The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	CS/SB 1234
INTRODUCER:	Education Committee and Senator Baxley
SUBJECT:	Free Expression on Campus
DATE:	February 19, 2018
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Androff	Graf	ED	**Fav/CS**
2.	Tulloch	Cibula	JU	**Pre-meeting**

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1234 establishes the "Campus Free Expression Act," (the Act) to authorize individuals to engage in expressive activity on public institutions of higher education campuses, within reasonable limits enforced by such institutions. Specifically, the bill:

- Authorizes a person who wishes to engage in an expressive activity in the outdoor areas of campus of a public institution of higher education to do so freely, spontaneously, and contemporaneously as long as the person's conduct is lawful and does not materially and substantially disrupt the functioning of the public institution.
- Designates the outdoor areas of campus of a public institution of higher education that accepts federal funding as traditional public forums and specifies that such public institution may create and enforce restrictions that are:
  - Reasonable and content-neutral on time, place, and manner of expression.
  - Narrowly tailored to a significant institutional interest.
- Prohibits a public institution of higher education from designating a specific area as a free speech zone or otherwise restricting expressive activities to a particular area of campus.
- Establishes a *state* cause of action for a violation of the Act and specifies available damages and a statute of limitations associated with such action.
- Requires a state university student government organization to provide a written explanation regarding the funding determination to a recognized student organization that submits a request for activity and service fee funding.
- Requires each student government association to maintain on its website an organized record of the funding requests it receives and disburses.

The bill takes effect July 1, 2018.

II. Present Situation:

Constitutional Guarantees of Free Speech and Expression

Freedom of speech is the right to engage in expression without censorship or interference from government or its agencies.[1] This right is guaranteed by both the constitutions of both the United States and the State of Florida.

The First Amendment of the United States Constitution provides that,

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article I, section 4 of the Florida Constitution provides that,

> Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.

A person's constitutional right to free speech is only be violated only if an infringement is "fairly attributable"[2] to the state or a state entity, such as the enforcement of a city ordinance or enforcement of a policy by a public college or university that affects speech.[3] Generally, private organizations, such as private universities, are not state actors for purposes of the First Amendment.[4]

Violations and Permissible Regulations of Free Speech and Expression

The government or another state actor, such as a public university, violates a person's right of free speech and expression when the person's speech is punished or restricted based on its **content**. Even offensive content is constitutionally protected and subject to the highest level of

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[1] *See Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).
[2] *Wickersham v. City of Columbia*, 481 F.3d 591, 597 (8th Cir. 2007).
[3] *See id.* (concerning plaintiff who previously won an injunction where first amendment rights were violated by city police who prohibited plaintiff from handing out anti-war fliers at an air show; the air show unsuccessfully countered that its first amendment rights were being violated by the injunction).
[4] *But see id.* ("The Supreme Court has recognized a number of circumstances in which a private party may be characterized as a state actor, such as where the state has delegated to a private party a power 'traditionally exclusively reserved to the State,' *see Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974), where a private actor is a 'willful participant in joint activity with the State or its agents,' *see Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 151, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), and where there is 'pervasive entwinement' between the private entity and the state, *see Brentwood*, 531 U.S. at 291, 121 S.Ct. 924.").

constitutional scrutiny so long as it does not constitute a threat or incite violence,[5] is not fraudulent or falsely defamatory,[6] or is not grossly obscene, as in the case of child pornography.[7] For example, in *Cohen v. California*, the United States Supreme Court reversed the conviction of a man arrested for wearing a jacket that said "F**k The Draft" while walking through the corridor of a courthouse, where the conviction was based solely on the contents of the jacket's message.[8] As noted by the Supreme Court, "so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected."[9]

However, the government or a public actor may limit or regulate an individual's freedom of speech or expression if the speech or expression occurs on government-owned property, such as at a public elementary, middle, or high school, or at public universities.[10] Such limitations are determined by the characterization of the type of public forum created on government property.[11]

Public Forums on Government Property

There are three types of public forums:[12]

- A "traditional" or "open public forum"[13] is a place with a longstanding tradition of freedom of expression, such as a public park, sidewalk, or street corner. In an open public forum, the government may only impose ***content-neutral***, logistical restrictions on the time, place, and manner of speech and expression.[14] Such content-neutral restrictions must be narrowly tailored to serve a significant governmental interest and leave open alternative channels for communication.[15]
- "Designated" public forums and "limited public forums"[16] are places with a more limited history of expressive activity. Examples may include a community theater or a university meeting hall.[17] However, a designated public forum usually refers to a place opened up for and designated to function like a traditional public forum, meaning the rules of a traditional public forum apply.[18] On the other hand, a limited public forum is usually opened only for certain groups or topics, and thus, the government may also restrict the use of the forum to

[5] *See Cohen v. California*, 403 U.S. 15, 18 (1981) (noting the message on defendant's jack did not incite violence or disruption of the draft).
[6] *See U.S. v. Alvarez*, 567 U.S. 709, 723 (2012) ("Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment.").
[7] *New York v. Ferber*, 458 U.S. 747, 764 (1982).
[8] 403 U.S. 15, 18 (1981).
[9] *Id.*
[10] *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).
[11] *Id.* at 678-79.
[12] *Id.*
[13] First Amendment Schools, *What is a public forum?* http://www.firstamendmentschools.org/freedoms/faq.aspx?id=13012, (last visited Feb. 18, 2018); *see Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37, 45-46 (1992).
[14] *Perry*, 460 U.S. at 45-46.
[15] *Id.*
[16] First Amendment Schools, *What is a public forum?* http://www.firstamendmentschools.org/freedoms/faq.aspx?id=13012, (last visited Feb. 18, 2018); *see Perry*, 460 U.S. at 45-46.
[17] *Perry*, 460 U.S. at 45-46.
[18] *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469-70 (2009).

the purposes for which the forum was opened in addition to time, place, and manner restrictions.[19] For example, when a public school permits outside groups to use it's building after hours for certain types of meetings, a limited public forum has been opened.[20] Once a limited forum is open, however, any limitation must be reasonable and viewpoint-neutral.[21]

- A "closed public forum" is a place that is not traditionally open to public expression, such as the teacher's school mailroom at issue in *Perry* or a military base.[22]

Speech and religious expression by students and teachers or professors is protected by the First Amendment of the U.S. Constitution.[23] However, such rights may be limited.[24] A student's right to free speech and expression is protected to the extent it does not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others."[25] On the other hand, "[i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than *a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint*."[26]

Thus, in *Tinker v. Des Moines Independent Community School District*, where several high school students expressed opposition to the Vietnam war by wearing black armbands to school that did not cause disruption or interfere with the rights of others, the students' suspension by school administration was deemed a violation of the students' first amendment rights.[27] On the other hand, in *Morse v. Frederick*, a high school principal did not violate a student's first amendment rights by confiscating a flag the student was waiving at a school event that advocated the use of illegal drugs.[28]

Notably, there is a distinction between the public expression of adults, which includes most college students, and the public expression of minors, which includes most high school students. As explained by the United States Supreme Court in *Bethel School District No. 403 v. Fraser*, adults have wider latitude in expressing themselves in public places than minors have in public schools:

> The First Amendment guarantees wide freedom in matters of adult public discourse. A sharply divided Court upheld the right to express an antidraft

[19] *Id.* at 46.
[20] *Good News Club v. Milford Central School*, 533 U.S. 98, 106–07 (2001) (holding school's exclusion of Christian children's club from meeting after hours based on its religious nature was unconstitutional viewpoint discrimination given the public school had opened on limited public forum).
[21] *Summum*, 555 U.S. at 470.
[22] *Id*.
[23] *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506, 513-514 (1969) ("First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gates."); *see Mergens*, 496 U.S. at 230, 250 (1990) and *Chandler v. Siegelman*, 230 F.3d 1313, 1316-1317 (11th Cir. 2001) *cert. denied*, 533 U.S. 916 (2001).
[24] *Id.* at 506, 512-13.
[25] *Id.* at 513.
[26] *Id.* at 509.
[27] *Id.*
[28] 551 U.S. 393 (2007).

> viewpoint in a public place, albeit in terms highly offensive to most citizens ["F**k The Draft"]. *See Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school. In *New Jersey v. T.L.O.*, 469 U.S. 325, 340–342, 105 S.Ct. 733, 742–743, 83 L.Ed.2d 720 (1985), we reaffirmed that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings. As cogently expressed by Judge Newman, "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket." *Thomas v. Board of Education, Granville Central School Dist.*, 607 F.2d 1043, 1057 (CA2 1979) (opinion concurring in result).[29]

Free Speech on Public University and College Campuses

The United States Supreme Court has recognized that "the college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'"[30] "'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools[,]' . . . and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."[31] In *Rosenberger v. Rector & Visitors of the University of Virginia*, the Supreme Court explained that portions of university campuses have traditionally been opened to speech:

> Th[e] danger [of chilling speech] is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. . . . [U]niversities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn. The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment.[32]

The Supreme Court has characterized public universities and college campuses generally as limited public fora for purposes of regulating speech, meaning that once the forum is created and opened, the university or college is forbidden from exercising any type of viewpoint or content

[29] 478 U.S. 682-83.
[30] *Healy v. James*, 408 U.S. 169, 180, 187 (1972) (holding that college could not deny student political group recognition no matter how abhorrent the group's views).
[31] *Id.* at 180-81 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).
[32] 515 U.S. 819, 835–36 (1995) (citations omitted).

discrimination.[33] However, reasonable time, place, and manner restrictions have frequently been upheld.[34]

For example, on the college campus in *Healey v. James*, the United States Supreme Court held that a political student group with views the college president found "abhorrent" could not be excluded as an official student organization based solely on the group's views and the "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression."[35] However, the Supreme Court held that the college could require the group to comply with reasonable time, place, and manner restrictions:

> [T]he critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not. Petitioners may, if they so choose, preach the propriety of amending or even doing away with any or all campus regulations. They may not, however, undertake to flout these rules.
> . . . .
> Just as in the community at large, reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related activities must be respected. A college administration may impose a requirement, such as may have been imposed in this case, that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law. Such a requirement does not impose an impermissible condition on the students' associational rights. Their freedom to speak out, to assemble, or to petition for changes in school rules is in no sense infringed. It merely constitutes an agreement to conform with reasonable standards respecting conduct. This is a minimal requirement, in the interest of the entire academic community, of any group seeking the privilege of official recognition.[36]

Free Speech Zones on College Campuses

Some public universities and colleges set up areas of campus known as "free speech zones" and restrict all free speech activities, such as picketing and demonstrating, to that area.[37] Many

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[33] *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (holding that denial of funds by student government to Christian student group for costs of printing newspaper when funds given to all other organizations for same purpose was unconstitutional viewpoint discrimination violating the first amendment); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993) (holding that church's first amendment rights to show a film to the public in a school facility were violated where school voluntarily opened a limited public forum for after school programs; stating "'the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'") (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).

[34] *See Healy*, 408 U.S. at 192 (noting that college may require a student organization to agree to abide by school rules before officially recognizing organization); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (finding that a high school could restrict a student's lewd speech at a school assembly where the manner of speech was inconsistent with the forum's purpose); *see also Morse v. Frederick*, 551 U.S. 393, 409 (2007) (finding a student held banner with the words "BONG HiTS 4 JESUS" during a nationally televised event was an inappropriate method of communicating a political idea that disrupted the purpose of the forum).

[35] *Healy* at 191 (quoting *Tinker*) (internal quotation marks omitted).

[36] *Healy* at 192-93.

[37] *See, e.g.*, Thomas J. Davis, *Assessing Constitutional Challenges to University Free Speech Zones under Public Forum Doctrine*, 79 Ind. L. J. 267, 267-68 (2004) ("In September 2000, a student at New Mexico State University was arrested after

schools also require prior notice and an application for a permit before engaging in first amendment activities.[38]

One such school, the University of Cincinnati, adopted a very restrictive policy requiring notice and a permit before permitting free speech activities, such as allowing a student group to ask other students to sign a petition. Additionally, the university restricted all free speech activities to a free speech zone, an area approximately one-tenth the size of a football field, which had very little pedestrian traffic.[39] One student group brought suit claiming the university's restrictive policies on free speech were unconstitutionally overbroad under the First Amendment. The university responded that it has a right to regulate all expressive activity on campus, and it unilaterally declared the campus to be a limited public forum.[40]

A federal district court in Ohio agreed with the students and enjoined the university from enforcing its policy. In so doing, the district court quoted the Supreme Court's decision in *Watchtower Bible*: "It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so."[41]

State University Student Activity Fees

Florida law authorizes postsecondary education institutions to charge tuition[42] and specified fees to students enrolled in a college credit program, unless as otherwise provided.[43] Specifically, each university board of trustees must establish a student activity and service fee on the main campus of the university and is permitted to establish such fee on any branch campus or center.[44] The law prescribes requirements for an activity and service fee committee and processes for increasing such fee.[45]

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disobeying a police officer's request to stop leafleting outside the student union because it was not an 'open forum area.' At the University of Mississippi in the same year, a student was arrested for protesting the student newspaper outside the school's only designated speech area. In November 2001, police ejected a West Virginia University student from a Disney on-campus recruiting seminar because the student had previously handed out anti-Disney flyers outside of the designated zone. And in 2002, twelve Florida State University students were arrested for trespassing after refusing to move their protest from in front of the administration building to a less visible 'demonstration zone.' Incidents such as these, involving university policies that limit student expression to defined areas of campus, have caused an outcry among students, university officials, and civil liberties groups, who have derided such zones as incompatible with the constitutional guarantee of free speech." (footnotes omitted)).

[38] *See, e.g.*, *Bowman v. White*, 444 F.3d 967 (8th Cir. 2006) (upholding University of Arkansas's permit requirement but holding preacher's first amendment rights violated under university's policy cap on five visits to campus per month).

[39] *Univ. of Cincinnati Chapter of Young Americans for Liberty v. Williams*, 2012 WL 2160969, *1 (Ohio S.D. June 12, 2012) (not reported in federal reporter).

[40] *Id.* at *1-*2. *See also* Monica Scott, *GVSU reaches settlement with student group alleging it restricted free speech*, GRAND RAPID NEWS, Mar. 2, 2017, http://www.mlive.com/news/grand-rapids/index.ssf/2017/03/gvsu_reaches_settlement_with_s.html (last visited Feb. 19, 2018) (article notes Grand Valley State University agreed to abolish its free speech zone).

[41] *Id.* (quoting *Watchtower Bible and Tract Soc'y of NY, Inc. v. Vill. of Stratton*, 536 U.S. 150, 165–66 (2002)).

[42] Tuition means the basic fee charged to a student for instruction provided by a public postsecondary educational institution in this state. A charge for any other purpose is not included in this fee. Section 1009.01(1), F.S.

[43] Sections 1009.23(2) and 1009.24(2), F.S.

[44] Section 1009.24(10)(a), F.S.

[45] *Id.*

Student activity and service fees must be expended for lawful purposes to benefit the student body in general.[46] This must include, but is not limited to, student publications and grants to duly recognized student organizations, the membership of which is open to all students at the university without regard to race, sex, or religion.[47] The fund may not benefit activities for which an admission fee is charged to students, except for concerts sponsored by student government associations.[48]

The student government association of the university must determine the allocation and expenditure of the student activity and service fee, except that the president of the university may veto any line item or portion thereof within the budget when submitted by the student government association legislative body.[49] Any unexpended and undispersed funds remaining at the end of a fiscal year must be carried over and remain in the student activity and service fund and be available for allocation and expenditure during the next fiscal year.[50]

The United States Supreme Court has that a university may be held liable for violating the first amendment rights of student organizations where its student government associations engages in viewpoint discrimination when awarding fees.[51]

Cause of Action for Violating a Person's Right to Free Speech

Federal law, section 1983,[52] authorizes a cause of action (a constitutional tort claim[53]) against a person "acting under the color of law" for violating a person's civil rights, including a person's first amendment right to free speech. Section 1983 provides in applicable part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, *shall be liable* to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.][54]

"To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was

[46] *Id.* at (10)(b).
[47] *Id.*
[48] Section 1009.24(10)(b), F.S.
[49] *Id.*
[50] *Id.*
[51] *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. at 829 (holding that denial of funds by student government to Christian student group for costs of printing newspaper when funds given to all other organizations for same purpose was unconstitutional viewpoint discrimination violating the first amendment).
[52] 42 U.S.C. § 1983.
[53] *See Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305–06 (1986) ("We have repeatedly noted that 42 U.S.C. § 1983[8] creates a species of tort liability in favor of persons who are deprived of rights, privileges, or immunities secured to them by the Constitution.") (internal quotation marks and citations omitted).
[54] *Id.* (emphasis added).

committed by a person acting under color of state law."[55]

As explained by the federal Eleventh Circuit Court of Appeals, section 1983 has been held by the United States Supreme Court *not* to be a congressional abrogation of the states' sovereign immunity from damages suits.[56] "The Eleventh Amendment to the United States Constitution bars claims for damages against a state, its agencies, and its employees in their *official* capacities unless a state has a waived its immunity."[57] Only the Florida Legislature can waive sovereign immunity and consent for the State to be sued.[58]

Although the state of Florida has waived immunity for purposes of traditional tort claims, it has *not* waived sovereign immunity under section 768.28(6), F.S., for purposes of raising constitutional torts under section 1983, nor consented to be sued in federal court.[59] Likewise, suits against the Board of Regents for the State University System enjoys limited immunity from section 1983 actions.[60]

But a state official or employee acting in his or her *individual* capacity enjoys only qualified immunity and may be sued under section 1983 in his or her individual capacity when acting under the color of law.[61] This is particularly true for claims involving individual retaliation based on the exercise of First Amendment rights.[62] The test for whether qualified immunity applies was stated recently by the Third District Court of Appeal in the 2016 case of *Harris v. G.K.*, involving a section 1983 action against several DCF employees involving the substantive due process rights of several foster children to be free from abuse:

> Qualified immunity shields a government actor from personal liability when his conduct does not violate clearly established rights. *See Anderson v. Creighton*, 483 U.S. 635, 638 [(1987)]. A two-part test is used to determine whether qualified immunity applies. First, the defendant must show that he performed the acts as part of a discretionary government function. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 [(1982)]. The burden then shifts to the plaintiff to prove that the defendant's conduct violated clearly established statutory or constitutional rights. *Harlow*, 457 U.S. at 818[;] *Becker v. Clark*, 722 So.2d 232, 233 (Fla. 2d DCA 1998).

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[55] *West v. Atkins*, 487 U.S. 42, 48 (1988).
[56] *Gamble v. Florida Dept. of Health & Rehab. Services*, 779 F.2d 1509, 1512 (11th Cir. 1986).
[57] *Chaffins v. Lindamood*, 1:17-CV-00061, 2017 WL 3130558, at *2 (M.D. Tenn. July 24, 2017) (citing *Quern v. Jordan*, 440 U.S. 332, 337 (1979), *overruled on other grounds by Hafer v. Melo*, 502 U.S. 21, 27 (1991)).
[58] FLA. CONST. art. X, s. 13 ("Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating."); *Circuit Court of Twelfth Judicial Circuit v. Dep't of Nat. Res.*, 339 So. 2d 1113, 1116–17 (Fla. 1976) ("Yet the plaintiffs are not wholly without remedy, for, as the Department suggests, they may file in the Legislature a claims bill to compensate them for the loss which they have suffered. Absent legislation waiving the state's sovereign immunity on August 16, 1973, this Court cannot authorize relief through the judicial process."). The Legislature has also waived sovereign immunity when the State files suit, thereby permitting the other party to bring a countersuit.
[59] *Gamble v. Florida Dept. of Health & Rehab. Services*, 779 F.2d 1509, 1515 (11th Cir. 1986) (stating "[section] 768.28, when viewed alone, was intended to render the state and its agencies liable for damages for traditional torts under state law, but to exclude such liability for 'constitutional torts.'") (citations omitted).
[60] *Bd. of Regents of State v. Snyder*, 826 So. 2d 382, 387 (Fla. 2d DCA 2002).
[61] *Majette v. Butterworth*, 699 F. Supp. 882, 884 (S.D. Fla. 1988) (citing *Fitzgerald v. McDaniel*, 833 F.2d 1516, 1520 (11th Cir. 1987)). *See West*, 487 U.S. at 49-50.
[62] *Bd. of Regents of State v. Snyder*, 826 So. 2d at 388.

> . . . .
> . . . Individual liability in such cases must be based on intentional violations of, or deliberate indifference to, the clearly established rights of the foster child. Mere negligence or carelessness does not establish personal liability as to the individual state employee.[63]

The applicable statute of limitations for cases brought under 42 U.S.C. § 1983, is the forum state's statute of limitations period for personal injury actions; or, where a state provides multiple limitation periods for personal injury, "section 1983 claims borrow the general or residual statute for personal injury actions."[64] In Florida, the statute of limitations is four years.[65] "Under federal law, the statute of limitations does not begin to run until the facts that would support a cause of action are apparent, or should be apparent to a person with a reasonably prudent regard for his rights."[66]

Additionally, a suit at law under section 1983 permits the recovery of money damages from a person under the principles applicable to common law tort cases.[67] These damages are usually limited to concrete, compensatory damages rather than an abstract value placed on a constitutional violation.[68] Punitive damages are also permitted for a violation of constitutional rights with the requisite showing of malicious intent.[69]

Currently, it appears many first amendment cases settle at between $25,000 and $50,000, [70] or for the requested action (such as eliminating a free speech zone) plus legal fees and costs.[71] However, the most egregious cases have settled at as much as $100,000 or more and typically involve the wrongful termination of professors and compensation for lost wages.[72]

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[63] 187 So. 3d 871, 874 (Fla. 3d DCA 2016) (alleging the failure of DCF employees to properly investigate and due their jobs resulted in years of abuse of children in a particular home going unnoticed).
[64] *Owens v. Okure*, 488 U.S. 235, 249 (1989); *Ruiz-Sulsona v. Univ. of Puerto Rico*, 334 F.3d 157, 159 (1st Cir. 2003). *See also Ali v. Higgs*, 892 F.2d 438, 439 (5th Cir. 1990) ("It is well established that federal courts borrow the forum state's general personal injury limitations period.").
[65] Section 95.11(3)(o), F.S.; *Israel on behalf of A.I. v. City of N. Miami*, 17-10040-A, 2017 WL 6887789, at *2 (11th Cir. Oct. 24, 2017) (not reported in federal reporter) (citing *Chappell v. Rich*, 340 F.3d 1279, 1283 (11th Cir. 2003).
[66] *Israel on behalf of A.I.*, 17-10040-A, 2017 WL 6887789, at *2 (citing *Rozar v. Mullis*, 85 F.3d 556, 561 (11th Cir. 1996).
[67] *See Stachura*, 477 U.S. at 306.
[68] *Id.* at 309.
[69] *Id.* at 306, n. 9, citing *Smith v. Wade*, 461 U.S. 30, 103 (1983)).
[70] *See, e.g.*, Press Release, Foundation for Individual Rights in Education, *Dixie State University Settlement Agreement*, (Sep. 17, 2015) https://www.thefire.org/dixie-state-university-settlement-agreement/ (last visited Feb. 19, 2018) (settling case for $50,000).
[71] Monica Scott, *GVSU reaches settlement with student group alleging it restricted free speech*, GRAND RAPID NEWS, Mar. 2, 2017, http://www.mlive.com/news/grand-rapids/index.ssf/2017/03/gvsu_reaches_settlement_with_s.html (last visited Feb. 19, 2018) (article notes Grand Valley State University agreed to abolish its free speech zone and agreed to pay legal frees of $11,025). Press Release, ECU News Service *Difference in Philosphy, ECU, former media advisor issue joint statement*, (Apr. 20, 2012), http://www.ecu.edu/news/isomstatement.cfm#.Worp2ainE2w (last visited Feb. 19, 2018) (noting settlement between East Carolina University and former director of student media in amount of $31,200).
[72] *See, e.g.*, Press Release, ACLU of Colorado, *ACLU Wins $100K Settlement for Former Adams State Professor Who Was Banned from Campus after Criticizing the University* (2016) https://aclu-co.org/aclu-wins-100k-settlement-former-adams-state-professor-banned-campus-criticizing-university/ (last visited Feb. 19, 2018); Press Release, Foundation for Individual Rights in Education, *Victory for Academic Freedom: 'Human Heredity' Professor Receives $100,000 Settlement*, (Jul. 26, 2010), https://www.thefire.org/victory-for-academic-freedom-human-heredity-professor-receives-100000-settlement/ (last visited Feb. 19, 2018).

Suits by individual students or by student groups concerning individual instances of civil rights violations against an individual acting "under the color of law" on behalf of a college or university, are often dismissed as moot when the student has a change of status; i.e., the student has graduated.[73]

III. Effect of Proposed Changes:

CS/SB 1234 establishes the "Campus Free Expression Act," (the Act) to authorize individuals to engage in expressive activity on public institutions of higher education campuses, within reasonable limits enforced by such institutions. Specifically, the bill:

- Authorizes a person who wishes to engage in an expressive activity in the outdoor areas of campus of a public institution of higher education to do so freely, spontaneously, and contemporaneously as long as the person's conduct is lawful and does not materially and substantially disrupt the functioning of the public institution.
- Designates the outdoor areas of campus of a public institution of higher education that accepts federal funding as traditional public forums and specifies that such public institution may create and enforce restrictions that are:
  - Reasonable and content-neutral on time, place, and manner of expression.
  - Narrowly tailored to a significant institutional interest.
- Prohibits a public institution of higher education from designating a specific area as a free speech zone or otherwise restricting expressive activities to a particular area of campus.
- Establishes a *state* cause of action for a violation of the Act and specifies available damages and a statute of limitations associated with such action.
- Requires a state university student government organization to provide a written explanation regarding the funding determination to a recognized student organization that submits a request for activity and service fee funding.
- Requires each student government association to maintain on its website an organized record of the funding requests it receives and disburses.

Definitions

The bill defines:

- A public institution of higher education to mean any public technical center, state university, law school, medical school, dental school, or Florida College System institution as defined in law.[74]
- A free speech zone to mean a designated area on a public institution of higher education's campus for the purpose of political protesting.
- Outdoor area of campus to mean a generally accessible area of the campus where members of the campus community are commonly allowed, including grassy areas, walkways, or other similar common areas. The bill specifies that the term does not include outdoor areas where access is restricted.

[73] *See, e.g., Ford v. Reynolds*, 167 Fed. Appx. 248, 249 (2d Cir. 2006) (not reported in federal reporter) (dismissing students' pleading alleging civil rights violation by school that implemented a ban on certain speakers as moot on the basis that students had all graduated and were not expelled or suspended, as threatened by the school).

[74] The bill references the definition of Florida College System institution under section 1000.21, F.S.

Right to Free Speech Activities

The bill provides that the Act protects expressive activities which include, but are not limited to, any lawful verbal or written means by which an individual may communicate ideas to others, including:

- All forms of peaceful assembly, protests, speeches, and guest speakers;
- Distributing literature;
- Carrying signs;
- Circulating petitions; and
- The recording and publication, including Internet publication, of video or audio recorded in outdoor areas of campus of public institutions of higher education.

The bill also specifies that a person who wishes to engage in an expressive activity in the outdoor areas of campus of a public institution of higher education may do so freely, spontaneously, and contemporaneously as long as the person's conduct is lawful and does not materially and substantially disrupt the functioning of the public institution of higher education.

The bill identifies the outdoor areas of campus of a public institution of higher education that accept federal funding as traditional public forums and authorizes a public institution of higher education to create and enforce restrictions that are:

- Reasonable and content-neutral on time, place, and manner of expression.
- Narrowly tailored to a significant institutional interest.

The bill states that any such restrictions must be clear, be published, and provide for ample alternative means of expression.
Additionally, the bill prohibits:

- A public institution of higher education from designating any area of campus as a free speech zone or otherwise creating polices that restrict expressive activities to a particular area of campus.
- Students, faculty, and staff of a public institution of higher education from "materially and substantially disrupt[ing]" previously scheduled or reserved activities on campus that occur at the same time as the free expression.

The provisions of the bill appear to be consistent with the federal and state constitutions. The bill provides that the outdoor areas of campus of a public institution of higher education are traditional public forums. Additionally, the words a "materially and substantially disrupt" appear to come from the United States Supreme Court's *Tinker* decision:

> A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without **'materially and substantially interfer(ing)** with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others. Burnside v. Byars, supra, 363 F.2d at 749. But conduct by the student, in class or out of it, which for

> any reason—whether it stems from time, place, or type of behavior—**materially disrupts** classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.[75]

State University Student Activity Fees

The bill requires a student government organization that receives a funding request for activity and service fee funding from a recognized student organization to provide a written explanation to the recognized student organization regarding the funding determination. Additionally, the bill requires each student government association requires each student government association to maintain on its website an organized record of the funding requests and awards it receives and disburses. The bill provides that this record must contain the:

- Name of each organization that requested funds,
- Amount the organization requested,
- Amount the organization received, and
- Written explanation regarding the funding determination.

The bill specifies that this organized record must be displayed prominently on the student government association's website. Accordingly, the bill may provide the public with data regarding state university student government associations' funding determinations.

Cause of Action

The bill creates a *state* cause of action, whereby if a public institution of higher education or an individual acting on behalf of a public institution of higher education willfully violates a person's expressive rights by an action prohibited under the Act, the Florida Attorney General or a person whose expressive rights are violated may bring an action in court of competent jurisdiction to recover compensatory damages, reasonable court costs, and attorney fees. This effectively operates as a limited waiver of sovereign immunity for constitutional tort cases, and caps liability at $100,000.

The bill provides that if the court finds that a violation of the Act occurred, the court must award the aggrieved party at least $500 for each violation or award compensatory damages, e.g. costs of printing literature or paying a speaker. The bill limits the total compensatory damages available to a plaintiff in a case arising from a single violation of the Act to $100,000, excluding reasonable court costs and attorney fees. The bill specifies that in the event of multiple plaintiffs, the court must divide the damages equally among the plaintiffs until the maximum award is exhausted.

Additionally, the bill provides a one-year statute of limitations for a cause of action. Accordingly, the Attorney General or a person aggrieved by a violation of this section must bring suit against the institution no later than 1 year after the date the cause of action accrues. The bill specifies that for purposes of the one-year statute of limitations, each day that a violation of the

[75] 393 U.S. 503, 512–13 (1969).

Act persists or each day that a policy in violation of the Act remains in effect constitutes a new violation of, and therefore, a new day that the cause of action accrues.

Accordingly, the bill provides a specific remedy in law for an individual whose expressive rights have been violated by a public institution of higher education.

The bill takes effect July 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Constitutional Issue:

The "federal funding" language could be problematic as an argument could be made that the statute applies to private universities accepting federal funding. By accepting federal funding, a person may argue that a private university is transformed into a public actor for purposes of the first amendment.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

It is likely there will be some future fiscal impact as the state would be waiving its sovereign immunity for the purpose of recognizing constitutional tort claims. The range of damages is limited to a $500 fee (which is really a fine) where there are no compensatory damages, or to compensatory damages, whichever is greater, not to exceed $100,000. However, the risk of such constitutional tort claims may be reduced by the elimination of free speech zones and the opening of outdoor spaces on public college and university campuses as traditional public forums.

VI. Technical Deficiencies:

None.

VII. Related Issues:

VIII. Statutes Affected:

This bill substantially amends section 1009.24, Florida Statutes.

This bill creates section 1004.097, Florida Statutes.

IX. Additional Information:

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

CS by Education on February 6, 2018.
The committee substitute retains the substance of the bill with the following modifications:

- Adds to the bill a provision related to state university student fees to:
  - Require a student government organization to provide a written explanation regarding the funding determination to a recognized student organization that submits a request for activity and service fee funding.
  - Require each student government association to maintain on its website an organized record of the funding requests and awards it receives and requests.
- Revises the bill provision related to compensatory damages associated with the cause of action to provide the aggrieved party at least $500 per violation and removes from the bill the $50 limit for additional violations.
- Clarifies the definition of a public institution of higher education in the bill to remove state college from that definition and maintains in the definition the reference to Florida College System institution as defined in law.

B. Amendments:

None.