

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 215 Emergency Orders Prohibiting Religious Services or Activities

**SPONSOR(S):** Pandemics & Public Emergencies Committee, DiCeglie and others

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 254

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Pandemics & Public Emergencies Committee	14 Y, 3 N, As CS	Smith	Williamson
2) State Affairs Committee	15 Y, 7 N	Landry	Williamson
3) Judiciary Committee			

### SUMMARY ANALYSIS

The State Emergency Management Act gives the Governor, the Division of Emergency Management, and counties and municipalities the authority to issue emergency orders during states of emergency and provides for the duration of such orders.

The bill provides that no emergency order may directly or indirectly prohibit religious institutions from conducting regular religious services or activities. The bill provides an exception for a general provision in an emergency order that applies uniformly to all entities in the affected jurisdiction. A general provision in an emergency order that also applies to religious institutions must be in the furtherance of a compelling government interest and be the least restrictive means for furthering that interest.

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

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Present Situation**

##### State Emergency Management Act

The State Emergency Management Act (Act),<sup>1</sup> establishes the framework for how Florida prepares for, responds to, and recovers from emergencies and disasters. It confers upon the Governor, the Division of Emergency Management (division),<sup>2</sup> and the governing body of each county and municipality certain emergency powers in the event of emergencies,<sup>3</sup> including public health emergencies<sup>4</sup> and disasters<sup>5</sup> resulting from natural,<sup>6</sup> technological,<sup>7</sup> or manmade<sup>8</sup> causes. These emergency powers are designed to ensure preparations of the state will be adequate to deal with, reduce vulnerability to, and recover from such emergencies and disasters; to provide for the common defense and to protect the public peace, health, and safety; and to preserve the lives and property of the people of the state.<sup>9</sup>

The Governor, the division, and counties and municipalities have specific emergency powers and authority granted to them in the event of an emergency. The individual powers are broad, but also include specific parameters in which they may be executed. Use of funds in response to a declared state of emergency is subject to transparency and auditing requirements, which are outlined in the Act.<sup>10</sup>

##### *Governor*

The Act vests the authority to declare a state of emergency in the Governor.<sup>11</sup> The Act authorizes the Governor to assume or delegate direct operational control over all or any part of emergency management functions in the event of an emergency.<sup>12</sup> This authority includes issuing executive orders,

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<sup>1</sup> See ch. 252, F.S.

<sup>2</sup> The Division of Emergency Management is established within the Executive Office of the Governor as a separate budget entity. It is responsible for all professional, technical, and administrative support functions necessary to carry out its responsibilities under part I of ch. 252, F.S. The director of the division is appointed by and serves at the pleasure of the Governor, and is the head of the division for all purposes. S. 14.2016(1), F.S.

<sup>3</sup> "Emergency" means any occurrence, or threat thereof, whether natural, technological, or manmade, in war or in peace, which results or may result in substantial injury or harm to the population or substantial damage to or loss of property. S. 252.34(4), F.S.

<sup>4</sup> "Public health emergency" means any occurrence, or threat thereof, whether natural or manmade, which results or may result in substantial injury or harm to the public health from infectious disease, chemical agents, nuclear agents, biological toxins, or situations involving mass casualties or natural disasters, declared as a public health emergency as declared by the State Health Officer. S. 252.34 (11), F.S.

<sup>5</sup> "Disaster" means any natural, technological, or civil emergency that causes damage of sufficient severity and magnitude to result in a declaration of a state of emergency by a county, the Governor, or the President of the United States. S. 252.34(2), F.S.

<sup>6</sup> "Natural emergency" means an emergency caused by a natural event, including, but not limited to, a hurricane, a storm, a flood, severe wave action, a drought, or an earthquake. S. 252.34(8), F.S.

<sup>7</sup> "Technological emergency" means an emergency caused by technological failure or accident, including, but not limited to, an explosion, transportation accident, radiological accident, or chemical or other hazardous material incident. S. 252.34(12), F.S.

<sup>8</sup> "Manmade emergency" means an emergency caused by an action against persons or society, including, but not limited to, enemy attack, sabotage, terrorism, civil unrest, or other action impairing the orderly administration of government. S. 252.34(7), F.S.

<sup>9</sup> S. 252.32, F.S.

<sup>10</sup> S. 252.3611, F.S.

<sup>11</sup> S. 252.36(2), F.S. A declaration of a state of emergency must be filed with the Division of Administrative Hearings within five days; otherwise, the declaration will be void. S. 252.36(3)(b), F.S.

<sup>12</sup> S. 252.36(1)(a), F.S.

proclamations, and rules that have the force and effect of law.<sup>13</sup> Such orders, proclamations, and rules last for 60 days, but may be renewed as necessary during the duration of the emergency so long as the renewal specifically states which provisions of the order, proclamation, or rule are being renewed.<sup>14</sup> The Legislature may, by concurrent resolution, terminate a governor's declared state of emergency or any order, proclamation, or rule made pursuant to the declared state of emergency.<sup>15</sup> The Act authorizes the Governor to order the closure of schools or businesses only if the Governor states specific public safety concerns that necessitate such closures and regularly reassesses the emergency to determine whether schools and businesses can be reopened safely.<sup>16</sup>

The Act specifically authorizes the Governor to use all resources of state government and counties and municipalities of the state when reasonably necessary to cope with an emergency.<sup>17</sup> Although the emergency powers reside in the Governor, the Governor may delegate certain powers to the State Coordinating Officer to manage and coordinate emergency efforts.<sup>18</sup>

The Governor must delegate emergency responsibilities to officers and agencies of the state and to counties and municipalities prior to an emergency or threat of an emergency and must use the services and facilities of existing officers and agencies of the state and counties and municipalities as the primary emergency management forces of the state. All such officers and agencies must cooperate with and extend their services and facilities to the division, as it may require.<sup>19</sup>

### *Division of Emergency Management*

The division, which is established within the Executive Office of the Governor, is responsible for all professional, technical, and administrative support functions necessary to carry out its responsibilities and emergency powers under part I of ch. 252, F.S. The director of the division is appointed by and serves at the pleasure of the Governor, and is the head of the division for all purposes.<sup>20</sup>

The Act charges the division with preparing and implementing a comprehensive emergency management plan that includes components that address evacuation; shelter; postdisaster response and recovery; additional provisions for preparedness, response, recovery, and mitigation that the division identifies as necessary; coordinated and expeditious deployment of state resources; a system of communications and warnings to the public; a schedule for annual preparedness exercises; and assignment of emergency support duties to various state agencies and personnel.<sup>21</sup> The division also oversees the development and implementation of the emergency preparedness plans of counties and municipalities,<sup>22</sup> as well as emergency preparedness coordination with the federal government.<sup>23</sup> In implementing the emergency management plan, the division is expected to make recommendations pertaining to structural emergency preparedness, prevention, and mitigation;<sup>24</sup> ensuring that the state and political subdivisions procure the supplies needed in the event of an emergency;<sup>25</sup> and educating and training the public, as well as state and local emergency management personnel, in emergency response plans.<sup>26</sup>

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<sup>13</sup> S. 252.36(1)(b), F.S.

<sup>14</sup> *Id.*

<sup>15</sup> S. 252.36(3)(a), F.S.

<sup>16</sup> S. 252.36(c), F.S.

<sup>17</sup> S. 252.36(6)(b), F.S.

<sup>18</sup> The State Coordinating Officer (SCO) is the authorized representative of the Governor to manage and coordinate state and local emergency response and recovery efforts. The SCO has the authority to commit any and all state resources necessary to cope with the emergency and the authority to exercise those powers in accordance with ss. 252.36(4)(a) and 252.36(6)-(11), F.S.

<sup>19</sup> S. 252.36(9), F.S.

<sup>20</sup> S. 14.2016, F.S.

<sup>21</sup> S. 252.35(2)(a), F.S.

<sup>22</sup> S. 252.35(2)(b)-(d), F.S.

<sup>23</sup> S. 252.35(2)(e), (r), F.S.

<sup>24</sup> S. 252.35(2)(f), F.S.

<sup>25</sup> S. 252.35(2)(g), (u), F.S.

<sup>26</sup> S. 252.35(2)(i)-(l), (n), (v), F.S.

During an emergency, the division has the authority to delegate, and provide for the subdelegation of duties, as necessary and appropriate.<sup>27</sup> The division also has the authority, under ch. 120, F.S.,<sup>28</sup> to create, implement, administer, adopt, amend, and rescind rules as needed to carry out its duties.<sup>29</sup> The division reports biennially to the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the Governor on the status of the emergency management capabilities of the state and its political subdivisions.<sup>30</sup>

### *Political Subdivisions*

Safeguarding the life and property of its citizens is an innate responsibility of the governing body of each political subdivision<sup>31</sup> of the state.<sup>32</sup> Political subdivisions have certain duties and responsibilities in order to provide effective and orderly governmental control and coordination of emergency operations, including a requirement that counties adopt an emergency management plan that is coordinated and consistent with the state comprehensive emergency management plan and program.<sup>33</sup>

Political subdivisions are authorized to declare a state of local emergency if an emergency affects only one political subdivision, which triggers the ability to request state assistance or invoke emergency-related mutual-aid assistance.<sup>34</sup> An emergency order issued by a political subdivision must be narrowly tailored to serve a compelling public health or safety purpose.<sup>35</sup> A state of local emergency may only be declared by a mayor, city manager, or board of county commissioners.<sup>36</sup> The duration of a local state of emergency is seven days and may be extended in seven-day increments.<sup>37</sup> Similarly, a local emergency order may only last for seven days, but may be extended in seven-day increments as necessary for a total duration of not more than 42 days.<sup>38</sup> Once a local emergency order expires, the political subdivision may not issue a substantially similar emergency order.<sup>39</sup> Should the Governor determine that a local emergency order unnecessarily restricts individual rights or liberties, the Governor may invalidate that local emergency order at any time.<sup>40</sup>

Political subdivisions are authorized and empowered to make, amend, and rescind orders and rules as necessary for emergency management purposes so long as such rules are not inconsistent with any orders or rules adopted by the division or by any state agency exercising a power delegated to it by the Governor or the division.<sup>41</sup> All orders and rules adopted by any political subdivision have the full force and effect of law when filed in the office of the clerk or recorder of the political subdivision within three days of their announcement;<sup>42</sup> however, any order or rule inconsistent with the State Emergency Management Act or the Florida Emergency Planning and Community Right-to-Know Act will be suspended to the extent that such conflict exists. Furthermore, any person violating any rule or order issued pursuant to either act is guilty of a second-degree misdemeanor and may be punished by a term of up to 60 days in jail and fines up to \$500.<sup>43</sup>

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<sup>27</sup> S. 252.35(2)(w), F.S.

<sup>28</sup> Administrative Procedure Act.

<sup>29</sup> S. 252.35(2)(y), F.S.

<sup>30</sup> S. 252.35(2)(x), F.S.

<sup>31</sup> The Act defines "political subdivision" as any county or municipality created by law. S. 252.32(10), F.S.

<sup>32</sup> S. 252.38, F.S.

<sup>33</sup> S. 252.38(1)(a), F.S.

<sup>34</sup> S. 252.38(3)(a)5., F.S.

<sup>35</sup> S. 252.38(4)(b), F.S.

<sup>36</sup> State Emergency Response Team, *State of Florida 2020 Comprehensive Emergency Management Plan*, FLORIDA DIVISION OF EMERGENCY MANAGEMENT, 15 (2020), <https://www.floridadisaster.org/globalassets/cemp/2020-cemp/2020-state-cemp.pdf>.

<sup>37</sup> S. 252.38(3)(a), F.S.

<sup>38</sup> S. 252.38(4)(c), F.S.

<sup>39</sup> S. 252.38(4)(e), F.S.

<sup>40</sup> S. 252.38(4)(d), F.S.

<sup>41</sup> S. 252.46, F.S.

<sup>42</sup> S. 252.46(2), F.S. Such emergency orders must also be made available via a conspicuous link on the political subdivision's website. S. 252.46(3), F.S.

<sup>43</sup> See s. 252.50, F.S.

## Federal and State Constitutional Law Regarding Religion

The relationship between religion and government in the United States is governed by the First Amendment to the U.S. Constitution,<sup>44</sup> which both prevents the government from establishing religion through the Establishment Clause and protects privately initiated expression and activities from government interference and discrimination through the Free Exercise Clause.

The First Amendment to the U.S. Constitution states:

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.

Similarly, article I, section 3 of the Florida Constitution states:

There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

Both the U.S. Constitution and the Florida Constitution contain an Establishment Clause and a Free Exercise Clause.<sup>45</sup>

### *Establishment of Religion*

The Establishment Clause of the First Amendment to the U.S. Constitution requires the government to maintain neutrality in its treatment of religion.<sup>46</sup> The same understanding applies under article I, section 3 of the Florida Constitution as Florida courts have generally held that in any state issue the federal constitution represents the “floor” for basic freedoms, and the state constitution represents the “ceiling.”<sup>47</sup> In general, when a law does not discriminate against any particular religion, courts will apply the *Lemon* Test, under which the law must have a secular purpose, its primary effect must not advance or inhibit religion, and it must not result in excessive entanglement between church and state.<sup>48</sup> Florida’s Establishment Clause differs from its federal counterpart by prohibiting the use of state revenue either directly or indirectly in the aid of any church, sect, or religious denomination or in aid of any sectarian institution.<sup>49</sup>

### *Free Exercise of Religion*

The protections of the Free Exercise Clause direct that no law may discriminate against some or all religious beliefs or regulate or prohibit conduct undertaken for religious reasons.<sup>50</sup> Florida courts have generally interpreted Florida’s Free Exercise Clause as coequal to the federal clause.<sup>51</sup> Additionally, the Florida Religious Freedom Restoration Act (FRFRA), modeled on the federal Religious Freedom

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<sup>44</sup> U.S. CONST. amend. 1.

<sup>45</sup> U.S. CONST. amend. 1; Art. I, s. 3, Fla. Const.

<sup>46</sup> *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

<sup>47</sup> *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1030 (Fla. 2004) (citing *Traylor v. State*, 596 So. 2d 957, 962 (Fla. 1992)).

<sup>48</sup> See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>49</sup> See *Council for Secular Humanism, Inc. v. McNeil*, 44 So. 3d 112, 117 (Fla. 1st DCA 2010) (finding that article 1, section 3 of the Florida Constitution prohibits payments from the state to faith-based groups providing substance abuse transitional housing). *But see Espinoza v. Mont. Dep’t of Rev.*, 140 S. Ct. 2246 (2020) (application of the Montana constitution’s no-aid provision to bar religiously affiliated schools from participating in a state-operated scholarship program violated the federal constitution’s Free Exercise Clause).

<sup>50</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

<sup>51</sup> *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1030 (Fla. 2004) (citing *Toca v. State*, 834 So. 2d 204, 208 (Fla. 2d DCA 2002)).

Restoration Act, specifically protects a person's right to the free exercise of religion by creating a heightened standard of review for government actions that substantially burden a person's exercise of religion.<sup>52</sup> The FRFRA provides that the government cannot substantially burden the exercise of religion unless there is a compelling government interest and the burden imposed is the least restrictive means of achieving that interest.<sup>53</sup> What constitutes a substantial burden is not defined by the statute, but the term is generally understood to apply to a situation in which "an individual is required to choose between following his or her religious beliefs and receiving a governmental benefit or when an individual must act contrary to his or her religious beliefs to avoid facing legal penalties."<sup>54</sup>

### *Recent Litigation*

The constitutionality of emergency orders relating to religious institutions, whether the order expressly includes or excludes religious institutions in its scope, is an evolving matter. Most recently, in April 2021, the U.S. Supreme Court granted injunctive relief in a challenge to California's emergency order that restricted, among other things, religious gatherings.<sup>55</sup> The Court found that the restrictions violated the Free Exercise Clause and based its findings on three applicable principles<sup>56</sup>:

- "[G]overnment regulations are not neutral and generally applicable... whenever they treat *any* comparable secular activity more favorably than religious exercise"
- "[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue"
- "[T]o satisfy strict scrutiny, the government must show that 'measures less restrictive of [religious institutions] could not address [the government's] interest in reducing the spread of COVID' and that 'the religious exercise at issue is more dangerous than [the other activities permitted by the government] even when the same precautions are applied.'"

### **Effect of the Bill**

The bill provides that no emergency order may directly or indirectly prohibit religious institutions from conducting regular religious services or activities. The bill provides an exception for a general provision in an emergency order that applies uniformly to all entities in the affected jurisdiction. According to the bill, a general provision in an emergency order that also applies to religious institutions must be in the furtherance of a compelling governmental interest and be the least restrictive means for furthering that interest.

The bill defines the term "religious institution" as a church, ecclesiastical or denominational organization, or established physical place for worship in this state at which nonprofit religious services and activities are regularly conducted and carried on and includes those bona fide religious groups that do not maintain specific places of worship. The term "religious institution" also includes a separate group or corporation that forms an integral part of a religious institution and that is not primarily supported by funds solicited outside of its own membership or congregation.

#### **B. SECTION DIRECTORY:**

**Section 1:** Creates s. 252.64, F.S., relating to protection of religious institutions.

**Section 2:** Provides an effective date of July 1, 2022.

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<sup>52</sup> See ch. 761, F.S.

<sup>53</sup> S. 761.03, F.S.

<sup>54</sup> WHITNEY K. NOVAK, CONG. RESEARCH SERV., IF11490, THE RELIGIOUS FREEDOM RESTORATION ACT: A PRIMER, (2020), <https://crsreports.congress.gov/product/pdf/IF/IF11490>.

<sup>55</sup> See *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam). This case contradicts a May 2020 Supreme Court case concerning California's emergency order in which the Court denied injunctive relief to a church. In his concurring opinion, Chief Justice Roberts noted that similar or more stringent restrictions applied to comparable secular gatherings, while more lenient restrictions were placed only on dissimilar gathering places where people are not typically expected to gather in large groups or remain for long periods of time. See *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring).

<sup>56</sup> *Id.*

## 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. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

The bill addresses federal and state constitutional rights regarding religion, which are discussed in section "A. Effect of Proposed Changes."

### B. RULE-MAKING AUTHORITY:

The bill neither authorizes nor requires administrative rulemaking by executive branch agencies.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On January 19, 2022, the Pandemics & Public Emergencies Committee adopted one amendment and reported the bill favorably as a committee substitute. The amendment provides that an emergency order falling within the scope of the bill may not "directly or indirectly," rather than "expressly," prohibit a religious institution from conducting regular religious services or activities.

This analysis is drafted to the committee substitute as approved by the Pandemics & Public Emergencies Committee.