).
[86] *Supra* note 1, at FN 14.
[87] J. Clark Kelso, *California's Constitutional Right to Privacy*, 19 PEPP. L. REV. 2, pg. 328 (1992), available at http://digitalcommons.pepperdine.edu/plr/vol19/iss2/1 (last visited December 28, 2017).
[88] B. Harding, Mark J. Criser & Michael R. Ufferman, *Right to Be Let Alone - Has the Adoption of Article I, Section 23 in the Florida Constitution, Which Explicitly Provides for a State Right of Privacy, Resulted in Greater Privacy Protection for Florida Citizens*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 945, pg. 945 (2000), available at http://scholarship.law.nd.edu/ndjlepp/vol14/iss2/8 (last visited December 28, 2017).

HAWAII
ARTICLE I: BILL OF RIGHTS
SECTION 6: RIGHT TO PRIVACY
Added by voter adoption of constitutional convention proposal in 1978.[89]

The right of the people to **privacy** is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.

ILLINOIS
ARTICLE I: BILL OF RIGHTS
SECTION 6: SEARCHES, SEIZURES, PRIVACY AND INTERCEPTIONS
Adopted as part of revision of constitution in 1970.[90]

The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, **invasions of privacy** or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

LOUISIANA
ARTICLE I: DECLARATION OF RIGHTS
SECTION 5: RIGHT TO PRIVACY

Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or **invasions of privacy**. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.

MONTANA
ARTICLE II: DECLARATION OF RIGHTS
SECTION 10: RIGHT OF PRIVACY
Adopted in 1972 by Constitutional Convention[91]

The right of **individua**l **privacy** is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

[89] Hawaii Legislative Reference Bureau, *The Constitution of the State of Hawaii,* available at http://lrbhawaii.org/con/ (last visited December 28, 2017).
[90] Illinois General Assembly Legislative Research Unit, *1970 Illinois Constitution: Annotated for Legislators (4th ed.),* available at http://www.ilga.gov/commission/lru/ILConstitution.pdf (last visited December 28, 2017).
[91] Larry Elison and Fritz Snyder, *The Montana State Constitution*, pg. xv

SOUTH CAROLINA
ARTICLE I: DECLARATION OF RIGHTS
SECTION 10: SEARCHES AND SEIZURES; INVASIONS OF PRIVACY

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable **invasions of privacy** shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.

WASHINGTON
ARTICLE I: DECLARATION OF RIGHTS
SECTION 7: INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED
Established in Washington Constitution of 1889.[92]

No person shall be disturbed in his **private affairs**, or his home invaded, without authority of law.

[92] *Supra* note 1, at FN 14.

By Commissioner Stemberger

stembergj-00039-17 201722__

A proposal to amend

Section 23 of Article I of the State Constitution to specify that a person has the right of privacy from governmental intrusion into the person's private life with respect to the privacy of information and the disclosure thereof.

Be It Proposed by the Constitution Revision Commission of Florida:

Section 23 of Article I of the State Constitution is amended to read:

ARTICLE I

DECLARATION OF RIGHTS

SECTION 23. Right of privacy.—Every natural person has the right to be let alone and free from governmental intrusion into the person's private life <u>with respect to privacy of information and the disclosure thereof,</u> except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

CODING: Words ~~stricken~~ are deletions; words <u>underlined</u> are additions.

2017-18 Florida Constitution Revision Commission

Proposal 22

The Florida Privacy Restoration Act

Presented to:

Declaration of Rights Committee

By CRC Commissioner

John Stemberger

PUBLIC PROPOSAL FILING DEADLINE (October 6): The CRC has adopted October 6 as the deadline to submit public proposals. We encourage Floridians to submit their proposals as soon as possible.

PUB 700698: Right of Privacy

by Kenneth Bell

ARTICLE I: DECLARATION OF RIGHTS, Section 23. Right of privacy.

SECTION 23.Right of privacy.

Every natural person has the right to be let alone and free from governmental intrusion into the person's private life with respect to privacy of information and the disclosure thereof, except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Public Proposal Filed by Former Supreme Court Justice Kenneth Bell

- “Every natural person has the right to be let alone and free from governmental intrusion into the person's private life with respect to privacy of information and the disclosure thereof, except as otherwise provide herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.”

FLORIDA
PRIVACY
RESTORATION ACT

The Florida Privacy Restoration Act, Proposal 22, is about two things

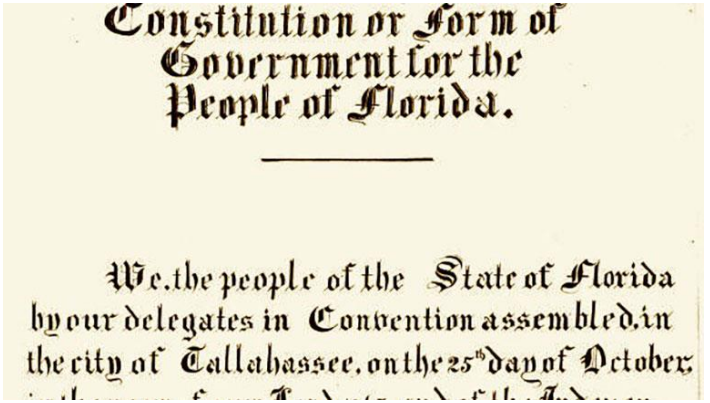
1

1) Restoring the original intent of the drafters, framers and people who adopted the amendment.

2

2) Restraining the Florida Supreme Court's gross overreach by ignoring the original intent of the amendment and producing bad public policy.

The origin & history behind Florida's Privacy Right Found in Article 1, Section 23



Constitution or Form of Government for the People of Florida.

We, the people of the State of Florida by our delegates in Convention assembled, in the city of Tallahassee, on the 25th day of October,

MAP OF Florida.

1972-1974:
Watergate Scandal

Wiretapping of DNC phones by agents of Nixon's campaign…

The New York Times

NEW YORK, FRIDAY, AUGUST 9, 1974

NIXON RESIGNS

URGES A TIME OF 'HEALING
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1974: Widespread Wiretapping by the CIA

On December 22, 1974 the New York Times reported…

"CIA directly conducted a massive, illegal domestic intelligence operation during the Nixon Administration against the antiwar movement and other dissident groups in the United States…"

1973-1974: Internet protocol suite (TCP/IP) was first developed and reported on by Robert E. Kahn and Vint Cerf

Banking Wire Transfers Occur

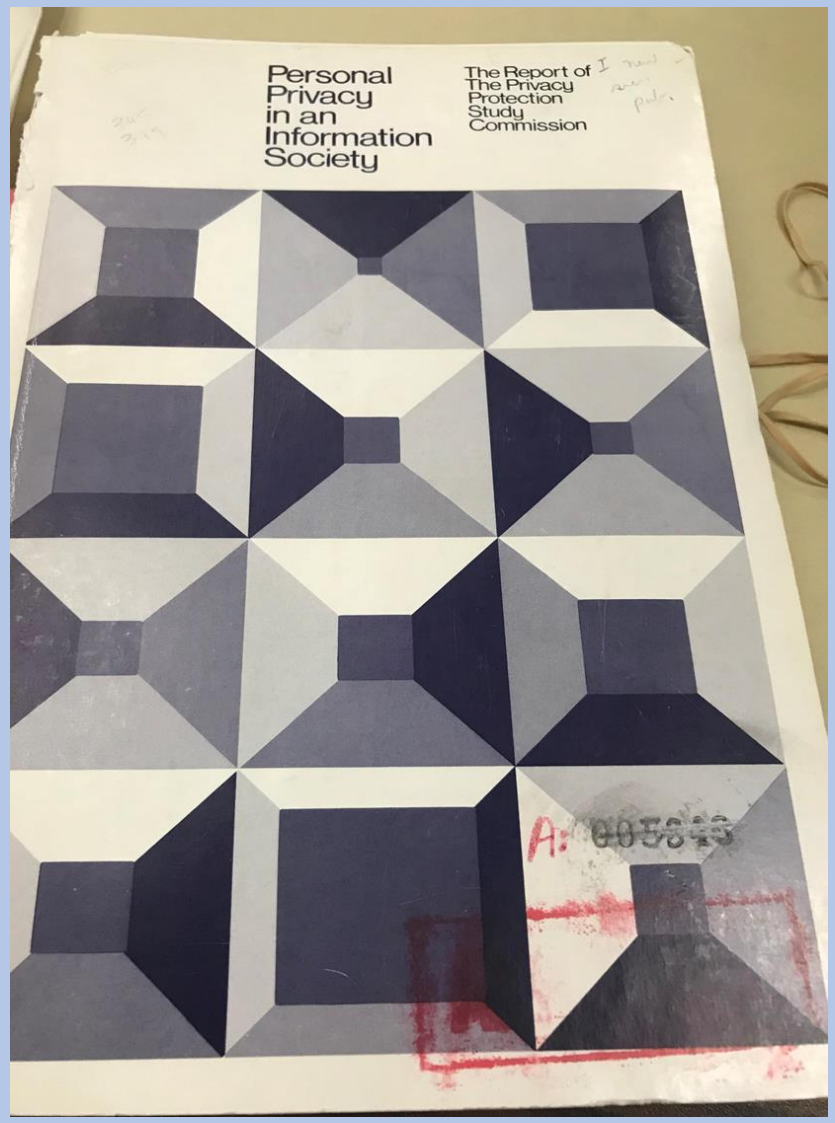
Late 70’s Rise of Facsimile Machines

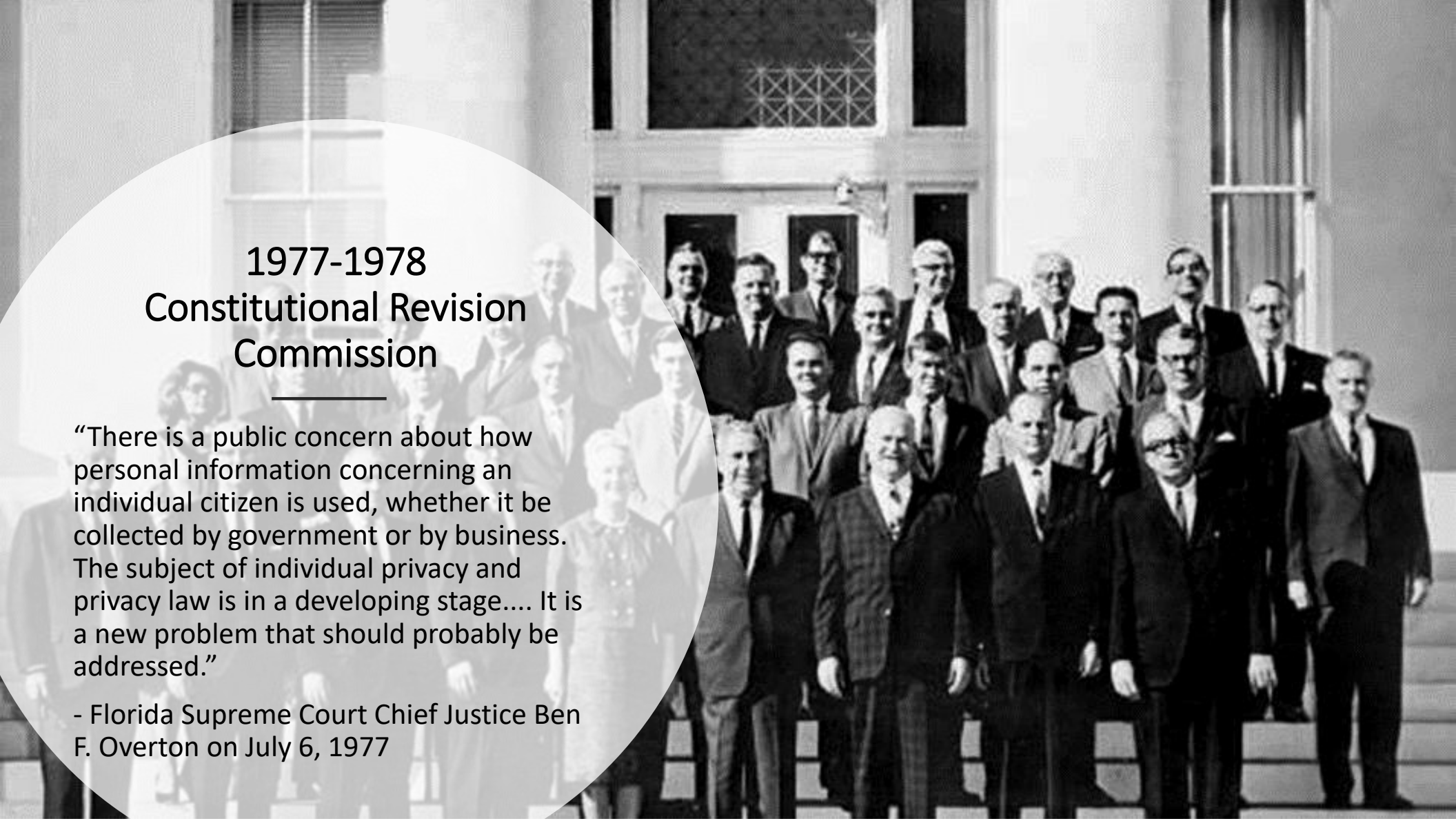
As a result of growing concerns over government's overreach into the area of personal informational privacy, the U.S. Congress created the "Privacy Protection Study Commission"…

The purpose of the Privacy Study Commission was to conduct a…

"…study of the data banks, automatic data processing programs, and informational systems of governmental regional, and private organizations, in order to determine the standards and procedures in force ***for the protection of personal information.***"

The commission's final report, "*Personal Privacy in an* ***Information*** *Age*" recommended that states adopt freestanding constitutional privacy amendments to address these growing concerns…





1977-1978 Constitutional Revision Commission

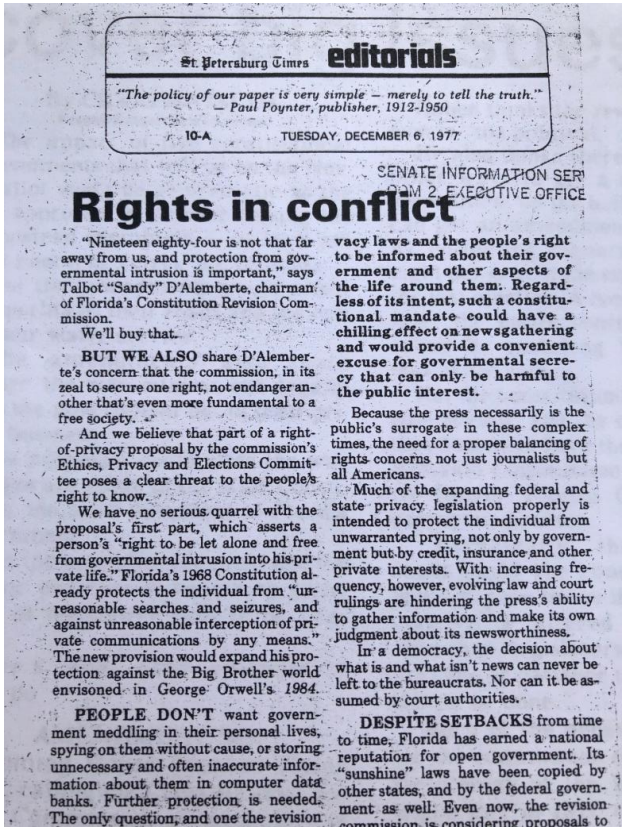
"There is a public concern about how personal information concerning an individual citizen is used, whether it be collected by government or by business. The subject of individual privacy and privacy law is in a developing stage.... It is a new problem that should probably be addressed."

- Florida Supreme Court Chief Justice Ben F. Overton on July 6, 1977

Text for Article 1, Section 23 Proposed by the 1978 CRC

Section. 23. Right of Privacy. Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein.

The 1978 Amendment was opposed by most daily newspapers and media organizations because of concerns over public records.



St. Petersburg Times **editorials**

"The policy of our paper is very simple — merely to tell the truth."
— Paul Poynter, publisher, 1912-1950

10-A TUESDAY, DECEMBER 6, 1977

Rights in conflict

"Nineteen eighty-four is not that far away from us, and protection from governmental intrusion is important," says Talbot "Sandy" D'Alemberte, chairman of Florida's Constitution Revision Commission.

We'll buy that.

BUT WE ALSO share D'Alemberte's concern that the commission, in its zeal to secure one right, not endanger another that's even more fundamental to a free society.

And we believe that part of a right-of-privacy proposal by the commission's Ethics, Privacy and Elections Committee poses a clear threat to the people's right to know.

We have no serious quarrel with the proposal's first part, which asserts a person's "right to be let alone and free from governmental intrusion into his private life." Florida's 1968 Constitution already protects the individual from "unreasonable searches and seizures, and against unreasonable interception of private communications by any means." The new provision would expand his protection against the Big Brother world envisoned in George Orwell's *1984*.

PEOPLE DON'T want government meddling in their personal lives, spying on them without cause, or storing unnecessary and often inaccurate information about them in computer data banks. Further protection is needed. The only question, and one the revision

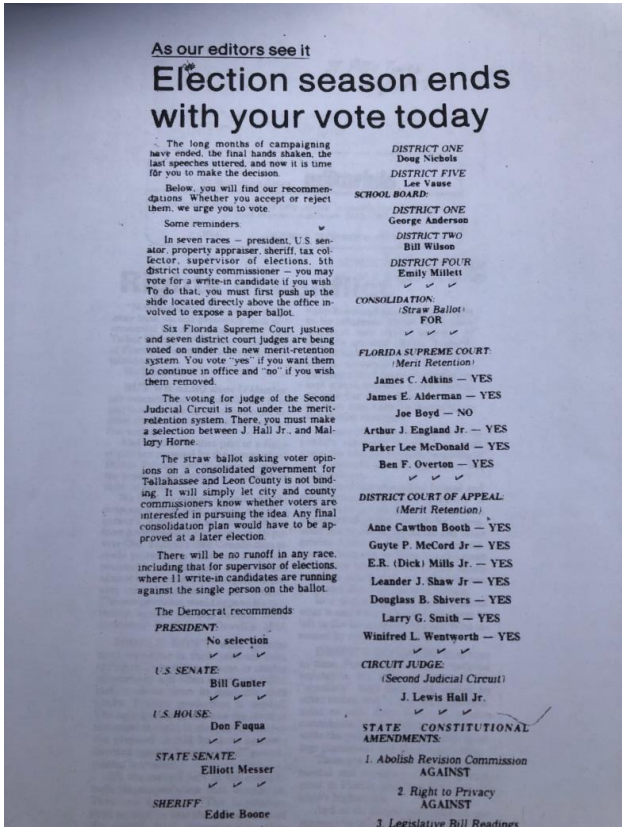
vacy laws and the people's right to be informed about their government and other aspects of the life around them. Regardless of its intent, such a constitutional mandate could have a chilling effect on newsgathering and would provide a convenient excuse for governmental secrecy that can only be harmful to the public interest.

Because the press necessarily is the public's surrogate in these complex times, the need for a proper balancing of rights concerns not just journalists but all Americans.

Much of the expanding federal and state privacy legislation properly is intended to protect the individual from unwarranted prying, not only by government but by credit, insurance and other private interests. With increasing frequency, however, evolving law and court rulings are hindering the press's ability to gather information and make its own judgment about its newsworthiness.

In a democracy, the decision about what is and what isn't news can never be left to the bureaucrats. Nor can it be assumed by court authorities.

DESPITE SETBACKS from time to time, Florida has earned a national reputation for open government. Its "sunshine" laws have been copied by other states, and by the federal government as well. Even now, the revision commission is considering proposals to



As our editors see it

Election season ends with your vote today

The long months of campaigning have ended, the final hands shaken, the last speeches uttered, and now it is time for you to make the decision.

Below, you will find our recommendations. Whether you accept or reject them, we urge you to vote.

Some reminders:

In seven races — president, U.S. senator, property appraiser, sheriff, tax collector, supervisor of elections, 5th district county commissioner — you may vote for a write-in candidate if you wish. To do that, you must first push up the slide located directly above the office involved to expose a paper ballot.

Six Florida Supreme Court justices and seven district court judges are being voted on under the new merit-retention system. You vote "yes" if you want them to continue in office and "no" if you wish them removed.

The voting for judge of the Second Judicial Circuit is not under the merit-retention system. There, you must make a selection between J. Hall Jr., and Mallory Horne.

The straw ballot asking voter opinions on a consolidated government for Tallahassee and Leon County is not binding. It will simply let city and county commissioners know whether voters are interested in pursuing the idea. Any final consolidation plan would have to be approved at a later election.

There will be no runoff in any race, including that for supervisor of elections, where 11 write-in candidates are running against the single person on the ballot.

The Democrat recommends:

PRESIDENT:
No selection

U.S. SENATE:
Bill Gunter

U.S. HOUSE:
Don Fuqua

STATE SENATE:
Elliott Messer

SHERIFF:
Eddie Boone

DISTRICT ONE
Doug Nichols

DISTRICT FIVE
Lee Vause

SCHOOL BOARD:

DISTRICT ONE
George Anderson

DISTRICT TWO
Bill Wilson

DISTRICT FOUR
Emily Millett

CONSOLIDATION:
(Straw Ballot)
FOR

FLORIDA SUPREME COURT:
(Merit Retention)
James C. Adkins — YES
James E. Alderman — YES
Joe Boyd — NO
Arthur J. England Jr. — YES
Parker Lee McDonald — YES
Ben F. Overton — YES

DISTRICT COURT OF APPEAL:
(Merit Retention)
Anne Cawthon Booth — YES
Guyte P. McCord Jr — YES
E.R. (Dick) Mills Jr. — YES
Leander J. Shaw Jr — YES
Douglass B. Shivers — YES
Larry G. Smith — YES
Winifred L. Wentworth — YES

CIRCUIT JUDGE:
(Second Judicial Circuit)
J. Lewis Hall Jr.

STATE CONSTITUTIONAL AMENDMENTS:

1. Abolish Revision Commission
AGAINST

2. Right to Privacy
AGAINST

3. Legislative Bill Readings

ORLANDO SENTINEL STAR
1/12/78

Sentinel Star

James D. Squires, Editor
Charles T. Brumback, President
Joseph J. McGovern, Executive Editor
Robert J. Bonnell, Managing Editor
Emmett Peter, Chief Editorial Writer

Orlando, Florida, Thursday, January 12, 1978

Danger in privacy guarantee

THE CONSTITUTION Revision Commission has approved a proposal for a far-reaching privacy guarantee to be included in the Florida Constitution.

Contesting rights-of-privacy legislation in this day and age is akin to editorializing in favor of sin. It just isn't accepted or, sorry to say, understood.

The proposal before the commission is fraught with danger. It would require the legislature to enact laws protecting individuals from businesses. That is about as broad a mandate as one can get.

ON THE SURFACE, such a constitutional amendment seems innocent enough. Who can quarrel that those pesky phone calls used to peddle everything from portraits to tombstones are a nuisance at times?

But, as Chief Justice Ben Overton of the Supreme Court warned, such a privacy amendment could serve to keep the press from covering certain events. He warned it would endanger freedom of the press and urged the words "unwarranted intrusion" be included. The wording was turned down.

There are laws aplenty right now on the books to assure the privacy of citizens. In fact, privacy suits against newspapers have far outpaced libel in recent years.

This is another example of governmental intrusion into the processes of obtaining information about which the public is entitled to know.

CERTAINLY this proposed amendment will face a First Amendment challenge and properly so. The First Amendment clearly states "Congress shall pass no law . . . abridging the freedom of speech or of the press."

Writing such into the Florida Constitution would merely be an attempt to circumvent the First Amendment and go further down the road to secrecy than even the U.S. Congress is prepared to do.

Let us hope wiser heads prevail before this bad amendment becomes bad law.

1978 CRC Privacy Amendment fails with 43.1% of the vote

Florida Department of State
Division of Elections
November 7, 1978 General Election

Official Results

Constitutional Amendment

Revision of Florida Constitution (basic document)

	Yes	No
Total	623,703	1,512,106
% Votes	29.2%	70.8%

Declaration of rights (rev. of Art. I, Sec. 2)

	Yes	No
Total	1,002,479	1,323,497
% Votes	43.1%	56.9%

House Sponsor Representative Jon Mills

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*"The goal is to provide individual and **informational privacy.** The bigger government gets, the more it tends to **collect information** on people. ... "Anybody [governmental bureaucracies] who wants information just throws it into forms," Mills said, adding businesses and homeowners are inundated with all sorts of **official forms containing questions that are not the government's business**... Mills said he would expect courts to express a conservative view on the amendment's applicability.* (emphasis added)

"Right to Privacy Amendment Debated," --John Mills, legislative sponsor of Joint Resolution on privacy, Florida Times-Union, October 26, 1980.

Senator sponsor
Senator Jack Gordon

"Most people automatically assume you have a right of privacy. But in the increasingly sophisticated world we live in with its wiretaps and **excessive data collection,** this amendment says you have a right to be left alone."

- Knight-Ridder News Service, "Dull Amendments Cover Big Issues" November 2, 1980

ARTICLE I

DECLARATION OF RIGHTS

Section 23. Right of Privacy. Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the publi c's right to access to public records and meetings as provided by law.

BE IT FURTHER RESOLVED that in accordance with the requirements of section 101.161, Florida Statutes, the substance of the amendment proposed herein shall appear on the ballot as follows:

Proposing the creation of Section 23 of Article I of the State Constitution establishing a constitutional right of privacy.

Filed in Office Secretary of State May 19, 1980.

ARTICLE I

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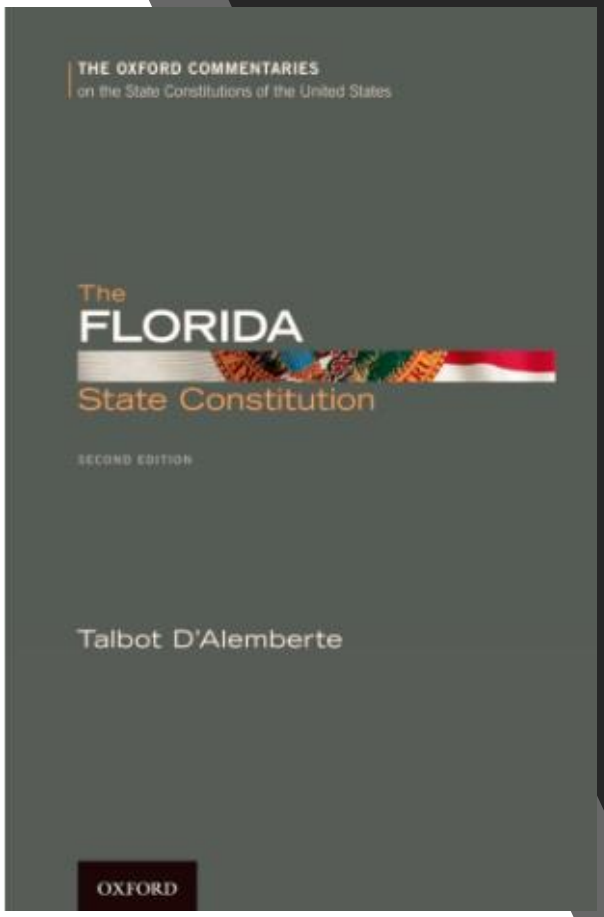


Excerpt from the textbook "The Florida State Constitution" by Talbot "Sandy" D'Alemberte

"After the wide-ranging proposals of that commission met defeat in 1978, this provision was taken up separately by the legislature in 1980 and passed by the electorate. Although it was opposed by most media organizations in the state on grounds that it might interfere with Florida's broad concepts of open government, this section does not limit open government."

Florida at Page 68

1980 Legislative Privacy Amendment passes by 60.6% (a 17.5% increase in the vote)

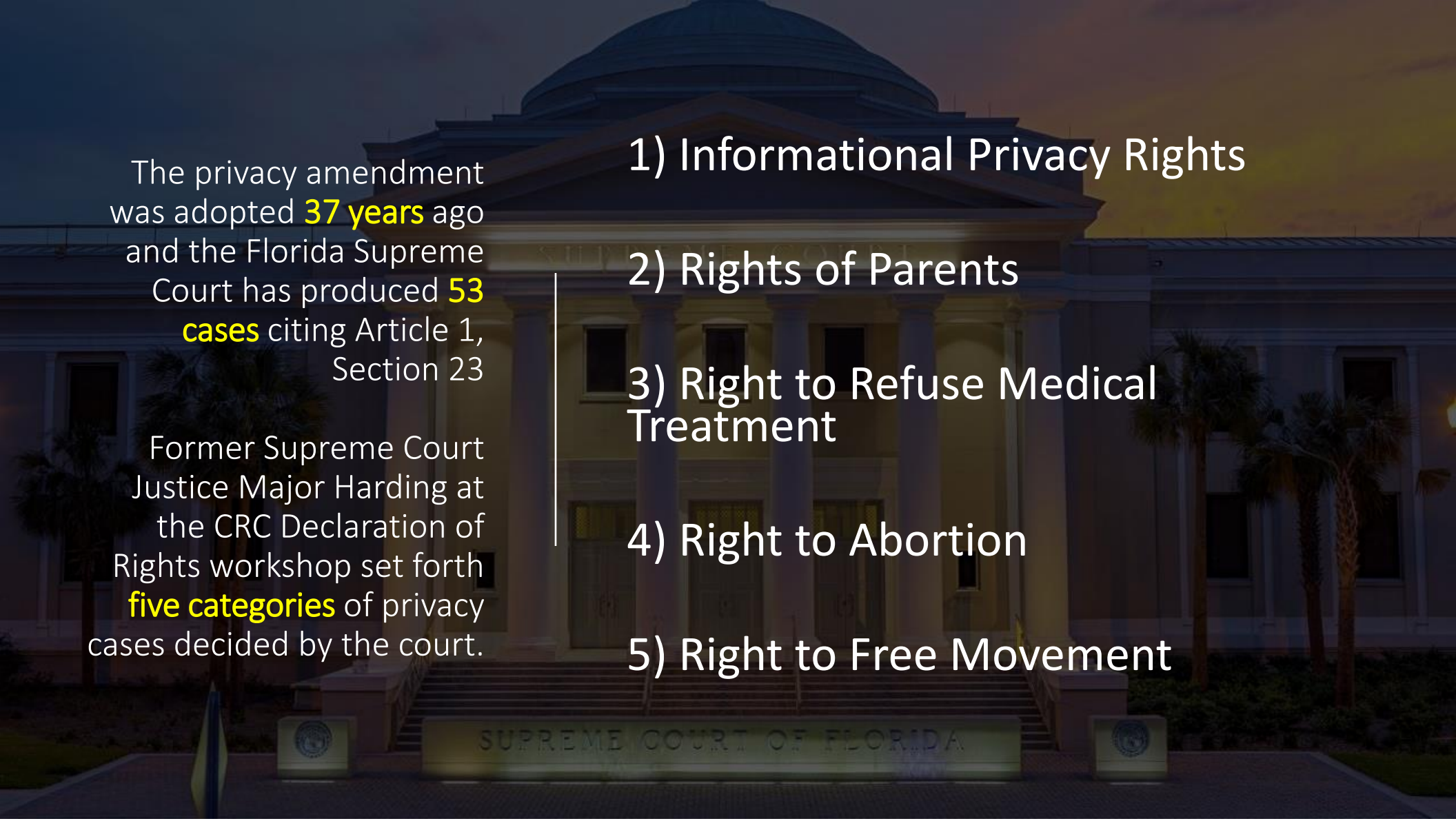
Florida Department of State
Division of Elections
November 4, 1980 General Election

Official Results

Constitutional Amendment

Right of privacy (Art. I, Sec. 23)

	Yes	No
Total	1,722,987	1,120,302
% Votes	60.6%	39.4%



The privacy amendment was adopted **37 years** ago and the Florida Supreme Court has produced **53 cases** citing Article 1, Section 23

Former Supreme Court Justice Major Harding at the CRC Declaration of Rights workshop set forth **five categories** of privacy cases decided by the court.

1) Informational Privacy Rights

2) Rights of Parents

3) Right to Refuse Medical Treatment

4) Right to Abortion

5) Right to Free Movement

A summary of privacy cases in Florida

TOPIC	# of cases	% of total cases	Privacy Right Found?	
			Yes	No
Informational Privacy	23	47.92%	1	22
Parental Rights	10	20.83%	9	1
Abortion	4	8.33%	3	1
Free Movement	3	6.25%	2	1
Right to Refuse Medical Treatment	3	6.25%	3	0
Miscellaneous Rights Denied	6	12.50%	0	6
Dicta	4			

Privacy Right Found	18	33.96%
Privacy Right Denied	31	58.49%
Privacy Right in Dicta	4	7.55%
TOTAL	**53**	**100.00%**

Informational Privacy

- 23 Florida Supreme Court cases involving informational privacy.

- Out of all 53 cases decided by the court over a 37-year period, an informational privacy right was found in only one case-- *Rasmussen vs South Florida Blood Service*, 500 So 2d 533 (Fla 1987)

- In the Rasmussen case, the court found an informational privacy right for those who contracted the AIDS virus and then donated blood inflecting Mr. Rasmussen.

Parental Privacy Rights

<u>9 Parents Rights Cases</u>

- 2 contract cases
  - Can a parent waive a child's contract rights?
  - Answer NO.

- 7 grandparents rights cases
  - Can a grandparent override parents rights?
  - Answer NO.

Right to Refuse Medical Treatment

3 Right to Refuse Medical Treatment Cases

1) Public Health Trust of Dade County v. Wons (1989)

Right to privacy includes right to refuse blood transfusion based on religious beliefs

2) In re Guardianship of Browning (1990)

Surrogate or proxy may exercise right to refuse medical treatment

3) Matter of Debreiul (1993)

Hospital may not override patients privacy right to refuse blood transfusion even if new born baby's life is at stake in pregnancy

Right to Abortion

4 Abortion Right Cases

1) *In Re T.W. A Minor (1989)*

Held parental consent laws unconstitutional

2) *Renee B. v. FL Agency for Health Care Admin (2001)*

Held no right to public funding of abortion

3) *North FL Women's Health & Counseling v. State (2003)*

Held the parental notification statute unconstitutional

4) *Gainesville Woman Care, LLC, et al. v. State (2017)*

Opined that the 24 hour reflection/waiting period before abortion is likely unconstitutional

Next, do you favor or oppose each of the following proposals? A law requiring women under 18 to get parental consent for any abortion

	Favor	Oppose	No opinion
	%	%	%
2011 Jul 15-17	71	27	2
2005 Nov 11-13	69	28	3
2003 Jan 10-12	73	24	3
1996 Jul 25-28	74	23	3
1992 Jan 16-19	70	23	7

GALLUP

Gallup Polls show the public favors parental consent laws before doctors perform abortions on minor girls.

69% -74% support

Next, do you favor or oppose each of the following proposals? A law requiring women seeking abortions to wait 24 hours before having the procedure done

	Favor	Oppose	No opinion
	%	%	%
2011 Jul 15-17	69	28	3
2003 Jan 10-12	78	19	3
1996 Jul 25-28	74	22	4
1992 Jan 16-19	73	23	4

GALLUP

Gallup Polls also show the public favors 24-hour waiting and reflection periods before abortions are performed

69%-74% Support

Legal Memo from CRC Staff William Hamilton to William Spicola

"The primary concern of the 1977-1978 CRC was that technological advances in communication rendered private citizens more vulnerable to government intrusion."

Legal Memo
from CRC Staff
William Hamilton
to William Spicola

"Abortion does not appear to have been a concern of the Commissioners or the Legislature when they were considering a State Constitutional Right of Privacy. The same could be said for the newspapers and the citizens who wrote to the CRC."

In *Gallant v. Stephens*, 358 So. 2d 536 (1978), the Florida Supreme Court held and reaffirmed long standing precedent dating back to 1960 that the intent of the framers and the people adopting it must be ascertained before interpreting a constitutional provision.

"In construing provisions of the Florida Constitution, we are obliged to ascertain and effectuate the intent of the framers and the people. State ex rel. Dade County v. Dickinson, 230 So. 2d 130 (Fla. 1969); Gray v. Bryant, 125 So. 2d 846 (Fla. 1960). Where possible, we are guided by circumstances leading to the adoption of a provision. In this case we have attempted to discern the rationale which led to the adoption of the last sentence in Article VII, Section 9(b). Its history in the 1966 Constitution Revision Commission and in the Florida Legislature supports appellee's view of its import. "

"It is reasonably clear from the minutes and notes of the Commission, and from the reports of the Legislature, that the focus of the last sentence of Section 9(b) was the delivery of municipal-type services by counties to all county residents, rather than the more narrow delivery of services solely to residents of intra-county municipalities." *Gallant* at

(emphasis added)

State vs JP, 907 So. 2d 1101 (Fla. 2004)

Juvenile Curfew Ordinance
Struck Down using Privacy Clause

City of Tampa passed a curfew ordinance seeking to further the following interests:

1) "the protection of juveniles, other citizens, and visitors from late night and early morning criminal activity;

2) the reduction of juvenile criminal activity; and

3) the enhancement and enforcement of parental control over children."

Justice Raoul Cantero Dissenting…

"The majority essentially holds that minors have a fundamental right to roam in public unsupervised during any time of the day or night. This would protect a minor's right to be on the street in the middle of the night, **regardless of the costs to the community in the form of higher crime rates, law enforcement costs and other negative consequences.** Neither the record in this case nor common sense suggests that the purported independence of juveniles to be out in the public during the late night and early morning hours constitutes such a fundamental right."

Wyche vs State, 619 So. 2d 231 (Fla. 1993)

Prostitution Loitering Ordinance Struck Down Using Privacy Clause

"Prior to enacting this ordinance, the City evidently recognized that people were loitering in public areas for the purpose of engaging in illegal acts, such as prostitution or lewd or indecent acts. The City has an obligation to protect its streets and its citizenry from the harm that frequently results from this type of activity, and the City responded by enacting an ordinance aimed at preventing the harm."

City of Tampa Florida

Justice Parker Lee McDonald Dissenting

"It is reasonable to **consider criminal activity taking place on public streets in full view of citizens and individuals, such as minors,** who may be endangered or negatively influenced by such acts, as constituting a more severe offense than those crimes committed elsewhere."

No new legitimate rights would be taken away under Proposal 22….

…because of federal law Privacy Rights involving conduct mirrors Florida's cases on privacy.

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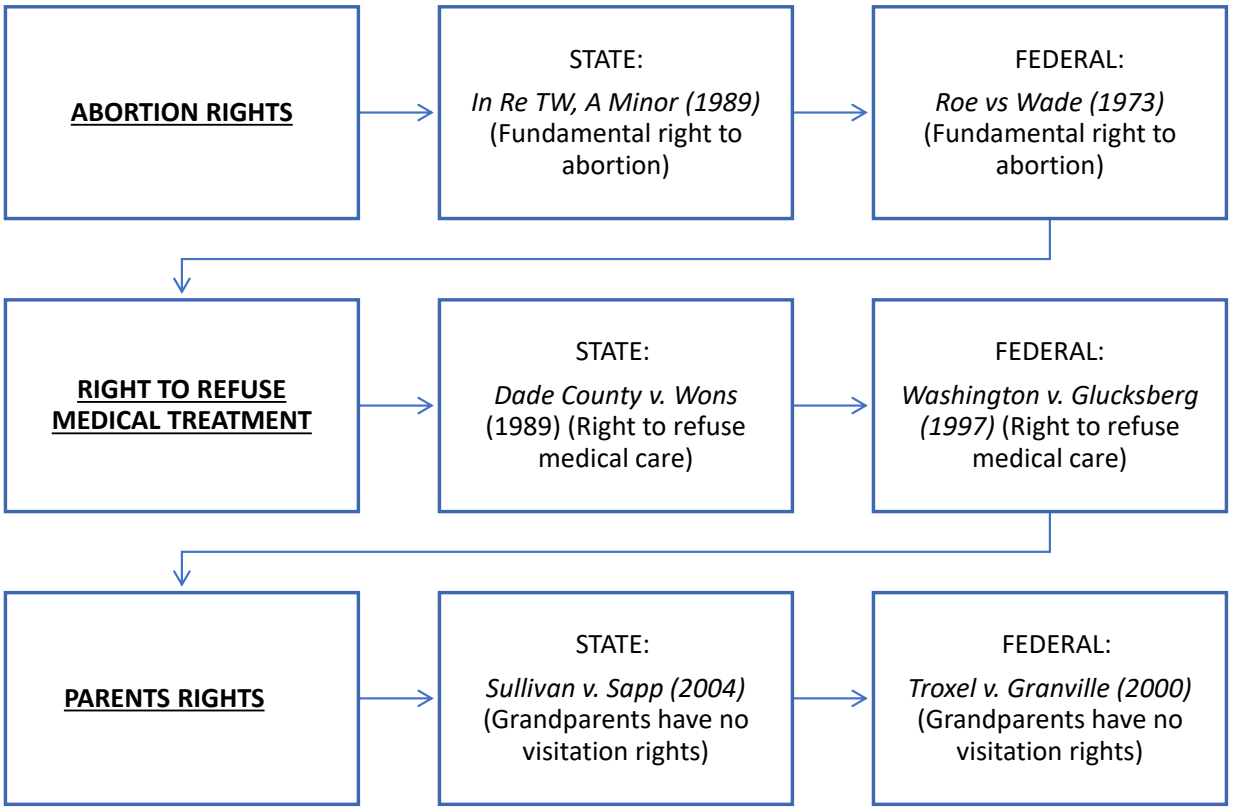


In all of these cases there is an overreach which produces bad policy endangering children, undermines parents & communities and efforts of law enforcement, the majority of the Florida Supreme Court neglects to apply its own precedent in order to interpret Article 1, Section 23.

Arguments in Opposition to Proposal 22

ACLU

"Rights that we have enjoyed and relied upon for decades will disappear."

Anti-Defamation League

"abolishing a woman's constitutional right to an abortion"

and

"Undermine a parent or guardian's right to child rearing such as the right to home school or provide alternative forms of education."

Freedom of Press Foundation

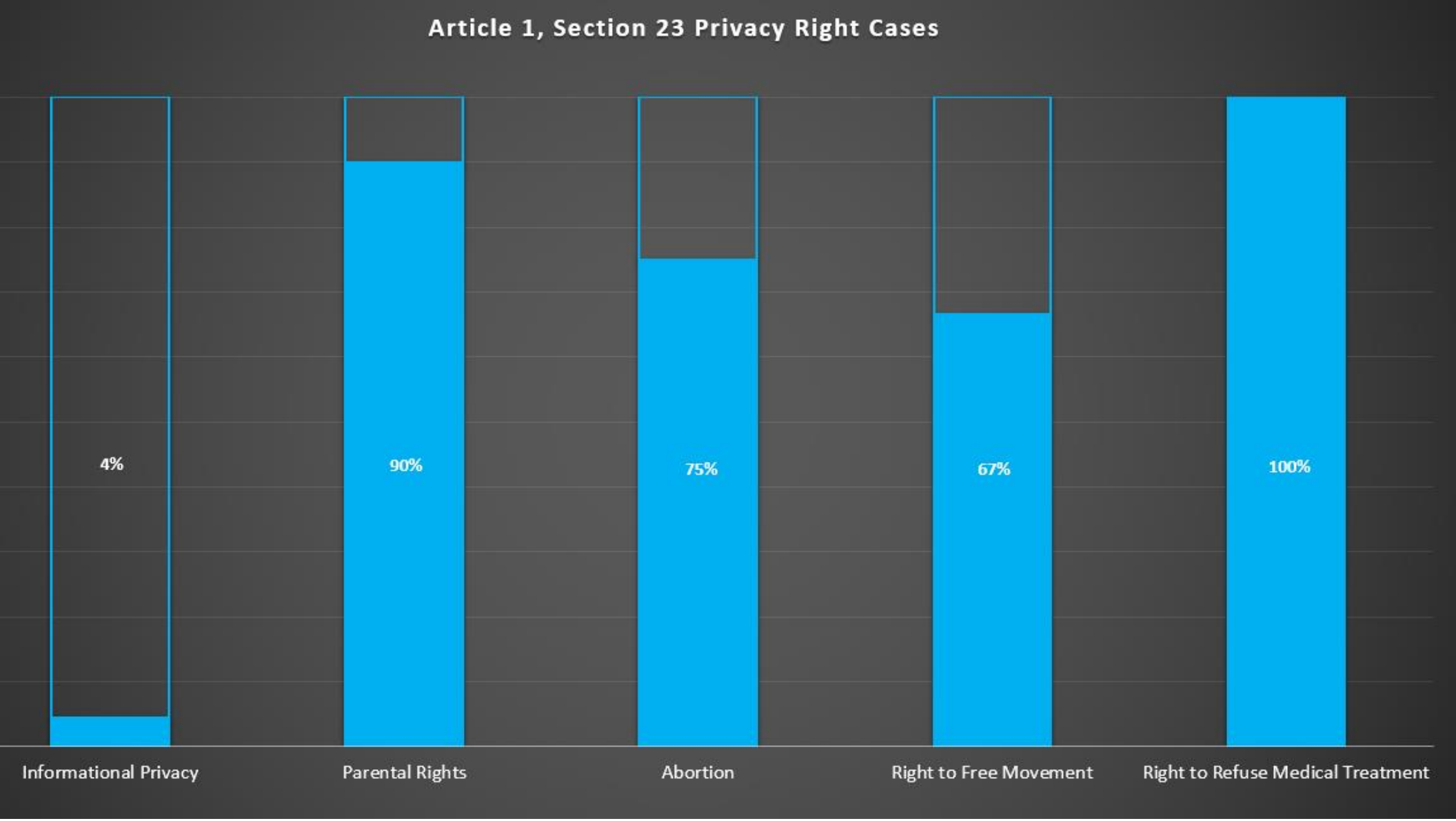
"Equally troubling is the potential for the courts to hold that certain information is 'private' pursuant to the revised privacy right and thus not subject to disclosure under Florida's public records law."

News Media Organizations & Editorial Boards Opposed

1978 Privacy Language

1980 Privacy Language

2018 Privacy Language


Article 1, Section 23 Privacy Right Cases
4%
90%
75%
67%
100%
Informational Privacy
Parental Rights
Abortion
Right to Free Movement
Right to Refuse Medical Treatment

Legitimate informational privacy issues are being ignored.

Instead, the court is abusing the right to privacy which is

* Endangering children
* Eroding parents rights
* Undermining community values
* Interfering with law enforcement's ability to fight crime.

Positive Campaign, Libertarian Leaning Themes Appealing to the General Public

PRIVACY IN FLORIDA: PERSONAL AUTONOMY AND LIBERTY

Jon Mills

This paper is an initial analysis, as part of a larger study, of the history and long-term effect of Florida's Privacy Amendment. The focus of this analysis is the scope of the Privacy Amendment's protection of personal autonomy and liberty. This issue is distinct from the amendment's protection against intrusions relating to personal information. The Privacy Amendment does much more than protect Floridian's private information.

In 1980, Floridians approved the following Privacy Amendment to the Florida Constitution: "Every natural person has the right to be let alone[1] and free from governmental intrusion into the person's private life."[2] The sponsors and legislative support for the resolution included a bi partisan cross section of the legislature that made up the three-fifths super majority necessary to place CS for HJR 387 on the 1980 ballot. The Privacy Amendment was passed by a vote of 1,722,997 (60.60%) to 1,120,302 (39.40%).

Interpreting the Privacy Amendment, the Florida Supreme Court has recognized a *fundamental* right to privacy in Florida[3] that is broader and more protective than the federal right to privacy offered by the Fourteenth Amendment to the U.S. Constitution.[4] Whereas the Fourteenth Amendment's liberty protections extend to specific "zones of privacy"[5] (e.g., marriage,[6] procreation,[7] contraception,[8] abortion,[9] family relationships,[10] and child rearing and education[11]), Florida's Privacy Amendment "extends to all aspects of an individual's private life…, and it ensures that the state cannot intrude into an individual's private life absent a compelling interest."[12]

The Florida standard for privacy is broader than the less-defined federal standard. The Florida standard for privacy demands that government justify any intrusion into one's privacy with (1) a compelling state interest and (2) the least intrusive means to accomplish that compelling state interest. The addition of Florida's Privacy Amendment undoubtedly enhances Floridians' right to protect themselves from a broad range of governmental intrusions.

Although the Florida Constitution offers a fundamental right to privacy, that fundamental right is not absolute. First, Florida's Privacy Amendment only protects a person's private life from governmental intrusions, not private and commercial intrusions.[13] Second, Florida's Privacy Amendment does not protect against all governmental intrusions, but against those governmental intrusions that violate a person's legitimate reasonable expectation of privacy.[14] If a person has a legitimate reasonable expectation of privacy, then Florida courts will inquire into "whether a compelling interest exists to justify that intrusion and, if so, whether the least intrusive means is being used to accomplish the goal."[15]

Under this legal framework for Florida's Privacy Amendment, protection from governmental intrusion is usually sought in one of two areas: (1) personal autonomy and (2) disclosure of information.[16] This Paper is only concerned with the first category: personal autonomy. The umbrella of personal autonomy covers a swath of family, medical, and employment issues. including: marriage, sexual practices,[17] procreation, contraception, sterilization, rearing and education of children, parental versus grandparental rights,[18] abortion,[19] life-sustaining measures,[20] physician-assisted suicide,[21] consent to treatment,[22] hiring practices,[23] licensing,[24] lewdness and obscenity,[25] and more.[26]

Florida Supreme Court Justice Ben F. Overton has acknowledged that Florida's Privacy Amendment "has had its greatest effect on Floridians in the area of personal autonomy protection."[27] However, Justice Overton and a number of legal scholars have underscored the

malleability of Florida's Privacy Amendment, which is regularly subject to legislative actions and judicial interpretation.

In 1998, Daniel R. Gordon examined the proposals before Florida's 1997-1998 Constitution Revision Commission (CRC) to amend Florida's Privacy Amendment.[28] Of the six-hundred ninety-five proposed changes to the Florida Constitution, twenty-nine proposals were aimed at Florida's Privacy Amendment, and eighteen of those twenty-nine proposals sought to affect personal autonomy protections.[29] More than half of these eighteen proposals dealt with abortion, and the others dealt with family protections; minors' right to privacy and right to assemble; physician-assisted suicide; life-sustaining measures; access to employment and benefits; and same-sex marriage.[30] None of these proposals were approved by the CRC.

CATEGORIES OF PRIVACY RELATED TO PERSONAL AUTONOMY

The following categories offer a context to define current and future privacy interests that may be considered under the personal autonomy aspect of Florida's Privacy Amendment. These categories have evolved from the "right to be let alone" in the context of governmental intrusions. Both these categories and the definition of the "right to be let alone" will constantly evolve. Overall, the concepts deal with the protection of personal space and personal decision-making balanced against governmental interests.

1. Marriage – The issue of marriage, and issues related to marriage, are viewed as personal and therefore protected against governmental intrusion. It is noteworthy that the right to marry has evolved substantially. In 2015, the U.S. Supreme Court recognized a right to same-sex marriage.[31] Florida challenged this right in federal litigation and lost.[32] Floridians have not challenged marriage-related laws in Florida's state court system, but it follows that the personal autonomy aspects of Florida's Privacy Amendment could be implicated in such challenges.

2. Sexual Practices – Sexual activity has always been viewed as a personal and intimate matter. Nonetheless, Florida and other states have sought to and have prohibited certain forms of intimate sexual conduct. Florida courts have recognized that there are personal autonomy aspects of Florida's Privacy Amendment that are applicable to statutes involving certain sexual activity involving minors.[33] The Florida Supreme Court also considered whether Florida's Privacy Amendment was applicable in a case involving a statute prohibiting certain acts with obscene materials, e.g. pornography.[34] Without Florida's Privacy Amendment, it is unclear what standard Florida courts will apply in similar cases.

3. Reproduction – Choices relating to child bearing are inherently personal choices. However, there are instances where states have intervened. The *Buck* case stands out. There the U.S. Supreme Court justified sterilization to prevent "three generations of imbeciles."[35] What if there are genetic indicators for violent or criminal behavior? Could genetic modification be required or permitted by legislation if privacy protections were withdrawn from this area?

4. Parenting – A parent's ability to make decisions about one's own children has been recognized in areas such as discipline, education, and health care as having both liberty and privacy interests. Florida courts have recognized that Florida's Privacy Amendment protects parenting decisions from grandparental interference. Florida courts have found unconstitutional statutes and local law providing for grandparental rights, reasoning that grandparents cannot intervene in parental decisions unless there is a compelling interest in preventing demonstrable harm to a child from those parental decisions.[36] Without Florida's Privacy Amendment, it is not clear whether federal case law would support a stringent compelling interest standard in the area of parental decisions.[37] A similar concern could apply to governmental intervention in parental decisions relating to home schooling and other alternative education decisions. In the 2018 legislative session, the Florida Legislature is considering HB 731, which is aimed at protecting the privacy of parents who home school their children. This bill demonstrates a legislative concern for privacy and a recognition that there may be government intrusions and a need for protection. The constitution may offer this protection as well. The longer-term issue is that the constitution can protect against future attempts to limit parental decisions to home school or seek alternative education for their children. Without Florida's Privacy Amendment, it is not clear whether the federal privacy protections would support a stringent compelling interest standard in the area of parental educational decisions.[38]

5. Personal Volition – Florida's legislature has limited personal volition on decisions relating to public safety, health, morals and welfare. For example, the state has mandated motorists wear seat belts. The state can detain an individual with a contagious disease. The state can define and control lewd conduct. This issue presents a large range of unknowns for the future. Is there a public safety justification for requiring implantation of identification chips or a requirement for universal identification cards or a legislative mandate that motorcyclists' wear safety helmets? Is constant surveillance of certain neighborhoods with drones justifiable? At what point does surveillance of the public violate Florida's Privacy Amendment by restricting personal volition?

6. Activities in Dwellings & Other Personal Space – Some protections for private conduct within the sanctity of the home are allowed in a free society. Two examples are personal intimate sexual practices and viewing pornography, discussed above. The right to view pornography in the home does not extend to the right to purchase pornography.[39] Some protections enhance barriers to surveillance of a home or protected space.

7. Medical Decisions – Personal autonomy has included the right to make certain medical decisions about oneself, e.g. abortion and refusal of life-sustaining treatment. Whereas the U.S. Supreme Court has applied standards with defined parameters in the abortion context,[40] the Florida Supreme Court has held the Florida's Privacy Amendment requires the compelling interest standard for any governmental limitation of abortion.[41] Recently, Florida's highest court determined that a required waiting period for abortion may violate the state constitutional right to privacy. [42] Florida courts also extend the Privacy Amendment's compelling interest standard in the refusal of life-sustaining treatment[43] and consent to treatment[44] contexts. Without Florida's Privacy Amendment, it is not clear whether the federal right to privacy would provide such a stringent standard for limiting

governmental intrusion into a person's private medical decisions including such other personal decisions as living wills and advanced directives.

8. Public Employment & Licensing Standards – In licensing and employment the state may have a compelling interest in personal details and practices of individuals. For example, mental health and emotional stability may be an issue in licensing lawyers. A history of smoking may be an issue in hiring public employees. However, what if certain genetic characteristics were part of licensing or employment background requirements and the state required genetic testing before hiring? Could government refuse to hire a person who engaged in otherwise legal off duty conduct such as smoking or drinking alcohol? Florida's Privacy Amendment ensures that in licensing and employment, the government show a compelling state interest and utilize the least intrusive means to satisfy that interest.

THE FUTURE

If Florida's Privacy Amendment did not extend protections to personal autonomy and decision making, there is no doubt that Florida citizens would be subject to a higher possibility of governmental intrusion in their private lives. The Florida Supreme Court has stated that Florida's explicit right to privacy extends beyond the zones of privacy protected by the implicit federal right to privacy. There is a federally-recognized zone of privacy, but Florida's is more extensive – due to its state constitutional provision. In other words, Florida's Privacy Amendment can protect extra zones of privacy if the government seeks to intrude on Floridian's private lives. When this occurs, the government will have to justify any intrusions by showing a compelling state interest and that the government is using the least intrusive means to accomplish that compelling state interest.

While future intrusions cannot be predicted with certainty, there is no doubt that advancing technology will provide opportunities to for the state to intrude into one's private life. Here are some potential examples:

1. Anticipatory policing through artificial intelligence. Analyzing social media to predict criminal behavior leading to unwarranted surveillance. Technology is increasingly able to predict behavior. Limitations on collections of certain information are enhanced by the privacy provision.
2. Genetic testing and screening for public health and safety interests, including employment. Genetics can predict health issues that can be helpful or intrusive. For the helpful issues, citizens should have personal choice as to whether to pursue them. For the intrusive issues, government should not be able to force genetic inquiry. For example, should all children be required to undergo genetic testing to screen for certain predispositions to disease, aggression, or other undesirable traits?
3. Mandating medical treatments and restrictions. Government has compelled or mandated certain treatments in the past. Obviously, there were excesses in the past such as sterilization of developmentally disabled -- a shocking intrusion that occurred in the United States. Again, the future is not predictable.
4. Determining parentage with new reproductive technologies. Individuals have been making decisions on reproduction utilizing rapidly evolving scientific options for

genetic choices and modifications. Without a right to personal autonomy, what sorts of governmental policies might be implicated?

5. Chip Implantation or Universal ID Cards for public safety and security purposes. Does the government have a compelling state interest to institute more sophisticated forms of identification to promote public safety and welfare?
6. Child rearing, e.g. limiting parental rights to home-school or other alternative education. As stated above, current legislative proposals are focused on protecting privacy of parents in a home school setting. Without the Privacy Amendment, there would be lesser protections for parental decision-making in the educational context if the government changed course and sought to intrude on this space. The right of parenting is certainly an issue that is constitutionally protected by the Privacy Amendment.
7. Drone Surveillance of certain locations or areas. The government already utilizes closed circuit television (CCTV) to observe large areas of public space. Red light cameras have been broadly used. New technology for observation, such as drones and location-tracking license plate readers, are being invented and refined. At some point general surveillance becomes a violation of privacy. GPS monitoring of individuals and constant CCTV observation of private dwellings are technologically possible.

Florida's Privacy Amendment, adopted by the voters and added to our State's Constitution in 1980, provides specific and strong protections against governmental intrusions into the private lives of individuals. The future implementation and precise effect of this fundamental right is as hard to predict as the future of technology. We cannot know. We can reliably hypothesize that technology will continue to present options and opportunities for governmental intrusion from drones to personal biometric identifiers to projections of individual conduct based on genetic assessments. We cannot know what government will do in the future either. We know that governments have been unreasonably intrusive in the past, even a U.S. government that upheld compulsory sterilization, a decision that has never been specifically overturned. Other intrusions have been overturned such as criminalizing sodomy and interracial marriage.

The federal interpretation of privacy and personal liberty have evolved to protect certain spheres of personal autonomy. But there is no doubt that Florida's privacy right, as a fundamental right that compels government to justify its intrusions with a compelling interest, is more extensive and better able to protect the individual. Florida's Privacy Amendment offers Floridians a shield to protect themselves in a future in which technology and government intrusions are not predictable and frankly, completely unknowable.

Jon Mills was a co sponsor of HJR 387 , the resolution that proposed the Article I section 23 right of privacy in the Florida Constitution in 1980. He has been counsel in high-profile privacy litigation, including protecting privacy rights of the families the victims of the Rolling murders, the families of Dale Earnhardt, Giannni Versace, Dawn Brancheau (the trainer who died in an accident at SeaWorld), and others. His work included serving as counsel to the CEO of a major corporation in a case that successfully prevented disclosure of sensitive information. He has a history of success dealing with complex and critical legal problems. He is a recognized international expert on privacy and cybersecurity who has written multiple books and articles on privacy and security including: "*Privacy in the New Media Age"* and "*Privacy the Lost Right"* (Oxford University Press). As a University of Florida Law Professor he has taught Privacy and Cybersecurity classes. He has also taught privacy to judges and lawyers worldwide, lectured in Latin America as part of the U.S. Department of State's Speakers Program, and presented continuing legal education courses on privacy and security to corporate leadership and general counsel. He has appeared in courts throughout the US including more than 40appearances in the Florida Supreme Court. He was a member of the 1998 Constitution Revision Commission and Chair of its Style and Drafting Committee.

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[1] *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[2] FLA. CONST. art. I, sect. 23; *see* Jon Mills, *Sex, Lies, and Genetic Testing: What Are Your Rights to Privacy in Florida*?, 48 FLA. L. REV. 813, 825 (1996). Prior to 1980, the Florida Constitution did not provide a general state constitutional right to privacy. *See* Shevin v. Byron, Harless, Schaffer, Reid & Associations, Inc., 379 So. 2d 633 (Fla. 1980) ("Any possible confusion arising from these prior cases should have been dispelled by our later decision in Laird v. State, 342 So.2d 962 (Fla.1977), wherein it was made clear that Florida has no general state constitutional right of privacy."). Florida's 1978 CRC attempted to amend the Florida Constitution by placing a privacy amendment on the 1978 ballot, but the measure was part of a package that was defeated. *See* Mills, *Sex, Lies, and Genetic Testing*, at 825.

[3] *See* Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1246 (Fla. 2017); State v. J.P., 907 So. 2d 1101, 1110 (Fla. 2004); Von Eiff v. Azicri, 720 So. 2d 510, 514 (Fla. 1998); City of North Miami v. Kurtz, 653 So. 2d 1025, 1027 (Fla. 1995); Winfield v. Division of Pari-Mutuel Wagering, Dept. of Business Regulation, 477 So. 2d 544, 547 (Fla. 1985).

[4] Gainesville Woman Care, LLC, 210 So. 3d at 124; Winfield, 477 So. 2d at 547–48 (Fla. 1985); *see* Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing an implicit right to privacy under the "liberty" protections of the Fourteenth Amendment to the U.S. Constitution).

[5] Roe v. Wade, 410 U.S. 113, 152 (1973).

[6] *See* Obergefell v. Hodges, 576 U.S. __ (2015); Loving v. Virginia, 388 U.S. 1 (1967).

[7] *See* Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942); Buck v. Bell, 274 U.S. 200 (1927).

[8] *See* Eisenstadt v. Baird 405 U.S. 438 (1972).

[9] *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992); *Roe*, 410 U.S. 113.

[10] *See* Prince v. Massachusetts, 321 U.S. 158 (1944).

[11] Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

[12] Honorable Ben F. Overton & Katherine E. Giddings, *The Right of Privacy in the Age of Technology and the Twenty-First Century: A Need for Protection from Private and Commercial Intrusion*, 25 FLA. ST. U. L. REV. 25, 40–1 (1997).

[13] *See* North Miami v. Kurtz, 653 So. 2d 1025, 1027-29 (Fla. 1995); *see also*, Overton & Giddings, *supra* note 12, at 40–41. For private and commercial intrusions into a person's private life, a person can seek redress through one of three common law invasion of privacy torts recognized by the Florida Supreme Court: (1) appropriation; (2) intrusion, and (3) public disclosure of private facts. Allstate Ins. Co. V. Ginsberg, 863 So. 2d 156, 162 (Fla. 2003). However, the Florida Supreme Court expressly rejected a fourth common law invasion of privacy tort: false light invasion in the public eye. Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1114 (Fla. 2008).

[14] *See Kurtz*, 653 So. 2d at 1027-29 (finding no legitimate reasonable expectation of privacy where applicant did not want to disclose smoking habits on municipal job application); Stall v. State, 570 So. 2d 257, 260 (Fla. 1990) (finding no reasonable expectation of privacy "in being able to patronize retail establishments for the purpose of purchasing [obscene] material"); *see also* Overton & Giddings, *supra* note 12, at 35–6.

[15] *Kurtz*, 653 So. 2d at 1028.

[16] *See* Daniel R. Gordon, *Upside Down Intentions: Weakening the State Constitutional Right to Privacy, A Florida Story of Intrigue and a Lack of Historical Integrity*, 71 TEMPLE L. REV 579 (1998) (distinguishing between behavioral, i.e. personal autonomy, and informational privacy protections).

[17] *See* B.B. v. State, 659 So. 2d 256 (Fla. 1995); Jones v. State, 640 So. 2d 1084 (Fla. 1994); State v. J.A.S., 686 So. 2d 1366 (Fla. 5th DCA 1997).
[18] *See* Von Eiff v. Azicri, 720 So. 2d 510 (Fla. 1998); Beagle v. Beagle, 678 So. 2d 1271, 1275-77 (Fla. 1996).
[19] *See* Gainesville Woman Care, LLC v. State, 210 So. 3d 1243 (Fla. 2017); North Florida Women's Health and Counseling Services, Inc. v. State, 866 So. 2d 612 (Fla. 2003); In re T.W., 551 So. 2d 1186 (Fla. 1989).
[20] *See* In re Guardianship of Browning, 568 So. 2d 4, 9-14 (Fla. 1990); In re Guardianship of Schiavo, 800 So. 2d 640 (Fla. 2d DCA 2001).
[21] *See* Krischer v. McIver 697 So. 2d 97 (Fla. 1997).
[22] *See* In re Dubreuil, 629 So. 2d 819 (Fla. 1993); M.N. v. Southern Baptist Hosp., 648 So. 2d 769, 771 (Fla. 1st DCA 1994); Rodriguez v. Pino, 634 So. 2d 681, 688 (Fla. 3d DCA 1994).
[23] *See* City of North Miami v. Kurtz, 653 So. 2d 1025 (Fla. 1995).
[24] *See* FL Board of Bar Examiners re: Applicant, 443 So. 2d 71 (Fla. 1983).
[25] *See* Stall v. State, 570 So. 2d 257 (Fla. 1990); State v. Conforti, 688 So. 2d 350 (Fla. 4th DCA 1997).
[26] *See also* State v. J.P., 907 So. 2d 1101 (Fla. 2004).
[27] Overton & Giddings, *supra* note 12, at 38–9.
[28] Gordon, *supra* note 16, at 586–87.
[29] *Id.*
[30] *Id.*
[31] Obergefell v. Hodges, 576 U.S. __ (2015).
[32] Brenner v. Scott, 2016 WL 3561754 (N.D. Fla. Mar. 30, 2016) (declaring unconstitutional Florida constitutional provision and statutes banning same-sex marriage).
[33] *See* B.B. v. State, 659 So. 2d 256 (Fla. 1995) (holding statute constitutional as applied); Jones v. State, 640 So. 2d 1084 (Fla. 1994) (holding statute constitutional).
[34] Stall v. State, 570 So. 2d 257 (Fla. 1990); *but see*, Stanley v. Georgia, 394 U.S. 557 (1969).
[35] Buck v. Bell, 274 U.S. 200 (1927).
[36] Von Eiff v. Azicri, 720 So. 2d 510 (Fla. 1998); Beagle v. Beagle, 678 So. 2d 1271, 1275-77 (Fla. 1996).
[37] *See* Prince v. Massachusetts, 321 U.S. 158 (1944).
[38] *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).
[39] *See* cases cited *supra* note 34 and accompanying text.
[40] Planned Parenthood v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113 (1973).
[41] Gainesville Woman Care, LLC v. State, 210 So. 3d 1243 (Fla. 2017); North Florida Women's Health and Counseling Services, Inc. v. State, 866 So. 2d 612 (Fla. 2003); In re T.W., 551 So. 2d 1186, 1189-96 (Fla. 1989).
[42] Gainesville Woman Care, LLC v. State, 210 So. 3d 1243 (Fla. 2017).
[43] In re Guardianship of Browning, 568 So. 2d 4, 9-14 (Fla. 1990); In re Guardianship of Schiavo, 800 So. 2d 640 (Fla. 2d DCA 2001).
[44] In re Dubreuil, 629 So. 2d 819 (Fla. 1993); M.N. v. Southern Baptist Hosp., 648 So. 2d 769, 771 (Fla. 1st DCA 1994); Rodriguez v. Pino, 634 So. 2d 681, 688 (Fla. 3d DCA 1994).

Examining the Impact of CRC Proposal 22 upon Privacy of Conduct

Paul Benjamin Linton, Esq.

Written Testimony of Paul Benjamin Linton, Esq. on
CRC Proposal 22 to Amend Article I, §23, of the Florida Constitution,
before the Florida Constitutional Revision Commission

Introduction

CRC Proposal 22, which would amend the privacy guarantee of the Florida Declaration of Rights, art. I, § 23, would not eliminate any constitutional rights that are not otherwise fully protected under the United States and Florida Constitutions. Rather, CRC Proposal 22 would restore the privacy guarantee of the state constitution to what its drafters had intended and what the citizens of Florida understood it would mean, specifically, protecting against governmental intrusion in the collection and disclosure of private information. The testimony that follows focuses on what impact adoption of Proposal 22 would have on the areas of conduct the Florida Supreme Court has held are protected by art. I, § 23.

Background and overview of art. I, § 23

Prior to the adoption of art. I, § 23, in 1980, the Florida Supreme Court had not recognized a state-based, constitutional right of privacy, apart from privacy rights protected the search and seizure provision of the Florida Declaration of Rights. *See In re Petition of Post-Newsweek Stations, Florida*, *Inc*., 370 So.2d 764, 779 (Fla. 1979) ("there is no express guarantee of a right of privacy contained in the Constitution of Florida, nor has any such constitutionally guaranteed right yet been found to exist through implication") (citing *Laird v. State*, 342 So.2d 962 (Fla. 1977); *Shevin v. Byron*, *Harless*, *Schaffer*, *Reid & Associates, Inc*., 379 So.2d 633, 639 (Fla. 1980) (Florida did not have a "state constitutional right of disclosure privacy"). *But see Yorty v. State*, 259 So.2d 146, 148 (Fla. 1972) (contra) (referring to a "right of privacy" under art. I, § 2). The adoption of art. I, § 23, of course, changed that.

In numerous cases, the Florida Supreme Court has commented that the "state constitutional right to privacy is much broader in scope, embraces more privacy interests, and extends more protection to those interests than its federal counterpart [referring to the implied right of privacy the Supreme Court has derived from the liberty language of the Due Process Clause of the Fourteenth Amendment]." *Von Eiff v. Azicri*, 720 So.2d 510, 514 (Fla. 1998). Notwithstanding this language, there is very little evidence that, in *practical* terms, art. I, § 23, is "much broader in scope," "embraces more privacy interests" or "extends more protection to those interests" than does the federal constitution, at least with respect to privacy of conduct, as opposed to privacy of information (or the disclosure thereof).

The three principal areas of conduct the Florida Supreme Court has recognized as being protected by art. I, § 23, are the right of parents to the care, custody and control of their minor children, the right of patients to refuse unwanted medical treatment and the right of pregnant women to obtain an abortion. Not one of those rights would be jeopardized by CRC Proposal 22, which simply restores art. I, § 23, to its original intended meaning (protecting informational privacy only).

The right of parents to the care, custody and control of their minor children

The Florida Supreme Court has repeatedly held that statutes that purported to authorize state trial courts to order visitation or custody of a minor child with a grandparent (over the objections of the child's parents), based solely upon the best interest of the child standard, without any requirement that the grandparent prove that the child would be harmed if visitation or custody were not allowed, violated the fundamental right of privacy of the parents in violation of art. I, § 23, of the Florida Constitution. *See Sullivan v. Sapp*, 866 So.2d 28, 35-38 (Fla. 2004); *Richardson v. Richardson*, 766 So.3d 1036, 1038-40 (Fla. 2000); *Saul v. Brunetti*, 753 So.2d 26, 27-29 (Fla. 2000); *Persico v. Russo*, 721 So.2d 302, 303 9Fla. 1998); *Van Eiff v. Azicri*, 720 So.3d 510, 513-16 (Fla. 1998); *Beagle v. Beagle*, 678 So.2d 1271, 1275-77 (Fla. 1996). CRC Proposal 22 would not affect this body of law.

First, long before the adoption of art. I, § 23, it was the law in Florida that, in a custody dispute between a natural party and a third party (including a grandparent), the applicable test must include consideration of the right of a natural parent "to enjoy the custody, fellowship and companionship of his offspring," "a rule older than the common law." *State ex rel. Sparks v. Reeves*, 97 So.2d 18, 20 (Fla. 1957). In *Reeves*, the Florida Supreme Court held that in such circumstances, custody should be denied to the natural parent and awarded to the grandparents only when granting custody to the parent would be detrimental to the welfare of the child. *Id*. Those pre-1980 precedents would not be affected by the adoption of CRC Proposal 22.

Second, in a series of cases going back almost one hundred years, the United States Supreme Court has recognized the fundamental liberty interest of natural parents to the care, custody and control of their children, *see Meyer v. Nebraska*, 262 U.S. 390 (1923) (education of children), *Pierce v. Society of Sisters*, 268 U..S. 510 (1925 (same), *Wisconsin v. Yoder*, 406 U.S. 205 (striking down compulsory school attendance statute as applied to Old Order Amish); *Moore v. City of East Cleveland*, *Ohio*, 431 U.S. 494 (1977) (striking down municipal ordinance restricting extended family living arrangements), *Santosky v. Kramer*, 455 U.S. 745 (1982) (requiring proof of "clear and convincing evidence" to terminate parental rights), a line of cases culminating in *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion), where the Court struck down a state statute purporting to confer upon grandparents the right to seek visitation with their grandchildren over the objection of the children's parents, without any showing that the denial of visitation would be injurious to the minor child. The Florida Supreme Court has recognized that "[p]arental authority over decision involving their minor children derives from the liberty interest contained in the Fourteenth Amendment to the United State Constitution and the guarantee of privacy in article I, section 23 of the Florida Constitution." *Kirton v. Fields*, 997 So.2d 349, 352 (Fla. 2008) (citing, among other cases, *Troxel* and *Meyer v. Nebraska*). That parental authority would not be affected in any way by CRC Proposal 22.

The right of patients to refuse unwanted medical treatment

The Florida Supreme Court has frequently relied upon the privacy guarantee of art. I,

§ 23, to uphold the right of patients, including surrogates acting on their behalf, to refuse unwanted medical treatment, including life-sustaining treatment. *See Matter of Debreiul*, 629 So.2d 819, 822 (Fla. 1993); *In re Guardianship of Browning*, 568 So.2d 4, 11 (Fla. 1990); *Public Health Trust of Dade County v. Wons*, 541 So.2d 96, 97-98 (Fla. 1989). Like the right of parents to the care, custody and control of their minor children, the right of patients to refuse unwanted medical treatment is not dependent upon art. I, § 23, of the Florida Constitution.

First, even before the effective date of § 23, the Florida Supreme Court had recognized a state constitutional right to refuse unwanted medical care. *Satz v. Perlmutter*, 379 So.2d 359 (Fla. 1980), *adopting* 362 So.2d 160 (Fla. Dist. Ct. Appeal 1978). That precedent would not be affected by the adoption of CRC Proposal 22.

Second, the United States Supreme Court has repeatedly held that there is both a common law right and a liberty interest protected by the liberty language of the Fourteenth Amendment to refuse unwanted medical treatment. *See Union Pacific Railroad Co. v. Botsford*, 141 U.S. 250, 251 (1891) ("[n]o right is held more sacred or is more carefully guarded by the common law than the right of every individual to the possession and control of his own person, free from all restraint or interference of others unless by clear and unquestionable authority of law"); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding compulsory vaccination order but recognizing, *id*. at 26, "the inherent right of every freeman to care for his own body and health in such way as to him seems best," and, *id*. at 39, refusing to construe the statute authorizing vaccination orders to create an "absolute rule that an adult must be vaccinated if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination or that vaccination, by reason of his then condition, would seriously impair his health or probably cause his death"); *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (prisoner in state custody "possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment"); *Cruzan v. Director*, *Missouri Dep't of Health*, 497 U.S. 261, 278 (1990) ("[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions"); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("[w]e have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment") (citing *Cruzan* in course of opinion rejecting right to physician-assisted suicide"). The right of patients to refuse unwanted medical treatment would not be affected by CRC Proposal 22.

The right of pregnant women to obtain an abortion

In several cases, the Florida Supreme Court has relied upon the privacy guarantee of art. I, § 23, to invalidate (or enjoin enforcement of) state statutes restricting the circumstances under which an abortion may be performed. *See In re T.W.* 551 So.2d 1186 (Fla. 1989) (striking down parental consent statute); *North Florida Women's Health & Counseling Services*, *Inc. v. State of Florida*, 866 So.2d 612 (Fla. 2003) (striking down parental notice statute); *Gainesville Woman Care*, *LLC v. State of Florida* (Fla. 2017) (temporarily enjoining enforcement of twenty-four

hour waiting period). The state supreme court, however, has rejected privacy based challenges to restrictions on abortion funding, *Renee B. v. Florida Agency for Health Care Administration*, 790 So.2d 1036 (Fla. 2001), and to a statute mandating informed consent before the performance of an abortion, *State of Florida v. Presidential Women's Center*, 937 So.2d 114, 118 (Fla. 2006) (informational requirements of informed consent statute that are "comparable to those of the common law and other Florida informed consent statutes implementing the common law . . . certainly may have no constitutional prohibition or generate the need for an analysis on the issue of constitutional privacy"). Moreover, the Florida Supreme Court's decision in *In re T.W.* has been overturned by a state constitutional amendment. *See* Fla. Const, art. X, § 22.

CRC Proposal 22 would have no significant effect on a woman's right to obtain an abortion. First, a woman's right to obtain an abortion is a liberty interest independently protected by the Due Process Clause of the Fourteenth Amendment. *Roe v. Wade*, 410 U.S. 113 (1973), *reaffirmed*, *as modified*, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Although the United States Supreme Court may allow a somewhat broader scope of *regulation* (but not *prohibition*) of abortion before viability than the Florida Supreme Court has allowed, the *core* right of a woman to obtain an abortion before viability for any reason, or after viability for any reason related to her life or health, is the same under both constitutions.

Second, regardless of the status of abortion as a *federal* constitutional right, abortion could continue to be recognized as a *state* constitutional right under other provisions of the Florida Constitution, for example, the due process (art. I, § 9) or equality (art. I, § 2) guarantees of the Declaration of Rights. Indeed, almost eight years before art. I, § 23, was adopted (and before *Roe v. Wade* was decided), the Florida Supreme Court struck down, on both state and federal constitutional grounds (vagueness), the State's nineteenth century abortion statute which prohibited abortion except to save the life of the mother. *State v. Barquet*, 262 So.2d 431 (1972). It is essential to keep in mind that CRC Proposal 22 has nothing in common with CS/HJR 1179 (2011 Sess.), which would have prevented the Florida Supreme Court from interpreting the state constitution "to create broader rights to an abortion than those contained in the United States Constitution," Proposed art. I, § 28(b). That amendment was defeated in 2012. The adoption of CRC Proposal 22 would not affect the right of an adult or minor to obtain an abortion in Florida.

Other issues

Brief mention should be made of a handful of other decisions of the Florida Supreme Court interpreting art. I, § 23, with respect to conduct. In *State v. J.P.*, 907 So.2d 1101, 1112-13 (Fla. 2004), the state supreme court invalidated two juvenile curfew ordinances because, in the majority's opinion, they impermissibly interfered with "the juveniles' fundamental rights to privacy and freedom of movement." In support of its holding, the court cited *Wyche v. State*, 619 So.2d 231, 235 (Fla. 1993), which struck down, as applied, a loitering statute. *Wyche*, however, cited art. I, § 23, only in passing, in a footnote. 619 So.2d at 235 n. 5. The case was actually decided on the basis of the right to engage in speech and expressive conduct, protected by art. I, § 4, of the Florida Constitution, and the right of association and assembly protected by art. I, § 5.

Id. at 235. Moreover, *J.P.* itself clearly recognized the authority of municipalities to adopt curfew ordinances for juveniles that are narrowly tailored to advance their compelling governmental interests. *J.P.*, 907 So.2d at 1117-19.

In *T.M.H. v. D.M.T.*, 129 So.3d 320 (Fla. 2013), the Florida Supreme Court, in a 4-3 decision, struck down, as applied to a lesbian couple, the Florida assisted reproduction technology statute. The majority's opinion was based upon the due process guarantees of the state and federal constitutions, the equal protection guarantees of both constitutions, as well as the privacy guarantee of art. I, § 23. *Id*. at 334-39. It is evident from the court's opinion that the result in the case would have been the same, even in the absence of any reliance on § 23.

Finally, in *B.B. v. State*, 659 So.2d 256 (Fla. 1995), the Florida Supreme Court held, on the basis of art. I, § 23, that a statute prohibiting sexual intercourse with a "chaste" minor could not be constitutionally applied to a sixteen-year-old minor in a delinquency petition. There was no majority opinion in the case and the statute was subsequently amended to address the constitution infirmity found by the court.

Conclusion

As the foregoing indicates, the Florida Supreme Court has relied upon art. I, § 23, in support of its holdings recognizing the right of parents to the care, custody and control of their minor children, the right of patients to refuse unwanted medical treatment and the right of pregnant women to obtain an abortion. None of those rights, however, would be affected by the adoption of art. I, § 23, because all three rights are independently protected by the liberty language of the Due Process Clause of the Fourteenth Amendment. Moreover, even before art. I, § 23, was adopted in 1980, the Florida Supreme Court had recognized, on state constitutional grounds, the first two rights and, with respect to the third, had struck down Florida's nineteenth-century abortion statute on both on state and federal due process (vagueness) grounds.

Although, as indicated above, the United States Supreme Court has allowed a somewhat broader scope of *regulation* of abortion than the Florida Supreme Court has permitted to date–statutes mandating parental consent or notice and statutes requiring short waiting periods–it has not allowed States to *prohibit* abortion before viability for any reason, or after viability for any reason relating to the woman's life or health, precisely the same limitations on abortion prohibitions the Florida Supreme Court imposed on the State of Florida in the *T.W*. case.

Even with respect to abortion regulation, the differences between what the federal constitution allows and what the state constitution allows are not great. First, the people of Florida have adopted a state constitutional amendment (art. X, § 22) authorizing the State to enact a parental notice statute, which effectively overturned the result in *In re T.W*., striking down Florida's earlier parental notice statute. Second, under controlling federal precedents, any parental consent statute that the Florida might decide to enact would have to include a confidential and expeditious judicial bypass option, which would give a pregnant minor the right

to seek judicial authorization of an abortion without the consent of either of her parents. Third, although the Florida Supreme Court has temporarily enjoined enforcement of the State's twenty-four hour waiting period, that litigation is ongoing and there is no final judgment of the state supreme court on the constitutionality of the statute. Regardless of the outcome of that case, however, the requirement of a short waiting period before a woman may obtain an abortion does not legally prevent any abortion, it merely delays (except in emergencies) performance of an abortion. Finally, regardless of the status of abortion as a constitutional right protected by the federal constitution, the Florida Supreme Court could recognize such a right based upon art. I, § 9 of the state constitution (due process) or art. I, § 2 (equality). Nothing in the language of the CRC Proposal 22, which amends only art. I, § 23, would preclude such a result. CRC Proposal 22 is not an "abortion neutrality" amendment like the one approved by the voters of Tennessee in 2014, nor is it comparable in any way to Proposed art. I, § 28, which was rejected by Florida voters in 2012.

CRC Proposal 22, which would restore the privacy guarantee of art. I, § 23, to its original intended and understood meaning, would not eliminate any constitutional rights that are not otherwise fully protected by the state and federal constitutions. Proposal 22 merits your approval.

January 22, 2018 DELIVERED VIA EMAIL

Florida Constitution Revision Commission
The Capitol
400 S. Monroe Street
Tallahassee, FL 32399

Re: Vote No on Proposal 22, Amending Art. 1, Section 23

Dear Chair Carlton and Declaration of Rights Committee Commissioners:

On behalf of more than 130,000 supporters state-wide, the American Civil Liberties Union (ACLU) of Florida submits this testimony urging the Constitution Revision Commission to reject Proposal 22, which would eliminate Floridians' Constitutional privacy protections, except for those related to information.

ACLU Florida

4343 W. Flagler St.
Miami, FL
(786) 363-2700
aclufl.org

Kirk Bailey
Political Director

Right of Privacy – Article I, Section 23

We urge the Commission to preserve the explicit right of privacy detailed in Article 1, Section 23 of the Florida Constitution, which provides:

> *"Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."*
> Art. I, Section 23, Florida Constitution.

Commissioner Stemberger's proposal would eliminate all existing privacy protections from Florida's Constitution except for those specifically relating to informational privacy. While Florida's Constitution currently (and since 1980) has broadly protected Floridians from government intrusion into all aspects of a person's "private life," Proposal 22 would strip away all such protections except "with respect to informational privacy and the disclosure thereof."

Florida's Greater Right to Privacy

Florida is one of several states, including Alaska and Montana, with an explicit privacy provision in its Constitution that provides greater protections against government overreach than the Federal Constitution. This privacy amendment, which was added to the Constitution directly by Florida citizens in a 1980 general election, "was intentionally phrased in strong terms . . . . in order to make the privacy right as strong as possible," Winfield v. Div. of Pari-Mutuel Wagering, Dept. of Bus. Regulation, 477 So. 2d 544, 548 (Fla. 1985). Indeed, the drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to ensure the broad application of this right. Id.

Unlike the U.S. Constitution, which contains only an *implicit* right of privacy, Florida's Constitution explicitly safeguards "the right to be let alone and free from governmental intrusion into the person's private life." As the Florida Supreme Court stated, "[s]ince the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution." Id. The Florida Supreme Court is vested with interpreting and applying the Florida Constitution (Art. V, Section 1 and Section 3) and its decisions deserve respect as an integral part of our system of government that rests on separation of powers.

ACLU Florida

Florida's broad right of privacy protects us against numerous forms of governmental intrusions into our private lives beyond just our private information. It protects us from government surveillance. It provides us with the right to be free from government scrutiny of activities we engage in in our own homes. It protects against intrusion into our most private medical decisions (including end-of-life and reproductive health decisions), and it protects our right to marry and engage in adult consensual intimacy.

If Proposal 22 is adopted, these fundamental protections that we have enjoyed and relied upon for decades will disappear, and Floridians' rights against government overreach will—for the first time in nearly four decades—be vulnerable to the whims of federal actors.

Florida's Constitution Already Protects Informational Privacy – Proposal 22 Does Not Add Any New Protections

Article 1, Section 23 already protects Floridians' informational privacy against governmental intrusions. Shaktman v. State, 553 So.2d 148, 150 (Fla. 1989) (Florida's right of privacy "ensures that individuals are able 'to determine for themselves when, how, and to what extent information about them is communicated to others'" (citation omitted)). Thus, Proposal 22 not only severely limits a host of privacy protections—it is also duplicative and unnecessary.

This proposal is not about safeguarding informational privacy, which is already protected under the Florida Constitution. It is about stripping away all existing privacy protections other than informational privacy. The way this proposal is written is misleading to the public. We urge the Commission to be honest with the public about the practical effect and implications of this proposal—which is to limit, not enhance, the Florida Constitution's existing protections against government overreach.

Floridians Reject Limiting State Constitution's Greater Privacy Protections for Abortion

Florida citizens have already rejected attempts to reduce Florida's constitutional protections for abortion. In 2012, Florida voters considered Amendment 6, which provided that the Florida Constitution "may not be interpreted to create broader rights to an abortion than those contained in the United States Constitution." The proposed amendment would have thus opened the door to more governmental interference with Florida women's private decision-making around pregnancy.

But Florida's citizens overwhelmingly rejected Amendment 6 by a margin of 55%-45%. Moreover, polls of Floridians have consistently found that a majority of Floridians support legalized abortion.

ACLU Florida

Because Florida voters rejected the 2012 amendment that expressly sought to allow greater governmental interference with the private decision to end a pregnancy, it is no coincidence that the current proposed amendment does not even mention abortion. Rather, Proposal 22 misleads the public into thinking it will enhance protections for informational privacy, and nothing more.

Parental Notification for Minors

Some Commissioners have expressed concern regarding a young woman's access to abortion. Florida is one of 12 states that require parental notification before a minor may obtain abortion care. Guttmacher Institute, *Parental Involvement in Minors' Abortions* (Oct. 1, 2017), *available at* https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions. Parental notification is established in Florida's Constitution (Article X, Section 22: "Parental Notice of Termination of a Minor's Pregnancy") and in Florida's statutes (§ 390.01114: "Parental Notice of Abortion Act").

Specifically, Florida's Constitution provides:

> SECTION 22. **Parental notice of termination of a minor's pregnancy.**—The Legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court. *Notwithstanding a minor's right of privacy provided in Section 23 of Article I, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy*. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial waiver of the notification.

This parental notification provision of Florida's Constitution was a legislatively referred constitutional amendment that was approved by the voters in the November 2004 election. The provision constitutionally

authorized the legislature to create parental notification laws, resulting in the passage of Section 390.1114, Florida Statutes, the "Parental Notice of Abortion Act."

Thus, Florida's constitution and statutes both provide for a system of parental notification. In Florida, while parents must be notified of a decision to terminate a pregnancy, parents cannot compel their child to have a child through a consent requirement.

While "parental consent" may sound benign, a government requirement for parental consent puts teens—particularly those who experience or are at risk of experiencing abuse—in danger. Unfortunately, it is well known that not all teens come from loving and supportive families. This is exemplified through statistics of child abuse and neglect, "parental consent/forced" child marriages, and the prevalence of child sexual abuse, with perpetrators often being a legal guardian or parent or person in the care and control of minors. Minors who have a loving and trusting relationship with their parents will choose to seek out their parents help and assistance if they are pregnant. A consent requirement is unnecessary for parents who have bonds of love and trust with their children and dangerous for minors who don't.

ACLU Florida

This is why major medical organizations like the American Medical Association, the American Academy of Pediatrics, the American Public Health Association, and the American College of Obstetricians and Gynecologists oppose parental consent requirements. See Am. Acad. Pediatrics, *The Adolescent's Right to Confidential Care When Considering Abortion* (Feb. 2017), at http://pediatrics.aappublications.org/content/139/2/e20163861. As the American Academy of Pediatrics has explained:

> [These] health professional organizations have reached a consensus that a minor should not be compelled or required to involve her parents in her decision to obtain an abortion, although she should be encouraged to discuss the pregnancy with her parents and/or other responsible adults. These conclusions result from objective analyses of current data, which indicate that legislation mandating parental involvement does not achieve the intended benefit of promoting family communication but does increase the risk of harm to the adolescent by delaying access to appropriate medical care or increasing the rate of unwanted births.

Id. Proposal 22 flies in the face of this medical consensus.

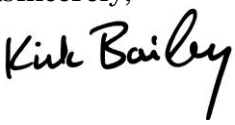
Conclusion

Given our current climate of threats to the full spectrum of our privacy rights, Floridians need our broad and independent constitutional privacy protections now more than ever. We urge this Commission not to exclude a woman's right

to privacy and decisional autonomy from Florida's Constitution, and not to eliminate all other privacy protections with the exception of information.

Thank you for your consideration of the above and we look forward to working with you as this process moves forward. Please do not hesitate to contact me at (786) 363-2713 or kbailey@aclufl.org if you have any questions or would like any additional information.

Sincerely,



Kirk Bailey
Political Director

ACLU Florida

ADL
Anti-Defamation League®

Florida

BY E-MAIL

January 24, 2018

Commissioner Lisa Carlton
Chair
Declaration of Rights Committee
Florida Constitution Revision Commission
The Capitol
400 S. Monroe Street
Tallahassee, FL 32399

Re: Proposal 22

Dear Commissioner Carlton,

On behalf of the Anti-Defamation League ("ADL"), we write to express our serious concerns about and opposition to Proposal 22, which would drastically undermine Floridians' constitutional privacy rights.

ADL is a leading civil rights organization that has been working to secure justice and fair treatment for all since its founding in 1913. To this end, we are dedicated to principles of religious and individual liberty, including the right to privacy.

Adopted in 1980, the Florida Constitution's Privacy Amendment found in Art. I § 23 provides every Floridian with more robust privacy protections for a "person's private life" than the Fourteenth Amendment to the U.S. Constitution. It protects Floridians against a broad range of governmental intrusions, including matters relating to:

- Marriage;
- Sexual practices;
- Reproduction;
- Parenting;
- Activities in dwellings or other personal spaces;
- Medical decisions; and
- Public employment and licensing standards.

With respect to reproductive rights, ADL firmly believes that government should not unnecessarily intrude on a woman's decision about abortion. Rather, the decision should be made in accordance with a woman's own religious and moral convictions. Although Proposal 22 makes no mention of abortion or reproductive rights, a clear result of this measure would be to repeal long-standing Florida

Supreme Court precedents on Art. I § 23, which protect a woman's right to terminate a pregnancy.

Although abolishing a woman's constitutional right to an abortion may be the overriding intent of this Proposal, its limitation on privacy rights "… to privacy of information and the disclosure thereof …" would have far ranging detrimental consequences on the private lives of all Floridians. For example without demonstrating a compelling state interest, state or local government could:

- Intrude into personal medical decisions outside the context of abortion such as end of life decisions, or furthermore mandate medical treatments;
- Undermine a parent or guardian's right to child rearing such as the right to home school or provide alternative forms of education;
- Require universal identification, including electronic forms; or
- Require genetic testing for public employment or state licenses.

For close to 30 years, the Privacy Amendment has ensured the personal freedom and autonomy of all Floridians. Without this essential liberty protection, it is unclear whether the federal privacy clause would adequately safeguard the private lives and decisions of the people of Florida. We therefore urge you to oppose this ill-advised and harmful proposal.

Sincerely,

David L. Barkey
Southeastern Counsel

cc: Commissioner John Stemberger
Commissioner Erika Donalds
Commissioner Emery Gainey
Commissioner Marva Johnson
Commissioner Arthenia Joyner
Commissioner Dr. Gary Lester

clarity+campaign(labs)

contact@claritycampaigns.com
+1 202 999 3225

To: Chairman Beruff and Members of the CRC
From: Clarity Campaign Labs
Date: December 5, 2017
Subject: Florida Survey Findings – Women's Health and Right to Privacy

We recently conducted a public opinion survey on women's health issues and the right to privacy as guaranteed by the Florida Constitution. We surveyed 2,216 Florida voters with live calls to both landlines and cell phones, as well as an online survey, giving us a margin of error of 2.07% at a 95% confidence interval. We fielded the survey October 19-28, 2017.

In general, we found a state that is politically divided, but very much united in its support for the existing language guaranteeing the right to privacy in the Florida Constitution. Just 7% of respondents would support a Constitution Revision Commission effort to remove the guaranteed right to privacy from the Constitution.

Women's Health

Language protecting the right to privacy is critical to women's health care access, which Floridians also support overwhelmingly. Though our sample was representative of a Florida midterm electorate, and thus somewhat conservative (45% reported voting for Trump in 2016, 43% for Clinton), 67% believe abortion should be legal, and 65% believe that the Florida Constitution specifically should protect the right of women to access legal abortions. Fifty-seven percent also support the Affordable Care Act requirement that insurance companies cover birth control for no co-pay. Floridians vehemently oppose government interference in their private lives, especially when it comes to planning their families: 75% agree that women should have the ability to make the decision about whether to have an abortion with her doctor without the government interfering.

These stances cut across nearly all demographics. Sixty-nine percent of women and 62% of men believe the Florida Constitution should protect the right of women to access legal abortions. A majority of respondents from all age groups and educational backgrounds believe this as well. All racial groups are overwhelmingly supportive of the Florida Constitution protecting abortion access, with at least 63% of respondents from every group feeling that way. Majorities of all religious groups except for LDS/Mormon (for which we only had a sample size of 12) also believe that the Florida Constitution should protect abortion access. Forty-eight percent of self-identified Republicans believe this as well, as do 61% of Independents and 85% of Democrats.

CRC and the Right to Privacy

The right to privacy is crucial to protecting women's health care access, particularly when it comes to contraception and abortion. In 1980, Floridians voted in favor of the current language, which guarantees "the right to be left alone and free from governmental intrusion" into a person's private life. This language is broad and relates to many aspects of life, but is particularly important when it comes to protecting an individual's private medical decisions. Florida is one of few states to explicitly protect the right to privacy in its Constitution, and its residents want to keep it that way. 74% of all respondents said they would not support an effort to remove the language.

Floridians of all backgrounds oppose removing the right to privacy language, including 84% of Democrats, 72% of Independents, and 67% of Republicans. 77% of men and 74% of women oppose removing the language, as do the majority of respondents from all age groups, ethnicities, and educational backgrounds. As evidenced by the resounding defeat of Amendment 6 on the 2012 General Election ballot, Floridians oppose changes to the Constitution that would roll back privacy protections and women's health care access. This language is uncontroversial and important in the eyes of Floridians.

Planned Parenthood®
Act. No matter what.

Florida Alliance of Planned Parenthood Affiliates, Inc.

January 23, 2018

VIA Electronic Mail
Committee Chairwoman Lisa Carlton
Declaration of Rights Committee
Florida Constitution Revision Commission
Lisa.Carlton@flcrc.gov
CC: Tashiba Robinson, Committee Staff Director
Tashiba.Robinson@flcrc.gov

RE: Revised Public Comment for January 25th Hearing on Right to Privacy

Dear Chair Carlton:

Below are additional comments we would like to submit for the record for the January 25th public hearing regarding Proposal 22, proposing changes to Article 1, Section 23.

We had previously submitted comments for the November 1st workshop and those comments are still applicable to our concerns with Proposal 22 regarding privacy rights.

Recent polling of Floridians demonstrate weakening state privacy protections is undesirable:

A public opinion survey on women's health issues and the right to privacy as guaranteed by the Florida Constitution was conducted by Clarity Campaign Labs October 19 – 28, 2017 with a survey of 2,216 Florida voters. The survey found that Florida is one of a few states to explicitly protect the right to privacy in its Constitution and its residents want to keep it that way. 74% of all respondents said they would not support an effort to remove the language. A memo with expanded upon findings is attached.

Impact on minors

To expand upon our previous comments related to Florida's constitutional requirement that minors notify parents before obtaining an abortion, we are concerned that by weakening the privacy clause, the door would be opened to requiring parental consent for an abortion.

Mandatory parental consent laws are opposed by the American Academy of Pediatrics, The American Medical Association, the Society for Adolescent Health and Medicine, the American Public Health Association, and the American College of Obstetricians and Gynecologists. These experts agree minors should seek support from responsible adults. Research has shown these laws do not increase parental involvement and do not foster healthy communication but rather

increase the risk of harm to adolescents by delaying access to appropriate medical care. These laws actually threaten young women's health and safety, especially those who may be victims of abuse already.

In 2016, a total of 193 judicial bypass petitions were granted by judges. These 193 individuals represent young people who for reasons of abuse or hardship were unable to notify their parents or guardians. Data on judicial bypasses is attached to this letter.

Privacy rights in Florida's constitution extend beyond reproductive health care.

While much of the conversation related to Proposal 22 has centered around reproductive rights, by emphasizing that Article 1 Section 23 pertains only to personal information and the disclosure thereof (which is already protected) other privacy rights are in jeopardy as well. Consider:

- As genetic testing becomes more common, advance and accurate, it's possible such testing might be used by the government to pigeonhole individuals based upon their educational potential.
- Employers could discriminate against persons who are genetically predisposed to serious physical or mental illness.
- Government or employers could assert a right to inquire into people's personal habits before hiring new employees or retaining current ones (think smoking or unhealthy eating).
- Drones or other electronic devices could potential be used for ongoing surveillance of private citizens.
- Government could become more involved in childrearing, interfering in issues of discipline, homeschooling or other decisions.

Conclusion

Florida's constitutional right to privacy encompasses a person's "right to the sole control of his or her person" and the "right to determine what shall be done with his own body."

The Florida Supreme Court has specifically recognized that "a competent person has the constitutional right to choose or refuse medical treatment, and that right extends to all relevant decisions concerning one's health."

If a pregnant woman decides to refuse a certain medical intervention in her pregnancy, for example, a court would have to determine whether the state's compelling state interest is sufficient to override the pregnant woman's constitutional right to the control of her person, including her right to refuse medical treatment.

The proposed amendment would gut the privacy amendment of this important protection. This could have a broad impact on not only reproductive decision-making, but medical decision-making of any type.

January 25, 2018

Chair Lisa Carlton
Declaration of Rights Committee
Florida Constitution Revision Commission
The Capitol
Tallahassee, Florida

Dear Chair Carlton,

We, the undersigned, support Proposal 22, which seeks to return Florida's privacy clause to the original intent of the 1978 Constitutional Review Commission, the Florida Legislature, and the Florida citizens who adopted it in 1980.

It is clear to us that the Florida Supreme Court has abused its proper role and ignored the reason the amendment was both proposed and adopted. Instead, the Court has radically interpreted the privacy clause in a manner never envisioned by the drafters or those who voted to amend it into the Florida Constitution.

We, as Floridians, want informational privacy protected and are convinced that the court has functionally failed to protect informational privacy. Instead:

- ✓ The court has consistently acted to create new and far-reaching rights which have undermined parent's rights, dogged local governmental authority, and interfered with law enforcement's ability to fight crime.
- ✓ The court has abused the privacy rights of our citizens by striking down city loitering laws in favor of prostitutes roaming freely.
- ✓ The court has abused our state privacy rights by striking down city curfews which sought to fight crime by keeping minors off the streets at inappropriate hours
- ✓ The high court has abused our state privacy rights by creating the fundamental right for minors to have an abortion without parental consent, thus stripping parents of their right to be involved with the irreversible, life-ending decision.

None of these decisions reflect the views of the people of Florida to whom our state constitution grants ultimate political power.

It is time that the Florida Supreme Court be held accountable and constrained from continuing its activist, revisionist history in the use of the privacy clause in its decisions.

Many of the below organizations and our supporters have spoken to you and your fellow CRC members in the CRC's public hearings held all across the state this year. **We strongly urge you to support and vote for Proposal 22.**

Thank you for your time and consideration.

Respectfully submitted,

Kevin Cieply
President & Dean
Ave Maria School of Law
Naples

Attorney Mat Staver
Founder and Chairman
Liberty Counsel
Orlando

Marilyn Rivera
President
Hispanic Action Network
Miami

Bill Bunkley
President
Florida Ethics & Religious Liberty Commission
Tampa

Art Ally
President
Timothy Partners, Ltd.
Orlando

Terry Kemple
President
Community Issues Council
Tampa

Russell Edward Amerling
President
Choose Life America Inc.
Ocala

Carl Jackson
Columnist/Host
The Carl Jackson Show
Orlando

Harry Lewis
Co-Chairman
Empower Jacksonville
Jacksonville

Rev. Cornelius J. Ganzel, Jr.
Senior Pastor
Coquina Presbyterian Church
Ormond Beach

Sue Trombino
President and Founder
Women Impacting the Nation
Boca Raton

Jannique Stewart
President
Love Protects
Fort Lauderdale

Rebekah Ricks
Owner
Homeschool Connection
Winter Haven

Tom Thompson
Chairman
Escambia Family Alliance
Pensacola

Dr. Michele Fleming
President/Director
Life Renewal Inc.
Jacksonville

Mary Lib Stevenson
President
Clay County Forum
Clay County

Patricia McEwen PhD
Director
Life Coalition International
Brevard County

Jessee Phillips
Seminole County
State Committeeman
Altamonte Springs

Abraham Rivera
Board of Directors
Mission Miami
Miami

Kathy Brown
Chairman
Brandon 9-12
Brandon

Karen Jaroch
Co-Founder/Board Member
Tampa 9-12
Tampa

Tim Curtis
Co-Founder/Board Member
Tampa 9-12
Tampa

Bryan Longworth
President
Personhood Florida

Darla Huddleston
President
Florida Healthy Choices Coalition

Wanda Kohn
Administrator
Pregnancy and Family Resource Alliance of Florida
Leesburg

Mark Culligan
Founder and Executive Director
Soli Deo Gloria International/New Hearts Outreach
Tampa

Sol Pitchon, MA
President and CEO
New Life Solutions
Largo

Michael A. Rodriguez
Chairman
National Americans of Faith Alliance PAC
Miami

Mike Neilis
Executive Director
United Christians of Florida PAC
Brandon

Paul Stenstrom
Publisher
News Times Journal
Tampa

Lynda Bell
President
Florida Right to Life
Tallahassee

James Satcher
Founder
Acts of Love
Bradenton

Regina Brown
Executive Director
Transforming Florida
Ocala

Dr. Rick and Amy Barker
Co-Pastors
Overcomers Community Church
Thonotossassa

Brad Avery
President
America Restored PAC
Tampa

Steve Czonstka
Okaloosa County
State Committeeman

Kay Durden
Lafayette County
State Committeewoman

Michele Herzog
Director
ProLife Action Ministries
Orlando

What Proposal 22 on Privacy Would and Would Not Do

"Every natural person has the right to be let alone and free from governmental intrusion into the person's private life *with respect to privacy of information and the disclosure thereof*, except as otherwise provide herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." (proposed new words in italics)

1) The amendment would limit the scope of the Florida courts' decisions to the original intent of the drafters and the people who adopted it namely to informational privacy and the government's ability to collect and disclose private and personal information.

2) The amendment would not "abolish abortion rights in Florida" as the ACLU claims. Abortion rights would continue under the existing US Supreme Court case of *Roe vs Wade* and its progeny. A federal fundamental right to abortion exists in all 50 states irrespective any state privacy rights created.

3) The amendment could allow the Florida legislature to adopt reasonable regulations on the abortion procedure guided by the limitations of federal abortion law. Currently, there are two relevant abortion laws that have been struck down under Article 1, Section 23. They involve laws involving requiring parental consent before an abortion surgery can be performed on a minor girl and a 24-hour waiting period requirement before an abortion is performed. Any regulation of abortion adopted under this amendment would still have to pass constitutional muster via the right to privacy in the US Constitution.

4) The amendment would reduce the court's ability to create new privacy rights outside of the original intent of the amendment (i.e.) privacy rights for prostitutes to solicit sex against local zoning laws or privacy rights for minors to be outside at all hours of the night against local curfew laws.

5) The amendment would allow courts to protect the informational privacy rights of citizens and limit government intrusions, such as police drones performing surveillance on residential homes, it would also allow courts to limit governments' ability to collect and disclose data from private third-party technology and social media companies. Such privacy rights would need to be balanced against other compelling governmental interests.

Florida Privacy Restoration Act

www.FLPrivacy.org

Legal Authorities on the Original Purpose & Intent of Florida's Privacy Clause

1) **Florida Supreme Court** in the 1987 case of Rasmussen v. South Florida Blood:

"*Although the general concept of privacy encompasses an enormously broad and diverse field of personal action and belief, there can be no doubt that the Florida amendment was intended to protect the right to determine whether or not sensitive information about oneself will be disclosed to others. The proceedings of the Constitution Revision Commission reveal that the right to informational privacy was a major concern of the amendment's drafters.*

Thus, a principal aim of the constitutional provision is to afford individuals some protection against the increasing collection, retention, and use of information relating to all facets of an individual's life. Rasmussen v. South Florida Blood Service, Inc., 500 So.2d 533, 536 (Fla. 1987).

2**) Florida Supreme Court Chief Justice Ben F. Overton** on July 6, 1977, at the opening session of Florida's 1977-78 Constitution Revision Commission: *"[W]ho, ten years ago, really understood that personal and financial data on a substantial part of our population could be collected by government or business and held for easy distribution by computer operated information systems? There is a public concern about how personal information concerning an individual citizen is used, whether it be collected by government or by business. The subject of individual privacy and privacy law is in a developing stage.... It is a new problem that should probably be addressed."*

3) **Rep. Jon Mills,** D-Gainesville, the legislative sponsor of the privacy amendment Resolution:

"*The goal is to provide individual and informational privacy. The bigger government gets, the more it tends to collect information on people. ... "Anybody [governmental bureaucracies] who wants information just throws it into forms*," Mills said, *adding businesses and homeowners are inundated with all sorts of official forms containing questions that are not the government's business.* . . . Mills said he would expect courts to express a conservative view on the amendment's applicability. "Right to Privacy Amendment Debated," Florida Times-Union, October 26, 1980.

4) **Center for Governmental Responsibility at University of Florida's Holland Law Center** said the purpose of the amendment is to require the State to justify the reasonableness of its intrusions upon informational privacy. A report prepared by the Center said, "*The impact of the privacy amendment would be to constrain the collection of information about individuals, and not limit public access to information properly collected."*

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1-25-18
Meeting Date

22
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Privacy Clause - #22

***Name** Barbara DeVane

Address 625 E. Brevard St
Street
Tallahassee FL 32308
City *State* *Zip*

Phone 850-251-4382

Email barbaradevane1@Yahoo.com

***Speaking:** ☐ For ☑ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☑ Yes ☐ No

If yes, who? FL NOW - National Organization for Women

Are you a registered lobbyist? ☑ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/2018
Meeting Date

22
Proposal Number (if applicable)

***Topic** Proposal 22

Amendment Barcode (if applicable)

***Name** Stephanie Pineiro

Address 2019 Dixie Belle Unit S
Street

Phone 407 969 5285

Orlando FL 32812
City *State* *Zip*

Email

***Speaking:** ☐ For ☑ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☑ ~~No~~

If yes, who?

Are you a registered lobbyist? ☐ Yes ☑ ~~No~~

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1-25-18
Meeting Date

22
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Privacy, Article I, Section 23

***Name** Kristina J. Wenberg, Liberty Counsel

Address 1053 Maitland Center Commons Blvd. Phone 757-567-4033
Street

Maitland FL 32751 Email KWenberg@LC.org.
City *State* *Zip*

***Speaking:** ☑ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☑ Yes ☐ No

If yes, who? Liberty Counsel.

Are you a registered lobbyist? ☐ Yes ☑ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

22
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Proposal 22

***Name** Kimberly Scott

Address 2300 N Ft. Mango Dr. *Street*
Phone 561.472.9940

West Palm Beach FL. 33409
City *State* *Zip*
Email Kimberly.Scott@ppsenfl.org

***Speaking:** ☐ For ☑ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☑ Yes ☐ No

If yes, who? FL. Alliance of Planned Parenthood Affiliates

Are you a registered lobbyist? ☑ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

22
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Right of Privacy

***Name** Ingrid Delgado

Address 204 W Park Ave
Street

Phone

Tallahassee FL 32301
City *State* *Zip*

Email

***Speaking**: [X] For [ ] Against [ ] Information Only

Waive Speaking: [ ] In Support [ ] Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? [X] Yes [ ] No

If yes, who? Florida Conference of Catholic Bishops

Are you a registered lobbyist? [X] Yes [ ] No

Are you an elected official or judge? [ ] Yes [X] No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record. ***Required***

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

22
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Right to Privacy

***Name** Jon Harris Maurer

Address 201 E. Park Ave, Ste. 200
Street

Phone

Tallahassee FL 32301
City *State* *Zip*

Email jonharris@equalityflorida.org

***Speaking**: ☐ For ☒ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☒ Yes ☐ No

If yes, who? Equality Florida

Are you a registered lobbyist? ☒ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

_____ *Meeting Date*

22 *Proposal Number (if applicable)*

_____ *Amendment Barcode (if applicable)*

***Topic** Proposal 22

***Name** Destiny Lane

Address 2833 S Adams St *Street*

Phone 407 421 6972

Tallahasse *City* FL *State* 32301 *Zip*

Email Desting.lanel@gmail.com

***Speaking:** ☐ For ☒ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☑ Yes ☐ No

If yes, who? [redacted]

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION
APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

22
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Preserving Privacy Protections

***Name** Kara Gross

Phone 850-347-6994

Address PO Box 10788
Street

Email kgross@aclufl.org

Tallahassee — FL — 32302
City — *State* — *Zip*

***Speaking:** ☐ For ☑ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☑ Yes ☐ No

If yes, who? American Civil Liberties Union of Florida

Are you a registered lobbyist? ☑ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

***Required**

Information submitted on this form is public record.

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1-25-18
Meeting Date

P22
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** The Right to Privacy & Proposal 22

***Name** Zachary Jones

Address _____ Phone _____
Street

Tallahassee FL Email _____
City *State* *Zip*

***Speaking:** ☑ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☑ No

If yes, who? _____

Are you a registered lobbyist? ☐ Yes ☑ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record. ****Required***

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

Meeting Date

Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Privacy Claim - Amendment

***Name** Pam Olsen

Address PO Box 14017 Phone 850-906-9170

Street

Tallahassee FL 32317 Email

City State Zip

***Speaking:** ☐ For ☐ Against ☐ Information Only

Waive Speaking: ☒ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☒ No

If yes, who? _____

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record. ***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

22
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** RIGHT OF PRIVACY

***Name** CHARO VALERO

Address 8235 NE 82ND ST
Street
MIAMI FL 33138
City *State* *Zip*

Phone 786 442 8199

Email CHARO@LATINAINSTITUTE.ORG

***Speaking**: ☐ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☒ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☒ Yes ☐ No

If yes, who? NATL LATINA INSTITUTE FOR REPRO HEALTH

Are you a registered lobbyist? ☒ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

_____
Meeting Date

22
Proposal Number (if applicable)

_____
Amendment Barcode (if applicable)

***Topic** Proposal 22

***Name** Madeline Brezin

Address 1401 N. Randolph Cir
Street
Tallahassee FL 32308
City *State* *Zip*

Phone 850-556-5071

Email mab16v@fsu.edu

***Speaking**: ☐ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☒ Against (Strongly)
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☒ No

If yes, who? _____

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

22
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Proposal 22

***Name** Gabriela Gonzalez

Address 6216 Christina Pkwy
Street
Lakeland FL 33813
City *State* *Zip*

Phone (863) 712-3066

Email ggg14@my.fsu.edu

***Speaking**: ☐ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☒ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☒ No

If yes, who? _____

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/2018
Meeting Date

#22
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** #22 Right to privacy

***Name** Mary K. Winn

Address 1006 Brookwood Dr.
Street

Phone (850) 766-2612

Tallahassee FL 32308
City *State* *Zip*

Email kathywinnglan@embarqmail.com

***Speaking:** ☐ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☒ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☒ Yes ☐ No

If yes, who? League of Women Voters

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☐ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1-25-18
Meeting Date

22
Proposal Number (if applicable)

***Topic** RIGHT TO PRIVACY

Amendment Barcode (if applicable)

***Name** JAN RUBINO

Address 726 INGLESIDE AVE
Street

TALLAHASSEE FL 32303
City *State* *Zip*

Phone 850-224-9262

Email rubinojan@yahoo.com

***Speaking:** ☐ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☒ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☒ Yes ☐ No

If yes, who? FLA. LEAGUE OF WOMEN VOTERS

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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****Required***

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1-25-18
Meeting Date

22
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Proposal 22

***Name** Patricia Singletary

Address 405 Collinsford Rd
Street

Tallahassee FL 32301
City *State* *Zip*

Phone

Email psingletary0227@gmail.com

***Speaking:** ☐ For ☑ Against ☐ Information Only

Waive Speaking: ☐ In Support ☑ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☑ No

If yes, who?

Are you a registered lobbyist? ☐ Yes ☑ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

22
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Proposal 22

***Name** Kendal McDowell

Address 75 N. Woodward UBox #64083 Phone
Street

Tallahassee FL 32313 Email
City *State* *Zip*

***Speaking:** ☐ For ☑ Against ☐ Information Only Waive Speaking: ☐ In Support ☑ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☑ No

If yes, who?

Are you a registered lobbyist? ☐ Yes ☑ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record. ***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

P22
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Privacy

***Name** Scott McCoy

Address P.O. Box 10788 *Street*

Phone 850-521-3042

Tally *City* FL *State* 32302 *Zip*

Email scott.mccoy@splcenter.org

***Speaking:** ☐ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☑ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☑ Yes ☐ No

If yes, who? Southern Poverty Law Center

Are you a registered lobbyist? ☑ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1-25-18
Meeting Date

22
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** proposal 22

***Name** Amelia Zehnder

Address 6812 Butterfly Dr
Street
Saint Cloud FL 34773
City *State* *Zip*

Phone 407 968 2636

Email ajz16b@my.fsu.edu

***Speaking:** ☐ For ☑ Against ☐ Information Only

Waive Speaking: ☐ In Support ☑ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☑ No

If yes, who? _____

Are you a registered lobbyist? ☐ Yes ☑ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

The Constitution Revision Commission

COMMITTEE VOTE RECORD

COMMITTEE: Declaration of Rights
ITEM: P 22
FINAL ACTION: Favorable
MEETING DATE: Thursday, January 25, 2018
TIME: 8:00 a.m.—5:00 p.m.
PLACE: The Capitol, Tallahassee, Florida

FINAL VOTE								
Yea	**Nay**	**COMMISSIONERS**	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**
X		Donalds						
	X	Gainey						
X		Johnson						
	X	Joyner						
X		Lester						
X		Stemberger, VICE CHAIR						
	X	Carlton, CHAIR						
4	3	**TOTALS**						
Yea	**Nay**		**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**

CODES: FAV=Favorable
UNF=Unfavorable
-R=Reconsidered
RCS=Replaced by Committee Substitute
RE=Replaced by Engrossed Amendment
RS=Replaced by Substitute Amendment
TP=Temporarily Postponed
VA=Vote After Roll Call
VC=Vote Change After Roll Call
WD=Withdrawn
OO=Out of Order
AV=Abstain from Voting

Constitution Revision Commission
Declaration Of Rights Committee
Proposal Analysis

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

Proposal #: P 75

Relating to: DECLARATION OF RIGHTS, Prosecution for crime; offenses committed by children; restrictive confinement of children

Introducer(s): Commissioner Martinez

Article/Section affected: Article I, Section 15

Date: January 24, 2018

	REFERENCE	ACTION
1.	DR	**Pre-meeting**
2.	EX	

I. SUMMARY:

The proposal amends Article I, Section 15 of the Florida Constitution to prohibit the Department of Corrections, the Department of Juvenile Justice, jails, or detention facilities from holding juveniles in restrictive confinement for any reason other than to ensure the safety of the child or others. The proposal provides time-standards when the use of restrictive confinement is required and for the use of mental health evaluations and treatment.

If approved by the Constitution Revision Commission, the proposal will be placed on the ballot at the November 6, 2018, General Election. Sixty percent voter approval is required for adoption. If approved by the voters, the proposal will take effect on January 8, 2019.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Solitary, or restrictive, confinement consists of the removal of an individual from the general prison population, whether voluntarily or involuntarily, placement of that individual in a single cell or with one other individual, and that individual remaining locked in that cell for most of the day, up to 22 hours or more. Solitary confinement originated from Quaker practices in the late eighteenth and early nineteenth centuries. It quickly spread in popularity throughout the United States and Europe. By 1890, the U.S. Supreme Court criticized the widespread use of solitary confinement, noting that individuals subjected to it often developed mental illness, attempted suicide, and had difficulties reintegrating back into society upon their releases. Use of solitary confinement declined at the start of the twentieth century, but saw a resurgence in the 1970s and 1980s as a tactic for controlling prison populations, which had exploded due to the "War on Drugs."

Jails
Confinement policies in Florida jails are governed by the Model Jail Standards ("the Standards"). Chapter 18 of the Standards governs admission classification and release of juveniles; it requires that juveniles be housed separately from adults unless they have been charged or convicted as an adult.

Chapter 13 governs discipline in jails and allow for administrative confinement (AC) and disciplinary confinement (DC).

- Administrative Confinement:
  - AC is defined as the segregation of an inmate for investigation, protection, or some cause other than disciplinary action.
  - Inmates may be placed in AC for the purpose of ensuring immediate control and supervision when it is determined they constitute a threat to themselves, to others, or to the safety and security of the detention facility.
  - There is no time limit specified for administrative confinement in the Standards.
- Disciplinary Confinement:
  - DC is defined as the segregation of an inmate for disciplinary reasons.
  - Inmates may be placed in DC as discipline for violation for one of many rules.

The length of time in DC should be proportionate to the offense and is limited to thirty days per incident. The Standards include hearings to determine and review disciplinary determination and methods by which inmates can file grievances regarding their confinement.

Department of Juvenile Justice
Currently, "restrictive confinement" is governed by various administrative rules of the Department of Juvenile Justice (DJJ).

DJJ rules 63G-2.014(7) and 63G-2.022(4) govern "behavioral confinement" in secure detention. Behavioral confinement is defined as the "placement of a youth in a secure room during volatile situations in which a youth's sudden or unforeseen onset of behavior imminently and substantially threatens the physical safety of others or himself." This form of confinement is limited to 8 hours with a mandatory report to be filed within 2 hours. The facility superintendent must authorize any extension past 8 hours, and only the regional director can extend behavioral confinement past 24 hours, and with notice to the Assistant Secretary. A Juvenile Detention Officer Supervisor must evaluate the youth at least every 3 hours to determine whether continued confinement is necessary.

In residential commitment facilities, DJJ defines "controlled observation" as follows:

> *An immediate, short-term crisis management strategy, not authorized for use as punishment or discipline, wherein a youth in a residential commitment program is placed in a separate, identified, safe and secure room used only for Controlled Observation. Placement in this room is in response to his or her sudden or unforeseen onset of behavior that substantially threatens the physical safety of others and compromises security. A program is authorized to use this strategy only when non-physical interventions with the youth would not be*

> *effective and during emergency safety situations where there is imminent risk of the youth physically harming himself or herself, staff, or others, or when the youth is engaged in major property destruction that is likely to compromise the security of the program or jeopardize the youth's safety or the safety of others.*[1]

Youth cannot be placed in controlled observation if they are "demonstrating acute psychological distress behaviors, such as panic, paranoia, hallucinations, and self-harming behaviors, or if the youth is a suicide risk, meaning a youth who demonstrates behaviors that indicate that he or she is thinking about or contemplating suicide or when the youth is identified as a suicide risk in the program's alert system. Additionally, if a youth in a controlled observation room begins demonstrating acute psychological distress or suicide risk behaviors, the youth shall immediately be removed from the room and follow-up mental health services shall be provided."[2] The duration of controlled observation is limited to 2 hours, and any extensions not to exceed 24 hours must come from the program director. Checks must be made on the youth every 15 minutes.

Department of Corrections

DOC's confinement policies are governed by Fla. Admin. Code R. 33-601 (2017) and Fla. Admin. Code R. 33-602 (2017). There are several types of confinement described by the rules that may be utilized by DOC: administrative confinement (AC), protective management (PM), disciplinary confinement (DC), and close management (CM). Each type of confinement is governed by a separate rule.

- Fla. Admin. Code R. 33-602.220 governs administrative confinement.
  - AC is defined as the temporary removal of an inmate from the general population in order to provide for security and safety until such time as a more permanent inmate management decision can be concluded such as disciplinary confinement, close management, protective management or transfer.
  - Allowable reasons for placement in AC:
    - Disciplinary charges are pending and the inmate needs to be temporarily removed from the general inmate population in order to provide for security or safety until such time as the disciplinary hearing is held.
    - Outside charges are pending against the inmate and the presence of the inmate in the general population would present a danger to the security or order of the institution.
    - Pending review of the inmate's request for protection from other inmates.
    - When an inmate has presented a signed written statement alleging that they are in fear of staff and provide specific information to support this claim.
    - An investigation, evaluation for change of status, or transfer is pending and the presence of the inmate in the general population might interfere with that investigation or present a danger to the inmate, other inmates, or to the security and order of the institution.
    - When an inmate is received from another institution when classification staff is not available to review the inmate file and classify the inmate into general population.
  - Total length of time in AC is not limited. However, after seventy-two hours a review of the

[1] 63E-7.002(20), Fla. Admin. Code.
[2] 63E-7.013(16)(e), Fla. Admin. Code.

circumstances of the confinement is required.

- Rule 33-602.221 governs protective management.
  - PM is defined as a special management status for the protection of inmates from other inmates in an environment as representative of that of the general population as is safely possible. PM is not disciplinary in nature and inmates in PM are not being punished and are not in confinement. The treatment of inmates in protective management shall be as near that of the general population as the individual inmate's safety and security concerns permit.
  - Allowable reasons for placement in PM:
    - Only for the protection of inmates from other inmates.
  - Total length of time in PM is not limited. However, the inmate's status must be reviewed once per week for the first sixty days of PM, beyond that, requires a monthly written report regarding the confinement and reviews every six months.
- Rule 33-602.222 governs disciplinary confinement.
  - DC is defined as a form of punishment in which inmates found guilty of committing violations of the department rules are confined for specified periods of time to individual cells based upon authorized penalties for prohibited conduct.
  - Allowable reasons for placement in DC:
    - An inmate can be placed in DC for violating one of many rules. The broad categories of rule violations include: (1) assault, battery, threats, and disrespect, (2) riots, strikes, mutinous acts and disturbances, (3) possession of contraband, (4) being in an unauthorized area, (5) count procedure violations, (6) disobeying orders, (7) destruction, misuse, or waste of property, (8) failure to maintain hygiene, (9) supervised community release program violations, and (10) other miscellaneous infractions.
  - Total length of time in DC is not limited and depends on the nature of the infraction for which the inmate was placed in DC. However, the inmate's status must be reviewed weekly and written reports regarding the confinement must be completed every sixty days.
- Rule 601.800 governs close management.
  - CM is defined as the confinement of an inmate apart from the general population, for reasons of security or the order and effective management of the institution, where the inmate, through his or her behavior, has demonstrated an inability to live in the general population without abusing the rights and privileges of others. There are three levels of CM, CM I being the most restrictive and CM III being the least restrictive.
  - Allowable reasons for placement in CM:
    - CM I: incidents involving a death, assault or battery, physical injury, taking hostages, instigation of a riot, property damage over $1,000, possession of weapons, sexual assaults, gang leadership, and various escape attempts.
    - CM II: violation of rules or acts that threaten safety, predatory actions against other inmates, causing injury to another inmate, escape attempts, participation in riots, threats of violence, trafficking contraband.
    - CM III: refusing to follow orders of staff, minor escape attempts involving no weapons or arrests for other felonies while escaped, helping another escape, behavior that is disruptive to the institution, predatory or aggressive acts, possession of contraband, gang membership.
  - Total length of time in CM is not limited. However, the inmate's status must be reviewed

weekly for the first sixty days and every thirty days thereafter and written reports regarding the confinement must be completed every sixty days.

The rules for all types of confinement allow for mental health evaluations and services for the confined individual. None of these rules differentiate between juveniles and adults regarding allowable reasons for confinement, regarding length of confinement, or in any other way. An individual's age is considered when they initially enter DOC custody.[3]

Studies Regarding Juveniles in Solitary Confinement

Recent studies show that solitary confinement can have a lasting effect on juveniles. An American Bar Association Juvenile Justice Center article states that the frontal lobe continues to develop until the early 20s.[4] The frontal lobe controls judgment, planning for the future, and foreseeing consequences of actions. Generally, studies recognize that juveniles in solitary confinement are more likely to develop mental health problems and that their existing mental problems are likely to be exacerbated. In addition, juveniles are more likely to exhibit antisocial behavior, self-harm, and attempt suicide while in solitary confinement.

Anecdotal evidence shows the lasting effects of solitary confinement on juveniles. One 16 year old girl began to cut herself after spending 4 months in solitary confinement, claiming it was "the only release of [her] pain."[5] Other teens described how they would rather die than continue to feel the despair of a life with no way out. Some teens commit suicide, even after being released from all confinement.

Recent Developments

In 2015, Justice Anthony Kennedy of the United States Supreme Court questioned the propriety of solitary confinement. In his concurring opinion in *Davis v. Ayala*,[6] he noted the toll that extended isolation may cause has been questioned by legal writers and commentators. But, he also acknowledged the use or necessity of temporary solitary confinement to impose discipline or protect other inmates or prison staff. Ultimately, he concluded that the courts should look at solitary confinement and consider other long-term confinement systems and determine whether correctional systems should be required to adopt alternatives.

On January 25, 2016, President Obama signed an executive order banning the use of solitary confinement for juveniles in the federal prison system. A multitude of states and counties have followed suit since, including New York state and Los Angeles county, both implementing severe restrictions on the use of solitary confinement on juveniles. Currently, Congress is considering the Sentencing Reform and Corrections Act, which, among other things, would permanently ban the use of solitary confinement for juveniles.

[3] 33-601.210, Fla. Admin. Code
[4] "Adolescence, Brain Development and Legal Culpability," American Bar Association Juvenile Justice Center, January 2004.
[5] Kysel, Ian, "Solitary Confinement Makes Teenagers Depressed and Suicidal. We Need to Ban the Practice," *Washington Post*, June 17, 2015.
[6] 135 S.Ct. 2187 (2015).

B. EFFECT OF PROPOSED CHANGES:

The proposal prohibits DOC, DJJ, and jail or detention facility staff from placing a child in any restrictive confinement away from a facility's general population for any reason other than to ensure the safety of the child or others.

The proposal prohibits keeping a child in restrictive confinement more than 24 hours unless the child cannot be safely housed outside of the restrictive confinement. Keeping a child in restrictive confinement for more than 24 hours must be reviewed and approved as proscribed by law. Any child kept in restrictive confinement for more than 24 hours must receive mental health evaluations and treatment, as needed.

If approved by the voters, the proposal will take effect on January 8, 2019.[7]

C. FISCAL IMPACT:

The fiscal impact on state and local government is indeterminate.

III. Additional Information:

A. Statement of Changes:
(Summarizing differences between the current version and the prior version of the proposal.)

None.

B. Amendments:

None.

C. Technical Deficiencies:

None.

D. Related Issues:

None.

[7] *See* Article XI, Sec. 5(e) of the Florida Constitution ("Unless otherwise specifically provided for elsewhere in this constitution, if the proposed amendment or revision is approved by vote of at least sixty percent of the electors voting on the measure, it shall be effective as an amendment to or revision of the constitution of the state 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.)

By Commissioner Martinez

martinezr-00091-17 201775__

A proposal to amend
Section 15 of Article I of the State Constitution to establish restrictions regarding the restrictive confinement of a child.

Be It Proposed by the Constitution Revision Commission of Florida:

Section 15 of Article I of the State Constitution is amended to read:

ARTICLE I
DECLARATION OF RIGHTS

SECTION 15. Prosecution for crime; offenses committed by children; restrictive confinement of children.—

(a) No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial.

(b) When authorized by law, a child as therein defined may be charged with a violation of law as an act of delinquency instead of crime and tried without a jury or other requirements applicable to criminal cases. Any child so charged shall, upon demand made as provided by law before a trial in a juvenile proceeding, be tried in an appropriate court as an adult. A child found delinquent shall be disciplined as provided by law.

(c) A child in the custody of the department of corrections, the department of juvenile justice, or any successor agency; or any jail or detention facility in this state may not be placed in any restrictive confinement away from the facility's general population for any reason other than to

martinezr-00091-17 201775__

ensure the safety of the child or others. Any child so confined may not be confined for longer than is essential to serve such purpose. The restrictive confinement may not last longer than twenty-four hours unless the confined child's behavior continues to be such that the child cannot be safely maintained outside of restrictive confinement due to physical aggression. In such instances, confinement beyond twenty-four hours may be allowed if reviewed and approved as prescribed by law. If a child is confined for longer than twenty-four hours, the child must receive mental health evaluations and treatment, as needed.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

January 22, 2018 DELIVERED VIA EMAIL

Florida Constitution Revision Commission
The Capitol
400 S. Monroe Street
Tallahassee, FL 32399

Re: Vote Yes on Proposal 75, Amending Art. 1, Section 15

Dear Chair Carlton and Declaration of Rights Committee Commissioners:

On behalf of more than 130,000 members and supporters state-wide, the American Civil Liberties Union (ACLU) of Florida submits this testimony urging the Constitution Revision Commission to adopt Commissioner Martinez's Proposal to limit the solitary confinement of youth (Proposal 75).

ACLU Florida

4343 W. Flagler St.
Miami, FL
(786) 363-2700
aclufl.org

Kirk Bailey
Political Director

Restrict the Solitary Confinement of Youth

Commissioner Martinez's proposal would prohibit the use of solitary confinement of youth except when necessary to ensure the safety of the youth or others, and would require that it be limited to twenty-four hours, unless reviewed and approved. Proposal 75 recognizes the growing consensus that isolating youth is cruel and counterproductive.

Passage of this amendment would ensure youth are protected from the known harms of isolation to have a better chance at rehabilitation.

Solitary Confinement is Devastating to the Development and Rehabilitation of Youth

The research is clear that solitary confinement is severely traumatizing. It leads to hyperresponsivity, hallucinations, panic attacks, cognitive defects, intrusive obsessive thoughts, paranoia, and reduced impulse control. It exacerbates preexisting mental illnesses and produces new ones, and the effects are long term. Even a few days of isolation predictably shifts EEG patterns toward abnormal patterns characteristic of stupor and delirium.[i]

And that is for fully formed adult minds. Subjecting youth to isolation is simply inhumane.

Adolescence is a time of rapid social, psychological and neurological development. Traumatic experiences interfere with this development and damage may be irreparable. Teens are designed to seek stimulation and socialization. They are more vulnerable to stress.[ii] The U.S. Supreme Court has recognized that youth are socially, psychologically and neurologically different from adults and must be treated differently.[iii]

.

A National Survey found that 62 percent of juveniles who commit suicide in detention had a history of solitary confinement and 50 percent of all juvenile suicides in detention happened during a stay in solitary confinement.[iv] Moreover, placing youth in solitary confinement is also counterproductive, as the use of solitary confinement appears to increase recidivism.[v] If adopted, this proposal would move Florida toward more effective rehabilitation of juvenile offenders.

Conclusion

The significant evidence of the harm of solitary confinement and the vulnerability of youth has led to the end of this practice in federal prisons. States are steadily following suit.[vi]

ACLU Florida

We urge this Commission to join this trend and end this cruel and counterproductive practice by adopting Proposal 75.

Thank you for your consideration of the above and we look forward to working with you as this process moves forward. Please do not hesitate to contact me at (786) 363-2713 or kbailey@aclufl.org if you have any questions or would like any additional information.

Sincerely,

Kirk Bailey

Kirk Bailey
Political Director

Cc: Michelle Morton, Juvenile Justice Policy Coordinator
Kara Gross, Legislative Counsel

---

[i] Stuart Grassian, Psychiatric Effects of Solitary Confinement, 22 WASH. U. J. L. & POL'Y 325 (2006).

[ii] Laura Dimon, *How Solitary Confinement Hurts the Teenage Brain*, THE ATLANTIC (Jun. 30, 2014), *see also* V.W. v. Conway, 236 F. Supp. 3d 554, 570 (N.D.N.Y. 2017).

[iii] Roper v. Simmons, 543 U.S. 551 (2005). *See also* Eddings v. Oklahoma, 455 U.S. 104 (1982).

[iv] Lindsay M. Hayes, Juvenile Suicide in Confinement: A National Survey, Office of Juvenile Justice and Delinquency Prevention Report 26-28 (2009).

[v] Shira E. Gordon, Solitary Confinement, Public Safety, and Recidivism, 47 U. Mich. J. L. Reform 495 (2014). *Available at* http://repository.law.umich.edu/mjlr/vol47/iss2/6.

[vi] Anne S. Teigen, States that Limit or Prohibit Juvenile Shackling and Solitary Confinement, National Conference of State Legislatures, (FEB. 15, 2017).

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

75
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Limiting juvenile solitary confinement

***Name** Kara Gross

Address PO Box 10788
Street

Phone 850-347-6994

Tallahassee | FL | 32302
City | *State* | *Zip*

Email kgross@aclufl.org

***Speaking:** ☐ For ☐ Against ☐ Information Only

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☑ Yes ☐ No

If yes, who? American Civil Liberties Union of Florida

Are you a registered lobbyist? ☑ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

***Required**

Information submitted on this form is public record.

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

P75
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Child Solitary Confinement

***Name** Scott D. McCoy

Address P.O. Box 10788 *Street*

Phone 850-521-3042

Tally *City* FL *State* 32302 *Zip*

Email scott.mccoy@splcenter.org

***Speaking**: ☐ For ☐ Against ☐ Information Only

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☑ Yes ☐ No

If yes, who? Southern Poverty Law Center

Are you a registered lobbyist? ☑ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

75
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Restrictive Confinement of Children

***Name** Ingrid Delgado

Address 201 W Park Ave
Street

Tallahassee FL 32301
City *State* *Zip*

Phone

Email

***Speaking**: ☐ For ☐ Against ☐ Information Only

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☑ Yes ☐ No

If yes, who? Florida Conference of Catholic Bishops

Are you a registered lobbyist? ☑ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

75
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Confinement of Children

***Name** Elizabeth Buchanan

Address _____ Phone _____
Street

Tallahassee FL Email _____
City *State* *Zip*

***Speaking:** ☒ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☒ Yes ☐ No

If yes, who? FSU Public Interest Law Center

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

75
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Confinement of Children

***Name** Caitlyn Kio

Address 426 Wilson Ave
Street
Tallahassee, FL 32303
City *State* *Zip*

Phone (850) 408-5974

Email caitlynkio@gmail.com

***Speaking:** [X] For [ ] Against [ ] Information Only

Waive Speaking: [ ] In Support [ ] Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? [X] Yes [ ] No

If yes, who? FSU Public Interest Law Center

Are you a registered lobbyist? [ ] Yes [X] No

Are you an elected official or judge? [ ] Yes [X] No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

75
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Confinement of Children

***Name** Paolo Annino

Address _____ Phone _____
Street

Tallahassee, FL Email _____
City *State* *Zip*

***Speaking:** [X] For [ ] Against [ ] Information Only

Waive Speaking: [ ] In Support [ ] Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? [X] Yes [ ] No

If yes, who? FSU Public Interest Law Center

Are you a registered lobbyist? [ ] Yes [X] No

Are you an elected official or judge? [ ] Yes [X] No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

75
Proposal Number (if applicable)

***Topic** Confinement of Children

Amendment Barcode (if applicable)

***Name** Ellis Curry

Address _____ Phone _____
Street

Jacksonville FL Email _____
City *State* *Zip*

***Speaking:** ☒ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☒ No

If yes, who? _____

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

****Required***

The Constitution Revision Commission

COMMITTEE VOTE RECORD

COMMITTEE: Declaration of Rights
ITEM: P 75
FINAL ACTION: Unfavorable
MEETING DATE: Thursday, January 25, 2018
TIME: 8:00 a.m.—5:00 p.m.
PLACE: The Capitol, Tallahassee, Florida

FINAL VOTE								
Yea	**Nay**	**COMMISSIONERS**	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**
	X	Donalds						
	X	Gainey						
X		Johnson						
X		Joyner						
	X	Lester						
	X	Stemberger, VICE CHAIR						
	X	Carlton, CHAIR						
2	5	**TOTALS**						
Yea	**Nay**		**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**

CODES: FAV=Favorable
UNF=Unfavorable
-R=Reconsidered
RCS=Replaced by Committee Substitute
RE=Replaced by Engrossed Amendment
RS=Replaced by Substitute Amendment
TP=Temporarily Postponed
VA=Vote After Roll Call
VC=Vote Change After Roll Call
WD=Withdrawn
OO=Out of Order
AV=Abstain from Voting

Constitution Revision Commission
Declaration Of Rights Committee
Proposal Analysis

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

Proposal #: P 15

Relating to: DECLARATION OF RIGHTS, Basic rights

Introducer(s): Commissioner Gamez

Article/Section affected: Article I, Section 2 – Basic rights.

Date: November 27, 2017

	REFERENCE	ACTION
1.	DR	**Pre-meeting**
2.	ED	

I. SUMMARY:

Article I, Section 2 of the Florida Constitution, Florida's "Equal Protection" Provision, establishes the equality of all persons under Florida law and delineates the basic inalienable rights guaranteed to all natural persons. It also expressly forbids discrimination by the government on the basis of race, religion, national origin, or physical disability.

Among the inalienable rights guaranteed under Article I, Section 2, are the right to acquire, possess, and protect property; however, the Florida Constitution carves out an exception which authorizes the Legislature to regulate or restrict property rights of "aliens ineligible for citizenship." This provision is commonly referred to as an "Alien Land Law." Alien Land Laws were adopted by several states in the late 19th and early 20th centuries to bar certain nationalities of immigrants from acquiring land.

This proposal repeals the Florida Alien Land Law. It also expands the prohibited bases of government discrimination to include "cognitive disabilities."

If passed by the Constitution Revision Commission, the proposal will be placed on the ballot at the November 6, 2018, General Election. Sixty percent voter approval is required for adoption. If approved by the voters, the proposal will take effect on January 8, 2019.

A proposal to repeal the Alien Land Law was previously submitted to voters in the 2008 General Election. The proposal received 47.9% of the vote for approval and was not adopted.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Article I, Section 2 of the Florida Constitution, Florida's "Equal Protection" Provision, establishes the equality of all persons under Florida law and delineates the basic inalienable rights guaranteed to all natural persons. It also expressly forbids discrimination by the government based on certain suspect classifications. Specifically, Article I, Section 2 of the Florida Constitution[1] provides:

> Basic rights.—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.

Alien Land Law

Property Rights under the Florida Constitution

Property rights are among the basic substantive rights expressly protected by the Basic Rights Provision. These property rights are "woven into the fabric of Florida History,"[2] and, occasionally, provide citizens greater protection with regard to property than the Due Process Clause of the 14th Amendment to the U.S. Constitution.[3]

Despite a more specific and broad guarantee of property rights under the Florida Constitution, the document carves out an exception that authorizes the Legislature to regulate or restrict such rights of "aliens ineligible for citizenship."[4] This provision is commonly known as an Alien Land Law. Florida, like many other states, adopted an Alien Land Law at a time when attitudes about immigration and the immigration policy of the United States were undergoing substantial change.

History of Florida Alien Land Law

Florida's Alien Land Law can be best understood within the context of the historical development of alien property rights in the United States of America. The law of real property in the United States is derived from English feudal law, which was designed to secure allegiance to the crown through military service.[5] Such a system did not lend itself to alien land ownership, thus aliens were not permitted to own land.[6] Subsequent laws eased this restriction, permitting aliens to obtain

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[1] FLA. CONST. ART I, S. 2 (1968).

[2] *Shriners Hospital for Crippled Children v. Zrillic*, 563 So. 2d 64, 67 (Fla. 1990).

[3] *See e.g. Shriners Hospital for Crippled Children v. Zrillic,* 563 So. 2d 64 (Fla. 1990) (holding Mortmain statute unconstitutional).

[4] The Florida Constitution does not define the term "aliens ineligible for citizenship." The term "alien" is commonly defined as relating, belonging, or owing allegiance to another country or government. *See Alien*. (n.d.). Retrieved November 27, 2017, from https://www.merriam-webster.com/dictionary/alien. Further, eligibility for U.S. Citizenship is governed by the Immigration and Nationality Act of 1952 (INA) (8 U.S.C. § 1101 – 1537). Thus, a literal interpretation of the clause relates to foreign persons ineligible for citizenship under the INA.

[5] Mark Shapiro, *The Dormant Commerce Clause: A Limit on Alien Land Laws*, 20 BROOK. J. INT'L L. 217, 220 (1993).

[6] *Id.*

real property by purchase, but not by inheritance.[7] By 1870, this English land system was abolished and aliens were granted full property rights.

Initially, the early English colonies in America adopted the English common law with regard to real property and also excluded aliens from land ownership.[8] However, beginning with the independence of the colonies through the late 19th century, there was a uniform tendency toward abolition or dilution of the common law exclusion of aliens from land ownership though legislation and judicial interpretation.[9] This trend is reflected in Florida's early constitutions which provided property rights to "foreigners" that were coextensive with property rights of citizens. The Florida Constitution of 1868 provided: [10]

> Section 17. Foreigners who are or who may hereafter become bona fide residents of the State, shall enjoy the same rights in respect to the possession, enjoyment, and inheritance of property as native-born citizens.

The Florida Constitution of 1885 similarly provided:[11]

> Section 18. Foreigners shall have the same rights as to the ownership, inheritance and disposition of property in this State as citizens of the State.

This guarantee of alien property rights was displaced not only in Florida, but in many other states, in response to growing anti-Japanese sentiment in the early 1900s.The antipathy was largely fueled by perceived unfair agricultural competition from an increasing influx of Japanese agricultural workers.[12] Other sources of angst included the "alleged disloyalty, clannishness, inability to assimilate, racial inferiority, and racial undesirability of the Japanese, whether citizens or aliens."[13]

In 1913, California, a state with one of the largest Asian immigrant populations, passed the first Alien Land Law aimed at the Japanese; it would become a model statute for other states.[14] The law prohibited persons "ineligible for citizenship" from owning or leasing farmland. At that time, the right to become a naturalized U.S. Citizen extended only to free white persons and persons of African nativity or descent.[15] Thus, the term "ineligible for citizenship" acted as a restriction based upon a racial classification without expressly singling out the Japanese.

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[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] FLA. CONST, Declaration of Rights, s. 17 (1868).
[11] FLA. CONST, Declaration of Rights, s. 18 (1885).
[12] ASIAN AMERICAN FEDERATION OF FLORIDA, *Florida Alien Land Law*, http://www.asianamericanfederation.org/ISSUES/Alien%20Land%20Law/florida_alien_land_law.html (last visited Nov. 17, 2017)
[13] *Oyama v. California*, 332 U.S. 633, 671 (1948)(Murphy, J., concurring)(identifying and refuting the arguments in support of California's Alien Land Law).
[14] Arizona, Washington, Florida, Louisiana, Oregon, Idaho, Montana, Kansas, Wyoming, Utah, New Mexico, and Arkansas were among the states to pass Alien Land Laws in the wake of California.
[15] The Immigration Act of 1924 (Pub.L. 68–139, H.R. 7995, 68th Cong., May 26, 1924) defined the term "ineligible to citizenship,' when used in reference to any individual, as an individual who is debarred from becoming a citizen of the United

The Florida Legislature proposed a similar constitutional amendment by joint resolution in 1925,[16] which, according to its sponsors, was also aimed specifically at Japanese subjects.[17] Florida State Senator Calkins explained "that the provisions of the measure followed closely those of the California plan."[18] He further acknowledged that although there seemed no immediate necessity for the regulation, "it was well to provide for it, now, in anticipation of future contingencies."[19] Such future contingencies may have been the belief that Asian farmers, driven from their property by restrictions in western states, would head east.[20] Editorials in Florida newspapers urged voters to reject the amendment as unnecessary, arguing that there was "no menace of foreign ownership in Florida."[21]

Nevertheless, the electors subsequently approved the proposed amendment to the Florida Constitution of 1885 in 1926, which thereafter provided:

> Section 18. Equal rights for aliens and citizens.-Foreigners who are eligible to become citizens of the United States under provisions of the laws and treaties of the United States shall have the same rights as to the ownership, inheritance and disposition of property in the state as citizens of the state, but the Legislature shall have power to limit, regulate and prohibit the ownership, inheritance, disposition, possession and enjoyment of real estate in the State of Florida by foreigners who are not eligible to become citizens of the United States under provisions of the laws and treaties of the United States.

The Alien Land Law was readopted during the 1968 revision of the Florida Constitution, and now appears as a portion of Article I, Section 2 of the Florida Constitution.[22] It has remained unaltered through subsequent constitution revision commissions in 1977-1978 and 1997-1998.[23] In 2007, staff of the Florida Senate Judiciary Committee conducted a review of Florida statutes adopted since 1847, and found that no statutes had been enacted by the Florida Legislature to restrict alien

States under section 2169 of the Revised Statutes. Section 2169, Revised Statutes, provided that the provisions of the Naturalization Act "shall apply to aliens, being free white persons, and to aliens of African nativity and to persons of African descent." Thus every other race was "ineligible to citizenship" under the Immigration Act of 1924. The Immigration Act of 1924 also included a provision excluding from entry any alien who by virtue of race or nationality was ineligible for citizenship. As a result, groups not previously prevented from immigrating – the Japanese in particular – would no longer be admitted to the United States.

[16] House Joint Resolution No. 750 (1925)

[17] *Florida to Vote on Alien Land Law*, THE NEW YORK TIMES, October 30, 1926, at 3.

[18] *Joint Committee Drafts New Appropriation Measure*, ST. PETERSBURG TIMES, June 4, 1925, Section 2.

[19] *Id.*

[20] *Supra* note 12.

[21] *See e.g., Reject the Three*, TAMPA SUNDAY TRIBUNE, October 24, 1926; *Defeat All*, THE MIAMI HERALD, October 30, 1926, at Editorial Page.

[22] HJR 1-2X (1968).

[23] The Chair of the 1997-1998 Revision Commission later explained that the Alien Land Law did not come up during the revision commissions and posited that if the commission had been aware of the provision, it probably would have been removed. *See* Randall Pendleton, *Old law bars Asian property ownership* The Florida Times-Union, (Feb. 12, 2001), http://jacksonville.com/tu-online/stories/021201/met_5375163.html#.WhBZGuSWzcs.

land ownership, possession, or inheritance pursuant to the Alien Land Law.[24] Rather, the only Florida statutes relating to alien property rights provide:

- Aliens have the same rights of inheritance as citizens;[25]
- Alien business organizations[26] that own real property, or a mortgage on real property, must maintain a registered agent in the state;[27] and
- For the taxation of an alien's real property upon his or her death.[28]

Naturalization under the Immigration and Nationality Act of 1952 (INA)

The Immigration and Nationality Act of 1952 (INA)[29] governs the naturalization[30] of aliens.[31] The naturalization process was made entirely race- and nationality-neutral under the INA. Persons currently ineligible for naturalization are ineligible based on individual considerations. Generally, an alien is eligible for naturalization if he or she:[32]

- Is at least 18 years old;
- Has been a legal permanent resident ("green card holder") of the United States for at least five years;
- Has lived for at least 3 months in the state or USCIS district of their application for naturalization;
- Demonstrates continuous residence in the United States for at least the 5 years immediately preceding the date of the application for naturalization;
- Demonstrates physical presence in the United States for at least 30 months out of the 5 years immediately preceding the date of the application for naturalization;
- Is able to read, write, and speak basic English;
- Has a basic understanding of U.S. history and government (civics);
- Has a good moral character; and
- Demonstrates an attachment to the principles and ideals of the U.S. Constitution.

Due to the requirement that an applicant for naturalization be a legal permanent resident, eligibility for naturalization also relates back to initial green card eligibility. In general, to meet the requirements for permanent residence, an alien must be eligible for one of the immigrant categories established under the INA,[33] have an approved immigrant petition, have an immigrant visa

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[24] Fla. S. Comm. On Judiciary, SJR 166 (2007) Staff Analysis 3 (Mar. 7, 2007), *available at* http://archive.flsenate.gov/data/session/2007/Senate/bills/analysis/pdf/2007s0166.ms.pdf.

[25] s. 732.1101, F.S.

[26] An alien business organization means any corporation, association, partnership, trust, joint stock company, or other entity organized under any laws other than the laws of the United States, of any United States territory or possession, or of any state of the United States; or any corporation, association, partnership, trust, joint stock company, or other entity or device 10 percent or more of which is owned or controlled, directly or indirectly, by an entity described in subparagraph 1. or by a foreign natural person. s. 607.0505(11)(a), F.S.

[27] s. 607.0505, F.S.

[28] s. 198.04, F.S.

[29] 8 U.S.C. § 1101 – 1537.

[30] Naturalization is the process by which U.S. citizenship is granted to a foreign citizen or national after he or she fulfills the requirements established by Congress.

[31] The term "alien" under the INA means any person not a citizen or national of the United States. 8 U.S.C. § 1101

[32] U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Naturalization Information*, www.uscis.gov/citizenship/educators/naturalization-information (last visited Nov. 18, 2017).

[33] An alien must qualify through familial ties, through employment, as a "special immigrant", through Refugee or Asylee Status, as a Human Trafficking and Crime Victim, as a Victim of Abuse, as a continuous resident of the United States beginning earlier

immediately available, and be admissible into the United States.[34] An alien is considered inadmissible to the United States if he or she:[35]

- Has a communicable disease designated by the Secretary of Health and Human Services as being of public health significance;
- Fails to present documentation of having received vaccination against vaccine-preventable diseases;
- Has a physical or mental disorder with associated harmful behavior or harmful behavior that is likely to reoccur;
- Is a drug abuser or addict;
- Has committed a crime involving moral turpitude or a violation of any controlled substance law;
- Has been convicted of two or more crimes of any kind, other than purely political offense, the aggregate sentences for which were five years or more;
- Is reasonably believed to be involved in drug trafficking, including individuals who aid, abet, conspire, or collude with others in illicit drug trafficking;
- Seeks entry to engage in prostitution, or has engaged in prostitution within the past ten years, including persons that profited from prostitution;
- Seeks entry to engage in any unlawful commercialized vice;
- Has ever asserted diplomatic immunity to escape criminal prosecution in the United States;
- Has engaged in severe violations of religious freedom as an official of a foreign government;
- Has committed or conspired to commit human trafficking, including individuals who aid, abet, or collude with a human trafficker;
- Has engaged in money laundering or seeks to enter the United States to engage in an offense relating to laundering of financial instruments;
- Is reasonably believed to be seeking entry to engage in sabotage, espionage, or attempts to overthrow the U.S. government by force;
- Is reasonably believed to have participated in any terrorist activities or is associated with terrorist organizations, governments, or individuals;
- Is reasonably believed to be a threat to foreign policy or has membership in any totalitarian party;
- Has participated in Nazi persecutions or genocide;
- Is likely to become a public charge;
- Lacks a labor certification;
- Has engaged in fraud or misrepresentation during the admissions process;
- Has been removed from the United States or has been unlawfully present in the United States;
- Is a practicing polygamist;
- Is a former citizen who renounced citizenship to avoid taxation;
- Has abused a student visa; or

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than January 1, 1972, or through a number of other special programs. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Green Card Eligibility Categories*, https://www.uscis.gov/greencard/eligibility-categories (last visited Nov. 18, 2017).

[34] U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Green Card Eligibility*, https://my.uscis.gov/exploremyoptions/green_card_eligibility (last visited Nov. 18, 2017).

[35] 8 U.S.C. § 1182 (Certain grounds of inadmissibility may be waived).

- Is an international child abductor or relative of such abductor.

Status of Florida Alien Land Law

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits states from denying "to any person within its jurisdiction the equal protection of the laws." This places substantial limitations on a state's ability to treat similarly circumstanced persons differently based upon "suspect classifications," among which are race, national origin, and alienage, unless such laws are necessary to promote a 'compelling' interest of government.

A provision of a state constitution can provide greater Equal Protection rights than those provided by the U.S. Constitution, but a state constitution cannot narrow such rights.[36] Accordingly, the controlling precedent of the U.S. Supreme Court relating to the equal protection rights of aliens under the Fourteenth Amendment is instructive in any discussion of the Florida Alien Land Law.

For most of U.S. history, states have been free to reserve resources for their own citizens or to share them with noncitizens at their discretion.[37] In a series of cases throughout the late 19th and early 20th century, the U.S. Supreme Court would recognize a permissible state interest in distinguishing between citizens and aliens in the enjoyment of such resources and in areas relating to public employment.[38] The recognition of a permissible state interest in the allocation of resources became known as the "special public interest doctrine." [39]

By 1886, however, the U.S. Supreme Court began to invalidate special public interest ordinances. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the U.S. Supreme Court struck down the administration of a facially-neutral ordinance which, as applied, discriminated against Chinese laundry mat owners.[40] In this seminal case, the Court established that the term 'person' in the equal protection clause encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside.[41] Nevertheless, *Yick Wo* did not completely rid the states of special public interest ordinances and the Supreme Court continued to uphold some laws barring noncitizens from jobs or natural resources, including Alien Land Laws.[42]

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[36] *Traylor v. Florida*, 596 So.2d 957, 963 (Fla. 1992)(providing that "in any given state, the federal Constitution thus represents the floor for basic freedoms; the state constitution, the ceiling.")

[37] *Hauenstein v. Lynham*, 100 U.S. 483, 484 (1880)(stating that the "the law of nations recognizes the liberty of every government to give foreigners only such rights, touching immovable property within its territory, as it may see fit to concede...in our country, this authority is primarily in the States where the property is situated.")

[38] *See e.g., Patsone v. Pennsylvania,* 232 U.S. 138 (1914)(holding that a Pennsylvania law prohibiting an unnaturalized foreign born resident from killing wild game did not violate due process and equal protection provisions of the Fourteenth Amendment); *Porterfield v. Webb*, 263 U.S. 225 (1923)(holding that California law denying Japanese the right to acquire or lease agricultural land did not violate the equal protection clause).

[39] Kevin R. Johnson, Raquel Aldana, Bill Ong Hing, Leticia M. Saucedo, and Enid Trucios-Haynes, UNDERSTANDING IMMIGRATION LAW 155 (2nd ed. 2015).

[40] An ordinance in San Francisco was used to deny commercial licenses almost exclusively to Children laundry mat owners, some of whom had operated their business for more than twenty years.

[41] *Yick Wo v. Hopkins*, 118 U.S. 356, 356 (1886).

[42] *See Cockrill v. California,* 268 U.S. 258 (1925); *Frick v. Webb*, 263 U.S. 326 (1923); *Webb v. O'Brien*, 263 U.S. 313 (1923); *Porterfield v. Webb*, 263 U.S. 225 (1923); *Terrace v. Thompson*, 263 U.S. 197 (1923).

By the end of World War II, the U.S. Supreme Court reversed course and strongly signaled in the dicta of two decisions relating to the California Alien Land Law that discriminatory Alien Land Laws directed at the Japanese were vulnerable to attack on equal protection grounds.[43] *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948), in particular cast doubt on the continuing validity of the special public interest doctrine in all contexts. Although, the specific question of Alien Land Laws did not come before the U.S. Supreme Court again, over the next decade, several State Supreme Courts declared Alien Land Laws unconstitutional in violation of the Fourteenth Amendment.[44] Other states repealed such laws.[45]

Shortly after the re-adoption of the Florida Alien Law in the 1968 revision of the state constitution, the U.S. Supreme Court largely rejected[46] the continuing validity of the special public interest doctrine. In *Graham v. Richardson*, 403 U.S. 365 (1971), a case relating to the provision of welfare benefits, the Court held that classifications based on alienage, like those based on nationality or race, are considered inherently suspect and subject to strict scrutiny.[47] In the wake of *Graham, t*he Supreme Court has invalidated a number of state laws disadvantaging aliens.[48] The Court has also found the protections of the Equal Protection Clause applicable to illegal aliens.[49]

In subsequent years, the U.S. Supreme Court has also found that "special public interest" laws may be unconstitutional because they impose burdens not permitted or contemplated by Congress in its regulations of the admission and conditions of admission of aliens.[50] In addition, to the extent such laws violate treaty obligations, they may be void under the Supremacy Clause.[51]

No federal or state court has examined whether the Florida Alien Land Law is permissible under the U.S. Constitution or Florida Constitution.[52]

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[43] *See Oyama v.* California, 332 U.S. 633 (1948)(holding that California Alien Land Law, as applied, deprived complainant of equal protection of the laws, however four concurring justices concluded that Alien Land Laws were unconstitutional as a whole); *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948)(holding that California statute barring issuance of commercial fishing licenses to persons "ineligible to citizenship" violated equal protection clause).

[44] *See e.g. Namba v. McCourt*, 204 P.2d 569, 583 (Or. 1949)(concluding that Oregon Alien Land Law was "violative of the principles of law which protect from classifications based upon color, race, and creed); *Sei Fujii v. California*, 242 P.2d 617, (Cal. 1952)(holding that the California Alien Land Law violates the Fourteenth Amendment); *Montana v. Oakland*, 287 P.2d 39, 42 (holding that the Montana Alien Land Law was unconstitutional on equal protection grounds).

[45] Utah, Washington, Wyoming, and New Mexico repealed their Alien Land Laws in 1947, 1966, 2001, and 2006, respectively.

[46] The U.S. Supreme Court has recognized an exception to the close analysis of state alienage classification for classifications involving political functions or self-governance. *See e.g. Foley v. Connelie*, 435 U.S. 291 (1978); *Ambach v. Norwick*, 441 U.S. 68 (1979).

[47] *Graham v Richardson*, 403 U.S. 365, 372 (1971) (stating that aliens as a class are a prime example of a "discrete and insular" minority for whom such heightened judicial solicitude is appropriate.)

[48] *See e.g., In re Griffiths*, 413 U.S. 717 (1953)(voiding a state law limiting bar membership to citizens); *Nyquist v. Mauclet*, 432 U.S. 1 (1977) (voiding a state law barring certain resident aliens from state financial assistance for higher education on equal protection grounds).

[49] *Plyer v. Doe*, 457 U.S. 202 (1982)(holding that a Texas statute which denied education funding and public school enrollment to illegal aliens violated equal protection clause).

[50] *See e.g. Hines v. Davidowitz*, 312 U.S. 52 (1941); *Toll v. Moreno*, 441 U.S. 458 (1979).

[51] *Asakura v. City of Seattle*, 265 U.S. 332 (1924).

[52] The Florida Alien Land Law has been quoted in approximately 20 cases decided by the Florida Supreme Court and the Florida District Courts of Appeal, but has never been the actual subject of one of those cases. There does not appear to be a case where the outcome was controlled by this Alien Land Law.

Efforts to Repeal the Florida Alien Land Law

In 2007, the Florida Legislature passed Senate Joint Resolution No. 166, proposing an amendment to the Florida Constitution to remove the Alien Land Law provision. The proposed amendment, known to voters as "Amendment 1" in the 2008 General Election, received only 47.9% of votes for approval, and was not adopted. Proponents of "Amendment 1" pointed to a mix of confusion regarding the ballot summary and attitudes about illegal immigration for the defeat.[53]

Subsequent legislative efforts to pass a resolution proposing the removal of the Alien Land Law have been unsuccessful.[54]

Disabilities

The Basic Rights Provision also expressly forbids discrimination by the government based on certain suspect classifications. Florida is one of only three states that designates disability as a constitutionally suspect classification.[55] The Florida Supreme Court has found that this explicit prohibition is a more stringent constitutional requirement than the right to be treated equally before the law.[56]

Development of Constitutional Protection for Persons with Disabilities

State constitutional protection for persons with disabilities is woven from developments during the 1970s in three parallel areas: educational rights, residential rights, and civil rights.[57] Some developments began in 1971 in federal and state courts, others in proposed legislative amendments, and still others in administrative regulations.[58]

It was within this social context that the Florida Legislature proposed a disability amendment to the Florida Constitution. In 1974, the Florida Senate introduced a Joint Resolution proposing to amend Article I, Section 2 of the Florida Constitution (the Basic Rights provision) to add "mental or physical handicap" as an additional ground of prohibited discrimination.[59] The companion House Joint Resolution,[60] proposed the following amendment to the Basic Rights provision delineating even broader and more specific rights for disabled persons than the Senate version:

> No person shall be subjected to discriminatory treatment which results in the deprivation of any right, benefit, or opportunity on account of a physical or mental handicap; this guarantee shall include, among other areas: housing, access to services and facilities available to the public, education, employment, and any governmental action.

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[53] Senator Geller, the resolution sponsor, later explained that "a lot of people thought [the amendment] had to do with illegal aliens, and it had nothing to do with illegal aliens." *See* Damien Cave, *In Florida, an Initiative Intended to End Bias is Killed,* THE NEW YORK TIMES (Nov. 5, 2008), www.nytimes.com/2008/11/06/us/06florida.html.

[54] *See* HJR 1553 (2011).

[55] Louisiana constitutionally prohibits discrimination based upon "physical condition." *See* LA. CONST. art. I, § 3 (1974). Rhode Island constitutionally prohibits discrimination on the basis of a "handicap." *See* R. I. CONST. art. I, § 2 (1986).

[56] *Scavella v. School Bd. of Dade County,* 363 So. 2d 1095, 1097 (Fla. 1978).

[57] The Florida Bar Committee on the Mentally Disabled, MENTAL DISABILITY LAW: EDUCATION RIGHTS OF THE HANDICAPPED, 1 (1979)

[58] *Id.*

[59] SJR 917 (1974).

[60] HJR 3621 (1974).

Senate staff explained that the Senate amendment "[spoke] to the rights that have been denied to physically and mentally handicapped because of the stigma attached to being handicapped."[61] However, the Senate Health & Rehabilitative Services Committee amended the proposal to remove mental disabilities from the Senate Joint Resolution.[62] The Senate Joint Resolution, encompassing only "physical handicaps" as a basis of prohibited discrimination, unanimously passed both the Florida Senate and House of Representatives on May 31, 1974.[63] Electors voted overwhelming to adopt the amendment during the 1974 General Election, garnering 76.43% of votes for approval.

In 1998, as the result of a proposal submitted to electors by the 1997-1998 Florida Constitution Revision Commission, the Basic Rights provision was again amended to revise the term "physical handicap" to "physical disability." The purpose of the amendment was to replace the term "handicap" which had come to be regarded as derogatory, and to offer a body of federal law that Florida courts could use when defining a "disability" under Article I, Section 2. [64]

Disability Discrimination

The standard of review that a court applies in evaluating a claim of discrimination mandates the level of protection guaranteed. Under both the U.S. Constitution and the Florida Constitution, the lowest level of judicial review, the rational basis test,[65] will apply to evaluate a claim of discrimination unless a suspect class, quasi-suspect class, or fundamental right is implicated by the challenged law.[66] In applying the rational basis test, courts begin with a strong presumption that the law or policy under review is valid and the challenging party bears the burden of demonstrating the law or policy does not have a rational basis. Classifications based upon race, national origin, and alienage, are considered "suspect classifications" which trigger a review of claimed discrimination under the highest standard, strict scrutiny.[67] In applying strict scrutiny, it is presumed that the law or policy is unconstitutional and the government bears the burden of proof to overcome the presumption.[68] The constitutional treatment of disabilities varies, however, under the U.S. Constitution and the Florida Constitution.

In *City of Cleburne v. Cleburne Living Center*,[69] the U.S. Supreme Court held that intellectual disabilities were not a "quasi-suspect class" for purposes of the Federal Equal Protection Clause, and that claims of discrimination based upon such classifications were subject to only rational basis review.[70] With regard to intellectual disabilities, the Court explained that:

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[61] Fla. S. Comm. on HRS, SJR 917 (1974) Staff Evaluation 1 (April 22, 1974).
[62] Senate Bill Action Report 211 (July 17, 1974).
[63] *Id.*
[64] Ann C. McGinley and Ellen Catsman Freiden, *Protecting Basic Rights of Florida Citizens*, THE FLORIDA BAR JOURNAL, October 1998.
[65] To satisfy the rational basis test, a statute must bear a rational and reasonable relationship to a legitimate state objective, and it cannot be arbitrary or capriciously imposed. *Dep't of Corr. v. Fla. Nurses Ass'n*, 508 So. 2d 317, 319 (Fla. 1987).
[66] *Amerisure Ins. Co. v. State Farm Mut. Auto. Ins. Co*., 897 So. 2d 1287, 1291 n.2 (Fla. 2005).
[67] Laws subject to strict scrutiny will be sustained only if they are suitably tailored to serve a compelling state interest. *Jackson v. Florida*, 191 So. 3d 423, 427 (Fla. 2016).
[68] The Florida Supreme Court explained that, "this test, which is almost always fatal in its application, imposes a heavy burden of justification upon the state.." *In re Estate of Greenberg*, 390 So. 2d 40, 43 (Fla. 1980).
[69] 473 U.S. 432 (1985).
[70] Despite purporting to apply rational basis scrutiny, the Court actually applied a heightened form of rational basis scrutiny, often referred to as "rational basis with teeth." *See* Michael E. Waterstone, *Disability Constitutional Law*, 63 Emory L. J. 527, 540 (2001).

> If the large and amorphous class of the mentally retarded were deemed quasi-suspect for the reasons given by the Court of Appeals, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.[71]

The Supreme Court would continue to affirm this position in later cases involving intellectual disabilities and the mentally ill.[72] Eventually, in *Board of Trustees of the University of Alabama v. Garrett*,[73]a case involving physical disabilities,[74] the U.S. Supreme Court extended to all groups of persons with disabilities the finding from *Cleburne*:[75]

> The result of *Cleburne* is that States are not required by the Fourteenth Amendment to make special accommodations for the *disabled*, so long as their actions toward such individuals are rational [Emphasis added].[76]

In contrast, under the Equal Protection Provision of the Florida Constitution, "physical disabilities" are a specifically enumerated suspect classification requiring strict scrutiny. The Florida Supreme Court has also described the express prohibition against discrimination as a more stringent constitutional requirement than the standard of review in equal protection cases involving suspect classifications.[77] Accordingly, courts need only decide whether laws deprive claimants of any right, not just the right to be treated equally before the law.[78] Thus, this clause in the Florida Constitution is "an unambiguous vehicle for providing greater protection to individuals who are members of any newly enumerated group"[79] than may be found under the U.S. Constitution.

Defining "Disability"

"Disability" or "physical disability" is not defined by the Florida Constitution, nor does it appear that any case has interpreted the meaning of this term under Article I, Section 2.[80] For purposes of construing an undefined constitutional provision, the Florida Supreme Court will first begin with

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[71] 473 U.S. 432, 445-446 (1985).
[72] *See e.g., Heller v. Doe*, 509 U.S. 312 (1993).
[73] 531 U.S. 356 (2001).
[74] The suit was brought by two state employees seeking money damages under the ADA, a nurse with breast cancer who lost her director position after undergoing cancer treatment and a security officer with asthma and sleep apnea denied workplace accommodations. 531 U.S. 356, 362 (2001).
[75] Steven K. Hoge, *Cleburne and the Pursuit of Equal Protection for Individuals with Mental Disorders,* THE JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW 43(4), p. 416-422, available at http://jaapl.org/content/43/4/416 (last visited Nov. 26, 2017).
[76] 531 U.S. 356, 367-368 (2001).
[77] 363 So. 2d 1095, 1097-1098 (1978).
[78] *Id.*
[79] *Supra* note 10.
[80] There does not appear to be any case interpreting the meaning of this term under Article I, Section 2 of the Florida Constitution.

an examination of the provision's explicit language. If that language is clear and unambiguous, and addresses the matter at issue, it is enforced as written. If, however, the provision's language is ambiguous or does not address the exact issue, a court must endeavor to construe the constitutional provision in a manner consistent with the intent of the framers and the voters.[81]

Concept-based Definition

In its ordinary usage, the term "disability" is understood as a physical, mental, cognitive, or developmental condition that impairs, interferes with, or limits a person's ability to engage in certain tasks or actions or participate in typical daily activities and interactions.[82] However, in practice, there is not a single definition of the term "disability." Health professionals, advocates, and other individuals use the term in different contexts, with different meanings.

For example, the concept of cognitive disabilities is extremely broad. In general, a person with a cognitive disability has a disability that adversely affects the brain resulting in greater difficulty performing one or more types of mental tasks[83] than the average person.[84] Cognitive impairment is not caused by any one disease or condition, nor is it limited to a specific age group.[85] There are at least two ways to classify cognitive disabilities: by functional disability or by clinical disability. Clinical diagnoses of cognitive disabilities include autism, Down Syndrome, traumatic brain injury (TBI), and even dementia. Other cognitive conditions include attention deficit disorder (ADD), dyslexia (difficulty reading), dyscalculia (difficulty with math), and learning disabilities in general.[86]

"Intellectual disabilities" refer to certain cognitive disabilities that develop at an early age. The American Association on Intellectual and Developmental Disabilities (AAIDD) defines "intellectual disability" as a disability characterized by significant limitations both in intellectual functioning (reasoning, learning, problem solving) and in adaptive behavior, which covers a range of everyday social and practical skills, with an onset before the age of 18.[87] The term covers the same population of individuals who were diagnosed previously with mental retardation.[88]

"Developmental Disabilities" is an umbrella term that includes intellectual disabilities but also includes other disabilities that are apparent during childhood.[89] Developmental disabilities are severe chronic disabilities that can be cognitive or physical or both. These disabilities typically manifest before the age of 22 and are likely to be lifelong. Some developmental disabilities are largely related to physical disabilities, such as cerebral palsy or epilepsy. Other conditions involve

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[81] *West Florida Regional Medical Center v. See*, 79 So. 3d 1, 9 (Fla. 2012).

[82] "Disability." Merriam-Webster.com. Accessed November 22, 2017. https://www.merriam-webster.com/dictionary/disability.

[83] Tasks such as reasoning, planning, problem-solving, abstract thinking, comprehension of complex ideas, and learning.

[84] Finn Orfano, *Defining cognitive disability*, BRIGHT HUB EDUCATION, http://www.brighthubeducation.com/special-ed-learning-disorders/70555-defining-cognitive-disabilities/ (last visited November 24, 2017).

[85] CENTERS FOR DISEASE CONTROL AND PREVENTION, *Cognitive Impairment: The Impact on Health in Florida*, https://www.cdc.gov/aging/pdf/cognitive_impairment/cogImp_fl_final.pdf (last visited Nov. 24, 2017).

[86] WebAIM, *Cognitive*, https://webaim.org/articles/cognitive/ (last visited Nov. 24, 2017).

[87] AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, *Frequently Asked Questions on Intellectual Disability*, https://aaidd.org/intellectual-disability/definition/faqs-on-intellectual-disability#.Whh9K7pFzct (last visited Nov. 24, 2017).

[88] *Id.*

[89] *Id.*

the co-occurrence of a physical and intellectual disability, for example Down Syndrome or Fetal Alcohol Syndrome.[90]

Intent-based Definition
The 1997-1998 Constitution Revision Commission cited the intent to offer a body of federal law for purposes of defining the term "disability" as one reason for replacing the term "physical handicap" with "physical disability" in 1998.[91] Related federal laws with definitions of "disabilities" could include, without limitation, the Americans with Disabilities Act,[92] the 1973 Rehabilitation Act,[93] the Social Security Disability Insurance Program,[94] the Fair Housing Act,[95] or the Individuals with Disabilities Education Act.[96]

B. EFFECT OF PROPOSED CHANGES:

The proposal repeals the Florida Alien Land Law. The repeal abrogates the authorization of the Legislature to regulate or prohibit the ownership, inheritance, disposition, and possession of real property by aliens ineligible for citizenship.

The proposal also expands the prohibited bases of government discrimination to include a "cognitive disability," rather than only physical disabilities. Thus, classifications based upon cognitive disabilities may be subject to a higher level of judicial scrutiny under the Florida Constitution than is currently required by the Equal Protection Clause of the U.S. Constitution.

The term "cognitive disability" is undefined.

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[90] *Id.*
[91] *Supra* note 64.
[92] Under the ADA, a "disability" is defined as a physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such impairment; or being regarded as having such an impairment. 42 U.S.C. § 12102.
[93] The definition of "disability" under the ADA applies to claims under the 1973 Rehabilitation Act. 29 U.S.C. § 705(20)(B).
[94] For individuals applying for disability benefits under Title II of the Social Security Act (Disability), and for adults applying under Title XVI (SSI), the definition of disability is the same. The law defines disability as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment (s) which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. Under Title XVI (SSI), a child under the age of 18 will be considered disabled if he or she has a medically determinable physical or mental impairment or combination of impairments that causes marked and severe functional limitations, and that can be expected to cause death or that has lasted or can be expected to last for a continuous period of not less than 12 months. A "medically determinable impairment" is an impairment that results from anatomical, physiological, or psychological abnormalities that can be shown by medically acceptable clinical and laboratory diagnostic techniques. *See Disability Evaluation under Social Security*, Social Security Administration, https://www.ssa.gov/disability/professionals/bluebook/general-info.htm (last visited Nov. 24, 2017).
[95] Under the FHA, a "handicap" means, with respect to a person, a physical or mental impairment which substantially limits one or more of such person's major life activities; a record of having such impairment; or being regarded as having such impairment. 42 U.S.C. § 3602 (h).
[96] Under IDEA, a "child with a disability" means a child with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities. For children aged 3 -9, the definition may also include children experiencing developmental delays in physical development, cognitive development, communication development, social or emotional development, or adaptive development. 20 U.S.C. § 1401(3).

If approved by the voters, the proposal will take effect on January 8, 2019.[97]

C. FISCAL IMPACT:

The fiscal impact on state and local government is indeterminate.

III. Additional Information:

A. Statement of Changes:
(Summarizing differences between the current version and the prior version of the proposal.)

None.

B. Amendments:

None.

C. Technical Deficiencies:

None.

D. Related Issues:

The adoption of the proposed amendment may subject Florida laws relating to mental, cognitive, or developmental disabilities to a heightened level of judicial scrutiny. Areas of the law which may be impacted include, but are not limited to guardianship, involuntary mental health treatment (Baker Act), etc.

[97] *See* FLA. CONST. ART XI, S. 5(E) (1968) ("Unless otherwise specifically provided for elsewhere in this constitution, if the proposed amendment or revision is approved by vote of at least sixty percent of the electors voting on the measure, it shall be effective as an amendment to or revision of the constitution of the state 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.)

By Commissioner Gamez

gameza-00034-17 201715__

A proposal to amend

Section 2 of Article I of the State Constitution to remove a provision authorizing laws that regulate or prohibit the ownership, inheritance, disposition, and possession of real property by aliens ineligible for citizenship and to provide that a person may not be deprived of any right because of a cognitive disability.

Be It Proposed by the Constitution Revision Commission of Florida:

Section 2 of Article I of the State Constitution is amended to read:

ARTICLE I

DECLARATION OF RIGHTS

SECTION 2. Basic rights.—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 a physical or cognitive disability.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

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January 24, 2018

VIA EMAIL ONLY: lisa.carlton@flcrc.gov
Commissioner Lisa Carlton
Chair Declaration of Rights Committee

VIA EMAIL ONLY: marva.johnson@flcrc.gov
Commissioner Marva Johnson
Chair Education Committee

Re: Florida Bar Real Property Probate & Trust Law Section /Proposals 15 and 30 (Disability)

Dear Commissioners Carlton and Johnson:

This letter is provided on behalf of the Real Property Probate & Trust Law Section of the Florida Bar, a group of Florida lawyers who practice in the areas of real estate, trust and a estate law. The Section is dedicated to serving all Florida lawyers and the public in these fields of practice. We produce educational materials and seminars, assist the public *pro bono*, draft legislation, draft rules of procedure and occasionally serve as a friend to the courts to assist on issues related to our fields of practice. Our Section has over 10,000 members. In response to the Commission's request to The Florida Bar, the Section has provided evaluations concerning other proposals, and was prepared to testify in November when Proposal 30 was calendared for the Declaration of Rights Committee.

Proposals 15 and 30 would amend the "physical disability" provision in the Declaration of Rights. The change would delete the limitation "physical" (Proposal 30), or add in addition to "physical disability" the adjective "cognitive." Both appear to seek an expansion of the anti-discrimination language to include mental disabilities which would appear to also include emotional disabilities.

The Section has historically strived to include the disabled and ensure that access and opportunities are available to the disabled. Many of the Section's members represent disabled clients with physical and/or mental disabilities, protecting their rights, and also have family members who are similarly disabled. Thus, the Section is cognizant of the need to avoid discrimination. At the same time, the Section is acutely aware that the Proposals appear to create many unanticipated adverse consequences.

Historically, a physically handicap no discrimination provision was added to the Constitution in 1974. The 1998 Constitutional Revision Commission determined that the term "handicap" was derogatory and proposed "disability" as a substitute. The voters approved that substitute.

Currently, disabilities issues are addressed in a number of Federal and State laws. Most notably relating to real property are the Americans with Disability Act and the Federal Fair Housing Act ("FHA"), as well as Florida's Fair Housing Act. These laws address both physical and non-physical disability issues.

Courts addressing disabilities have recognized numerous mental conditions to be disabilities protected by one or more Federal laws, for example: See *Groner v. Golden Gate Gardens Apartments, 250 F.3d 1039, 1041, 1045, (6th Cir. 2001)* (holding tenant suffering from schizophrenia and depression has a "serious mental illness" and therefore, considered to be covered by the FHA); *Bryant Woods Inn, Inc. v. Howard County, Md., 124 F.3d 597, 599 (4th Cir. 1997)* (holding people suffering from Alzheimer's and other forms of dementia considered handicapped under the FHA); *Radecki v. Joura, 114 F.3d 115, 116, (8th Cir. 1997)* (concluding depression can be a handicap pursuant to the FHA).

Identifying physical disabilities was perceived to be relatively easy for both disabled persons, employers, housing providers and business persons. Though "physical disability" was not defined in the Constitution, generally physical disabilities were observable, providing a more objective criteria for those regulated and those seeking regulation under civil and fair rights laws.

Significant uncertainties, and thus significant litigation continue, regarding what is a mental or an emotional disability protected by law. Among the continuing threshold issues are:

- What constitutes a mental or non-physical disability?
- What objective tests are available?
- What exclusions are present?

In the area of non-physical disabilities in the housing and business arena significant issues continue over animals in public spaces. As recent as this week the New York Times reported that one of the world's largest air carriers faces disability accommodation requests for "comfort turkeys, gliding possums known as sugar gliders, snakes, spiders and more" which create safety problems as well as a backlash for those who are unquestionably disabled. "Delta Airlines Tightened the Rules for Service and Support Animals" January 22, 2018, page B2.

Neither proposed Constitutional amendment provides any assistance for interpretation, unlike laws that address disability issues. Definitions and thresholds are not present in the Proposals. If the Proposals delegated implementation lawmaking authority to the Legislature, the Proposals do not address a significant question: what level of scrutiny would a law impacting disabilities be subject? If the Proposals create a strict scrutiny analysis, then that is almost an impossible burden for a law or regulation to overcome.

Significant concerns exist regarding how the Proposals would interact beyond housing and access areas, into education, criminal justice and public safety, and other areas of business, state action, and personal conduct. The economic impact on the State, as well as businesses and individuals would likely be significant.

Thus, the Section appreciates the opportunity to present this short summary of concerns regarding the Proposals. This letter is not intended to evaluate political or extra-legal issues. This letter is not an advocacy position of the Real Property Probate & Trust Law Section of the Florida Bar.

If there are any questions or comments, then please do not hesitate to contact me.

Very truly yours,

Michael J. Gelfand

RPPTL Section Liaison to the
Constitutional Revision Commission

MJG/cmh
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CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1-25-18
Meeting Date

15/30
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Article I, section 2 - Basic Rights

***Name** Cristina M. Suarez, Deputy City Attorney, City of Coral Gables

Address 405 Biltmore Way, 3rd Floor
Street

Phone 305-460-5218

Coral Gables FL 33156
City *State* *Zip*

Email csuarez@coralgables.com

***Speaking:** ☑ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☑ Yes ☐ No

If yes, who? The City of Coral Gables

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

15
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Basic Rights

***Name** Craig Lee

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***Speaking**: ☑ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

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***Required**

The Constitution Revision Commission

COMMITTEE VOTE RECORD

COMMITTEE: Declaration of Rights
ITEM: P 15
FINAL ACTION:
MEETING DATE: Thursday, January 25, 2018
TIME: 8:00 a.m.—5:00 p.m.
PLACE: The Capitol, Tallahassee, Florida

FINAL VOTE			11/29/2017 1 Motion to Temporarily Postpone Carlton		1/25/2018 2 Motion to Temporarily Postpone Stemberger			
Yea	**Nay**	**COMMISSIONERS**	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**
		Donalds						
		Gainey						
		Johnson						
		Joyner						
		Lester						
		Stemberger, VICE CHAIR						
		Carlton, CHAIR						
		TOTALS	FAV	-	FAV	-		
Yea	**Nay**		**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**

CODES: FAV=Favorable
UNF=Unfavorable
-R=Reconsidered
RCS=Replaced by Committee Substitute
RE=Replaced by Engrossed Amendment
RS=Replaced by Substitute Amendment
TP=Temporarily Postponed
VA=Vote After Roll Call
VC=Vote Change After Roll Call
WD=Withdrawn
OO=Out of Order
AV=Abstain from Voting

Constitution Revision Commission
Declaration Of Rights Committee
Proposal Analysis

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

Proposal #: P 30

Relating to: DECLARATION OF RIGHTS, Basic rights

Introducer(s): Commissioner Martinez

Article/Section affected: Article I, Section 2 – Basic rights.

Date: November 27, 2017

	REFERENCE	ACTION
1.	DR	**Pre-meeting**
2.	ED	

I. SUMMARY:

Article I, Section 2 of the Florida Constitution, Florida's "Equal Protection" Provision, expressly forbids discrimination by the government on the basis of race, religion, national origin, or physical disability. This proposal expands the prohibited bases of discrimination to include "any disability," rather than only physical disabilities.

If passed by the Constitution Revision Commission, the proposal will be placed on the ballot at the November 6, 2018, General Election. Sixty percent voter approval is required for adoption. If approved by the voters, the proposal will take effect on January 8, 2019.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

The Equal Protection Clause of the U.S. Constitution and the Basic Rights Provision of the Florida Constitution entitle everyone to stand before the law on equal terms with others. In addition to this principle of equal treatment, the Florida Constitution also expressly prohibits discrimination by the government on the basis of an individual's race, religion, natural origin, or physical disability. Specifically, Article I, Section 2 of the Florida Constitution provides:

> Basic rights.—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.**

Florida is one of only three states with an express constitutional prohibition regarding discrimination on the basis of a disability.[1] The Florida Supreme Court has found that this explicit prohibition is a more stringent constitutional requirement than the right to be treated equally before the law.[2]

Development of Constitutional Protection for Persons with Disabilities

State constitutional protection for persons with disabilities is woven from developments during the 1970s in three parallel areas: educational rights, residential rights, and civil rights.[3] Some developments began in 1971 in federal and state courts, others in proposed legislative amendments, and still others in administrative regulations.[4]

It was within this social context that the Florida Legislature proposed a disability amendment to the Florida Constitution. In 1974, the Florida Senate introduced a Joint Resolution proposing to amend Article I, Section 2 of the Florida Constitution (the Basic Rights provision) to add "mental or physical handicap" as an additional ground of prohibited discrimination.[5] The companion House Joint Resolution,[6] proposed the following amendment to the Basic Rights provision delineating even broader and more specific rights for disabled persons than the Senate version:

> No person shall be subjected to discriminatory treatment which results in the deprivation of any right, benefit, or opportunity on account of a physical or mental handicap; this guarantee shall include, among other areas: housing, access to services and facilities available to the public, education, employment, and any governmental action.

Senate staff explained that the Senate amendment "[spoke] to the rights that have been denied to physically and mentally handicapped because of the stigma attached to being handicapped."[7] However, the Senate Health & Rehabilitative Services Committee amended the proposal to remove mental disabilities from the Senate Joint Resolution.[8] The Senate Joint Resolution, encompassing only "physical handicaps" as a basis of prohibited discrimination, unanimously passed both the Florida Senate and House of Representatives on May 31, 1974.[9] Electors voted overwhelming to adopt the amendment during the 1974 General Election, garnering 76.43% of votes for approval.

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[1] Louisiana constitutionally prohibits discrimination based upon "physical condition." *See* LA. CONST. art. I, § 3 (1974). Rhode Island constitutionally prohibits discrimination on the basis of a "handicap." *See* R. I. CONST. art. I, § 2 (1986).
[2] *Scavella v. School Bd. of Dade County*, 363 So. 2d 1095, 1097 (Fla. 1978).
[3] The Florida Bar Committee on the Mentally Disabled, MENTAL DISABILITY LAW: EDUCATION RIGHTS OF THE HANDICAPPED, 1 (1979)
[4] *Id.*
[5] SJR 917 (1974).
[6] HJR 3621 (1974).
[7] Fla. S. Comm. on HRS, SJR 917 (1974) Staff Evaluation 1 (April 22, 1974).
[8] Senate Bill Action Report 211 (July 17, 1974).
[9] *Id.*

In 1998, as the result of a proposal submitted to electors by the 1997-1998 Florida Constitution Revision Commission, the Basic Rights provision was again amended to revise the term "physical handicap" to "physical disability." The purpose of the amendment was to replace the term "handicap" which has come to be regarded as derogatory, and to offer a body of federal law that Florida courts could use when defining a "disability" under Article I, Section 2.[10]

Disability Discrimination

The standard of review that a court applies in evaluating a claim of discrimination mandates the level of protection guaranteed. Under both the U.S. Constitution and the Florida Constitution, the lowest level of judicial review, the rational basis test,[11] will apply to evaluate a claim of discrimination unless a suspect class, quasi-suspect class, or fundamental right is implicated by the challenged law.[12] In applying the rational basis test, courts begin with a strong presumption that the law or policy under review is valid and the challenging party bears the burden of demonstrating the law or policy does not have a rational basis. Classifications based upon race, national origin, and alienage, are considered "suspect classifications" which trigger a review of claimed discrimination under the highest standard, strict scrutiny.[13] In applying strict scrutiny, it is presumed that the law or policy is unconstitutional and the government bears the burden of proof to overcome the presumption.[14] The constitutional treatment of disabilities varies, however, under the U.S. Constitution and the Florida Constitution.

In *City of Cleburne v. Cleburne Living Center*,[15] the U.S. Supreme Court held that intellectual disabilities were not a "quasi-suspect class" for purposes of the Federal Equal Protection Clause, and that claims of discrimination based upon such classifications were subject to only rational basis review.[16] With regard to intellectual disabilities, the Court explained that:

> If the large and amorphous class of the mentally retarded were deemed quasi-suspect for the reasons given by the Court of Appeals, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.[17]

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[10] Ann C. McGinley and Ellen Catsman Freiden, *Protecting Basic Rights of Florida Citizens*, THE FLORIDA BAR JOURNAL, October 1998.

[11] To satisfy the rational basis test, a statute must bear a rational and reasonable relationship to a legitimate state objective, and it cannot be arbitrary or capriciously imposed. *Dep't of Corr. v. Fla. Nurses Ass'n*, 508 So. 2d 317, 319 (Fla. 1987).

[12] *Amerisure Ins. Co. v. State Farm Mut. Auto. Ins. Co*., 897 So. 2d 1287, 1291 n.2 (Fla. 2005).

[13] Laws subject to strict scrutiny will be sustained only if they are suitably tailored to serve a compelling state interest. *Jackson v. Florida*, 191 So. 3d 423, 427 (Fla. 2016).

[14] The Florida Supreme Court explained that, "this test, which is almost always fatal in its application, imposes a heavy burden of justification upon the state.." *In re Estate of Greenberg*, 390 So. 2d 40, 43 (Fla. 1980).

[15] 473 U.S. 432 (1985).

[16] Despite purporting to apply rational basis scrutiny, the Court actually applied a heightened form of rational basis scrutiny, often referred to as "rational basis with teeth." *See* Michael E. Waterstone, *Disability Constitutional Law*, 63 Emory L. J. 527, 540 (2001).

[17] 473 U.S. 432, 445-446 (1985).

The Supreme Court would continue to affirm this position in later cases involving intellectual disabilities and the mentally ill.[18] Eventually, in *Board of Trustees of the University of Alabama v. Garrett,*[19]a case involving physical disabilities,[20] the U.S. Supreme Court extended to all groups of persons with disabilities the finding from *Cleburne*:[21]

> The result of *Cleburne* is that States are not required by the Fourteenth Amendment to make special accommodations for the *disabled*, so long as their actions toward such individuals are rational [Emphasis added].[22]

In contrast, under the Equal Protection Provision of the Florida Constitution, "physical disabilities" are a specifically enumerated suspect classification requiring strict scrutiny. The Florida Supreme Court has also described the express prohibition against discrimination as a more stringent constitutional requirement than the standard of review in equal protection cases involving suspect classifications.[23] Accordingly, courts need only decide whether laws deprive claimants of any right, not just the right to be treated equally before the law.[24] Thus, this clause in the Florida Constitution is "an unambiguous vehicle for providing greater protection to individuals who are members of any newly enumerated group"[25] than may be found under the U.S. Constitution.

Defining "Disability"

"Disability" or "physical disability" is not defined by the Florida Constitution, nor does it appear that any case has interpreted the meaning of this term under Article I, Section 2.[26] For purposes of construing an undefined constitutional provision, the Florida Supreme Court will first begin with an examination of the provision's explicit language. If that language is clear and unambiguous, and addresses the matter at issue, it is enforced as written. If, however, the provision's language is ambiguous or does not address the exact issue, a court must endeavor to construe the constitutional provision in a manner consistent with the intent of the framers and the voters.[27]

Concept-based Definition

In its ordinary usage, the term "disability" is understood as a physical, mental, cognitive, or developmental condition that impairs, interferes with, or limits a person's ability to engage in

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[18] *See e.g., Heller v. Doe*, 509 U.S. 312 (1993).
[19] 531 U.S. 356 (2001).
[20] The suit was brought by two state employees seeking money damages under the ADA, a nurse with breast cancer who lost her director position after undergoing cancer treatment and a security officer with asthma and sleep apnea denied workplace accommodations. 531 U.S. 356, 362 (2001).
[21] Steven K. Hoge, *Cleburne and the Pursuit of Equal Protection for Individuals with Mental Disorders,* THE JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW 43(4), p. 416-422, available at http://jaapl.org/content/43/4/416 (last visited Nov. 26, 2017).
[22] 531 U.S. 356, 367-368 (2001).
[23] 363 So. 2d 1095, 1097-1098 (1978).
[24] *Id.*
[25] *Supra* note 10.
[26] There does not appear to be any case interpreting the meaning of this term under Article I, Section 2 of the Florida Constitution.
[27] *West Florida Regional Medical Center v. See*, 79 So. 3d 1, 9 (Fla. 2012).

certain tasks or actions or participate in typical daily activities and interactions.[28] However, in practice, there is not a single definition of the term "disability." Health professionals, advocates, and other individuals use the term in different contexts, with different meanings.

For example, the concept of cognitive disabilities is extremely broad. In general, a person with a cognitive disability has a disability that adversely affects the brain resulting in greater difficulty performing one or more types of mental tasks[29] than the average person.[30] Cognitive impairment is not caused by any one disease or condition, nor is it limited to a specific age group.[31] There are at least two ways to classify cognitive disabilities: by functional disability or by clinical disability. Clinical diagnoses of cognitive disabilities include autism, Down Syndrome, traumatic brain injury (TBI), and even dementia. Other cognitive conditions include attention deficit disorder (ADD), dyslexia (difficulty reading), dyscalculia (difficulty with math), and learning disabilities in general.[32]

"Intellectual disabilities" refer to certain cognitive disabilities that develop at an early age. The American Association on Intellectual and Developmental Disabilities (AAIDD) defines "intellectual disability" as a disability characterized by significant limitations both in intellectual functioning (reasoning, learning, problem solving) and in adaptive behavior, which covers a range of everyday social and practical skills, with an onset before the age of 18.[33] The term covers the same population of individuals who were diagnosed previously with mental retardation.[34]

"Developmental Disabilities" is an umbrella term that includes intellectual disabilities but also includes other disabilities that are apparent during childhood.[35] Developmental disabilities are severe chronic disabilities that can be cognitive or physical or both. These disabilities typically manifest before the age of 22 and are likely to be lifelong. Some developmental disabilities are largely related to physical disabilities, such as cerebral palsy or epilepsy. Other conditions involve the co-occurrence of a physical and intellectual disability, for example Down Syndrome or Fetal Alcohol Syndrome.[36]

Intent-based Definition

The 1997-1998 Constitution Revision Commission cited the intent to offer a body of federal law for purposes of defining the term "disability" as one reason for replacing the term "physical handicap" with "physical disability" in 1998.[37] Related federal laws with definitions of

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[28] "Disability." Merriam-Webster.com. Accessed November 22, 2017. https://www.merriam-webster.com/dictionary/disability.

[29] Tasks such as reasoning, planning, problem-solving, abstract thinking, comprehension of complex ideas, and learning.

[30] Finn Orfano, *Defining cognitive disability*, BRIGHT HUB EDUCATION, http://www.brighthubeducation.com/special-ed-learning-disorders/70555-defining-cognitive-disabilities/ (last visited November 24, 2017).

[31] CENTERS FOR DISEASE CONTROL AND PREVENTION, *Cognitive Impairment: The Impact on Health in Florida*, https://www.cdc.gov/aging/pdf/cognitive_impairment/cogImp_fl_final.pdf (last visited Nov. 24, 2017).

[32] WebAIM, *Cognitive*, https://webaim.org/articles/cognitive/ (last visited Nov. 24, 2017).

[33] AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, *Frequently Asked Questions on Intellectual Disability*, https://aaidd.org/intellectual-disability/definition/faqs-on-intellectual-disability#.Whh9K7pFzct (last visited Nov. 24, 2017).

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Supra* note 10.

"disabilities" could include, without limitation, the Americans with Disabilities Act,[38] the 1973 Rehabilitation Act,[39] the Social Security Disability Insurance Program,[40] the Fair Housing Act,[41] or the Individuals with Disabilities Education Act.[42]

B. EFFECT OF PROPOSED CHANGES:

This proposal amends Article I, Section 2 of the Florida Constitution (the Basic Rights Provision) to expand the prohibited bases of discrimination to include "any disability," rather than only physical disabilities. Thus, classifications based upon disabilities may be subject to a higher level of judicial scrutiny under the Florida Constitution than is currently required by the Equal Protection Clause of the U.S. Constitution.

The term "disability" is undefined, but may encompass a wide spectrum of physical, mental, cognitive, and developmental conditions that impair, interfere with, or limit a person's ability to engage in certain tasks or actions. It may also encompass "disabilities" as defined under various federal laws.

If approved by the voters, the proposal will take effect on January 8, 2019.[43]

C. FISCAL IMPACT:

The fiscal impact on state and local government is indeterminate.

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[38] Under the ADA, a "disability" is defined as a physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such impairment; or being regarded as having such an impairment. 42 U.S.C. § 12102.

[39] The definition of "disability" under the ADA applies to claims under the 1973 Rehabilitation Act. 29 U.S.C. § 705(20)(B).

[40] For individuals applying for disability benefits under Title II of the Social Security Act (Disability), and for adults applying under Title XVI (SSI), the definition of disability is the same. The law defines disability as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment (s) which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. Under Title XVI (SSI), a child under the age of 18 will be considered disabled if he or she has a medically determinable physical or mental impairment or combination of impairments that causes marked and severe functional limitations, and that can be expected to cause death or that has lasted or can be expected to last for a continuous period of not less than 12 months. A "medically determinable impairment" is an impairment that results from anatomical, physiological, or psychological abnormalities that can be shown by medically acceptable clinical and laboratory diagnostic techniques. *See Disability Evaluation under Social Security*, Social Security Administration, https://www.ssa.gov/disability/professionals/bluebook/general-info.htm (last visited Nov. 24, 2017).

[41] Under the FHA, a "handicap" means, with respect to a person, a physical or mental impairment which substantially limits one or more of such person's major life activities; a record of having such impairment; or being regarded as having such impairment. 42 U.S.C. § 3602 (h).

[42] Under IDEA, a "child with a disability" means a child with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities. For children aged 3 -9, the definition may also include children experiencing developmental delays in physical development, cognitive development, communication development, social or emotional development, or adaptive development. 20 U.S.C. § 1401(3).

[43] *See* FLA. CONST. ART XI, S. 5(E) (1968) ("Unless otherwise specifically provided for elsewhere in this constitution, if the proposed amendment or revision is approved by vote of at least sixty percent of the electors voting on the measure, it shall be effective as an amendment to or revision of the constitution of the state 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.)

III. Additional Information:

A. Statement of Changes:

(Summarizing differences between the current version and the prior version of the proposal.)

None.

B. Amendments:

None.

C. Technical Deficiencies:

None.

D. Related Issues:

The adoption of the proposed amendment may subject Florida laws relating to mental, cognitive, or developmental disabilities to a heightened level of judicial scrutiny. Areas of the law which may be impacted include, but are not limited to guardianship, involuntary mental health treatment (Baker Act), etc.

By Commissioner Martinez

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A proposal to amend
Section 2 of Article I of the State Constitution to provide that a person may not be deprived of any right because of any disability.

Be It Proposed by the Constitution Revision Commission of Florida:

Section 2 of Article I of the State Constitution is amended to read:

ARTICLE I
DECLARATION OF RIGHTS

SECTION 2. Basic rights.—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 <u>any</u> ~~physical~~ disability.

CODING: Words ~~stricken~~ are deletions; words <u>underlined</u> are additions.

GELFAND & ARPE, P.A.

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January 24, 2018

VIA EMAIL ONLY: lisa.carlton@flcrc.gov
Commissioner Lisa Carlton
Chair Declaration of Rights Committee

VIA EMAIL ONLY: marva.johnson@flcrc.gov
Commissioner Marva Johnson
Chair Education Committee

Re: Florida Bar Real Property Probate & Trust Law Section /Proposals 15 and 30 (Disability)

Dear Commissioners Carlton and Johnson:

This letter is provided on behalf of the Real Property Probate & Trust Law Section of the Florida Bar, a group of Florida lawyers who practice in the areas of real estate, trust and a estate law. The Section is dedicated to serving all Florida lawyers and the public in these fields of practice. We produce educational materials and seminars, assist the public *pro bono*, draft legislation, draft rules of procedure and occasionally serve as a friend to the courts to assist on issues related to our fields of practice. Our Section has over 10,000 members. In response to the Commission's request to The Florida Bar, the Section has provided evaluations concerning other proposals, and was prepared to testify in November when Proposal 30 was calendared for the Declaration of Rights Committee.

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Currently, disabilities issues are addressed in a number of Federal and State laws. Most notably relating to real property are the Americans with Disability Act and the Federal Fair Housing Act ("FHA"), as well as Florida's Fair Housing Act. These laws address both physical and non-physical disability issues.

Courts addressing disabilities have recognized numerous mental conditions to be disabilities protected by one or more Federal laws, for example: See *Groner v. Golden Gate Gardens Apartments, 250 F.3d 1039, 1041, 1045, (6th Cir. 2001)* (holding tenant suffering from schizophrenia and depression has a "serious mental illness" and therefore, considered to be covered by the FHA); *Bryant Woods Inn, Inc. v. Howard County, Md., 124 F.3d 597, 599 (4th Cir. 1997)* (holding people suffering from Alzheimer's and other forms of dementia considered handicapped under the FHA); *Radecki v. Joura, 114 F.3d 115, 116, (8th Cir. 1997)* (concluding depression can be a handicap pursuant to the FHA).

Identifying physical disabilities was perceived to be relatively easy for both disabled persons, employers, housing providers and business persons. Though "physical disability" was not defined in the Constitution, generally physical disabilities were observable, providing a more objective criteria for those regulated and those seeking regulation under civil and fair rights laws.

Significant uncertainties, and thus significant litigation continue, regarding what is a mental or an emotional disability protected by law. Among the continuing threshold issues are:

- What constitutes a mental or non-physical disability?
- What objective tests are available?
- What exclusions are present?

In the area of non-physical disabilities in the housing and business arena significant issues continue over animals in public spaces. As recent as this week the New York Times reported that one of the world's largest air carriers faces disability accommodation requests for "comfort turkeys, gliding possums known as sugar gliders, snakes, spiders and more" which create safety problems as well as a backlash for those who are unquestionably disabled. "Delta Airlines Tightened the Rules for Service and Support Animals" January 22, 2018, page B2.

Neither proposed Constitutional amendment provides any assistance for interpretation, unlike laws that address disability issues. Definitions and thresholds are not present in the Proposals. If the Proposals delegated implementation lawmaking authority to the Legislature, the Proposals do not address a significant question: what level of scrutiny would a law impacting disabilities be subject? If the Proposals create a strict scrutiny analysis, then that is almost an impossible burden for a law or regulation to overcome.

Significant concerns exist regarding how the Proposals would interact beyond housing and access areas, into education, criminal justice and public safety, and other areas of business, state action, and personal conduct. The economic impact on the State, as well as businesses and individuals would likely be significant.

Thus, the Section appreciates the opportunity to present this short summary of concerns regarding the Proposals. This letter is not intended to evaluate political or extra-legal issues. This letter is not an advocacy position of the Real Property Probate & Trust Law Section of the Florida Bar.

If there are any questions or comments, then please do not hesitate to contact me.

Very truly yours,

Michael J. Gelfand

RPPTL Section Liaison to the
Constitutional Revision Commission

MJG/cmh
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CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1-25-18
Meeting Date

15/30
Proposal Number (if applicable)

***Topic** Article I, Section 2 - Basic Rights

Amendment Barcode (if applicable)

***Name** Cristina M. Suarez, Deputy City Attorney, City of Coral Gables

Address 405 Biltmore Way, 3rd Floor
Street

Phone 305-460-5218

Coral Gables FL 33156
City *State* *Zip*

Email csuarez@coralgables.com

***Speaking:** ☑ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☑ Yes ☐ No

If yes, who? The City of Coral Gables

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record. ****Required***

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/2018
Meeting Date

30
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** Disabilities

***Name** Eddy Labrador

Address 115 S. Andrews Ave. Room 426 Phone 954-357-7525
Street

Ft. Lauderdale FL 33301 Email elabrador@broward.org
City *State* *Zip*

***Speaking:** ☑ For ☑ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☐ No

If yes, who? Broward County

Are you a registered lobbyist? ☑ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

The Constitution Revision Commission

COMMITTEE VOTE RECORD

COMMITTEE: Declaration of Rights
ITEM: P 30
FINAL ACTION: Favorable
MEETING DATE: Thursday, January 25, 2018
TIME: 8:00 a.m.—5:00 p.m.
PLACE: The Capitol, Tallahassee, Florida

FINAL VOTE			11/29/2017 1 Motion to Temporarily Postpone Carlton					
Yea	**Nay**	**COMMISSIONERS**	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**
X		Donalds						
X		Gainey						
X		Johnson						
X		Joyner						
X		Lester						
X		Stemberger, VICE CHAIR						
	X	Carlton, CHAIR						
6	1	**TOTALS**	FAV	-				
Yea	**Nay**		**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**

CODES: FAV=Favorable
UNF=Unfavorable
-R=Reconsidered
RCS=Replaced by Committee Substitute
RE=Replaced by Engrossed Amendment
RS=Replaced by Substitute Amendment
TP=Temporarily Postponed
VA=Vote After Roll Call
VC=Vote Change After Roll Call
WD=Withdrawn
OO=Out of Order
AV=Abstain from Voting

Constitution Revision Commission
Declaration Of Rights Committee
Proposal Analysis

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

Proposal #: P 36

Relating to: DECLARATION OF RIGHTS, Excessive punishments

Introducer(s): Commissioner Martinez

Article/Section affected: Article I, Section 17

Date: January 22, 2018

	REFERENCE	ACTION
1.	DR	**Pre-meeting**
2.	JU	

I. SUMMARY:

Article I, Section 17 of the Florida Constitution provides that the death penalty is an authorized punishment for capital crimes designated by the Florida Legislature. The provision also empowers the Florida Legislature to select methods of execution in Florida. Currently, a death sentence in Florida may be carried out by lethal injection or electrocution.

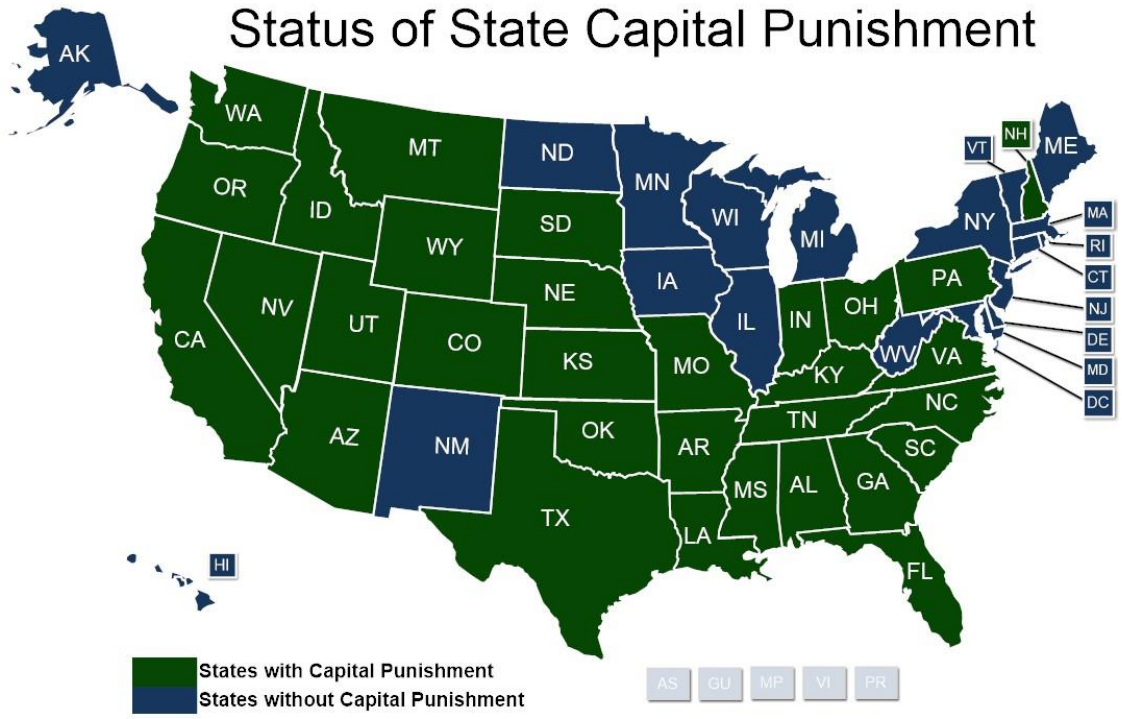
This proposal repeals the death penalty as an authorized punishment for capital crimes and provides that the death penalty, while not in violation of the Eighth Amendment's prohibition on cruel and unusual punishment, is prohibited under the Florida Constitution. The proposal establishes life imprisonment without the possibility for release as the maximum penalty for capital crimes.

If approved by the Constitution Revision Commission, the proposal will be placed on the ballot at the November 6, 2018, General Election. Sixty percent voter approval is required for adoption. If approved by the voters, the proposal will take effect on January 8, 2019. The proposal does not appear to apply retroactively.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Congress or any state legislature may prescribe the death penalty, also known as capital punishment, for murder and other capital crimes. Capital punishment is currently authorized in 31 states, by the federal government, and the U.S. Military.[1]



Source: National Conference of State Legislatures[2]

The Supreme Court has ruled that the death penalty is not a per se violation of the Eighth Amendment's ban on cruel and unusual punishment, but the Eighth Amendment does shape certain procedural aspects regarding when a death sentence may be imposed and how it must be carried out.[3]

The Eighth Amendment requires that punishment be proportional to the crime. In performing its proportionality analysis, the Supreme Court looks to the following three factors: a consideration of the offense's gravity and the stringency of the penalty; a consideration of how the jurisdiction punishes its other criminals; and a consideration of how other jurisdictions punish the same crime.[4] This requirement has effectively limited the application of the death penalty to only capital

[1] NATIONAL CONFERENCE OF STATE LEGISLATURES, *States and Capital Punishment*, Feb. 2, 2017, available at http://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx (last visited Jan. 21, 2018). However, a governor-imposed moratorium is in effect in Colorado, Oregon, Pennsylvania and Washington. *See* DEATH PENALTY INFORMATION CENTER, *States With and Without the Death Penalty*, Nov. 9, 2016, available at https://deathpenaltyinfo.org/states-and-without-death-penalty (last visited Jan. 21, 2018).
[2] *Id.*
[3] *See Gregg v. Georgia*, 428 U.S. 153 (1976).
[4] *See Solem v. Helm*, 463 U.S. 277 (1983).

offenses.[5] Additionally, when imposing a sentence of death, juries must be guided by the particular circumstances of the criminal, and the court must have conducted an individualized sentencing process.

Although a legislature may prescribe the manner of execution, the Eighth Amendment requires that it not inflict unnecessary or wanton pain upon the criminal.[6] Courts apply an "objectively intolerable" test when determining if the method of execution violates the Eighth Amendment's ban on cruel and unusual punishments.[7] The Supreme Court has never invalidated a state's chosen procedure for carrying out the death penalty as a violation of the Eighth Amendment.[8]

Additionally, the Eighth Amendment prohibits the execution of certain persons. A sentence of death may not be carried out against an offender, in any state, if:

- The offender was a juvenile when he or she committed the capital offense;[9]
- The offender is intellectually disabled;[10] or
- The offender is insane.[11]

Legal History of Capital Punishment in Florida

Prior to 1923, Florida executions were carried out by the counties rather than the state, with the first known execution taking place in 1827.[12] The most common method of execution at the time was hanging. In 1923, the Florida Legislature placed all executions in Florida under state (rather than local) jurisdiction and substituted electrocution for hanging as an execution method. [13]

In 1972, in *Furman v. Georgia,* the United States Supreme Court struck down all then-existing death penalty statutes in the U.S. on grounds that the imposition and carrying out of the death penalty constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments due to the arbitrary and racially biased way in which death sentences were imposed.[14]

Florida was the first state to statutorily reenact the death penalty after the then existing capital statutes were invalidated by the *Furman v. Georgia* decision and its related cases. In late November 1972, a special session of the Florida Legislature was convened, the primary purpose of which was to consider a new death penalty law. New capital punishment procedures were passed on December 1, and signed into law by Governor Askew on December 8.[15] Florida resumed

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[5] *See Coker v. Georgia*, 433 U.S. 584 (1977) (prohibiting the imposition of the death penalty for the crime of raping an adult woman because it violates the proportionality requirement).
[6] *See Ingraham v. Wright*, 430 U.S. 651 (1977).
[7] *See Baze v. Rees*, 553 U.S. 35 (2008).
[8] *See Baze v. Rees*, 553 U.S. 35 (2008).
[9] *See Roper v. Simmons*, 543 U.S. 551, (2005).
[10] *See Atkins v. Virginia*, 536 U.S. 304, (2002); s. 921.137, F.S.
[11] *See Ford v. Wainwright*, 477 U.S. 399 (1986); *Panetti v. Quarterman*, 551 U.S. 930 (2007).
[12] DEATH PENALTY INFORMATION CENTER, *Florida*, available at https://deathpenaltyinfo.org/florida-1 (last visited Jan. 21, 2018).
[13] FLORIDA DEPARTMENT OF CORRECTIONS, *Annual Report: Fiscal Year 2015-2016,* pg. 36..
[14] *See Furman v. Georgia*, 408 U.S. 238 (1972)
[15] Michael L. Radelet, *Rejecting the Jury: The Imposition of the Death Penalty in Florida*, 18 U.C. Davis L. Rev 1410 (1984-1985), available at https://lawreview.law.ucdavis.edu/issues/18/4/iii-empirical-studies/DavisVol18No4_Radelet.pdf (last visited Jan. 22, 2018).

executions in 1979, after the U.S. Supreme Court ended the de facto moratorium on the death penalty in *Gregg v. Georgia*, 428 U.S. 153 (1976).

Prior to 2002, specific authority to impose the death penalty existed only by general law and did not emanate from a specific constitutional source other than the general police power of the state. In 2001, in response to a number of cases challenging the death penalty and electrocution as prohibited by the Florida Constitution as "cruel or unusual" punishment, the Legislature by joint resolution proposed the following amendment to Section 17 of the Florida Constitution:

> SECTION 17. Excessive punishments.--Excessive fines, cruel and ~~or~~ unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. The death penalty is an authorized punishment for capital crimes designated by the legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution. Any method of execution shall be allowed, unless prohibited by the United States Constitution. Methods of execution may be designated by the legislature, and a change in any method of execution may be applied retroactively. A sentence of death shall not be reduced on the basis that a method of execution is invalid. In any case in which an execution method is declared invalid, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method. This section shall apply retroactively.

The proposed amendment was adopted by the electors in 2002, garnering 69.7% of votes for approval.

Capital Sentencing Proceedings

Capital Felonies that have been designated by the Florida Legislature as eligible for imposition of the death penalty consist of the following specified offenses:

- First-degree murder;[16]
- The killing of an unborn child by injury to the mother if it resulted in the death of the mother (allows for distinct charges for the death of the child and the mother);[17]
- Willfully and unlawfully making, possessing, throwing, projecting, placing, discharging any destructive device if the act results in the death of another person (including attempts); [18]

[16] The unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being; when committed by a person engaged in the perpetration of, or in the attempt to perpetrate another felony (i.e. arson, sexual battery, robbery, burglary, kidnapping, aggravated abuse of a child or vulnerable adult, carjacking, etc.); or which resulted from the unlawful distribution by a person 18 years of age or older of certain illegal substances. s. 782.04, F.S.
[17] s. 782.09(1)(a), F.S.
[18] s. 790.161(4), F.S.

- Unlawfully manufacturing, possessing, selling, delivering, sending, mailing, displaying, using, or making readily accessible to others a weapon of mass destruction if death results (including threats, attempts, and conspiracies);[19]
- Certain drug trafficking, importation, and manufacturing crimes that result in death or where the probable result of such act would be the death of a person;[20]
- Sexual battery upon, or in the attempt to commit sexual battery the injury of the sexual organs of, a person less than 12 years of age, if committed by a person 18 years of age or older.[21]

Trial Phase

In Florida, an offense that may be punished by death, must be prosecuted by indictment.[22]The Florida Rules of Criminal Procedure require the state to give notice to a defendant of its intent to seek the death penalty within 45 days from the date of arraignment on any of the aforementioned capital felonies.[23] The notice must be filed with the court within 45 days of arraignment and contain a list of the aggravating factors the state intends to prove, and has reason to believe it can prove, beyond a reasonable doubt.[24] The court may allow the state to amend the notice upon a showing of good cause.[25]

Section 775.082(1)(a), F.S., provides that if the offender is convicted of a capital felony at trial, he or she must be punished by death if the death penalty sentencing proceeding subsequent to the conviction results in a determination that such person be punished by death. Otherwise, such person is sentenced to life imprisonment without the possibility for parole.

Sentencing Phase

If a defendant is convicted of a capital felony, a separate sentencing proceeding is conducted to determine whether the defendant should be sentenced to death or life imprisonment.[26] The proceeding is conducted by the trial judge before the trial jury, or, if the trial jury in unable to be reconvened, was waived, or the defendant pled guilty, is conducted by the trial judge before a jury impaneled for the purpose.[27] A defendant may waive his or her right to a sentencing proceeding by a jury.[28]

In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant, including statutorily specified aggravating factors and mitigating circumstances.

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[19] s. 790.166, F.S.
[20] s. 893.135(1), F.S.
[21] s. 794.011(2)(a), F.S.; But see *Kennedy v. Louisiana*, 554 U.S. 407 (2008) holding that the Eighth Amendment to U.S. Constitution prohibits imposition of the death penalty for the rape of a child in cases where the crime did not result, and was not intended to result, in the death of the victim.
[22] Fla. R. Crim. P. 3.140.
[23] Fla. R. Crim. P. 3.181.
[24] *Id.*
[25] *Id.*
[26] s. 921.141(1), F.S.
[27] s. 921.141(1), F.S.
[28] *Id.*

Aggravating Factors for Capitol Felonies (except capital drug trafficking offenses)
The aggravating factors that may be considered are limited to the following for all capital felonies except capitol drug trafficking offenses:[29]

- The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.
- The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
- The defendant knowingly created a great risk of death to many persons.
- The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.
- The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
- The capital felony was committed for pecuniary gain.
- The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
- The capital felony was especially heinous, atrocious, or cruel.
- The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
- The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.
- The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.
- The victim of the capital felony was a person less than 12 years of age.

[29] s. 921.141(6), F.S.

- The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

- The capital felony was committed by a criminal gang member, as defined in s. 874.03.

- The capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed.

- The capital felony was committed by a person subject to an injunction issued pursuant to s. 741.30 or s. 784.046, or a foreign protection order accorded full faith and credit pursuant to s. 741.315, and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.

Aggravating Factors in Capital Drug Trafficking Offenses

The aggravating factors that may be considered in capital drug trafficking felonies are limited to the following:[30]

- The capital felony was committed by a person under a sentence of imprisonment.

- The defendant was previously convicted of another capital felony or of a state or federal offense involving the distribution of a controlled substance which is punishable by a sentence of at least 1 year of imprisonment.

- The defendant knowingly created grave risk of death to one or more persons such that participation in the offense constituted reckless indifference or disregard for human life.

- The defendant used a firearm or knowingly directed, advised, authorized, or assisted another to use a firearm to threaten, intimidate, assault, or injure a person in committing the offense or in furtherance of the offense.

- The offense involved the distribution of controlled substances to persons under the age of 18 years, the distribution of controlled substances within school zones, or the use or employment of persons under the age of 18 years in aid of distribution of controlled substances.

- The offense involved distribution of controlled substances known to contain a potentially lethal adulterant.

- The defendant intentionally killed the victim; intentionally inflicted serious bodily injury that resulted in the death of the victim; or intentionally engaged in conduct

[30] s. 921.142(7), F.S.

intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim.

- The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.
- The defendant committed the offense after planning and premeditation.
- The defendant committed the offense in a heinous, cruel, or depraved manner in that the offense involved torture or serious physical abuse to the victim.

Mitigating Circumstances
Unlike aggravating factors, mitigating circumstances are not limited by statute, but include the consideration of the following:[31]

- The defendant has no significant history of prior criminal activity.
- The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- The defendant was an accomplice in the capital felony committed by another person, and the defendant's participation was relatively minor.
- The victim was a participant in the defendant's conduct or consented to the act.
- The defendant was under extreme duress or under the substantial domination of another person.
- The capacity of the defendant to appreciate the criminality of her or his conduct or to conform her or his conduct to the requirements of law was substantially impaired.
- The age of the defendant at the time of the offense.
- The defendant could not have reasonably foreseen that her or his conduct in the course of the commission of the offense would cause or would create a grave risk of death to one or more persons.
- The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

After hearing all of the evidence presented regarding aggravating and mitigating circumstances, the jury must determine, unanimously, whether any aggravating factors exists.[32] If the jury does not unanimously find that one aggravating factor exists, the defendant is ineligible for a sentence of death.[33] If the jury unanimously find at least one aggravating factor, the defendant is eligible for

[31] ss. 921.141(7) and 921.142(8), F.S.
[32] s. 921.141(2), F.S.
[33] s. 921.141(2), F.S.

a sentence of death and the jury must make a recommendation to the court as to whether the defendant should be sentenced to life imprisonment without the possibility of parole or death.[34]

If the jury recommends a sentence of life imprisonment without the possibility of parole, the court must impose the recommended sentence.[35] If the jury recommends a sentence of death, the court, after considering each aggravating factor found by the jury and all mitigating circumstances, may impose a sentence of death or life imprisonment without the possibility of parole.[36]

If the defendant waived his or her right to a sentencing proceeding by a jury, the trial judge, after considering all aggravating factors and mitigating circumstances, may impose a sentence of life imprisonment without parole or a sentence of death (only if the court finds the existence of one aggravating factor beyond a reasonable doubt).[37]

In each case in which the court imposes a sentence of death, the court must enter a written order addressing the aggravating factors which were found to exist, the mitigating circumstances reasonably established by the evidence, whether there are sufficient aggravating factors to warrant the death penalty, and whether the aggravating factors outweigh the mitigating circumstances reasonably established by the evidence.[38] If the court does not issue its order requiring the death sentence within 30 days after of the rendition of the judgment and sentence, the court must instead impose a sentence of life imprisonment without the possibility of parole.[39]

Appeals

Death sentences are automatically appealed to the Florida Supreme Court.[40] The Florida Supreme Court reviews the enumerations of error, if raised, the sufficiency of the evidence used to convict the defendant, and the proportionality of the appellant's death sentence.[41] The Court is required to review the sufficiency of the evidence and the proportionality of the appellant's death sentence even if such issues are not raised on appeal.[42] The Florida Supreme Court must render a judgment within two years of the filing of the notice of appeal.[43]

The Court's judgment may affirm the trial court's decision or remand the case to the trial court for a new guilt/innocence and/or penalty phase, or remand the case to the trial court with directions for a judgment of acquittal or to reduce the sentence to life. The defendant may further appeal the decision of the Florida Supreme Court to the U.S. Supreme Court, the "direct appeal," or pursue a number of collateral remedies.

[34] s. 921.141(2), F.S.
[35] s. 921.141(3), F.S.
[36] s. 921.141(3), F.S.
[37] s. 921.141(3), F.S.
[38] s. 921.141(4), F.S.
[39] s. 921.141(4), F.S.
[40] s. 921.141(5), F.S.; Art. 5, Sec. 3, Fla. Const.; Fla. R. App. Proc. 9.030(a)(1)(A)(i).
[41] ss. 924.051(3) and 921.141(4), F.S.; Fla. R. App. Proc. 9.142(a)(5).
[42] Fla. R. App. P. 9.142(a)(5).
[43] s. 921.141(5), F.S.

Methods of Execution

A sentence of death imposed in Florida may not specify any particular method of execution,[44] as execution methods may change over time. A change in execution methods is not considered as an increase in punishment or modification of the penalty of death.[45]

Current law provides that a death sentence may be executed by one of two methods: lethal injection or electrocution.[46] A death sentence will be carried out by lethal injection unless the person sentenced to death affirmatively elects to be executed by electrocution.[47] Florida administers executions by lethal injection or electric chair at the execution chamber located at Florida State Prison in Raiford, FL.[48]

Lethal Injection Protocol

Florida uses the following drugs in its lethal injection protocol: etomidate, rocuronium bromide, and potassium acetate.[49] The Florida Department of Corrections establishes detailed procedures for execution by lethal injection.[50]

Electrocution

A person convicted and sentenced to death for a capital crime has one opportunity to elect that his or her death sentence be carried out by electrocution.[51] The inmate must personally make the election in writing and deliver it to the warden of the correctional facility within 30 days after the issuance of the mandate from the Florida Supreme Court affirming the sentence of death.[52] If the inmate fails to make the election within the specified time period, the election is deemed waived and he or she will be executed by lethal injection.[53] A sentence of death by electrocution is performed through use of an electric chair.[54] The Florida Department of Corrections establishes detailed procedures for execution by electrocution.[55]

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[44] s. 922.108, F.S.
[45] s. 922.105(5), F.S.
[46] s. 922.10, F.S.
[47] s. 922.105(1), F.S.
[48] Florida Department of Corrections, *Death Row*, available at http://www.dc.state.fl.us/oth/deathrow/ (last visited Jan. 21, 2018).
[49] *See* Florida Department of Corrections, *Execution by Lethal Injection Procedures*, Jan. 24, 2017, available at http://www.dc.state.fl.us/oth/deathrow/lethal-injection-procedures-as-of_01-04-17.pdf (last visited Jan. 21, 2018).
[50] *Id.*
[51] s. 922.105(2), F.S.
[52] s. 922.105(2), F.S. If the mandate issued prior to the effective date of the Act, the election must be made and delivered to the warden within thirty days after the effective date of the Act. If a warrant of execution was pending on the effective date of the Act, or if a warrant is issued within 30 days after the effective date of the Act, the person sentenced to death who is the subject of the warrant must submit a written election within 48 hours after a new date for execution of the death sentence is set by the Governor.
[53] s. 922.105(2), F.S.
[54] The three-legged electric chair was constructed from oak by Department of Corrections personnel in 1998 and installed at Florida State Prison in Raiford, FL, in 1999. The previous chair was made by inmates from oak in 1923 after the Florida legislature designated electrocution as the official mode of execution.
[55] *See* FLORIDA DEPARTMENT OF CORRECTIONS, *Execution by Electrocution Procedures*, Jan. 24, 2017, available at http://www.dc.state.fl.us/oth/deathrow/electrocution-procedures-as-of_01-04-17.pdf (last visited Jan. 21, 2018).

If lethal injection or electrocution is held unconstitutional by the Florida Supreme Court under the State Constitution; or held to be unconstitutional by the United States Supreme Court under the United States Constitution; or if the United States Supreme Court declines to review any judgment of a lower court holding a method of execution unconstitutional under the United States Constitution; all persons sentenced to death in Florida for a capital crime must be executed by any other constitutional method of execution.[56] Under such circumstances, the death sentence remains in force until the sentence can be lawfully executed by any valid method of execution.[57]

Execution

An inmate's death sentence may not be carried out until the Governor issues a death warrant.[58] A death warrant may be issued after the inmate has pursued all possible collateral remedies in a timely manner or after the inmate has failed to pursue said remedies within specified time limits.[59] Upon issuance of a death warrant, the Governor must transmit the warrant and the record to the warden and direct the warden to execute the sentence at a time designated in the warrant.[60]

The warden of the state prison designates the executioner.[61] The warden (or a deputy) must be present at the execution and must select twelve individuals to witness the execution.[62] A qualified physician must be present, and the inmate's counsel, ministers of religion, representatives of the media, and prison and correctional officers may be present.[63] Immediately before the inmate's execution, the death warrant must be read to the inmate.[64] The physician must announce when death has been inflicted.[65]

After the death sentence has been executed, the warden must send the warrant and a signed statement of the execution to the Secretary of State and file an attested copy of the warrant and statement with the clerk of the court that imposed the sentence.[66]

Florida Capital Punishment Statistics

Since the reinstatement of capital punishment by the United States Supreme Court in 1976, Florida has executed 95 inmates.[67] During the same period, several other states have carried out a greater number of executions, including Texas, Oklahoma, and Virginia.[68] Florida inmates spend an average of 15.6 years on death row before execution of the death sentence.[69] The average age at

[56] s. 922.105(3), F.S.
[57] s. 922.105(9), F.S.
[58] s. 922.052(1), F.S.
[59] s. 922.095, F.S
[60] s. 922.052(1), F.S.
[61] s. 922.10, F.S. A person authorized by state law to prepare, compound, or dispense medication and designated by the Department of Corrections may prepare, compound, or dispense a lethal injection. Section 922.105(6), F.S.
[62] s. 922.11, F.S.
[63] *Id.*
[64] s. 922.10, F.S.
[65] s. 922.11(2), F.S.
[66] s. 922.12, F.S.
[67] *Supra* note 48.
[68] By early 2016, Texas, Oklahoma, and Virginia had carried out 531, 112, and 111 executions, respectively. *See* Tonya Alanez, *Death penalty in Florida: By the numbers*, SUN SENTINEL, Jan. 15, 2016, available at http://www.sun-sentinel.com/news/florida/fl-death-penalty-roundup-20160115-story.html (last visited Jan. 21, 2018).
[69] *Supra* note 13.

offense for executed inmates is 27.4 years old and the average age at the time of execution is 44.9 years old.[70]

Florida Executions Since 1976 [71]					
Year	***# of Executions***	***Year***	***# of Executions***	***Year***	***# of Executions***
1979	1	1992	2	2005	1
1980	0	1993	3	2006	4
1981	0	1994	1	2007	0
1982	0	1995	3	2008	2
1983	1	1996	2	2009	2
1984	8	1997	1	2010	1
1985	3	1998	4	2011	2
1986	3	1999	1	2012	3
1987	1	2000	6	2013	7
1988	2	2001	1	2014	8
1989	2	2002	3	2015	2
1990	4	2003	3	2016	1
1991	2	2004	2	2017	3
TOTAL: 95					

Current Death Row Statistics

As of January 21, 2018, there were a total of 349 people awaiting execution in Florida[72] – more than any other state except California.[73]. Men on death row are housed at Florida State Prison in Raiford, FL, and Union Correctional Institution in Raiford, FL. The women on death row are housed at Lowell Annex in Lowell, FL.[74]

There is currently one active death warrant which was issued on January 19, 2018, and is scheduled to be carried out on February 22, 2018.[75]

Florida Death Row Population as of 1/21/18			
Race	***Female***	***Male***	***Total***
White	1	207	208
Black	2	131	133
Other	0	8	8
TOTAL	***3***	***346***	***349***

[70] *Supra* note 13.
[71] *Supra* note 48.
[72] Florida Department of Corrections, *Death Row Roster*, available at http://www.dc.state.fl.us/OffenderSearch/deathrowroster.aspx (last visited Jan. 21, 2018).
[73] California has 747 inmates under a sentence of death. *See* Paige St. John and Maloy Moore, *These are the 747 inmates awaiting execution of California's death row*, Los Angeles Times, Aug. 24, 2017, available at http://www.latimes.com/projects/la-me-death-row/ (last visited Jan. 21, 2018).
[74] *Supra* note 48.
[75] Florida Supreme Court, *Pending Death Warrant Filings*, available at http://www.floridasupremecourt.org/pub_info/deathwarrants.shtml (last visited Jan. 21, 2018).

Pending Cases
As of January 15, 2017, state attorneys reported a total of 313 pending death penalty cases of which 66 were ready for trial in the twenty judicial circuits.[76]

Exonerations
According to the Death Penalty Information Center, a non-profit organization based out of Washington, D.C., 27 people have been "exonerated"[77] from Florida's death row since 1973, more than any other state.[78]

B. EFFECT OF PROPOSED CHANGES:

This proposal repeals the death penalty as an authorized punishment for capital crimes and provides that the death penalty, while not in violation of the Eight Amendment's prohibition on cruel and unusual punishment, is prohibited under the Florida Constitution. The proposal establishes life imprisonment without the possibility for release as the maximum penalty for capital crimes.

If approved by the voters, the proposal will take effect on January 8, 2019.[79] The proposal does not appear to apply retroactively.

C. FISCAL IMPACT:

The fiscal impact on state and local government is indeterminate.

III. Additional Information:

A. Statement of Changes:

(Summarizing differences between the current version and the prior version of the proposal.)

None.

B. Amendments:

None.

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[76] House of Representatives Judiciary Committee Staff Analysis, HB 527 (2017 Session), Feb. 21, 2017, available at http://myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h0527c.JDC.DOCX&DocumentType=Analysis&BillNumber=0527&Session=2017 (last visited Jan. 21, 2018).

[77] Defendants must have been convicted, sentenced to death and subsequently either acquitted of all charges related to the crime that placed them on death row; had all charges related to the crime that placed them on death row dismissed by the prosecution or the courts; or been granted a complete pardon based on evidence of innocence. *See* Death Penalty Information Center, *The Innocence List*, available at https://deathpenaltyinfo.org/innocence-list-those-freed-death-row (last visited Jan. 21, 2018)

[78] *Supra* note 12.

[79] *See* Article XI, Sec. 5(e) of the Florida Constitution ("Unless otherwise specifically provided for elsewhere in this constitution, if the proposed amendment or revision is approved by vote of at least sixty percent of the electors voting on the measure, it shall be effective as an amendment to or revision of the constitution of the state 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.)

C. Technical Deficiencies:

None.

D. Related Issues:

None.

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CRC ACTION

Commissioner .
Comm: UNFAV .
01/25/2018 .
.
.
.

The Committee on Declaration of Rights (Joyner) recommended the following:

CRC Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 17 of Article I of the State Constitution is amended to read:

ARTICLE I

DECLARATION OF RIGHTS

SECTION 17. Excessive punishments.—

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(a) Excessive fines, cruel and unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. The death penalty is an authorized punishment for capital crimes designated by the legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution. Any method of execution shall be allowed, unless prohibited by the United States Constitution. Methods of execution may be designated by the legislature, and a change in any method of execution may be applied retroactively. A sentence of death shall not be reduced on the basis that a method of execution is invalid. In any case in which an execution method is declared invalid, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method. This section shall apply retroactively.

(b) Beginning on July 1, 2019, and each fifth year thereafter, there shall be established a death penalty process review commission. The commission shall undertake a comprehensive review and examination of the death penalty process and make findings and recommendations not later than one year after the commission is established.

(1) The commission shall be composed of twelve total members, four members selected by the Governor, two members selected by the Speaker of the House of Representatives, two members selected by the President of the Senate, and four

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members selected by the Chief Justice of the Florida Supreme Court with the advice and counsel of the other Supreme Court Justices. Vacancies in the membership of the commission shall be filled in the same manner as the original appointments.

(2) At its initial meeting, the members of the commission shall elect a member to serve as chair and the commission shall adopt its rules of procedure. Thereafter the commission shall convene at the call of the chair.

(3) The commission shall issue a report of its findings and recommendations to the Governor, the Speaker of the House of Representatives, the President of the Senate, and the Chief Justice of the Supreme Court. The commission shall also file a copy of its report with the custodian of state records.

(4) The commission shall not be established as scheduled on a five-year anniversary date if during the immediate preceding five years, the death penalty was not an authorized punishment for capital crimes in this state.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete everything before the enacting clause

and insert:

A proposal to amend

Section 17 of Article I of the State Constitution to establish a death penalty process review commission.

By Commissioner Martinez

martinezr-00054-17 201736__

A proposal to amend
Section 17 of Article I of the State Constitution to delete provisions authorizing the death penalty as a punishment for capital crimes designated by the Legislature and to provide for prospective application.

Be It Proposed by the Constitution Revision Commission of Florida:

Section 17 of Article I of the State Constitution is amended to read:

ARTICLE I
DECLARATION OF RIGHTS

SECTION 17. Excessive punishments.—Excessive fines, cruel and unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. Life imprisonment without the possibility for release is the maximum penalty allowable ~~The death penalty is an authorized punishment~~ for capital crimes designated by the legislature. Except for the death penalty, which is prohibited, the prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution. ~~Any method of execution shall be allowed, unless prohibited by the United States Constitution. Methods of execution may be designated by the legislature, and a change in any method of execution may be applied retroactively. A sentence of death shall not be reduced on the basis that a method of execution is invalid. In any case in which an~~

martinezr-00054-17 201736__

~~execution method is declared invalid, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method.~~ This section does not ~~shall~~ apply retroactively.

January 22, 2018 DELIVERED VIA EMAIL

Florida Constitution Revision Commission
The Capitol
400 S. Monroe Street
Tallahassee, FL 32399

Re: Vote Yes on Proposal 36, Amending Art. 1, Section 17
Abolishing the Death Penalty

Dear Chair Carlton and Declaration of Rights Committee Commissioners:

ACLU Florida

4343 W. Flagler St.
Miami, FL
(786) 363-2700
aclufl.org

Kirk Bailey
Political Director

Kara Gross
Legislative Counsel

On behalf of more than 130,000 members and supporters state-wide, the American Civil Liberties Union (ACLU) of Florida submits this testimony in support of Proposal 36, which would finally and definitively abolish the death penalty in Florida.

The death penalty inherently violates the constitutional ban against cruel and unusual punishment and the guarantees of due process of law and of equal protection under the law. Furthermore, it is contrary to the tenets of a civilized society for the state to give itself the right to intentionally, premeditatively, methodically, and ceremoniously kill human beings – especially when such killings are meted out in an arbitrary and discriminatory fashion.

Moreover, Florida has exonerated 26 people on death row – more than any other state. In other words, the state has mistakenly sentenced at least 26 people to die, and if not for their perseverance, these wrongfully convicted individuals would have been killed at the hands of the state.

Punishing a human being by killing them is inconsistent with the fundamental values of our democratic system. The death penalty is uncivilized in theory and unfair and inequitable in practice.

The ACLU of Florida opposes the death penalty on moral, practical, and constitutional grounds:

The death penalty is cruel and unusual punishment in violation of the Constitution. There is no debate that the death penalty is a cruel and barbaric punishment, not only to the executed individuals, but also to their loved ones and family members (parents, children, siblings, spouses) who are left behind. It is unusual because Florida is one of only a few states to engage in state-sponsored executions last year, and thirty-five states, plus an additional three jurisdictions, have either abolished the death penalty or have had no executions in the past five years. Additionally, only the United States of all the western industrialized nations engages in this punishment. It is also unusual because it is not uniformly administered and only a random number of convicted murderers in the United States receive a sentence of death.

Capital punishment denies due process of law. The imposition of a state-sponsored death sentence is often arbitrary, and always irrevocable – forever depriving an individual of the opportunity to benefit from new evidence or new laws that might warrant the reversal of a conviction, or the setting aside of a death sentence. Most horrifically, innocent people are too often sentenced to death, especially as indicated above, in Florida. Since 1973, over 156 people have been released from death row in twenty-six states because of their innocence, new evidence that exonerated them or evidence of prosecutorial misconduct. Nationally, at least one person is exonerated for every 10 that are executed. As noted, in Florida alone, 26 wrongfully convicted death-row inmates have been exonerated.

ACLU Florida

The death penalty violates the constitutional guarantee of equal protection. The system of state-sponsored executions in the United States is applied in an unfair and unjust manner. It is applied randomly and discriminatorily, and is imposed disproportionately upon offenders who are people of color, especially if their victims were white, and on those who are poor and uneducated and do not have the resources to effectively navigate the criminal justice system. Additionally, it is concentrated in certain geographic regions of the country.

The death penalty does not make our communities safer. The death penalty does not reduce, prevent, or deter violent crime. It is a waste of taxpayer funds and has little public safety benefit. The vast majority of law enforcement professionals surveyed agree that capital punishment does not deter violent crime, and a survey of police chiefs nationwide found that they ranked the death penalty as the least effective means of reducing violent crime. Politicians who preach the desirability of executions as a method of crime control have misled the public and fail to identify and address the true causes of crime.

The death penalty wastes limited resources. Capital punishment squanders the time and energy of courts, prosecuting attorneys, defense counsel, juries and law enforcement personnel. It unduly burdens the criminal justice system, and is counterproductive as an instrument to deter violent crime. Limited funds that could be used to prevent and solve crime (and provide education and jobs) are wasted on capital punishment and the appeals process.

Opposing the death penalty does not indicate a lack of concern and support for murder victims and their families. Ending state-sponsored executions in Florida signals a statewide recognition that it is inhumane in a civilized society for the state to take the life of another human being, regardless of that person's horrible crime. Moreover, the families of many murder victims do not support state-sponsored violence to avenge the death of their loved one, and would in many instances prefer knowing that the defendant would spend life in jail. Moreover, many loved ones would also prefer not to endure endless litigation and years of appeals and be forced to continuously relive the traumatic events.

A just and humane society does not deliberately kill human beings. An execution is a violent and barbaric public spectacle of official homicide, and one that endorses killing to solve social problems – the worst possible example to set for the citizenry, and especially children. Governments worldwide have often attempted to justify their lethal fury by extolling the purported benefits that such killing would bring to the rest of society. The benefits of capital punishment are illusory, but the human costs and resulting destruction of community decency are real.

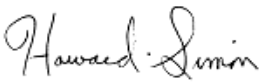
Conclusion

ACLU Florida

The ACLU of Florida vigorously opposes the death penalty because it denies equal protection of the law, is cruel and unusual punishment, is disproportionately inflicted on the poor and uneducated, and because its application is inconsistent with fundamental guarantees of due process of law. For all the above reasons, we strongly urge this Commission to support Proposal 36 and abolish Florida's barbaric practice of state-sponsored killing and bring the state of Florida in line with evolving universal moral standards. The use of state-sponsored executions has significantly diminished worldwide. It will soon be completely part of the "dust bin of history." Florida should not be the last remaining outlier.

Thank you for your consideration of the above and we look forward to working with you as this process moves forward. Please do not hesitate to contact me at kbailey@aclufl.org (786) 363-2713 or kgross@aclufl.org (786) 363-4436, if you have any questions or would like any additional information.

Sincerely,



Howard Simon
Executive Director

Cc: Kirk Bailey, Political Director
Kara Gross, Legislative Counsel

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

July 25 2018
Meeting Date

36
Proposal Number (if applicable)

→ strike all
Amendment Barcode (if applicable)

***Topic** death penalty

***Name** Mark Schlakman

Address FSU/CAHR 426 W Jefferson St. Phone 850 644 4614
Street

Tallahassee FL 32301 Email mschlakman@fsu.edu
City *State* *Zip*

***Speaking:** ☐ For ☐ Against ☑ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☑ No

If yes, who? _____

Are you a registered lobbyist? ☐ Yes ☑ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

CONSTITUTION REVISION COMMISSION
APPEARANCE RECORD

(Deliver completed form to Commission staff)

1-25-2015
Meeting Date

36
Proposal Number (if applicable)

978168
Amendment Barcode (if applicable)

***Topic** EXCESSIVE PUNISHMENTS

***Name** REX DIMMIC

Address 255 N. BROADWAY
Street

Phone 863 [redacted] 638-4250

BARTOW FL 33831
City *State* *Zip*

Email rdimmig@pd10.org

***Speaking:** [N/A] For [✓] Against [ ] Information Only

Waive Speaking: [ ] In Support [ ] Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? [✓] Yes [ ] No

If yes, who? FLORIDA PUBLIC DEFENDER ASSOCIATION

Are you a registered lobbyist? [ ] Yes [✓] No

Are you an elected official or judge? [✓] Yes [ ] No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record. ****Required***

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1/25/18
Meeting Date

36
Proposal Number (if applicable)

***Topic** Death Penalty

Amendment Barcode (if applicable)

***Name** Ingrid Delgado

Address 204 W Park Ave *Street* Phone

Tallahassee *City* Fl *State* 32301 *Zip* Email

***Speaking**: ☐ For ☐ Against ☐ Information Only

Waive Speaking: ☒ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☒ Yes ☐ No

If yes, who? Florida Conference of Catholic Bishops

Are you a registered lobbyist? ☒ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

****Required***

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1-25-18
Meeting Date

36
Proposal Number (if applicable)

***Topic** Excessive Punishments

Amendment Barcode (if applicable)

***Name** Dr. Gordon Waldo, Professor Emeritus

Address 3001 Shamrock South
Street

Phone 850 228-1200

Tallahassee FL 32309
City *State* *Zip*

Email gwaldo@fsu.edu

***Speaking:** ☑ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☑ No

If yes, who? _____

Are you a registered lobbyist? ☐ Yes ☑ No

Are you an elected official or judge? ☐ Yes ☑ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record. ****Required***

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

1-25-2018
Meeting Date

36
Proposal Number (if applicable)

Amendment Barcode (if applicable)

***Topic** P 36 EXCESSIVE PUNISHMENTS

***Name** REX DIMMIG

Address 255 N. BROADWAY
Street

BARTOW FL 33831
City *State* *Zip*

Phone 863 534-4250

Email rdimmig@pd10.org

***Speaking:** ☑ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☑ Yes ☐ No

If yes, who? FLORIDA PUBLIC DEFENDER ASSOCIATION

Are you a registered lobbyist? ☐ Yes ☑ No

Are you an elected official or judge? ☑ Yes ☐ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

***Required**

The Constitution Revision Commission

COMMITTEE VOTE RECORD

COMMITTEE: Declaration of Rights
ITEM: P 36
FINAL ACTION:
MEETING DATE: Thursday, January 25, 2018
TIME: 8:00 a.m.—5:00 p.m.
PLACE: The Capitol, Tallahassee, Florida

FINAL VOTE			1/25/2018 1 Amendment 978168 Joyner		1/25/2018 2 Motion to Temporarily Postpone Joyner			
Yea	**Nay**	**COMMISSIONERS**	**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**
		Donalds		X				
		Gainey		X				
		Johnson	X					
		Joyner	X					
		Lester		X				
		Stemberger, VICE CHAIR	X					
		Carlton, CHAIR		X				
		TOTALS	-	UNF	FAV	-		
Yea	**Nay**		**Yea**	**Nay**	**Yea**	**Nay**	**Yea**	**Nay**

CODES: FAV=Favorable
UNF=Unfavorable
-R=Reconsidered
RCS=Replaced by Committee Substitute
RE=Replaced by Engrossed Amendment
RS=Replaced by Substitute Amendment
TP=Temporarily Postponed
VA=Vote After Roll Call
VC=Vote Change After Roll Call
WD=Withdrawn
OO=Out of Order
AV=Abstain from Voting