

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

BILL: SB 100

INTRODUCER: Senator Fine

SUBJECT: Display of Flags by Governmental Entities

DATE: February 10, 2025

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McVaney	McVaney	GO	Pre-meeting
2.			CA	
3.			RC	

I. Summary:

SB 100 prohibits a governmental agency, local government, or other unit of local government, including a public school, college, or university, from erecting or displaying a flag that represents a political viewpoint, including a politically partisan, racial, sexual orientation, gender, or political ideology viewpoint.

Any governmental entity that displays the United States flag must do so in a manner in which the United States flag is in a more prominent position than any other displayed flag.

The bill allows an active or retired member of the United States Armed Forces or National Guard to use reasonable force to prevent the desecration, destruction, or removal of the United States flag, or to replace it to a prominent position, except when directly ordered not to do so by a law enforcement officer who is acting in the scope of his or her employment.

The bill is not expected to impact state or local government revenues and expenditures.

The bill takes effect July 1, 2025.

II. Present Situation:

United States Flag Code

The United States Flag Code (Code) establishes advisory rules for display and care of the national flag of the United States of America (U.S.).¹ In addition to the Code, Congress has designated the national anthem and set out the proper conduct when it is played with the flag present.² The Code is designed as a guide for use by all citizens and citizen groups that may not

¹ 4 U.S.C. ss. 4-10.

² 36 U.S.C. s. 301.

be associated directly with the federal government.³ As a result, the Code does not prescribe any penalties for non-compliance nor does it include enforcement provisions. The Code does not purport to cover all possible situations, although it does empower the President of the United States to alter, modify, repeal, or prescribe additional rules regarding the flag.⁴

Display of Flags

Flag of the United States

Federal law provides that the U.S. flag should be displayed daily on or near the main administration building of every public institution, in or near every polling place on election days, and during school days in or near every schoolhouse.⁵

State law requires the U.S. flag to be displayed:

- Daily, when the weather permits, from a staff upon the state capitol and upon each county courthouse;⁶
- At all designated polling places on all days when an election is being held;⁷
- Daily, when the weather permits, at each publicly supported and controlled auditorium in a separate building;⁸
- Inside each publicly supported and controlled auditorium within a part of a building when the auditorium is open;⁹
- Daily, when the weather permits, on the grounds of each public K-20 educational institution and district school board building;¹⁰ and
- Within each classroom of a public K-20 educational institution.¹¹

Further guidance on the protocol and display of the United States flag is provided by the Florida Department of State.¹²

State of Florida Flag

Section 256.015, F.S., directs the Governor to adopt a protocol on “flag display.” The protocol must provide guidelines for the proper display of the state flag and for the lowering of the state flag to half-staff on appropriate occasions, such as on holidays and upon the death of

³ 4 U.S.C. s. 5.

⁴ 4 U.S.C. s. 10.

⁵ 4 U.S.C. s. 6.

⁶ Section 256.01, F.S.

⁷ Section 256.011, F.S.

⁸ Section 256.11, F.S.

⁹ *Id.*

¹⁰ Section 1000.06(1), F.S.

¹¹ Section 1000.06(2), F.S.

¹² Florida Department of State, *Flag Protocols and Display*, <https://dos.myflorida.com/about-the-department/flag-and-seal-protocol/flag-protocols-and-display/#:~:text=Chapter%20256%20of%20the%20Florida,be%20exposed%20to%20public%20view> (last visited Jan. 29, 2024).

high-ranking state officials, uniformed law enforcement and fire service personnel, and prominent citizens.¹³

In practice, the state flag protocol requires the official flag of Florida to be displayed on a daily basis, when weather permits, at each state educational institution, every county school building, and each elementary and secondary public school, except when it is closed for vacation.¹⁴ Generally, the state flag is flown above all other flags except the U.S. flag, the POW/MIA flag, and a foreign visitor's flag, if the foreign visitor is being honored in Florida by an agency or department of the U.S. Government.¹⁵

POW-MIA Flag

The National League of Families' POW-MIA flag is designated as the symbol of America's concern and commitment to resolving, as fully as possible, the fates of Americans still prisoner, missing, and unaccounted for in Southeast Asia.¹⁶ A POW-MIA flag must be displayed at:

- Each state-owned building at which the U.S. flag is displayed, if the POW-MIA flag is available free of charge to the agency that occupies the building, and if the display is in accordance with federal laws and regulations;¹⁷
- Each rest area along an interstate highway in the state;¹⁸ and
- Each state park where the U.S. flag is displayed.¹⁹

Honor and Remember Flag

The Honor and Remember Flag is the state's emblem of service and sacrifice of the brave men and women of the U.S. Armed Forces.²⁰ The flag may be displayed at any of the following locations:

- A state-owned building at which the U.S. flag is displayed;
- A state-owned military memorial; and
- Any other state-owned location.²¹

The flag may be displayed on the following days:

- Veterans Day;
- Gold Star Mother's Day; and
- A day on which a member of the United States Armed Forces who is a resident of this state loses his or her life in the line of duty.²²

¹³ Section 256.015(1), F.S.; *see also* Executive Office of the Governor, *EOG Flag Protocol*, <https://www.flgov.com/eog/sites/default/files/pdf/2022-EOG-Flag-Protocol.pdf> (last visited Feb. 3, 2025).

¹⁴ *See* ss. 256.032 and 1000.06(1), F.S.; Department of State, *Flag Protocols and Display*, *supra* note 12.

¹⁵ Executive Office of the Governor, *EOG Flag Protocol*, 2, <https://www.flgov.com/eog/sites/default/files/pdf/2022-EOG-Flag-Protocol.pdf> (last visited Feb. 3, 2025).

¹⁶ 36 U.S.C. s. 902(2).

¹⁷ Section 256.12, F.S.

¹⁸ Section 256.13, F.S.

¹⁹ Section 256.14, F.S.

²⁰ Section 256.16, F.S.

²¹ Section 256.16(2)(a), F.S.

²² Section 256.16(2)(b), F.S.

Local governments are empowered to adopt rules to display the Honor and Remember flag at local government locations.²³

Firefighter Memorial Flag

The Division of State Fire Marshal of the Department of Financial Services is directed by law to design, produce, and implement the creation and distribution of an official state Firefighter Memorial Flag to honor firefighters who died in the line of duty.²⁴ The flag may be displayed at memorial or funeral services of firefighters who have died in the line of duty, at firefighter memorials, at fire stations, at the Fallen Firefighter Memorial located at the Florida State Fire College in Ocala, by the families of fallen firefighters, and at any other location designated by the State Fire Marshal.²⁵

Other Government-Sponsored Flags

Various counties, municipalities, universities, colleges, and K-12 schools have adopted “flags” to garner support for the various institutions. Cities that have their own flags include Orlando,²⁶ Mount Dora,²⁷ and Tampa.²⁸ Florida counties that have their own flags include Orange County²⁹ and Osceola County.³⁰ These flags are a symbol of the local history and a source of pride to help individuals feel more connected to their city and county.

Other government-sponsored flags include the warning and safety flags displayed at public beaches.³¹ The purpose of these flags is to improve public safety. The flags provide general warnings about the overall conditions of the water.³²

Improper Use or Mutilation of Flags

In Florida, a person commits a second degree misdemeanor³³ if the person improperly uses the state or the U.S. flag³⁴ by marking the flag, exposing an improperly marked flag for public viewing,³⁵ or if a person publicly mutilates, defaces, defiles, defies, tramples upon, or by word or

²³ Section 256.16, F.S.

²⁴ Section 256.15, F.S.

²⁵ Section 256.15(1), F.S.; *see also* Rule 69A-62.050(6), F.A.C.

²⁶ City of Orlando, *Flag*, <https://www.orlando.gov/News/Our-New-City-of-Orlando-Flag> (last visited Feb. 3, 2025).

²⁷ City of Mount Dora, *City Flag*, <https://ci.mount-dora.fl.us/854/City-Flag> (last visited Feb. 3, 2025).

²⁸ City of Tampa, *Flag*, <https://www.tampa.gov/city-clerk/info/archives/city-of-tampa-flag> (last visited Feb. 3, 2025).

²⁹ Orange County Government, *A Story Worth Flagging: The Origination of Orange County's Official Flag*, <https://newsroom.ocfl.net/2020/06/a-story-worth-flagging-the-origination-of-orange-countys-official-flag/> (last visited Feb. 3, 2025).

³⁰ Osceola County, *County History*, <https://www.osceola.org/Community/About-Osceola-County/General-Information/County-History> (last visited Feb. 3, 2025).

³¹ Section 380.276, F.S.

³² Florida Department of Environmental Protection, *Beach Warning Flag Program*, <https://floridadep.gov/rcp/fcmp/content/beach-warning-flag-program> (last visited Feb. 3, 2025).

³³ A second-degree misdemeanor is punishable by imprisonment not to exceed 60 days and a fine not to exceed \$500. *See ss.* 775.082 and 775.083, F.S.

³⁴ Section 256.08, F.S., defines “flag” to include any flag, standard, color, ensign or shield, or copy, picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purporting to be such flag, standard, color, ensign or shield of the United States or of this state, or a copy, picture or representation thereof.

³⁵ Section 256.05, F.S.

act casts contempt upon any such flag.³⁶ However, s. 876.52, F.S., makes it a first-degree misdemeanor, if a person publicly mutilates, defaces, tramples upon, or burns, with intent to insult, any flags, standards, colors, or ensigns of the U.S. or of Florida.³⁷

Freedom of Speech and Expression

The First Amendment to the U.S. Constitution guarantees that “Congress shall make no law ... abridging the freedom of speech.”³⁸ Generally, a government cannot restrict speech on the basis of the message expressed;³⁹ content-based restrictions are presumptively invalid.⁴⁰ “Speech” is not strictly limited to verbal utterances, but also includes written word, conduct, and symbolic speech.⁴¹ The rights guaranteed by the First Amendment apply with equal force to state governments through the due process clause of the Fourteenth Amendment.⁴² While the text of the state and federal constitutions differs, the protection and freedom of speech under the state constitution “is the same as is required under the First Amendment.”⁴³

Restricting Speech

The government may regulate speech in specific instances, so long as it has a sufficient government interest justifying the restriction and uses an appropriately tailored approach. Dependent on the circumstances, speech restrictions are subject to different levels of scrutiny by the courts. Strict scrutiny requires the government to prove that the restriction is narrowly tailored to achieve a compelling government interest.⁴⁴ Intermediate scrutiny requires a narrowly tailored restriction that serves a significant government interest.⁴⁵ Rational basis review requires a legitimate government purpose for the restriction.⁴⁶

Types of speech

Political speech is the highest, most protected type of speech.⁴⁷ Laws that burden political speech are subject to strict scrutiny. Political speech encompasses:

- Discussion of governmental affairs, which includes:
 - Candidates,
 - Structures and form of government,

³⁶ Section 256.06, F.S.

³⁷ A first-degree misdemeanor is punishable by imprisonment not to exceed 1 year and a fine not to exceed \$1,000. *See ss. 775.082 and 775.083, F.S.*

³⁸ U.S. CONST. amend. I.

³⁹ *Texas v. Johnson*, 491 U.S. 397 (1989); *State v. T.B.D.*, 656 So.2d 479 (Fla. 1995).

⁴⁰ *See, e.g., Police Dept. of Chicago v. Mosely*, 408 U.S. 92 (1972).

⁴¹ *Virginia v. Black*, 538 U.S. 343, 358 (2003); *Spence v. Washington*, 418 U.S. 405, 410-411 (1974); *see, e.g., Minnesota Voters All. v. Mansky*, 585 U.S. 1, 11 (2018) (holding that political badges, buttons, and other insignia qualify as First Amendment speech); *U.S. v. Eichman*, 496 U.S. 310, 315 (providing that flag burning is expressive conduct afforded protections as speech under the First Amendment).

⁴² U.S. CONST. amend. XIV; *see also* FLA. CONST., art. I.

⁴³ *Dep't of Educ. v. Lewis*, 416 So.2d 455, 461 (Fla. 1982); *Scott v. State*, 368 So.3d 8, 10 (Fla. 4th DCA 2023), *review denied*, No. SC2023-1188 (Fla. Nov. 22, 2023), and *cert. denied sub nom.*; *Scott v. Fla.*, No. 23-7786 (U.S. Oct. 7, 2024).

⁴⁴ *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 171 (2015).

⁴⁵ *City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 76 (2022).

⁴⁶ *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991).

⁴⁷ BLACK'S LAW DICTIONARY, *Speech* (12th ed. 2024) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in the judgment)).

- The manner in which the government is operated, and
- All similar matters relating to political processes.
- Expression of a disagreement with government policy;
- Discussion of changes in the laws and constitution; and
- Claims of government corruption, maladministration, or misuse of funds, even if it undermines confidence in or increases discontent with government.⁴⁸

“Symbolic” or “expressive” speech is the “use of action or gesture as a surrogate or substitute for words.” Most restrictions on symbolic speech are invalid; it may, however, be restricted when the type of speech or message the conduct symbolizes would not be protected.⁴⁹

A flag may be deemed symbolic speech. Regulations that cover symbolic content are subject to a strict scrutiny review and will be upheld if they:⁵⁰

- Are within the constitutional power of the government;
- Further an important or substantial governmental interest;
- Are based on a governmental interest that is unrelated to the suppression of free expression; and
- Are narrowly tailored so the incidental restriction on alleged First Amendment freedoms is no greater than is essential to further the state interest.

For example, the act of flag burning has been expressive conduct afforded protections as speech under the First Amendment by the U.S. Supreme Court.⁵¹

Types of Restrictions

In general, there are two types of restrictions on speech – content-based and content-neutral. Content-based restrictions target speech based on its subject-matter and is viewed with disfavor by the courts. Such restrictions are presumptively invalid and evaluated under strict scrutiny.⁵²

However, a content-neutral regulation, also called a time-place-manner restriction, is generally permitted. Courts apply intermediate scrutiny to time-place-manner restrictions, and allow reasonable restrictions on the time, place, and manner in which speech is made.⁵³

⁴⁸ 16B C.J.S. *Constitutional Law* s. 933 (2024).

⁴⁹ Constitutional Law Deskbook ss. 8:112 and 8:93 (2024); see *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969).

⁵⁰ *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968); see also, *Firestone v. News-Press Pub. Co.*, 538 So.2d 457, 459 (Fla. 1989).

⁵¹ *Eichman*, 496 U.S. at 315.

⁵² *Vidal v. Elster*, 602 U.S. 286, 292 (2024). In particular, the Supreme Court held that view-point discrimination, which targets not just the subject matter, “but particular views taken by the speakers,” is considered “a particularly egregious form of content discrimination.”

⁵³ For time-place-manner restrictions to be upheld, the state must show that the government’s interest is unrelated to the suppression of speech, and that the restriction is not substantially broader than necessary to further the important governmental interest or that ample alternative methods of communicating the message have been left open. 16B C.J.S. *Constitutional Law* s. 957 (2024); *Heffron v. Int’l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 648-650 (1981).

“Place” restrictions limit where speech may happen. “[T]he standards by which limitations on speech must be evaluated differ depending on the character of the property at issue.”⁵⁴ In particular, there are three forums of government-owned property:⁵⁵

- **Traditional public forums**, such as public streets, sidewalks, and parks, are places “by long tradition or by government fiat have been devoted to assembly and debate;”⁵⁶
- **Designated public forums** are areas not traditionally open to assembly and debate, but are instead designated by the government as “a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects;”⁵⁷ and
- **Non-public forums**, where the “principal function of the property would be disrupted by expressive conduct,” such as military reservations and jailhouses.⁵⁸

Speakers may be excluded from traditional or designated public forums “only when the exclusion is necessary to serve a compelling state interest, and the exclusion is narrowly drawn to achieve that interest.” Generally, public forum speech regulations must be content-neutral, provide for alternative channels of communications, and otherwise meet intermediate scrutiny. By contrast, “access to a nonpublic forum can be based on subject matter and speaker identity so long as the limits are reasonable and are viewpoint neutral” (meet rational basis review).⁵⁹

Government Speech

The First Amendment protects citizens’ speech from government regulation, but its restrictions do not extend to government speech itself.⁶⁰ The government speech doctrine is the principle that a government can freely “select the views that it wants to express,”⁶¹ which includes the freedom not to speak and speaking through the removal of speech that the government disapproves.⁶² The U.S. Supreme Court has prescribed the following inquiries to determine whether a government action amounts to its own speech, or a regulation of private expression:

- The history of the expression at issue;
- The public’s likely perception as to who (the government or a private person) is speaking; and
- The extent to which the government has actively shaped or controlled the expression.⁶³

The U.S. Supreme Court has stated that the act of flying flags, particularly at the seat of government, tends toward an expression of government speech because “[f]lags evolved as a

⁵⁴ *Frisby v. Schultz*, 487 U.S. 474, 479 (1988) (internal quotation marks and citation omitted); *see also, Int’l Soc. for Krishna Consciousness, Inc. v. Lee*, 925 F.2d 576, 579 (2d Cir. 1991), *aff’d in part*, 505 U.S. 672 (1992), and *aff’d*, 505 U.S. 830 (1992) (citing *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44 (1983)).

⁵⁵ *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

⁵⁶ *Id.*; *Int’l Soc. for Krishna Consciousness, Inc.*, 925 F.2d at 579 (2d Cir. 1991).

⁵⁷ *Cornelius*, 473 U.S. at 802.

⁵⁸ *Id.* at 804; *Int’l Soc. for Krishna Consciousness, Inc.*, 925 F.2d at 580 (2d Cir. 1991).

⁵⁹ *Cornelius*, 473 U.S. at 806; *Int’l Soc. for Krishna Consciousness, Inc.*, 925 F.2d at 580 (2d Cir. 1991).

⁶⁰ *N.A.A.C.P. v. Hunt*, 891 F.2d 1555, 1565 (11th Cir. 1990), *citing Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 139 (1973).

⁶¹ *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009), *quoting Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000).

⁶² *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1012 (9th Cir. 2000).

⁶³ *Shurtleff v. City of Boston, Ma.*, 596 U.S. 243, 244 (2022).

way to symbolize communities and governments ... flying a flag other than a government's own can also convey a governmental message..."⁶⁴ However, when a city allowed private groups to fly flags that it "neither actively controlled these flag raisings nor shaped the messages the flags sent," it was not exercising government speech but was allowing private speech to occur.⁶⁵ In these instances of such private speech, the government cannot discriminate against the speakers based on their viewpoint as it would violate the First Amendment.⁶⁶

Public Employees

A public employee's speech on a matter of public concern is protected by the First Amendment guarantee of free speech, as citizen speech, and may be restricted only if the state's interest, as an employer, in promoting the efficiency of the public services it performs through its employees, outweighs the employee's interests as a citizen in commenting on a matter of public concern. Actual disruption is not required, but mere speculative concerns are inadequate.⁶⁷

Generally, restrictions on public employees' free speech are subject to two tests. If a public employee's speech is a part of one's official duties, then the speech is not protected. Where the speech does not go to the "core of their jobs,"⁶⁸ the courts then determine whether the restriction of the speech or the employment discipline as a result of the speech constitutes a First Amendment violation according to the *Pickering-Connick* multi-factor balancing test.

The *Pickering-Connick* test first asks whether the public employee was speaking on a matter of "public concern" or as a private citizen.⁶⁹ The content, form, and context of a given statement determines if the speech is a matter of public concern.⁷⁰ If it does not, the speech is not protected by the First Amendment. If the speech goes to a matter of public concern, the courts will then balance "a public employee's First Amendment rights against a public employer's interest in promoting public efficiency" by considering whether the speech in question:

- Impairs discipline by superiors;
- Impairs harmony among coworkers or has a detrimental impact on close working relationships;
- Impedes the performance of the public employee's duties, or conflicts with those duties;
- Interferes with the operation or mission of the agency;
- Is communicated to the public or to coworkers in private; and
- Makes use of the authority and public accountability which the employee's role entails.⁷¹

⁶⁴ *Id.*

⁶⁵ *Id.* at 244-245.

⁶⁶ *Id.* at 247, citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828-830 (1995).

⁶⁷ 16B C.J.S. *Constitutional Law* s. 1062.

⁶⁸ *Garcetti v. Ceballos*, 547 U.S. 410, at 433 (J. Souter, dissenting).

⁶⁹ 16A AM. JUR. 2D *Constitutional Law* s. 491 (2024); Legal Almanac, *The First Amendment: Freedom of Speech* s. 8:4; *Connick v. Myers*, 461 U.S. 138, 142-148 (1983).

⁷⁰ 16B C.J.S. *Constitutional Law* s. 1068.

⁷¹ 63C AM. JUR. 2D *Public Officers and Employees* s. 195 (2024) (citing *Smith v. Gilchrist*, 749 F.3d 302, 309 (4th Cir. 2014)).

III. Effect of Proposed Changes:

The bill prohibits a governmental entity from erecting or displaying a flag that represents a political viewpoint, including, but not limited to, a politically partisan, racial, sexual orientation and gender, or political ideology viewpoint. The bill states that a governmental entity must remain neutral when representing political viewpoints in displaying or erecting a flag.

Thus, a governmental entity is prohibited from displaying a flag that represents a politically partisan viewpoint, including a flag representing any of the political parties (Republican, Democratic, Green, etc.). Similarly, the bill prohibits the display of a flag representing political ideology, such as Christian democracy, communism, conservatism, fascism, feminism, green politics, Islamism, liberalism, libertarianism, nationalism, populism, republicanism, social democracy, socialism, etc.

For purposes of the bill, a “governmental entity” is a governmental agency, local government, or other unit of local government, including a public school, public college, or public university. Although not specifically mentioned, the term “governmental agency” appears to include entities in all three branches of state government, cities, counties, school districts, special districts, and subcomponents of each.

The bill further provides that the prohibition on the display of a flag representing a political viewpoint by a governmental entity does not limit a private individual’s expression of private speech or viewpoints, or his or her rights otherwise protected by the First Amendment of the U.S. Constitution. Nor does the prohibition limit a governmental entity’s ability to display or erect a flag that is required or authorized by general law.

The bill requires the U.S. flag must be displayed in a prominent position that is superior to any other flag that is also displayed, which is consistent with Florida’s flag protocol.

The bill provides that an active or retired member of the U.S. Armed Forces or National Guard may use reasonable force to prevent the desecration, destruction, or removal of the United States flag, or to replace it to a prominent position, except when directly ordered not to do so by a law enforcement officer who is acting in the scope of his or her employment. This provision allows an active or retired member to interfere, using reasonable force, with private speech that is otherwise protected by the First Amendment.

The bill takes effect July 1, 2025.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties or municipalities’ ability to raise revenue, or reduce the percentage of state tax shared with counties and municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

If a law fails to give persons fair notice as to what is prohibited, it may violate the Due Process Clause. A law must clearly delineate prohibited conduct so that a person of ordinary intelligence is not forced to guess about the statute's meaning or application. Where a law fails to provide such notice, it violates the void for vagueness doctrine.⁷² Additionally, a law may be unconstitutionally vague where "it authorizes or even encourages arbitrary and discriminatory enforcement."⁷³ The vagueness of content-based regulation of speech raises special First Amendment concerns because of its "obvious chilling effect on free speech."⁷⁴

While the bill provides examples of what represents a "political viewpoint" for purposes of the bill, it does not define the term. The governmental entity that merely displays a particular flag in recognition of a visiting dignitary or group of people may not be expressing a political viewpoint. However, a citizen that is opposed to that visiting dignitary or group of people may view the display that shows the governmental entity supports the dignitary or group of people (arguably a political viewpoint).

Similarly, while the bill clearly regulates governmental speech, which is not limited by First Amendment regulations, it is unclear where government speech (or that undertaken by a "governmental entity") ends and private speech begins for purposes of this regulation. For example, it is unclear whether a city commissioner who displays an Israeli flag in his personal office at City Hall is conducting private or government speech. Similarly, a university-approved French club may be uncertain of the legality of its display of the flag of France at its club meetings on university property. Prior governmental practices may have created a zone of private speech regarding erection or display of a flag in a public forum area of governmental property.

Currently, it is unclear whether specific government employees are encompassed within the bill's use of "governmental agency." All public employees have First Amendment protections, with teachers, for instance, retaining certain free speech protections at school. However, the First Amendment speech rights of public school employees are not

⁷² *Connally v. Gen. Constr. Co.*, 269 U.S. 385 (1926).

⁷³ *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

⁷⁴ *Reno v. Am. C.L. Union*, 521 U.S. 844, 871-872 (1997).

so boundless that they may deliver any message to anyone anytime they wish.⁷⁵ There are certain instances in which free speech may legitimately be restricted in school.⁷⁶ For instance, public elementary, middle, and high schools may be able to restrict student speech “in light of the special characteristics of the school environment.”⁷⁷ Students have the right to express themselves in public schools as long as their “speech” does not “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”⁷⁸ The extent to which this extends to teachers and public universities, however, is unclear.

If a court determines that the law impermissibly regulates speech in a vague manner, including what speech and by whom, the law may be invalidated.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None identified.

B. Private Sector Impact:

None identified.

C. Government Sector Impact:

The bill is not expected to impact state or local government revenues and expenditures.

VI. Technical Deficiencies:

Section 256.08, F.S., defines the term “flag” as applied to ss. 256.05-256.07, F.S., as “any flag, standard, color, ensign or shield, or *copy, picture or representation* thereof, made of any substance or represented or produced thereon, and of any size, evidently purporting to be such flag, standard, color, ensign or shield of the United States or of this state, or a copy, picture or representation thereof.”⁷⁹ However, this definition will not apply to s. 256.045, F.S., created by the bill.

Without a statutory definition of a term, the courts may rely on standard dictionary meaning of the term. In this instance, Merriam-Webster Dictionary defines “flag” as “a usually rectangular piece of fabric of distinctive design that is uses as a symbol (as of a nation), as signaling device, or a decoration.”⁸⁰ Similarly, the Cambridge Dictionary defines “flag” as “a piece of cloth,

⁷⁵ *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022).

⁷⁶ *B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734, 738 (8th Cir. 2009).

⁷⁷ Killion, Congressional Research Service, *Freedom of Speech: An Overview* at 24 (quoting *Tinker*, 393 U.S. at 506; citing Cong. Rsch. Serv., School Free Speech and Government as Educator, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-7-8-3/ALDE_00000757/), *supra* note 60.

⁷⁸ *Tinker*, 393 U.S. at 513.

⁷⁹ (Emphasis added.)

⁸⁰ Merriam-Webster, *flag*, <https://www.merriam-webster.com/dictionary/flag> (last visited Feb. 6, 2025).

usually rectangular and attached to a pole at one edge, that has a pattern that shows it represents a country or group.”⁸¹

To minimize any misinterpretation of the term “flag,” the Legislature may want to consider a definition whether narrower (similar to the typical dictionary definition limiting it to “cloth”) or broader (similar to the statutory definition expanding the meaning to include a “copy, picture, or representation, made of any substance or represented or produced thereon”).

VII. Related Issues:

Lines 43-50, or proposed s. 256.045(4), F.S., enables an “active or retired member of the United States Armed Forces or the National Guard” to use “reasonable force” to prevent damage or removal of a U.S. flag. Without any consistent training, these members may not be aware of what constitutes impermissible desecration, destruction, or removal of a U.S. flag and what actions may be protected speech under the First Amendment. If the active or retired member tries to prevent action on private property, the member may be open to trespass charges. This provision appears to allow an active or retired member to interfere, using reasonable force, with private speech that is otherwise protected by the First Amendment.

Additionally, the bill leaves to individual discretion what “reasonable force” to use. This may result in the use of excessive force that is punishable by criminal penalties for assault and battery or claims for the same in tort.⁸² A tort is where “we draw lines around acceptable and unacceptable non-criminal behavior,”⁸³ and assign a remedy for “[a] civil wrong, other than breach of contract... [or] a breach of a duty that the law imposes on persons.”⁸⁴ Criminal behavior, by comparison, is an offense against the community at large that is so severe that the government is compelled to take direct action to punish those who cause harm and protect the community.⁸⁵

The individuals subject to the active or retired member’s “reasonable force,” especially if on private property, have the right of self-defense. For both criminal and tortious assault and battery, individuals are entitled to plead self-defense.⁸⁶ Generally, a person is entitled to use force, only to the extent it is reasonably necessary, to repel an attack.⁸⁷

VIII. Statutes Affected:

This bill creates the section 256.045 of the Florida Statutes.

⁸¹ Cambridge, *flag*, https://dictionary.cambridge.org/us/dictionary/english/flag#google_vignette (last visited Feb. 6, 2025).

⁸² *Shaw v. Fletcher*, 137 Fla. 519, 522 (1939); *see, e.g., Garcia v. Carnival Corp.*, 838 F. Supp. 2d 1334, 1337 (S.D. Fla. 2012) (applying Florida law) (providing that assault and battery are recognized in Florida as intentional torts); *Herzfeld v. Herzfeld*, 781 So.2d 1070, 1071 (Fla. 2001) (classifying assault and battery as an intentional tort); ss. 784.001 and 784.03, F.S. (defining the crimes of assault and battery, respectively).

⁸³ *Jews For Jesus, Inc. v. Rapp*, 997 So.2d 1098, 1105 (Fla. 2008) (internal quotation marks and citation omitted).

⁸⁴ BLACK’S LAW DICTIONARY, *Tort* (12th ed. 2024).

⁸⁵ BLACK’S LAW DICTIONARY, *Crime* (12th ed. 2024) (citing Henry S. Maine, *Ancient Law* 320 (17th ed. 1901)); BLACK’S LAW DICTIONARY, *Criminal Law* (12th ed. 2024); *see s. 775.012*, F.S. (providing purposes for Florida Criminal Code).

⁸⁶ *See cf s. 776.085*, F.S.

⁸⁷ *Price v. Gray's Guard Serv., Inc.*, 298 So.2d 461, 463-4 (Fla. 1st DCA 1974); ss. 776.012 and 776.041, F.S.

IX. Additional Information:

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

None.

- B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
