

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1 Combating Public Disorder  
**SPONSOR(S):** Fernandez-Barquin and others  
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 484

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice & Public Safety Subcommittee	11 Y, 6 N	Hall	Hall
2) Justice Appropriations Subcommittee			
3) Judiciary Committee			

### SUMMARY ANALYSIS

Over the past year, protests relating to race, police tactics, and politics have swept across the country. While many protests in Florida remained peaceful, some cities were forced to issue emergency curfews as police officers were injured and local businesses were damaged and burglarized. Most recently, the Governor activated the National Guard to assist in securing the Capitol after authorities warned of threats of violent protests. While some violent and disorderly behavior associated with rioting may be prosecuted under current law, prosecuting and preventing other violent and destructive conduct may be difficult.

HB 1 gives law enforcement and prosecutors additional tools to prevent violence and property destruction and to hold any person who uses a protest as an opportunity to commit crime accountable for their actions. The bill:

- Defines previously undefined crimes of affray, rioting, and inciting a riot and creates new crimes and enhanced penalties for aggravated rioting and aggravated inciting a riot.
- Increases penalties for assault or battery when committed in furtherance of a riot and requires a court to sentence a person convicted of battery of a law enforcement officer committed in furtherance of a riot to a six month minimum mandatory sentence.
- Creates the crime of mob intimidation, prohibiting a mob from forcefully compelling or attempting to compel another person to do any act or to assume or abandon a particular viewpoint.
- Enhances penalties for specified burglary and theft offenses committed during a riot when facilitated by conditions arising from the riot.
- Creates new crimes prohibiting a person from defacing, damaging, or destroying a memorial.
- Increases the lowest permissible sentence for specified crimes committed in furtherance of a riot.
- Requires a person arrested for specified offenses related to rioting and unlawful assembly to be held in jail until he or she appears for a first appearance hearing and a court determines bond.
- Creates the crime of cyberintimidation by publication, prohibiting a person from posting another person's personal identification information with the intent to threaten, intimidate, or harass that person.
- Creates a process by which a citizen of a municipality may challenge a reduction to the operating budget of a municipal law enforcement agency.
- Waives sovereign immunity for tort claims arising from a riot or unlawful assembly if the governing body of a municipality interferes with law enforcement's ability to provide reasonable police protection.
- Creates an affirmative defense in a civil action arising from a riot or unlawful assembly if the plaintiff's injury or damage was sustained as a result of participating in a riot or unlawful assembly.
- Corrects constitutional infirmities in the current prohibition against obstructing a roadway.

The bill may have a positive indeterminate impact on prison and jail beds by creating new felony and misdemeanor offenses. The bill may have a negative indeterminate fiscal impact on municipal governments by waiving sovereign immunity for specified civil claims arising from a riot or unlawful assembly.

The bill has an effective date of July 1, 2021.

### FULL ANALYSIS

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0001a.CRM

DATE: 1/27/2021

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

In May 2020, protests erupted across the country in response to the death of George Floyd, a black man who was killed under the knee of a white police officer in Minneapolis, Minnesota. Large and small cities alike experienced peaceful protests mixed with outbreaks of violence and destruction.<sup>1</sup>

Locally, several Florida cities experienced incidents of rioting and civil unrest. While most protests were peaceful, isolated groups were responsible for acts of violence and property damage. In Miami, following the issuance of an emergency curfew, four police officers were injured, 17 police cars were damaged, and 46 arrests were made after police responded to looting at an outdoor shopping center and protests outside of police headquarters. Groups of protestors marched onto I-95, blocking traffic and creating hours of gridlock. Miami-Dade County temporarily suspended all public transit service in response to the unrest. Following the rioting, city and private cleaning crews were employed to remove graffiti and debris.<sup>2</sup>

In Tampa, what began as a peaceful protest near the University of South Florida, devolved into unrest as police were forced to form barriers around businesses after several stores were broken into and looted. One sporting goods store and a gas station were set on fire. A crowd of people launched fireworks into officers, while others threw bottles and rocks, and the windows of multiple police cars were broken.<sup>3</sup> Tampa's mayor issued a citywide curfew and city and county leaders reported more than 50 businesses were damaged or burglarized and more than 50 police cars were damaged. More than 40 people were arrested for charges including burglary and rioting.<sup>4</sup>

In Jacksonville, peaceful protests involving over 1,000 participants escalated when a group of about 200 people began confronting police, throwing water bottles, rocks, and bricks, and attempting to set police cars on fire. Some officers were injured by rocks and bricks<sup>5</sup> while one officer was hospitalized after being stabbed in the neck.<sup>6</sup>

In July 2020, protestors demonstrating in a crosswalk in St. Petersburg refused to move for a fire-rescue ambulance and local police received over 400 complaint calls about protestors blocking traffic.<sup>7</sup> In September 2020, also in St. Petersburg, protestors accosted a couple dining outside at a restaurant. A video capturing the incident showed a protestor threatening to punch a diner and berating other diners with expletives and insults.<sup>8</sup>

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<sup>1</sup> Joanna Walters, *George Floyd protests: The US cities that became hotspots of unrest*, The Guardian (May 31, 2021), <https://www.theguardian.com/us-news/2020/may/31/george-floyd-protests-us-cities-hotspots-unrest> (last visited Jan. 20, 2021).

<sup>2</sup> Douglas Hanks, Sarah Blaskey, Nicholas Nehamas, Daniel Chang, *Scenes of destruction- few injuries- on morning after Miami protest of George Floyd death*, Miami Herald (May 31, 2020), <https://www.miamiherald.com/article243130356.html> (last visited Jan. 20, 2021).

<sup>3</sup> Julio Ochoa, *Peaceful Protests Turn Violent in Tampa in Response to George Floyd Killing*, WUSF Public Media (May 30, 2020), <https://wusfnews.wusf.usf.edu/law-order/2020-05-30/peaceful-protests-turn-violent-in-tampa-in-response-to-george-floyd-killing> (last visited Jan. 20, 2021).

<sup>4</sup> Mary Shedden, Daylina Miller, Stephanie Colombini, *Tampa Issues Curfew After Businesses Damaged in Overnight Protests*, WUSF Public Media (May 31, 2021), <https://www.wusfnews.wusf.usf.edu/law-order/2020-05-31/tampa-issues-curfew-after-businesses-damaged-in-overnight-protests> (last visited Jan. 20, 2021).

<sup>5</sup> Marilyn Parker, *Peaceful protest marred by riots in downtown Jacksonville*, News4Jax (May 30, 2020), <https://www.news4jax.com/news/local/2020/05/30/demonstrators-in-jacksonville-join-national-i-cant-breathe-protests/> (last visited Jan. 20, 2021).

<sup>6</sup> Andrea Torres, *Officer stabbed in neck during protests in Jacksonville* (May 31, 2020), <https://www.local10.com/news/local/2020/05/31/officer-stabbed-in-neck-during-protests-in-jacksonville/> (last visited Jan. 20, 2021).

<sup>7</sup> Jillian Olsen, *Protesters refused to let an ambulance pass, St. Pete police say*, WTSP Tampa Bay (July 9, 2020), <https://www.wtsp.com/article/news/local/protests/st-petersburg-protestors-fire-truck/67-1553a001-0683-4363-8b39-ab4a28930146> (last visited Jan. 20, 2021).

<sup>8</sup> Josh Fiallo, Romy Ellenbogen, Caitlin Johnston, *Demonstrators vs. diners: St. Petersburg encounter goes viral*, Tampa Bay Times (Sept. 24, 2020), <https://www.tampabay.com/news/st-petersburg/2020/09/24/tense-exchnage-between-st-pete-demonstrators-and-diners-goes-viral/> (last visited Jan. 20, 2021).

Most recently, in January 2021, a large group of protestors violently stormed the U.S. Capitol as lawmakers were certifying the Electoral College vote. The riot led to five deaths, including the death of one Capitol police officer who was reportedly struck in the head with a fire extinguisher while engaging with rioters. Overall, 60 Capitol police officers were injured.<sup>9</sup> Following the violence, the FBI warned state and local officials about the potential for unrest and chatter of plans to storm government buildings leading up to Inauguration Day.<sup>10</sup> On January 15, 2021, the FBI arrested one person in Tallahassee after he encouraged others online to join a violent attack on protestors who were anticipated to gather at the Florida Capitol.<sup>11</sup> Later that day, Governor DeSantis issued an executive order activating the Florida National Guard to assist the Florida Department of Law Enforcement and local law enforcement authorities in their efforts to protect the state, its citizens, and public buildings and property from potential unrest.<sup>12</sup>

## **Unlawful Assembly, Affray, Rioting, Inciting or Encouraging a Riot**

### Background

#### *Unlawful Assembly*

Section 870.02, F.S., prohibits three or more persons from meeting together to commit a breach of the peace or any other unlawful act. A criminal violation for unlawful assembly is a second degree misdemeanor punishable by up to 60 days in county jail and a \$500 fine.<sup>13</sup> Under Florida law, a person commits a breach of the peace by:

- Committing any act which may:
  - Corrupt the public morals,
  - Outrage the sense of public decency, or
  - Affect the peace and quiet of persons who may witness them; or
- Engaging in:
  - Brawling or fighting,
  - Conduct which constitutes a breach of the peace, or
  - Disorderly conduct.<sup>14</sup>

The Florida Supreme Court (FSC) has relied on the common law definition of an unlawful assembly to define which elements must be alleged for the offense to pass constitutional muster. Persons participating in an unlawful assembly commit a breach of the peace when: an assembly of three or more persons who, having a common unlawful purpose, assemble in such a manner as to give a reasonable person in the vicinity of the assembly a well-founded fear of a breach of the peace.<sup>15</sup> Applying this definition, the FSC has held that prohibiting an assembly whose purpose is to commit a breach of the peace is not a violation of the First Amendment.<sup>16</sup>

Section 870.03, F.S., similarly prohibits an unlawful assembly from demolishing, pulling down or destroying, or beginning to pull down or destroy any dwelling house or other building, or any ship or vessel. A violation is a third degree felony punishable by up to five years in prison and a \$5,000 fine.<sup>17</sup>

#### *Affray*

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<sup>9</sup> Kenya Evelyn, *Capitol Attack: the five people who died*, The Guardian (Jan. 8, 2021), <https://www.theguardian.com/us-news/2021/jan/08/capitol-attack-police-officer-five-deaths> (last visited Jan. 20, 2021).

<sup>10</sup> Steven Lemongello and Gray Rohrer, *DeSantis calls up National Guard in advance of possible protests at Florida Capitol*, Orlando Sentinel (Jan. 15, 2021), <https://www.orlandosentinel.com/politics/os-ne-tallahassee-rally-sunday-20210115-ug4mdgcuovbqj5vlpjh4sahua-story.html> (last visited Jan. 20, 2021).

<sup>11</sup> Jeff Burlew, *FBI arrests former U.S. soldier in alleged plot to carry out violence at Florida Capitol*, Tallahassee Democrat (Jan. 15, 2021), <https://www.tallahassee.com/story/news/local/2021/01/15/capitol-riots-florida-protests-violence/4175324001/> (last visited Jan. 20, 2021).

<sup>12</sup> Fla. Exec. Order No. 21-11, National Guard Activation in Response to Possible Protest (Jan. 15, 2021).

<sup>13</sup> Ss. 775.082 and 775.083, F.S.

<sup>14</sup> S. 877.03, F.S.

<sup>15</sup> *State v. Simpson*, 347 So.2d 414, 415 (Fla. 1977).

<sup>16</sup> *Id.*

<sup>17</sup> Ss. 775.082 and 775.083, F.S.

Section 870.01(1), F.S., imposes a first degree misdemeanor<sup>18</sup> penalty on a person who commits an affray. The statute does not define the elements of the offense, leaving Florida courts to rely on the common law. At common law an "affray" is defined as the fighting of two or more persons in a public place, to the terror of the people.<sup>19</sup> An affray is distinguished from an assault or battery by requiring fighting by two or more people, while an assault or battery may be committed by only one person.<sup>20</sup>

### *Rioting and Inciting or Encouraging a Riot*

Under Florida law, all persons found guilty of rioting, or of inciting or encouraging a riot, are guilty of a third degree felony.<sup>21</sup> Like the affray statute, the riot statute does not define prohibited conduct by laying out the elements of the crime. Florida courts have resorted to the common law definition of riot when deciding challenges to the statute. At common law, a "riot" is a tumultuous disturbance of the peace by three or more persons, assembled and acting with a common intent, either in executing a lawful private enterprise in a violent or turbulent manner, to the terror of the people, or in executing an unlawful enterprise in a violent and turbulent manner.<sup>22</sup> The FSC has construed s. 870.01(2), F.S., to require three or more persons to act with the common intent to mutually assist each other in a violent manner to the terror of the people and a breach of the peace.

For the offense of inciting or encouraging a riot, the FSC has held that a person must speak or act with the intent to provoke a riot, and the person's language must clearly intend to incite a breach of the peace. To avoid any infringement of the First Amendment, a person's words must be such that they advocate violence and tend to incite an immediate breach of the peace.<sup>23</sup> Specifically, the FSC has construed the statute to require circumstances constituting a clear and present danger of a riot and require the defendant's language to tend to incite an assembly to an immediate breach of the peace.<sup>24</sup>

### Effect of the Bill- Unlawful Assembly, Affray, Rioting, Inciting or Encouraging a Riot, Mob Intimidation

HB 1 defines the crime of affray by prohibiting a person from engaging in fighting, by mutual consent, in a public place, to the terror of the people. The bill incorporates the elements of an affray as defined at common law and used by the FSC in deciding previous challenges to the statute. A violation for an affray remains a first degree misdemeanor.

The bill also provides a statutory definition of rioting. Under the bill, a person who participates in a public disturbance involving an assembly of three or more persons acting with a common intent to mutually assist each other in disorderly and violent conduct resulting in injury or damage to another person or property, or creating a clear and present danger of injury or damage to another person or property, is guilty of rioting. Rioting remains a third degree felony and the offense continues to be ranked a Level 3 offense on the Criminal Punishment Code's (CPC) offense severity ranking chart (OSRC).<sup>25</sup>

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<sup>18</sup> A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. *Id.*

<sup>19</sup> *Carnley v. State*, 88 Fla. 281, 283 (Fla. 1924).

<sup>20</sup> *O.A. v. State*, 312 So.2d 202, 203 (Fla. 2d DCA 1975).

<sup>21</sup> Rioting, or inciting or encouraging a riot, is a Level 3 offense on the Criminal Punishment Code's offense severity ranking chart. S. 921.0022(3)(c), F.S.

<sup>22</sup> *State v. Beasley*, 317 So.2d 750, 752 (Fla. 1975).

<sup>23</sup> *Id.* at 753.

<sup>24</sup> In *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the U.S. Supreme Court held that "the constitutional guarantees of free speech and free press do not permit the State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

<sup>25</sup> Felony offenses subject to the CPC are listed in a single offense severity ranking chart, which uses 10 offense levels to rank felonies from least severe (Level 1) to most severe (Level 10). Each felony offense is assigned to a level according to the severity of the offense, commensurate with the harm or potential for harm to the community that is caused by the offense, as determined by statute. A person's primary offense, any other current offenses, and prior convictions are scored using the points designated for the offense severity level of each offense. The final calculation, following the scoresheet formula, determines the lowest permissible sentence that the trial court may impose, absent a valid reason for departure. S. 921.0022, F.S.

The bill creates the new offense of aggravated rioting. Under the bill, aggravated rioting is a second degree felony punishable by up to 15 years imprisonment and a \$10,000 fine<sup>26</sup> and is ranked a Level 4 offense on the OSRC. A person commits aggravated rioting, if, in the course of rioting, he or she:

- Participates with nine or more persons;
- Causes great bodily harm to a person not participating in the riot;
- Causes property damage in excess of \$5,000;
- Displays, uses, threatens to use, or attempts to use a deadly weapon;<sup>27</sup> or
- By force, or threat of force, endangers the safe movement of a vehicle traveling on a public street, highway, or road.

HB 1 defines the offense of inciting or encouraging a riot. Under the bill, a person who willfully incites or encourages another to participate in a riot, resulting in a riot or a clear and present danger of a riot, commits a third degree felony. Inciting or encouraging a riot continues to be ranked as a Level 3 offense on the OSRC. The bill also creates a new offense for aggravated inciting or encouraging a riot. Under the bill, the crime is a second degree felony and is ranked as a Level 4 offense on the OSRC. A person commits aggravated inciting or encouraging a riot if he or she:

- Incites or encourages a riot resulting in:
  - Great bodily harm to another person not participating in the riot.
  - Property damage in excess of \$5,000.
- Supplies a deadly weapon to another person or teaches another person to prepare a deadly weapon with intent that the deadly weapon be used in a riot.

HB 1 also creates a new crime for mob intimidation. Under the bill, it is unlawful for a person, assembled with two or more other persons and acting with a common intent, to compel or induce, or attempt to compel or induce, another person by force, or threat of force, to do any act or to assume or abandon a particular viewpoint. A violation for mob intimidation is a first degree misdemeanor.

The bill requires a person arrested for rioting,<sup>28</sup> aggravated rioting, inciting or encouraging a riot, aggravated inciting or encouraging a riot, unlawful assembly, or mob intimidation to be held in custody until he or she appears for a first appearance hearing and a court determines bond.<sup>29</sup>

## **Obstructing a Roadway**

### Background

Section 316.2045, F.S., generally prohibits<sup>30</sup> a person from willfully obstructing the free, convenient, and normal use of any public street, highway, or road. A person who willfully obstructs the free, convenient, and normal use of any public street, highway, or road by impeding, hindering, stifling, retarding, or restraining traffic by standing or approaching motor vehicles thereon, or by endangering the safe movement of vehicles, commits a pedestrian violation.<sup>31, 32</sup> If a person does so to solicit, without proper authorization or a lawful permit,<sup>33</sup> the offense becomes a second degree misdemeanor.<sup>34</sup>

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<sup>26</sup> Ss. 775.082 and 775.083, F.S.

<sup>27</sup> When undefined in statute, Florida courts have defined a "deadly weapon" as an instrument that will likely cause death or great bodily harm when used in the ordinary and usual manner contemplated by its design or an object that is used or threatened to be used in a way likely to produce death or great bodily harm. See *Brown v. State*, 86 So.3d 569, 571 (Fla. 5th DCA 2012).

<sup>28</sup> Under either s. 870.01(2), F.S., or s. 870.03, F.S.

<sup>29</sup> Similarly, under current law, when a defendant is charged with a specified offense, such as a gang related crime or an act of domestic violence, he or she must be held without bail until his or her first appearance to ensure the full participation of the prosecutor and the protection of the public. See s. 903.046(2)(f) and s. 741.2901, F.S.

<sup>30</sup> S. 316.2045(5), F.S., exempts commercial vehicles collecting solid waste or recycling when displaying amber flashing hazard lights.

<sup>31</sup> Ch. 318, F.S.

<sup>32</sup> A pedestrian violation is punishable by a \$15 fine and court costs. S. 316.2045(1), F.S.

<sup>33</sup> A permit to use a state-maintained road or right-of-way is required only for a purpose and in the manner laid out in s. 337.406, F.S.

<sup>34</sup> In *Vigue v. Shoar*, No. 3:19-CV-186-J-32JBT, 2020 WL 6020484, at \*18 (M.D. Fla. Oct. 12, 2020) (appeal pending), the Court found that the portion of s. 337.406(1), F.S., relating to charitable solicitation imposes an unconstitutional prior restraint on speech. The Court found the portions of s. 337.406(1), F.S., pertaining to charitable solicitation are severable from the remainder of the statute, and as such, the portions of s. 337.406(1), F.S., unrelated to charitable solicitation and the entirety of s. 337.406(2)–(5) remain unaffected.

However, a charity registered under ch. 496, F.S.,<sup>35</sup> or a political campaign is exempt from permitting requirements for activities on a local street or road.<sup>36, 37</sup>

### *Free Speech*

Speech regulations are generally analyzed as to whether they are content-based or content-neutral. A content-based law targets speech based on its content and is subject to strict scrutiny, while a content-neutral law regulates the time, place, and manner of expression, without regard to the substance or message, and is subject to intermediate scrutiny. Content-based laws are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve a compelling state interest.<sup>38</sup> Whereas, content-neutral laws need only be tailored to serve a significant government interest, and leave open alternative channels of communication. A law may also place an unconstitutional prior restraint on speech when access to a public forum is denied before the expression occurs. Prior restraints “are not per se unconstitutional,” but there is a “strong presumption against their constitutionality.”<sup>39</sup> Requiring a permit to exercise free speech in a public forum is typically unconstitutional without a narrow, objective, and definite standard to guide a permitting authority.<sup>40</sup>

### *Constitutional Challenges*

In 2003, the U.S. District Court for the Middle District of Florida found that s. 316.2045, F.S., was content-based, vague, and overbroad, because the law facially preferred the viewpoints expressed by registered charities and political campaigns, while restricting the expression of all other subjects, without serving a compelling state interest.<sup>41, 42</sup> Based on its findings, the Court held that s. 316.2045, F.S., was unconstitutional because it imposed content-based restrictions on speech in a traditional public forum which was not narrowly tailored to meet a compelling state interest.<sup>43, 44</sup> While the Legislature amended s. 316.2045, F.S., following the *Bischoff* ruling, the implemented changes did not address the unconstitutional portions of the law.<sup>45</sup> As a result, local law enforcement agencies continuing to enforce the law have been subject to legal action.<sup>46</sup>

### Effect of the Bill – Obstructing a Roadway

HB 1 amends s. 316.2045, F.S., to remove portions held unconstitutional by federal courts while preserving the state interest of keeping roadways safe. Under the bill, a person commits a pedestrian violation if he or she intentionally obstructs the free, convenient, and normal use of a public street, highway, or road by impeding, hindering, stifling, retarding, or restraining traffic or passage thereon by:

- Standing or remaining on the street, highway or road; or

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<sup>35</sup> Ch. 496, F.S., requires that non-profit organizations register with the Department of Agriculture and Consumer Services, provide various background and financial information, and pay a registration fee ranging from \$10 to \$400 depending on the contributions received in the last fiscal year. A person or organization acting on the charity’s behalf is also exempt.

<sup>36</sup> S. 316.2045(2), F.S.

<sup>37</sup> A local government may issue a permit for its streets or roads, and in 2007, the legislature specifically provided that qualified charities are also exempt from local permitting requirements, if certain conditions are met. See Ch. 2007–43, Laws of Fla.

<sup>38</sup> *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015).

<sup>39</sup> *United States v. Frandsen*, 212 F.3d 1231, 1236–37 (11th Cir. 2000).

<sup>40</sup> *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150–51, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969).

<sup>41</sup> *Bischoff v. Fla.*, 242 F. Supp. 2d 1226, 1256 (M.D. Fla. 2003). See also *Vigue v. Shoar*, No. 3:19-CV-186-J-32JBT, 2020 WL 6020484, (M.D. Fla. Oct. 12, 2020) (appeal pending) (S. 316.2045, F.S., impermissibly prefers speech by 501(c)(3) charities and by persons who are engaged in “political campaigning” over all other activity that retards traffic, without any showing that the latter is more disruptive than the former.); *Homeless Helping Homeless, Inc. v. City of Tampa*, No. 8:15-CV-1219-T-23AAS, 2016 WL 4162882 (M.D. Fla. Aug. 5, 2016).

<sup>42</sup> *Id* at 1257. (Holding that nothing in the section’s content-based charity-noncharity distinction or political-nonpolitical distinction has any bearing whatsoever on road safety or uniformity).

<sup>43</sup> The Court also held that s. 316.2055, F.S., is content-neutral, but unconstitutionally broad.

<sup>44</sup> Courts have also held that s. 316.2045, F.S., constitutes an unconstitutional prior restraint on expression. *Vigue v. Shoar* at 14.

<sup>45</sup> See 2007-50 Fla. Att’y Gen. Op. (2007).

<sup>46</sup> In 2006, the Northern District of Florida issued a preliminary injunction as to ss. 316.2045 and 337.406, F.S. *Chase v. City of Gainesville*, No. 1:06-CV-044-SPM/AK, 2006 WL 2620260 (N.D. Fla. Sept. 11, 2006). Subsequently, the parties in *Chase* agreed to have the court permanently enjoin enforcement of ss. 316.2045 and 337.406, F.S., and find both statutes facially unconstitutional. *Chase v. City of Gainesville*, No. 1:06-CV-44-SPM/AK, 2006 WL 3826983 (N.D. Fla. Dec. 28, 2006). See also *Vigue v. Shoar*, No. 3:19-CV-186-J-32JBT, 2020 WL 6020484 (M.D. Fla. Oct. 12, 2020) (appeal pending).

- Endangering the safe movement of vehicles or pedestrians traveling thereon.

The bill retains the current exception for commercial vehicles collecting solid waste. Under the bill, a charity, political campaign, or any other person may safely exercise free speech along public roadways without prior restraint or content-based restrictions.

## **Assault and Battery**

### Background

An assault is an intentional, unlawful threat by word or act to do violence to another, combined with the apparent ability to do so, and doing some act which creates a well-founded fear in the other person that such violence is imminent.<sup>47</sup> Assault is a second degree misdemeanor. An aggravated assault is an assault with a deadly weapon without intent to kill or with an intent to commit a felony.<sup>48</sup> Aggravated assault is a third degree felony.

A battery occurs when a person actually and intentionally touches or strikes another person against the person's will or intentionally causes bodily harm to another person.<sup>49</sup> A battery is generally a first degree misdemeanor, however, if an offender has a prior conviction for battery, aggravated battery, or felony battery, a battery is enhanced to a third degree felony.<sup>50</sup>

An aggravated battery occurs when a person committing battery: intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or uses a deadly weapon. Additionally, a battery committed upon a pregnant victim whom the offender knew or should have known was pregnant is also an aggravated battery.<sup>51</sup>

### *Crimes Against Specified Persons*

Section 784.07(2), F.S., reclassifies the misdemeanor or felony degree of assault, aggravated assault, battery, and aggravated battery when a person knowingly commits any of these offenses upon a specified person while such person is engaged in the lawful performance of his or her duties, including:

- A law enforcement officer (LEO);<sup>52</sup>
- A firefighter;
- An emergency medical care provider;
- A railroad special officer;
- A traffic accident investigation officer;
- A nonsworn law enforcement agency employee;
- A law enforcement explorer;
- A traffic infraction enforcement officer;
- A parking enforcement specialist;
- A uniformed licensed security officer;
- A security officer employed by the board of trustees of a community college; or
- A public transit employee or agent.

The offenses are reclassified as follows:

- Assault is reclassified from a second degree misdemeanor to a first degree misdemeanor.

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<sup>47</sup> S. 784.011, F.S.

<sup>48</sup> S. 784.021, F.S.

<sup>49</sup> S. 784.03, F.S.

<sup>50</sup> "Conviction" means a determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld or a plea of nolo contendere is entered. S. 784.03, F.S.

<sup>51</sup> S. 784.045, F.S.

<sup>52</sup> "Law enforcement officer" includes a law enforcement officer (LEO), a correctional officer (CO), a correctional probation officer, a part-time LEO, a part-time CO, an auxiliary LEO, and an auxiliary CO, as those terms are respectively defined in s. 943.10, F.S., and any county probation officer; an employee or agent of the Department of Corrections who supervises or provides services to inmates; an officer of the Florida Commission on Offender Review; a federal LEO as defined in s. 901.1505, F.S.; and law enforcement personnel of the Fish and Wildlife Conservation Commission, the Department of Environmental Protection, or the Department of Law Enforcement. S. 784.07(1)(d), F.S.

- Battery is reclassified from a first degree misdemeanor to a third degree felony.
- Aggravated assault is reclassified from a third degree felony to a second degree felony.
  - The penalty for aggravated assault upon an LEO includes a three-year mandatory minimum sentence.<sup>53</sup>
- Aggravated battery is reclassified from a second degree felony to a first degree felony.<sup>54</sup>
  - The penalty for aggravated battery upon an LEO includes a five-year mandatory minimum sentence.<sup>55</sup>

### Effect of the Bill – Assault and Battery

HB 1 reclassifies or increases the criminal penalty for an assault or battery when committed in furtherance of a riot or an aggravated riot, as follows:

- Assault is reclassified from a second degree misdemeanor to a first degree misdemeanor.
- Aggravated assault is re-ranked from a Level 6 to a Level 7 offense on the OSRC.<sup>56</sup>
- Battery is reclassified from a first degree misdemeanor to a third degree felony and is ranked as a Level 2 offense on the OSRC.
- Aggravated battery is re-ranked from a Level 7 to a Level 8 offense on the OSRC.<sup>57</sup>
- Battery on a LEO is re-ranked from a Level 4 to a Level 5 offense on the OSRC and a person convicted for the crime must be sentenced to a six month mandatory minimum sentence.

The bill requires a person arrested for committing assault or battery in furtherance of a riot or aggravated riot to be held in custody until he or she appears for a first appearance hearing and a court determines bond.

### **Cyberintimidation by Publication**

#### Background

##### *Doxing*

“Doxing” refers to gathering an individual’s personal identification information (PII), such as a name, telephone number, email address, or physical address, and disclosing or posting it publicly, usually for malicious purposes such as public humiliation, stalking, identity theft, or targeting an individual for harassment.<sup>58</sup> Doxing victims can include both private citizens who have had their personal information released to the public, and well-known people who have had information such as their home addresses or personal telephone number released without their consent. For example, in 2019 two former U.S. Senate aides publicly released the home addresses and telephone numbers of several senators after illegally obtaining the information from the computerized Senate personnel database.<sup>59</sup> Both aides were convicted under federal law for crimes related to unauthorized access of a computer database since doxing is not currently a federal crime.

##### *First Amendment*

The First Amendment to the U.S. Constitution does not protect “true threats” as free speech and the government is permitted to restrict such speech.<sup>60</sup> For speech to be a true threat, a person must intentionally or knowingly communicate the threat and the listener must have a reasonable fear that the

<sup>53</sup> S. 784.07(2)(c), F.S.

<sup>54</sup> A first degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine. Ss. 775.082 and 775.083, F.S.

<sup>55</sup> S. 784.07(2)(d), F.S.

<sup>56</sup> S. 921.0022(3)(f), F.S.

<sup>57</sup> S. 921.0022(3)(g), F.S.

<sup>58</sup> U.S. Department of Homeland Security, *How to Prevent Online Harassment from Doxing*, (Apr. 2017),

<https://www.dhs.gov/sites/default/files/publications/How%20to%20Prevent%20Online%20Harassment%20From%20Doxing.pdf> (last visited Jan. 20, 2021).

<sup>59</sup> Politico, *Ex-Hassan Aide Sentenced to 4 Years for Doxing Senators*, (Aug. 5, 2019),

<https://www.politico.com/story/2019/06/19/maggie-hassan-staff-doxing-case-1370529> (last visited Jan. 20, 2021).

<sup>60</sup> *Virginia v. Black*, 538 U.S. 343, 344 (2003) quoting *Watts v. United States*, 394 U.S. 705, 708 (1969).



speaker intends to carry out the threat.<sup>61</sup> The prohibition on true threats “protect[s] individuals from the fear of violence” and “from the disruption that fear engenders,” in addition to protecting people “from the possibility that the threatened violence will occur.”<sup>62</sup>

### *Criminal Use of Personal Identification Information*

Section 817.568(4), F.S., prohibits a person from willfully and without authorization possessing, using, or attempting to use PII concerning another for the purpose of harassing that person. A person who violates this prohibition commits harassment by use of PII, a first degree misdemeanor. While the law may prohibit behavior similar to some forms of doxing, it does not specifically prohibit the type of speech which can cause a person to fear for his or her safety or contemplate a third party using PII to harass or threaten a victim.

### Effect of the Bill- Cyberintimidation by Publication

HB 1 prohibits a person from electronically publishing the PII of another with the intent that the information will be used to threaten, intimidate, harass, incite violence, commit a crime against a person, or place a person in reasonable fear of death or great bodily harm. A violation is punishable as a first degree misdemeanor.

The bill defines “electronically publish” to mean to disseminate, post, or otherwise disclose information to an Internet site or forum. Under the bill, “harass” means to engage in conduct directed at a specific person that is intended to cause substantial emotional distress to such person and serves no legitimate purpose. “Harass” does not mean to use PII for accepted commercial purposes and the term does not include constitutionally protected conduct such as organized protests.

The bill defines “personal identification information” to mean any name or number that may be used, alone or in conjunction with any other information, to identify a specific person, including any:

- Name, postal or electronic mail address, telephone number, social security number, date of birth, mother’s maiden name, official state-issued or United States-issued driver license or identification number, alien registration number, government passport number, employer or taxpayer identification number, Medicaid or food assistance account number, bank account number, credit or debit card number, or personal identification number or code assigned to the holder of a debit card by the issuer to permit authorized electronic use of such card;
- Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
- Unique electronic identification number, address, or routing code;
- Medical records;
- Telecommunication identifying information or access device; or
- Other number or information that can be used to access a person’s financial resources.

## **Theft and Burglary**

### Background

A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or use, the property of another with intent to, either temporarily or permanently:<sup>63</sup>

- Deprive the other person of a right to the property or a benefit from the property; or
- Appropriate the property to his or her own use or to the use of any person not entitled to use the property.

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<sup>61</sup> *Planned Parenthood v. ACLU*, 290 F.3d 1058, 1076-77 (9th Cir. 2002) (holding that a true threat is “a statement which, in the entire context and under all the circumstances, a reasonable person would foresee the statement would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person.”).

<sup>62</sup> *Id.* See also *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388 (1992).

<sup>63</sup> S. 812.014(1)(a)–(b), F.S.

Section 812.014, F.S., defines theft offenses and generally categorizes the offense level based on the value of the property stolen. Whether a theft is a misdemeanor or a felony may also depend on the offender’s prior history of theft convictions or the type of property stolen. The offense levels for theft crimes based on property value thresholds are classified as follows:

	Property Value	Offense Level
Grand Theft	≥ \$100,000	First Degree Felony
	≥ \$20,000, but < \$100,000	Second Degree Felony
	≥ \$10,000, but < \$20,000	Third Degree Felony
	≥ \$5,000, but < \$10,000	Third Degree Felony
	≥ \$750, but < \$5,000	Third Degree Felony
	≥ \$100, but < \$750 if taken from a dwelling or unenclosed curtilage <sup>64</sup> of a dwelling	Third Degree Felony
Petit Theft	≥ \$100, but < \$750	First Degree Misdemeanor
	< \$100	Second Degree Misdemeanor

A person commits burglary by:<sup>65</sup>

- Entering a dwelling, structure, or conveyance with the intent to commit an offense therein – unless the premises are open to the public or the person’s entry is licensed or invited; or
- Remaining in a dwelling, structure, or conveyance:
  - Surreptitiously, with the intent to commit an offense therein;
  - After permission to remain is withdrawn, with the intent to commit an offense therein; or
  - To commit or attempt to commit a forcible felony.<sup>66</sup>

A burglary is a felony offense classified according to the offense’s specific circumstances, as follows:

- A burglary of an unoccupied structure or conveyance is a third degree felony.<sup>67</sup>
- A burglary of a dwelling, an occupied structure or conveyance, or an authorized emergency vehicle is a second degree felony.<sup>68</sup>
- A burglary is a first degree felony when an offender:<sup>69</sup>
  - Commits an assault or a battery;
  - Becomes armed with explosives or a dangerous weapon within the premises;
  - Causes damage to a dwelling or structure with a motor vehicle; or
  - Causes damage to a dwelling or structure over \$1,000.

*Theft or Burglary During a State of Emergency*

The penalty for specified theft and burglary offenses is reclassified when a person commits the offense during a declared state of emergency (SOE) and the perpetration of the offense is facilitated by conditions arising from the emergency.<sup>70</sup> Conditions arising from the emergency are defined to include civil unrest, power outages, curfews, voluntary or mandatory evacuations, or a reduction in the presence of or response time for first responders or homeland security personnel.<sup>71</sup> Under current law, specified penalties for theft or burglary offenses committed during an SOE are increased as follows:

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<sup>64</sup> “Unenclosed curtilage of a dwelling” means the unenclosed land or grounds, or any outbuildings, directly and intimately adjacent to and connected with the dwelling and necessary, convenient, and habitually used in connection with that dwelling. S. 810.09(1)(b), F.S.  
<sup>65</sup> S. 810.02, F.S.  
<sup>66</sup> “Forcible felony” means 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. S. 776.08, F.S.  
<sup>67</sup> S. 810.02(4), F.S.  
<sup>68</sup> S. 810.02(3), F.S.  
<sup>69</sup> S. 810.02(2), F.S.  
<sup>70</sup> Ss. 810.02(3)(f) and (4)(b) and 812.014(2)(b)4. and (c), F.S.  
<sup>71</sup> *Id.*

- A third degree felony theft is reclassified as a second degree felony and the offense is re-ranked one level higher on the OSRC;<sup>72</sup>
- A second degree felony theft is reclassified as a first degree felony and the offense is re-ranked one level higher on the OSRC;<sup>73</sup>
- A third degree felony burglary is reclassified as a second degree felony and the offense is re-ranked one level higher on the OSRC; and
- A second degree felony burglary is reclassified as a first degree felony and the offense is re-ranked one level higher on the OSRC.<sup>74</sup>

A person arrested for burglary during an SOE must remain in custody until he or she appears for a first appearance hearing and a court determines bond.<sup>75</sup> Current law does not require a person arrested for theft during an SOE to be detained until first appearance.

### Effect of the Bill- Theft and Burglary

HB 1 reclassifies specified theft and burglary offenses committed during a riot or an aggravated riot, when the commission of the crime is facilitated by conditions arising from the riot, as follows:

- A third degree felony theft is reclassified to a second degree felony, if the property value is at least \$5,000, and the offense is re-ranked from a Level 3 to a Level 4 or a Level 4 to a Level 5 on the OSRC.
- A second degree felony theft is reclassified to a first degree felony, and the offense is re-ranked from a Level 5 to a Level 6 on the OSRC.
- A second degree felony burglary is reclassified as a first degree felony, and the offense is re-ranked one level higher on the OSRC.
- A third degree felony burglary is reclassified as a second degree felony, and the offense is re-ranked from a Level 4 to a Level 5 on the OSRC.

Under the bill "conditions arising from the riot" include civil unrest, power outages, curfews, or a reduction in the presence of, or response time for, first responders or homeland security personnel.

The bill requires a person arrested for committing theft during a riot or aggravated riot or a declared SOE or burglary during a riot or an aggravated riot to be held in custody until he or she appears for a first appearance hearing and a court determines bond.

### **Damaging or Destroying Memorials**

#### Background

Memorials throughout Florida<sup>76</sup> recognize historical events or significant accomplishments of residents, including a number of memorials located on the grounds of the Capitol Complex.<sup>77</sup> Throughout Florida, vandals have destroyed memorials honoring veterans, such as a Jacksonville memorial honoring local fallen soldiers that was damaged in May 2018<sup>78</sup> and a war memorial in Gainesville's Veterans Memorial

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<sup>72</sup> S. 812.014(2)(b)4., F.S.

<sup>73</sup> S. 812.014(2)(c)13., F.S.

<sup>74</sup> S. 810.02(3)(f), F.S.

<sup>75</sup> Ss. 810.02(3)(f) and (4)(b), F.S.

<sup>76</sup> See ch. 265, F.S.

<sup>77</sup> Section 281.01, F.S., defines capitol complex to mean portions of Tallahassee, Leon County, Florida, commonly referred to as the Capitol, the Historic Capitol, the Senate Office Building, the House Office Building, the Knott Building, the Pepper Building, the Holland Building, and the curtilage of each, including the state-owned lands and public streets adjacent thereto within an area bounded by and including Monroe Street, Jefferson Street, Duval Street, and Gaines Street. The term also includes the State Capital Circle Office Complex located in Leon County, Florida. See ss. 265.001-265.006, F.S.

<sup>78</sup> Bridgette Matter, *Monument for local slain soldier vandalized*, Action News JAX (Mar. 20, 2018),

<https://www.actionnewsjax.com/news/local/monument-for-local-slain-soldier-vandalized/718999871> (last visited Jan. 20, 2021).

Park damaged in April 2016.<sup>79</sup> Similarly, in 2018, a Pensacola man was arrested for damaging a 9/11 monument<sup>80</sup> and vandals damaged 18 tombstones and statues at an historic Tampa graveyard.<sup>81</sup>

### *Criminal Mischief*

A person commits criminal mischief by willfully and maliciously injuring or damaging the property of another, including by vandalism or graffiti.<sup>82</sup> The penalty for criminal mischief generally corresponds to the value of the damage:

Value of Damage <sup>83</sup>	Penalty
≤ \$200	Second degree misdemeanor
> \$200 but ≤ \$1,000	First degree misdemeanor
> \$1,000	Third degree felony

Criminal mischief may also be enhanced to a third degree felony based on a prior criminal mischief conviction<sup>84</sup> or the nature of the property damaged, including when a person damages a:

- Church, synagogue, mosque, or other place of worship, or a religious article therein, if the damage is valued greater than \$200.<sup>85</sup>
- Public telephone, regardless of the value of the damage.<sup>86</sup>
- Sexually violent predator detention or commitment facility,<sup>87</sup> if the damage is valued greater than \$200.<sup>88</sup>

A minor who commits criminal mischief by placing graffiti on any public or private property is subject to additional penalties, and any criminal mischief offense relating to graffiti requires specified community service and a fine ranging from \$250 to \$1,000.<sup>89</sup>

No law specifically protects memorials from malicious damage, destruction, or removal, and the owner or caretaker is often left to pay for the repair to vandalized structures without recourse.

### *Injuring or Removing a Tomb or Monument*

Under s. 872.02, F.S., a person commits a third degree felony if he or she:

- Willfully and knowingly destroys, mutilates, defaces, injures, or removes any:
  - Tomb,<sup>90</sup> monument, gravestone, burial mound, earthen or shell monument containing human skeletal remains or associated burial artifacts, or other structure or thing placed or designed for a memorial of the dead; or
  - Fence, railing, curb, or other thing intended for the protection or ornamentation of any tomb, monument, gravestone, burial mound, earthen or shell monument containing

<sup>79</sup> *War monument smashed into pieces at Florida park*, Fox News (Apr. 13, 2016), <https://www.foxnews.com/us/war-monument-smashed-into-pieces-at-florida-park> (last visited Jan. 20, 2021).

<sup>80</sup> Associated Press, *Florida Man Accused of Vandalizing 9/11 Monument in Park*, U.S. News and World Report (Jun. 1, 2019), <https://www.usnews.com/news/best-states/florida/articles/2018-06-01/florida-man-accused-of-vandalizing-9-11-monument-in-park> (last visited Jan. 20, 2021).

<sup>81</sup> Ryan Smith, *Tampa Police search for vandals who damaged several tombs at historic cemetery*, ABC Action News (July 18, 2018), <https://www.abcactionnews.com/news/region-tampa/tampa-police-search-for-vandals-who-destroyed-several-tombs-at-historic-cemetery> (last visited Jan. 20, 2021).

<sup>82</sup> S. 806.13(1)(a), F.S.

<sup>83</sup> S. 806.13(1)(b), F.S.

<sup>84</sup> S. 806.13(1)(b)4., F.S.

<sup>85</sup> S. 806.13(2), F.S.

<sup>86</sup> S. 806.13(3), F.S.

<sup>87</sup> As defined in ch. 394, F.S.

<sup>88</sup> S. 806.13(4), F.S.

<sup>89</sup> See ss. 806.13(7), 806.13(8), 806.13(6)(b), and 806.13(6)(a) and (c), F.S.

<sup>90</sup> A "tomb" includes any mausoleum, columbarium, or belowground crypt. S. 872.02(4), F.S. A "mausoleum" is a structure or building that is substantially exposed above the ground and that is intended to be used for the entombment of human remains. S. 497.005(46), F.S. A "columbarium" is a structure or building that is substantially above the ground and that is intended to be used for the inurnment of cremated remains. S. 497.005(8), F.S.

human skeletal remains or associated burial artifacts, or structure or thing placed or designed for a memorial of the dead, or for any enclosure for the burial of the dead.

- Willfully destroys, mutilates, removes, cuts, breaks, or injures any tree, shrub, or plant located within any enclosure for the burial of the dead.

Additionally, it is a second degree felony to willfully and knowingly disturb the contents of a tomb or grave. Neither crime is ranked on the OSRC, meaning both are assigned a ranking under s. 921.0023, F.S. An unranked third degree felony is a Level 1 offense and an unranked second degree felony is a Level 4 offense. The section exempts certain persons and entities from criminal liability including:

- Any person acting under the direction or authority of the Division of Historical Resources of the Department of State;
- Cemeteries operating under ch. 497, F.S.; or
- Any person otherwise authorized by law to remove or disturb a tomb, monument, gravestone, burial mound, or similar structure, or its contents.

### Effect of the Bill – Damaging or Destroying Memorials

HB 1 creates new crimes specifically aimed at preventing vandalism to, or destruction of, memorials. The bill defines a memorial to include specific memorials established by ch. 265, F.S.,<sup>91</sup> and any plaque, statue, marker, flag, banner, cenotaph, religious symbol, painting, seal, tombstone, structure name, or display when such item is:

- Constructed and located with the intent that it be permanently displayed or perpetually maintained;
- Dedicated to an historical person, entity, event, or a series of events; and
- Intended to honor or recount any past or present:
  - Military service of any U.S. Armed Forces military personnel; or
  - Public service by any Florida or U.S. resident.

Under the bill, a person commits:

- Criminal mischief of a memorial, a third degree felony ranked as a Level 2 offense on the ORSC, if he or she, without authorization from the memorial's owner, willfully and maliciously defaces, injures, or otherwise damages a memorial in a manner resulting in damage greater than \$200.
- Destruction or demolition of a memorial, a second degree felony ranked as a Level 4 offense on the ORSC, if he or she, without authorization from the memorial's owner, willfully and maliciously, destroys, demolishes, or pulls down a memorial.

HB 1 requires a court to order a person convicted of either offense to pay restitution, including the full cost to repair or replace the memorial. The bill does not prohibit the owner of a memorial, or any person authorized by the owner of the memorial, from taking down or relocating any memorial.

The bill increases the offense severity ranking level of offenses for injuring or removing a grave or tomb by one level when a person commits the offense in furtherance of a riot or aggravated riot. As such, a third degree felony offense will be increased from a Level 1 to a Level 2 offense on the OSRC, and disturbing the contents of a grave or tomb is increased from a Level 4 to a Level 5 offense. The increased ranking will subject an offender committing either offense in furtherance of a riot or aggravated riot to an increased lowest permissible sentence under the CPC.

## **Municipal Law Enforcement Funding**

### Background

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<sup>91</sup> Including: The Florida Women's Hall of Fame; The Florida Medal of Honor Wall; The Florida Veterans' Hall of Fame; The POW-MIA Chair of Honor Memorial; The Florida Veterans' Walk of Honor and Florida Veterans' Memorial Garden; The Florida Law Enforcement Officers' Hall of Fame; The Florida Holocaust Memorial; The Florida Slavery Memorial; and Any other memorial located within the Capitol Complex, including Waller Park.

## Law Enforcement Funding

In 2020, following a series of incidents involving the unjustified or questionable use-of-force by law enforcement, activists began a nationwide movement to “defund the police.” Although in some circumstances the goal of defunding the police is the complete elimination of a law enforcement agency, the more common usage advocates for shifting a portion of the law enforcement budget to social services and other community initiatives that may reduce crime without the need for law enforcement intervention.<sup>92</sup> For example, in July 2020, St. Petersburg announced it would redirect grant money that was earmarked to hire additional police officers to contract with social service workers to respond to nonviolent emergency calls.<sup>93</sup> The social service workers are scheduled to start responding to emergency calls by the end of January 2021.<sup>94</sup> Critics of the “defund the police” movement argue a drastic reduction in law enforcement will lead to an increase in crime and will disproportionately impact minority communities and further marginalize the residents in those areas.<sup>95</sup>

### Municipal Budgets

A municipality is required to adopt a budget each fiscal year.<sup>96</sup> As part of the budget process, a municipality is required to post a tentative budget to the municipality’s official website prior to a formal hearing adopting the final budget.<sup>97</sup> In the vast majority of municipalities in Florida, the police chief serves at the pleasure of the city commission or city manager and law enforcement funding is entirely controlled by the governing body of the municipality.

### Sheriffs’ Budgets

The Florida Constitution specifies five elected county officers, including the county sheriff.<sup>98</sup> In contrast to a municipal law enforcement agency, a sheriff has much greater input in the budget process. For each fiscal year, the sheriff submits a proposed budget to the county commission. After reviewing the sheriff’s budget request, the county commission may amend, modify, increase, or reduce the recommended budget.<sup>99</sup>

If the sheriff disagrees with the budget modifications or reductions, he or she may file an appeal to the Administration Commission, which is comprised of the Governor and Cabinet.<sup>100</sup> The Executive Office of the Governor (EOG) conducts a budget hearing to consider the sheriff’s appeal. Following the budget hearing, the EOG forwards its recommendation to the Administration Commission, which may amend, modify, increase, or reduce the sheriff’s budget. The decision of the Administration Commission is final.<sup>101</sup>

### Effect of the Bill- Municipal Law Enforcement Funding

HB 1 creates a budget appeal process for municipal law enforcement agencies similar to that available to a county sheriff. If a municipality’s tentative budget contains a funding reduction to the operating budget of the municipal law enforcement agency, a resident of a municipality may file an appeal within 30 days of the date the tentative budget is posted on the municipality’s website. The bill requires a municipality to reply to the appeal within five working days of receipt. The bill requires the EOG to

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<sup>92</sup> Michael Balsamo, *When Protestors Demand ‘Defund the Police’ at George Floyd Demonstrations, What Does It Mean?*, Chicago Tribune (June 7, 2020), <https://www.chicagotribune.com/nation-world/ct-nw-cb-george-floyd-protesters-defund-police-20200607-kiupi5allvgehinzidz3jund5e-story.html> (last visited Jan. 20, 2021).

<sup>93</sup> Mitch Perry, *St. Pete Police Social Worker Program Set to Begin*, Bay News 9 (Jan. 13, 2021)

<https://www.baynews9.com/fl/tampa/news/2021/01/13/st-pete-police-social-worker-program-set-to-begin-> (last visited Jan. 20, 2021).

<sup>94</sup> *Id.*

<sup>95</sup> Tom Jackman, *Defunding or disbanding the police is a dangerous idea if done hastily*, Washington Post (June 18, 2020), <https://www.washingtonpost.com/crime-law/2020/06/18/guest-post-defunding-or-disbanding-police-is-dangerous-idea-if-done-hastily/?outputType=amp> (last visited Jan. 20, 2021).

<sup>96</sup> The fiscal year for a municipality in Florida is October 1 through September 30. S. 166.241(1) - (2), F.S.

<sup>97</sup> S. 166.241(3), F.S.

<sup>98</sup> Art. VIII, s. 1(d), Fla. Const.

<sup>99</sup> S. 30.49, F.S.

<sup>100</sup> S. 30.49(4), F.S.

<sup>101</sup> *Id.*

conduct a hearing on the appeal and make a recommendation to the Administration Commission which may amend, modify, increase, or reduce the municipal law enforcement budget. Under the bill, the decision of the Administration Commission is final.

## **Sovereign Immunity and Civil Liability**

### Background

#### *Statutory Waiver of Sovereign Immunity*

Sovereign immunity is a principle under which a government cannot be sued without its consent.<sup>102</sup> Article X, section 13 of the Florida Constitution allows the Legislature to waive this immunity. Section 768.28(1), F.S., authorizes suits in tort against the State and its agencies and political subdivisions for damages resulting from the negligence of government employees acting in the scope of their employment. This liability exists only where a private person would be liable for the same conduct. The waiver applies only to “injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee’s office or employment ....”<sup>103</sup>

Tort recovery from a governmental entity in Florida is capped at \$200,000 per person and \$300,000 total per incident.<sup>104</sup> Although a court may enter a judgment exceeding these amounts, unless the Legislature passes a claims bill, a claimant may not collect any amount exceeding the statutory caps.

#### *Exceptions*

The statutory waiver of sovereign immunity is not absolute. The FSC has recognized that there are certain functions which are inherent in the act of governing and that judicial interference with these “discretionary” functions would lead to the court second-guessing policy and planning decisions of the legislative and executive branches.<sup>105</sup> Governmental entities are immune from tort claims arising from decisions over whether to enforce a law, the tactical deployment of police officers, and the obligation to provide law enforcement protection because courts have held these are all discretionary functions.<sup>106</sup>

There are also statutory exceptions to the waiver of sovereign immunity. Section 768.28(15), F.S., bars any claim against a governmental entity by a person who unlawfully participates in a riot, unlawful assembly, public demonstration, mob violence, or civil disobedience if the claim arises out of that person’s participation in a riot, unlawful assembly, public demonstration, mob violence, or civil disobedience.

### Effect of the Bill- Sovereign Immunity and Civil Liability

HB 1 waives a municipality’s sovereign immunity for damages caused by a riot or unlawful assembly if the governing body of the municipality intentionally obstructs or interferes with the ability of law enforcement to provide reasonable law enforcement protection during the riot or unlawful assembly. Under the bill, a person who is injured, killed, or suffers damage to his or her property due to a riot or unlawful assembly may sue the municipality if the municipality interfered with the municipal law enforcement agency’s ability to provide reasonable law enforcement protection. The municipality’s failure to provide reasonable law enforcement protection must be the proximate cause of the injury or damages. The complete waiver of sovereign immunity under the bill means the \$200,000 per person or \$300,000 per incident recovery limits do not apply.

## **Affirmative Defense to a Civil Action**

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<sup>102</sup> Legal Information Institute, *Sovereign Immunity*, [www.law.cornell.edu/wex/sovereign\\_immunity](http://www.law.cornell.edu/wex/sovereign_immunity) (last visited Jan. 20, 2021).

<sup>103</sup> S. 768.28(1), F.S.

<sup>104</sup> S. 768.28(5), F.S.

<sup>105</sup> *Trianon Park Condominium Ass’n v. City of Hialeah*, 468 So.2d 912, 918 (Fla. 1985).

<sup>106</sup> *Id.*, *Wallace v. Dean*, 3 So.3d 1035 (Fla. 2009), *Wong v. City of Miami*, 237 So.2d 132 (Fla. 1970), *Hernandez v. City of Miami*, 305 So.2d 277 (Fla. 3d DCA 1974), *Carter v. City of Stuart*, 468 So.2d 955 (Fla. 1985).

## Background

### *Affirmative Defense*

An affirmative defense is “a legal defense in which the defendant introduces evidence, which, if found to be credible, will negate criminal liability or civil liability, even if it is proven that the defendant committed the alleged acts.”<sup>107</sup> Examples of affirmative defenses include contributory negligence, assumption of risk, insanity, self-defense, and entrapment.<sup>108</sup>

Section 776.085, F.S., provides that a defendant in a civil action for personal injury, wrongful death, or property damage has a defense if the plaintiff’s injuries or damages were sustained while the plaintiff was committing or attempting to commit a forcible felony.<sup>109</sup> The plaintiff’s conviction for committing or attempting to commit a forcible felony can be proven by introducing a prior criminal conviction or by a preponderance of the evidence.<sup>110</sup> Any civil action in which a defendant has raised this affirmative defense is required to be stayed until the conclusion of the plaintiff’s criminal proceedings, unless the court finds a conviction would not be a valid defense.<sup>111</sup>

### Effect of the Bill- Affirmative Defense to a Civil Action

HB 1 creates an affirmative defense available to a defendant in a civil action for personal injury, wrongful death, or property damage if the plaintiff’s injuries or damages were caused because he or she participated in a riot or unlawful assembly. The plaintiff’s participation in the riot or unlawful assembly can be established by the plaintiff’s criminal conviction for participating in a riot, aggravated riot, or unlawful assembly, or by a preponderance of the evidence in civil court that the plaintiff participated in a riot, aggravated riot, or unlawful assembly. Under the bill, a civil action in which a defendant raises the affirmative defense is stayed until the conclusion of the plaintiff’s criminal proceedings, unless the court finds a conviction would not be a valid defense.

#### B. SECTION DIRECTORY:

- Section 1:** Amends s. 166.241, F.S., relating to fiscal years, budgets, and budget amendments.
- Section 2:** Amends s. 316.2045, F.S., relating to obstruction of public streets, highways, and roads.
- Section 3:** Amends s. 768.28, F.S., relating to waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions; indemnification; risk management programs.
- Section 4:** Amends s. 784.011, F.S., relating to assault.
- Section 5:** Amends s. 784.021, F.S., relating to aggravated assault.
- Section 6:** Amends s. 784.03, F.S., relating to battery; felony battery.
- Section 7:** Amends s. 784.045, F.S., relating to aggravated battery.
- Section 8:** Creates s. 784.0495, F.S., relating to mob intimidation.
- Section 9:** Amends s. 784.07, F.S., relating to assault or battery of law enforcement officers, firefighters, emergency medical care providers, public transit employees or agents, or other specified officers; reclassification of offenses; minimum sentences.
- Section 10:** Amends s. 806.13, F.S., relating to criminal mischief; penalties; penalty for minor.
- Section 11:** Creates s. 806.135, F.S., relating to destroying or demolishing a memorial.
- Section 12:** Amends s. 810.02, F.S., relating to burglary.
- Section 13:** Amends s. 812.014, F.S., relating to theft.
- Section 14:** Creates s. 836.115, F.S., relating to cyberintimidation by publication.
- Section 15:** Amends s. 870.01, F.S., relating to affrays and riots.
- Section 16:** Amends s. 870.02, F.S., relating to unlawful assemblies.
- Section 17:** Amends s. 870.03, F.S., relating to riots and routs.

<sup>107</sup> Legal Information Institute, *Affirmative Defense*, [https://www.law.cornell.edu/wex/affirmative\\_defense](https://www.law.cornell.edu/wex/affirmative_defense) (last visited Jan. 20, 2021).

<sup>108</sup> *Id.*

<sup>109</sup> *Supra* note 65.

<sup>110</sup> S. 776.085(1), F.S.

<sup>111</sup> S. 776.085(3), F.S.



- Section 18:** Creates s. 870.07, F.S., relating to affirmative defenses in civil action; party convicted of riot or unlawful assembly.
- Section 19:** Amends s. 872.02, F.S., relating to injuring or removing tomb or monument; disturbing contents of grave or tomb; penalties.
- Section 20:** Amends s. 921.0022, F.S., relating to Criminal Punishment Code; offense severity ranking chart.
- Section 21:** Provides an effective date of July 1, 2021.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may have a positive indeterminate impact on prison beds by creating new felony offenses relating to public disorder.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill may have a positive indeterminate impact on jail beds by creating new misdemeanor offenses relating to public disorder and requiring offenders arrested for offenses related to rioting to be held in custody until appearing for a first appearance hearing.

The bill may have a negative indeterminate fiscal impact on local governments by exposing them to civil liability for any damages, including those arising from personal injury, wrongful death, or property damage proximately caused by a municipal law enforcement agency's failure to provide reasonable protection during a riot or unlawful assembly, if the governing body of a municipality intentionally obstructs or interferes with law enforcement's ability to provide reasonable protection during such riot or unlawful assembly.

### 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. The bill does not appear to affect county or municipal governments.

2. Other:

The First Amendment of the U.S. Constitution guarantees that "Congress shall make no law ... 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>112</sup> The rights guaranteed by the First Amendment apply with equal force to state governments through the due process clause of the Fourteenth Amendment.<sup>113</sup>

The U.S. Supreme Court has emphasized that the First Amendment right to free speech includes a right to make hate speech, holding recently as a “bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.”<sup>114</sup> However, the First Amendment does not protect “true threats,” and the government may restrict such speech<sup>115</sup> to “protect[s] individuals from the fear of violence” and “from the disruption that fear engenders,” in addition to protecting persons “from the possibility that the threatened violence will occur.”<sup>116</sup> Furthermore, the FSC has held that prohibiting an assembly whose purpose is to commit a breach of the peace is not a violation of the First Amendment.<sup>117</sup>

Speech regulations are generally analyzed as to whether they are content-based or content-neutral. In a public forum, the government may regulate the time, place, and manner of expression, if the restrictions are content-neutral, narrowly tailored to serve a significant government interest, and leave open alternative channels of communication.

While HB 1 may constitute a regulation on the time, place, and manner of expression, the bill does not prohibit or prefer any specific content and is intended to prevent public disorder while protecting the free speech of lawful protestors.

**B. RULE-MAKING AUTHORITY:**

Not applicable.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

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<sup>112</sup> U.S. Const., amend. I.

<sup>113</sup> U.S. Const. amend. XIV. See also Article I, Fla. Const.

<sup>114</sup> *Matal v. Tam*, 137 S.Ct. 1744, 1751 (2017).

<sup>115</sup> *Virginia v. Black*, 538 U.S. 343, 344 (2003) quoting *Watts v. United States*, 394 U.S. 705, 708 (1969).

<sup>116</sup> *Id.* See also *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388 (1992).

<sup>117</sup> *State v. Simpson*, 347 So.2d 414, 415 (Fla. 1977).