

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 909 Free Expression on Campus  
**SPONSOR(S):** Civil Justice & Claims Subcommittee; Rommel; Clemons and others  
**TIED BILLS:** none **IDEN./SIM. BILLS:** SB 1234

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Post-Secondary Education Subcommittee	9 Y, 5 N	McAlarney	Bishop
2) Civil Justice & Claims Subcommittee	11 Y, 4 N, As CS	Jones	Bond
3) Education Committee			

### SUMMARY ANALYSIS

CS/HB 909 creates s. 1004.097, F.S, the "Campus Free Expression Act" (Act), which addresses the issue of free speech on Florida university and college campuses.

The bill defines the terms free speech zone, outdoor areas of campus, and public institutions of higher education. It clarifies that an individual's expressive rights may not be infringed upon, and that an institution is prohibited from restricting expressive activities to a particular area of campus and prohibited from designating free speech zones.

Protected activities include speeches and writings that an individual uses to communicate ideas to others. These include:

- Peaceful assembly.
- Peaceful protests.
- Speeches.
- Guest speakers.
- Distributing literature.
- Carrying signs.
- Circulating petitions.
- Video or audio recording in outdoor areas of campus.

Reasonable limits on expressive activities are permitted. However, students, faculty, or staff may not materially and substantially disrupt activities on campus. An institution may restrict expressive activities only if the restrictions are reasonable. The restrictions must be content-neutral on time, place, and manner of expression, and must be narrowly tailored to a significant institutional interest. All restrictions must be clear, published, and provide for ample alternative means of expression.

The bill empowers individuals and the Attorney General to defend free speech rights by creating a state cause of action against the public institution of higher education. Remedies for violations include monetary damages of at least \$500, court costs, and attorney fees. A one-year statute of limitations is set.

The bill does not appear to have a fiscal impact on state or local governments.

The bill has an effective date of July 1, 2018.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Present Situation

##### Intellectual Diversity and Freedom of Expression

In 2013, the American Council of Trustees and Alumni (ACTA), with the James Madison Institute (JMI), produced a comprehensive report that reviewed state university policies in Florida relating to the right to free expression on campus.<sup>1</sup> The report found that, while Florida institutions have broad policy statements that declare the right to free expression on campus, they also have broad policies that punish “offensive” speech or restrict expression to designated “free speech zones.”<sup>2</sup> The Foundation for Individual Rights in Education (FIRE) also conducted a review of the state of free speech on college campuses.<sup>3</sup> FIRE conducted a survey of the publicly available policies at 449 4-year postsecondary institutions (345 public and 104 private) and found that 39.6 percent of those institutions maintain severely restrictive speech codes that prohibit constitutionally protected speech.<sup>4</sup> FIRE rated colleges and universities as either “red light,”<sup>5</sup> “yellow light,”<sup>6</sup> or “green light”<sup>7</sup> based on the amount of restrictions their written policies place on protected speech. Over a 9-year period, the number of public postsecondary institutions that received a “red light” rating dropped from 79 percent to 33.9 percent.<sup>8</sup>

As of 2017, the only Florida public universities that have received a “green light” campus free speech rating are the University of Florida and the University of North Florida.<sup>9</sup>

In January 2015, the Committee on Freedom of Expression at the University of Chicago produced a free speech policy statement (referred to as the “Chicago Statement”) that affirmed the centrality of unfettered debate to the university’s mission.<sup>10</sup> Below is an excerpt from this statement:<sup>11</sup>

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<sup>1</sup> American Council of Trustees and Alumni (with the James Madison Institute), *Florida Rising: An assessment of Public Universities in the Sunshine State* (June 2013). Available at: [https://www.goacta.org/publications/florida\\_rising](https://www.goacta.org/publications/florida_rising) (last visited Jan. 11, 2018).

<sup>2</sup> *Id.*

<sup>3</sup> Foundation for Individual Rights in Education, *Spotlight on Free Speech Codes 2017*. Available at: <https://www.thefire.org/spotlight-on-speech-codes-2017/> (last visited Jan. 17, 2018).

<sup>4</sup> *Id.*

<sup>5</sup> Foundation for Individual Rights in Education, *Spotlight on Free Speech Codes 2017*. Available at: <https://www.thefire.org/spotlight-on-speech-codes-2017/> (last visited Jan. 17, 2018). A “red light” institution is one that has at least one policy both clearly and substantially restricting freedom of speech, or that bars public access to its speech-related policies by requiring a university login and password for access. A “clear” restriction is one that unambiguously infringes on protected expression.

<sup>6</sup> Foundation for Individual Rights in Education, *Spotlight on Free Speech Codes 2017*. Available at: <https://www.thefire.org/spotlight-on-speech-codes-2017/> (last visited Jan. 17, 2018). A “yellow light” institution is one that maintains policies that could be interpreted to suppress protected speech or policies that, while clearly restricting freedom of speech, restrict narrow categories of speech.

<sup>7</sup> Foundation for Individual Rights in Education, *Spotlight on Free Speech Codes 2017*. Available at: <https://www.thefire.org/spotlight-on-speech-codes-2017/> (last visited Jan. 17, 2018). A “green light” institution is one whose written policies do not seriously threaten campus expression. It does not indicate whether an institution actively supports free expression in practice.

<sup>8</sup> Foundation for Individual Rights in Education, *Spotlight on Free Speech Codes 2017*. Available at: <https://www.thefire.org/spotlight-on-speech-codes-2017/> (last visited Jan. 17, 2018).

<sup>9</sup> James Madison Institute, *Free expression and Intellectual Diversity: How Florida Universities Currently Measure Up*. (December 14, 2017). Available at: <https://www.jamesmadison.org/Library/docLib/PolicyBrief-FreeSpeech-v05.pdf> (last visited Jan. 11, 2018).

<sup>10</sup> *Id.*

<sup>11</sup> University of Chicago, *Report of the Committee on Free Expression* (2015). Available at: <https://freeexpression.uchicago.edu/sites/freeexpression.uchicago.edu/files/FOECommitteeReport.pdf> (last visited Jan. 11, 2018).

Because the University is committed to free and open inquiry in all matters, it guarantees all members of the University community the broadest possible latitude to speak, write, listen, challenge, and learn. Except insofar as limitations on that freedom are necessary to the functioning of the University, the University of Chicago fully respects and supports the freedom of all members of the University community “to discuss any problem that presents itself.”

Of course, the ideas of different members of the University community will often and quite naturally conflict. But it is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Although the University greatly values civility, and although all members of the University community share in the responsibility for maintaining a climate of mutual respect, concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community.

Several other postsecondary institutions have adopted some version of the “Chicago Statement” since 2015.<sup>12</sup>

## US Constitutional Right to Free Speech

The First Amendment to the U.S. Constitution states 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.*<sup>13</sup>

### What Does Free Speech Mean?

The Supreme Court of the United States (SCOTUS) historically determines what exactly constitutes protected speech. The following are examples of speech, both direct (words) and symbolic (actions), that the SCOTUS has decided are, or are not, entitled to First Amendment protections.<sup>14</sup>

Freedom of speech includes the right:<sup>15</sup>

- Not to speak (specifically, the right not to salute the flag).<sup>16</sup>
- Of students to wear black armbands to school to protest a war (“Students do not shed their constitutional rights at the schoolhouse gate.”).<sup>17</sup>
- To use certain offensive words and phrases to convey political messages.<sup>18</sup>
- To contribute money to political campaigns.<sup>19</sup>
- To advertise commercial products and professional services.<sup>20</sup>
- To engage in symbolic speech such as burning the American flag in protest.<sup>21</sup>

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<sup>12</sup> Foundation for Individual Rights in Education, *Spotlight on Free Speech Codes 2017*. Available at: <https://www.thefire.org/spotlight-on-speech-codes-2017/> (last visited Jan. 11, 2018).

<sup>13</sup> Congress.gov, The Constitution of the United States of America: Analysis and Interpretation, Amendments to the Constitution, Bill of Rights, 1<sup>st</sup> Amendment, p. 1071, <https://www.congress.gov/content/conan/pdf/GPO-CONAN-2017-10-2.pdf> (last visited Jan. 11, 2018).

<sup>14</sup> Administrative Office of the U.S. Courts, About Federal Courts, Educational Resources, What Does Free Speech Mean?, <http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does> (last visited Jan. 11, 2018).

<sup>15</sup> *Id.*

<sup>16</sup> *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).

<sup>17</sup> *Tinker v. Des Moines*, 393 U.S. 503 (1969).

<sup>18</sup> *Cohen v. California*, 403 U.S. 15 (1971).

<sup>19</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>20</sup> *Virginia Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

<sup>21</sup> *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990).

Freedom of speech does not include the right:<sup>22</sup>

- To incite actions that would harm others such as shouting 'fire' in a crowded theater."<sup>23</sup>
- To make or distribute obscene materials.<sup>24</sup>
- To burn draft cards as an anti-war protest.<sup>25</sup>
- To permit students to print articles in a school newspaper over the objections of the school administration.<sup>26</sup>
- Of students to make an obscene speech at a school-sponsored event.<sup>27</sup>
- Of students to advocate illegal drug use at a school-sponsored event.<sup>28</sup>

## **Free Speech at Higher Education Institutions**

The SCOTUS stated that the "college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'"<sup>29</sup> If public universities stifle student speech and prevent the open exchange of ideas on campus "our civilization will stagnate and die."<sup>30</sup> In college classrooms young adults learn to exercise these constitutional rights necessary to participate in our system of government and to tolerate others' exercise of the same rights. There is "no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large . . . Quite to the contrary, the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."<sup>31</sup>

## **Effect of Proposed Changes**

CS/HB 909 creates the "Campus Free Expression Act" (Act), s. 1004.097, F.S, which addresses the issue of free speech on the campuses of public postsecondary institutions.

The Act defines the terms free speech zone, outdoor areas of campus, and public institutions of higher education as follows:

- Free speech zone is defined as a designated area on a public institution of higher education's campus for the purpose of political protesting.
- Outdoor areas of campus are defined generally as accessible areas of the campus where members of the campus community are commonly allowed, including grassy areas, walkways, or other similar common areas. The term does not include outdoor areas where access is restricted.
- Public institution of higher education (institution) is defined as any public technical center, state college, state university, law school, medical school, dental school, or other Florida College System institution as defined in s. 1000.21, F.S.

Free speech rights are protected by enforcing the right to peacefully protest or distribute literature on campus, and clarifying that an individual's expressive rights may not be infringed upon. Protected activities include speeches and writings that an individual uses to communicate ideas to others.

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<sup>22</sup> Administrative Office of the U.S. Courts, About Federal Courts, Educational Resources, What Does Free Speech Mean?, <http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does> (last visited Jan. 11, 2018).

<sup>23</sup> *Schenck v. United States*, 249 U.S. 47 (1919).

<sup>24</sup> *Roth v. United States*, 354 U.S. 476 (1957).

<sup>25</sup> *United States v. O'Brien*, 391 U.S. 367 (1968).

<sup>26</sup> *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

<sup>27</sup> *Bethel School District #43 v. Fraser*, 478 U.S. 675 (1986).

<sup>28</sup> *Morse v. Frederick*, 551 U.S. 393 (2007).

<sup>29</sup> *Healy v. James*, 408 U.S. 169, 180 (1972).

<sup>30</sup> *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

<sup>31</sup> *Healy v. James*, 408 U.S. 169, 180 (1972).

These include:

- Peaceful assembly.
- Peaceful protests.
- Speeches.
- Guest speakers.
- Distributing literature.
- Carrying signs.
- Circulating petitions.
- Video or audio recording in outdoor areas of campus.

Reasonable limits on expressive activities are permitted; however, students, faculty, or staff may not materially disrupt activities on campus. An individual may exercise rights freely as long as his or her conduct is lawful and does not materially and substantially disrupt the functioning of the public institution of higher education.

Restrictions must be reasonable and content-neutral on time, place, and manner of expression. These restrictions must be narrowly tailored to a significant institutional interest. This clarifies the legal standard for courts to apply and ensures that regulations are truly necessary to prevent disruption. All restrictions must be clear, published, and provide for ample alternative means of expression. Additionally, institutions are prohibited from creating policies restricting expressive activities to a particular area of campus and designating free speech zones.

A state cause of action with a one-year statute of limitation is created. If an individual is prevented from speaking or writing, or is forced to do so in a free-speech zone, that individual or the Attorney General can file a lawsuit in state court against the public institution of higher education. Remedies for violations include monetary damages, court costs, and attorneys' fees. However, the total compensatory damages available, excluding reasonable court costs and attorney fees, may not exceed \$100,000. If there are multiple plaintiffs, the court must divide the damages equally among the plaintiffs until the maximum award is exhausted. If the court finds a violation has occurred, the court must award the greater of \$500 for each violation or compensatory damages.

#### B. SECTION DIRECTORY:

**Section 1:** Explains that the act may be cited as the "Campus Free Expression Act".

**Section 2:** Creates s. 1004.097, F.S., the "Campus Free Expression Act," authorizing public institutions of higher education to create and enforce restrictions on expressive activities on campus; provides cause of action for violation of the act; provides for specific damages; and provides a statute of limitations.

**Section 3:** Provides an effective date of July 1, 2018.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

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

##### 1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable.

2. Other:

Not applicable.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 30, 2018, the Civil Justice and Claims Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Clarified that a civil action to enforce the bill is against the public institution of higher education.
- Specified that if the court finds that a violation occurred, the court must award the greater of \$500 per violation or compensatory damages.
- Removed the per day minimum damages.

This analysis is drafted to the committee substitute as passed by the Civil Justice and Claims Subcommittee.