

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 Appropriations

BILL: CS/HB 1

INTRODUCER: Judiciary Committee and Representatives Fernandez-Barquin, Byrd, and others

SUBJECT: Combating Public Disorder

DATE: April 8, 2021

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Erickson	Sadberry	AP	Favorable

I. Summary:

The bill addresses acts of public disorder to define previously undefined offenses of affray, riot, and inciting a riot and create the offenses of aggravated rioting and aggravated inciting a riot. The bill also:

- Requires a person arrested for unlawful assembly, riot, and certain offenses committed in furtherance of a riot or aggravated riot, to be held in jail until he or she appears for a first appearance hearing and a court determines bond;
- Creates a budget appeal process to challenge reductions in municipal law enforcement agencies' budgets similar to that available to a county sheriff;
- Corrects constitutional infirmities in the current prohibition against obstructing a roadway;
- Provides that a municipality is civilly liable for specified damages proximately caused by the municipality's breach of a duty to allow the municipal law enforcement agency to respond appropriately to protect persons and property during a riot or an unlawful assembly (as specified in the bill);
- Increases penalties for assault and battery, and increases offense severity level rankings for aggravated assault and aggravated battery, when committed in furtherance of a riot or an aggravated riot;
- Creates the crime of mob intimidation, which prohibits a mob from using force or the threat of imminent force to compel or induce, or attempt to compel or induce, a person to do or refrain from doing any act or to assume, abandon, or maintain a particular viewpoint against that person's will;
- Provides for a six-month mandatory minimum sentence for battery on a law enforcement officer if the offense was committed in furtherance of a riot or an aggravated riot;
- Increases the offense severity level rankings for assault and battery on a law enforcement officer or other specified official when the offense was committed in furtherance of a riot or an aggravated riot;
- Punishes criminal mischief that involves damaging a memorial or historic property if the damage is greater than \$200, and requires restitution of the full cost of repair or replacement of the memorial or historic property;

- Creates the crime of destroying or demolishing a memorial or historic property and requires restitution of the full cost of repair or replacement of the memorial or historic property;
- Reclassifies the degree, and increases the offense severity level ranking, of specified burglary and theft offenses committed during a riot or an aggravated riot when facilitated by conditions arising from the riot;
- Creates the crime of cyberintimidation by publication, which prohibits a person from electronically publishing another person's personal identification information with the intent to incite violence or commit a crime against the person or threaten or harass the person, placing the other person in reasonable fear of bodily harm;
- Creates an affirmative defense in a civil action for damages for personal injury, wrongful death, or property damage that such action arose from injury or damage sustained by a participant acting in furtherance of a riot;
- Increases the offense severity ranking level of offenses involving injuring or removing a tomb or monument; and
- Ranks battery during a riot or an aggravated riot and other offenses in the offense severity level ranking chart of the Criminal Punishment Code.

The Criminal Justice Impact Conference estimated that the original bill (HB 1) would have a "positive indeterminate" prison bed impact, meaning an unquantifiable increase in prison beds. See Section V. Fiscal Impact.

The bill takes effect upon becoming a law.

II. Present Situation:

Unlawful Acts During Policing Protests and Breach of the U.S. Capitol

In 2020, protests relating to policing practices and other issues occurred around the nation. Attention was especially focused on the death of George Floyd¹ and several other Black Americans during incidents involving use of force by law enforcement officers. Some protestors and counter-protestors at some of these protests engaged in unlawful acts, including rioting and other violent acts.² While protests in Florida appear to have been mostly peaceful according to news accounts,³ unlawful acts were committed at some of these protests, including battery on

¹ George Floyd, a resident of Minneapolis, was arrested and restrained by a Minneapolis police officer named Derek Chauvin. According to news reports, for nearly nine minutes (per the original estimate) and despite Mr. Floyd repeatedly complaining that he could not breathe, Officer Chauvin pinned Mr. Floyd's head to the ground by pressing his knee to the side of Mr. Floyd's neck. It was also reported that three other Minneapolis police officers at the scene who witnessed the neck restraint did not intervene to stop it. Death was ruled to be a homicide and Chauvin and the witnessing officers were charged. See, e.g., *Timeline: Key events in the month since George Floyd's death* (June 25, 2020), Reuters, available at <https://www.reuters.com/article/us-minneapolis-police-usa-onemonth-timel/timeline-key-events-in-the-month-since-george-floyds-death-idUSKBN23W1NR> (last visited March 24, 2021) and Amir Vera, *Independent autopsy and Minnesota officials say George Floyd's death was homicide* (June 2, 2020), CNN, available at <https://www.cnn.com/2020/06/01/us/george-floyd-independent-autopsy/index.html> (last visited March 24, 2021).

² See, e.g., Joanna Walters, *George Floyd protests: The US cities that became hotspots of unrest* (May 31, 2020), The Guardian, available at <https://www.theguardian.com/us-news/2020/may/31/george-floyd-protests-us-cities-hotspots-unrest> (last visited March 24, 2021).

³ See, e.g., Associated Press, *Curfews Issued in Florida as Peaceful Protests Turn Violent* (June 1, 2020), Voice of America, available at <https://www.voanews.com/usa/curfews-issued-florida-peaceful-protests-turn-violent> (last visited March 24, 2021) and *Floyd protests: Mostly peaceful protests Sunday around Florida call for justice and action* (May 31, 2020),

officers, damage to police cars and businesses, rioting, arson, burglary, theft, blocking traffic, and graffiti.⁴ According to news reports, some protestors also verbally accosted a couple dining outside at a St. Petersburg restaurant.⁵

On January 6, 2021, there was a rally in Washington, D.C., to protest Congress certifying the electoral votes for the President and Vice President of the United States. Following the rally, most of the protestors marched to the U.S. Capitol. Of the rally crowd, “[f]ederal officials estimate that roughly 800 people surged into the [Capitol] building, though they caution that such numbers are imprecise, and the real figure could be 100 people or more in either direction.”⁶ A Capitol Police officer died the day after the riot from injuries sustained during the riot, two Capitol Police officers committed suicide in the weeks following the riot, and more than 140 officers were injured, according to the Capitol Police officers’ union.⁷ Further, a protester was fatally shot and three other protestors died from medical emergencies suffered during the riot.⁸ More than 350 suspects have been identified and at least 150 have been charged by the U.S. Department of Justice.⁹ Charges include interstate threats, unlawful entry, possession of a destructive device, firearm-related violations, theft, assault on a federal law enforcement officer,

Florida Today, available at <https://www.floridatoday.com/story/news/2020/05/31/floyd-protests-mostly-peaceful-protests-sunday-around-florida-call-justice-and-action/5301864002> (last visited March 24, 2021).

⁴ See, e.g., Michelle Solomon, *Miami protest Saturday goes from peaceful to pandemonium* (May 31, 2020), WPLG Local10.com, available at <https://www.local10.com/news/local/2020/05/30/watch-protests-in-downtown-miami-in-response-to-minneapolis-death-of-george-floyd/> (last visited March 24, 2021); Julio Ochoa, *Peaceful Protests Turn Violent in Tampa in Response to George Floyd Killing* (May 30, 2020), WUSF Public Media, available at <https://wusfnews.wusf.usf.edu/law-order/2020-05-30/peaceful-protests-turn-violent-in-tampa-in-response-to-george-floyd-killing> (last visited March 24, 2021); Mary Shedden, Daylina Miller, and Stephanie Colombini, *Tampa Issues Curfew After Businesses Damaged in Overnight Protests* (May 31, 2020), WUSF Public Media, available at <https://wusfnews.wusf.usf.edu/law-order/2020-05-31/tampa-issues-curfew-after-businesses-damaged-in-overnight-protests> (last visited March 24, 2021); Marilyn Parker, *Peaceful protest marred by riots in downtown Jacksonville* (May 30, 2020), News4Jax, available at <https://www.news4jax.com/news/local/2020/05/30/demonstrators-in-jacksonville-join-national-i-cant-breathe-protests/> (last visited March 24, 2021); Andrea Torres, *Officer stabbed in neck during protests in Jacksonville* (May 31, 2020), WPLG Local10.com, available at <https://www.local10.com/news/local/2020/05/31/officer-stabbed-in-neck-during-protests-in-jacksonville/> (last visited March 24, 2021); and Jillian Olsen, *Protesters refused to let an ambulance pass, St. Pete police say* (July 9, 2020), WTSP Tampa Bay, available at <https://www.wtsp.com/article/news/local/protests/st-petersburg-protestors-fire-truck/67-1553a001-0683-4363-8b39-ab4a28930146> (last visited March 24, 2021).

⁵ See, e.g., Josh Fiallo, Romy Ellenbogen, and Caitlin Johnston, *Demonstrators vs. diners: St. Petersburg encounter goes viral* (Sept. 24, 2020), *Tampa Bay Times*, available at <https://www.tampabay.com/news/st-petersburg/2020/09/24/tense-exchange-between-st-pete-demonstrators-and-diners-goes-viral/> (last visited March 4, 2021).

⁶ Devlin Barrett and Spencer S. Hsu, *Justice Department, FBI debate not charging some of the Capitol rioters* (Jan. 23, 2021), *Washington Post*, available at https://www.washingtonpost.com/national-security/doj-capitol-rioters-charges-debate/2021/01/23/3b0cf112-5d97-11eb-8bcf-3877871c819d_story.html (last visited March 24, 2021).

⁷ Bill McCarthy, *Newsmax host falsely claims ‘only one person died’ at Capitol Jan. 6* (Feb. 9, 2021), *PolitiFact* (The Poynter Institute), available at <https://www.politifact.com/factchecks/2021/feb/09/greg-kelly/newsmax-host-falsely-claims-only-one-person-died-c/> (last visited March 24, 2021).

⁸ *Id.*

⁹ *The Capitol Siege: The Arrested And Their Stories* (March 26, 2021), NPR, available at <https://www.npr.org/2021/02/09/965472049/the-capitol-siege-the-arrested-and-their-stories> (last visited April 2, 2021); and Paul P. Murphy, Katelyn Polantz, Marshall Cohen, and Evan Perez, *At least 150 people have been charged by Justice Department in Capitol riot* (Jan. 26, 2021), CNN, available at <https://amp.cnn.com/cnn/2021/01/26/politics/capitol-riot-arrests-150/index.html> (last visited March 24, 2021).

disorderly conduct, and curfew violations.¹⁰ Other potential charges being discussed by federal prosecutors include felony murder, seditious conspiracy, and racketeering.¹¹

Criminal Punishment Code

The Criminal Punishment Code¹² (Code) is Florida’s primary sentencing policy. Noncapital felonies sentenced under the Code receive an offense severity level ranking (Levels 1-10).¹³ Points are assigned and accrue based upon the offense severity level ranking assigned to the primary offense, additional offenses, and prior offenses. Sentence points escalate as the severity level escalates. Points may also be added or multiplied for other factors such as victim injury or the commission of certain offenses. The lowest permissible sentence is any nonstate prison sanction in which total sentence points equal or are less than 44 points, unless the court determines that a prison sentence is appropriate. If total sentence points exceed 44 points, the lowest permissible sentence in prison months is calculated by subtracting 28 points from the total sentence points and decreasing the remaining total by 25 percent.¹⁴ Absent mitigation,¹⁵ the permissible sentencing range under the Code is generally the lowest permissible sentence scored up to and including the maximum penalty provided under s. 775.082, F.S.¹⁶

Affray, Unlawful Assembly, and Riot

Affray

Section 870.01(1), F.S., provides that it is a first degree misdemeanor¹⁷ to commit an affray. This statute does not provide a definition of affray, so courts have used the common law definition of the term: “The common law defined an affray as the fighting of two or more persons in a public place, to the terror of the people.”¹⁸

¹⁰ *Id.* and *Thirteen Charged in Federal Court Following Riot at the United States Capitol* (Jan. 8, 2021), U.S. Department of Justice, available at <https://www.justice.gov/opa/pr/thirteen-charged-federal-court-following-riot-united-states-capitol> (last visited March 24, 2021).

¹¹ Jan Wolfe and Sarah N. Lynch, *Explainer: What crimes can the U.S. Capitol rioters be charged with?* (Jan. 9, 2021), Reuters, available at <https://www.reuters.com/article/us-usa-trump-capitol-crimes/explainer-what-crimes-can-the-u-s-capitol-rioters-be-charged-with-idUSKBN29E0ND> (last visited March 24, 2021); Devlin Barrett and Matt Zapotosky, *Here are the potential criminal charges Capitol rioters could face* (Jan. 27, 2021), Washington Post, available at https://www.washingtonpost.com/national-security/crime-charges-capitol-sedition/2021/01/07/33df542e-5109-11eb-b96e-0e54447b23a1_story.html (last visited March 24, 2021); and Mark Hosenball and Sarah N. Lynch, *Exclusive: U.S. mulls using law designed to prosecute Mafia against Capitol rioters* (Feb. 3, 2021), Reuters, available at <https://www.reuters.com/article/us-usa-trump-capitol-rico-exclusive-idUSKBN2A32W2> (last visited March 24, 2021).

¹² Sections 921.002-921.0027, F.S. See chs. 97-194 and 98-204, L.O.F. The Code is effective for offenses committed on or after October 1, 1998.

¹³ Offenses are either ranked in the offense severity level ranking chart in s. 921.0022, F.S., or are ranked by default based on a ranking assigned to the felony degree of the offense as provided in s. 921.0023, F.S.

¹⁴ Section 921.0024, F.S. Unless otherwise noted, information on the Code is from this source.

¹⁵ The court may “mitigate” or “depart downward” from the scored lowest permissible sentence, if the court finds a mitigating circumstance. Section 921.0026, F.S., provides a list of mitigating circumstances.

¹⁶ If the scored lowest permissible sentence exceeds the maximum penalty in s. 775.082, F.S., the sentence required by the Code must be imposed. If total sentence points are greater than or equal to 363 points, the court may sentence the offender to life imprisonment. Section 921.0024(2), F.S.

¹⁷ A first degree misdemeanor is punishable by up to one year in jail and a fine of up to \$1,000. Sections 775.082 and 775.083, F.S.

¹⁸ *Carnley v. State*, 88 Fla. 281, 102 So. 333, 334 (1924). “As for ‘terror,’ it has been held that the fight need not create actual terror to constitute an affray, but such may be presumed from fighting in a public place. [*Carwile v. State*, 35 Ala. 392

Unlawful Assembly

Section 870.02, F.S., provides that it is a second degree misdemeanor¹⁹ for three or more persons meeting together to commit a breach of the peace²⁰ or any other unlawful act. The Florida Supreme Court has held that the “basic common law elements apply” to s. 870.02, F.S., and has construed this statute “to prohibit (1) an assembly of three or more persons who, (2) having a common unlawful purpose, (3) assemble in such a manner as to give rational, firm, and courageous persons in the neighborhood of the assembly a well-grounded fear of a breach of the peace.”²¹ The Court has further held that this statute does not infringe on free speech or assembly if the term ‘unlawful assembly’ used in s. 870.02, F.S., meets the Court’s previously-described definition, the elements are “established by the circumstances of the incident,” and the “charging document ... articulate[s] the facts which establish each of those elements.”²²

Section 870.03, F.S., provides that it is a third degree felony²³ if any persons unlawfully assembled demolish, pull down or destroy, or begin to demolish, pull down or destroy, any dwelling house or other building, or any ship or vessel.²⁴ The third degree felony is not ranked in the Code offense severity level ranking chart. Therefore, it is assigned a “default” ranking under s. 921.0023, F.S., based on felony degree. A third degree felony offense is ranked as a Level 1 offense.²⁵

Riot and Inciting or Encouraging a Riot

Section 870.01(2), F.S., provides that it is a third degree felony to commit a riot or incite or encourage a riot. Because the statute does not provide a definition of riot, the Florida Supreme Court has applied the common law definition of the term, which is “a tumultuous disturbance of

(1860)]. This is consistent with the common law notion of an affray as an attack upon the public order and sense of security which could lead to actual violence. *See State v. Huntley*, 25 N.C. 418 (1843).” *D.J. v. State*, 651 So.2d 1255, 1256 (Fla. 1st DCA 1995). The Court noted that “North Carolina and Alabama ... have adopted the identical common law definition of affray.” *Id.*

¹⁹ A second degree misdemeanor is punishable by up to 60 days in jail and a fine of up to \$500. Sections 775.082 and 775.083, F.S.

²⁰ Section 877.03, F.S., provides that it is a second degree misdemeanor to commit such acts as are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them, or engage in brawling or fighting, or engage in such conduct as to constitute a breach of the peace or disorderly conduct. The Florida Supreme Court has narrowed the application of the statute to avoid possible infringement on constitutionally-protected speech, limiting its application so it only applies “to words which ‘by their very utterance . . . inflict injury or tend to incite an immediate breach of the peace,’ *White v. State*, ... [330 So.2d 3, 7 (Fla.1976)]; *See Chaplinsky v. New Hampshire*, ... [315 U.S. 568, 572 (1942)]; or to words, known to be false, reporting some physical hazard in circumstances where such a report creates a clear and present danger of bodily harm to others.” *State v. Saunders*, 339 So.2d 641, 644 (Fla. 1976). The Court in *Saunders* construed s. 877.03, F.S., “so that no words except ‘fighting words’ or words like shouts of ‘fire’ in a crowded theatre fall within its proscription, in order to avoid the constitutional problem of overbreadth, and ‘the danger that a citizen will be punished as a criminal for exercising his right of free speech.’” *Id.*, at 644, quoting *Spears v. State*, 337 So.2d 977, 980 (Fla. 1976).

²¹ *State v. Simpson*, 347 So.2d 414, 415 (Fla. 1977) (footnote omitted).

²² *Id.* at 416.

²³ A third degree felony is punishable by up to five years in state prison and a fine of up to \$5,000. Sections 775.082 and 775.083, F.S.

²⁴ The Florida Supreme Court has construed s. 870.03, F.S., to include the common law elements of unlawful assembly. *Mobley v. State*, 409 So.2d 1031, 1034 (Fla. 1982).

²⁵ Section 921.0023(1), F.S.

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.”²⁶

For the offense of inciting or encouraging a riot, the Court has held:

[T]he words uttered by such person or the act done by him must be such as to support a finding that they were said or done with intent to provoke a riot. In the light of all the circumstances, the language used must clearly intend to incite a breach of the peace. We recognize that our statute may not be used to interfere with an individual’s right to free speech. For our statute to be constitutional, the words used must be such that they advocate violence and tend to incite an immediate breach of the peace.²⁷

The Court held that, subject to the following limitations, the offenses of riot and inciting or encouraging a riot are constitutional. “The offense of riot is as it is defined at common law, and each of the common law elements of the offense must be established by the circumstances of the incident. Specifically, the charging document must articulate facts which establish that three or more persons acted with a common intent to mutually assist each other in a violent manner to the terror of the people and a breach of the peace.”²⁸

The Court also described what must be included in the charging document regarding inciting or encouraging a riot:

With reference to the offense of inciting or encouraging a riot, the charging document must establish circumstances justifying a clear and present danger of a riot in accordance with its elements as heretofore set out and that the language used by the defendant tended to incite the persons assembled to an immediate breach of the peace. Conduct which involves a clear and present danger of force or violence is not constitutionally protected even though it is intertwined with protected speech and conduct. It is no abridgment of free speech or assembly to make criminal the promoting, encouraging, and aiding of an assembly, the purpose of which is to wreak violence.²⁹

The offenses of riot and inciting or encouraging a riot are ranked in Level 3 of the Code offense severity level ranking chart.³⁰

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 (“disbanding”) 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

²⁶ *State v. Beasley*, 317 So.2d 750, 752-753 (Fla. 1975) (citations omitted).

²⁷ *Id.* at 753 (citations omitted).

²⁸ *Id.* at 753.

²⁹ *Id.* at 753 (citation omitted).

³⁰ Section 921.0022(3)(c), F.S.

without the need for law enforcement intervention.³¹ 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.³²

Critics of the “defund the police” movement argue that 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.³³ Proponents of the “defund the police” movement argue that “investing in communities would act as a better deterrent to crime by directly addressing societal problems like poverty, mental illness, and homelessness — issues that advocates say police are poorly equipped to handle, and yet are often tasked with.”³⁴

Municipal Budgets

A municipality is required to adopt a budget each fiscal year.³⁵ 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.³⁶ Typically, the municipal police chief is appointed or hired by a city official or officials (mayor, city manager, city commission) and law enforcement funding is determined by the municipal governing body.

Sheriffs’ Budgets

The Florida Constitution specifies five elected county officers, including the county sheriff.³⁷ In contrast to a municipal law enforcement agency, a sheriff has much greater input in the budget process. For each fiscal year,³⁸ 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.³⁹

If the sheriff disagrees with the budget modifications or reductions, he or she may file an appeal to the Administration Commission,⁴⁰ which is comprised of the Governor and Cabinet.⁴¹ 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

³¹ Michael Balsamo, *When Protestors Demand ‘Defund the Police’ at George Floyd Demonstrations, What Does It Mean?* (June 7, 2020), Chicago Tribune, available at <https://www.chicagotribune.com/nation-world/ct-nw-cb-george-floyd-protesters-defund-police-20200607-kiupi5allvgehinzidz3jund5e-story.html> (last visited March 24, 2021).

³² Mitch Perry, *St. Pete Police Social Worker Program Set to Begin* (Jan. 13, 2021), Bay News 9, available at <https://www.baynews9.com/fl/tampa/news/2021/01/13/st-pete-police-social-worker-program-set-to-begin-> (last visited March 24, 2021).

³³ Tom Jackman, *Defunding or disbanding the police is a dangerous idea if done hastily* (June 18, 2020), Washington Post, available at <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 March 24, 2021).

³⁴ Amanda Arnold, *What Exactly Does It Mean to Defund the Police?* (June 12, 2020), The Cut, available at <https://www.thecut.com/2020/06/what-does-defund-the-police-mean-the-phrase-explained.html> (last visited March 24, 2021).

³⁵ The fiscal year for a municipality is October 1 through September 30. Section 166.241(1) and (2), F.S.

³⁶ Section 166.241(3), F.S.

³⁷ Art. VIII, s. 1(d), Fla. Const.

³⁸ The fiscal year for a sheriff is October 1 through September 30. Section 30.49(1), F.S.

³⁹ Section 30.49, F.S.

⁴⁰ Section 30.49(4), F.S.

⁴¹ Section 14.202, F.S.

Administration Commission, which may amend, modify, increase, or reduce the sheriff's budget. The decision of the Administration Commission is final.⁴²

Further, if in the judgment of the sheriff an emergency should arise by reason of which the sheriff would be unable to perform his or her duties without the expenditure of larger amounts than those provided in the budget, he or she may apply to the board of county commissioners for the appropriation of additional amounts. If the board of county commissioners approves the sheriff's request, no further action is required on either party. If the board of county commissioners disapproves a portion or all of the sheriff's request, the sheriff may apply to the Administration Commission for the appropriation of additional amounts. The Administration Commission may require a budget hearing on the application. If any increase is granted by the Administration Commission, the board of county commissioners, and the budget commission, if there is one, must amend accordingly the budget of the appropriate county fund or funds.⁴³

Obstruction of Roadways

Section 316.2045, F.S.

Section 316.2045(1), F.S., provides that it is a pedestrian violation⁴⁴ for a person willfully to obstruct the free, convenient, and normal use of any public street, highway, or road by impeding, hindering, stifling, retarding, or restraining traffic or passage thereon, by standing or approaching motor vehicles thereon, or by endangering the safe movement of vehicles or pedestrians traveling thereon.

Section 316.2045(2), F.S., provides that it is a second degree misdemeanor for a person, without proper authorization or a lawful permit, willfully to obstruct the free, convenient, and normal use of any public street, highway, or road by any of the means specified in subsection (1) in order to solicit.

Section 316.2045(3), F.S., authorizes the appropriate local government to issue permits for the use of any street, road, or right-of-way not maintained by the state.

Organizations qualified under s. 501(c)(3) of the Internal Revenue Code and registered pursuant to ch. 496, F.S., or persons or organizations acting on their behalf are exempted from:

- The provisions of s. 316.2045(2), F.S., for activities on streets or roads not maintained by the state. Permits for the use of any portion of a state-maintained road or right-of-way are required only for those purposes and in the manner set out in s. 337.406, F.S.⁴⁵
- Local requirements for a permit issued under s. 316.2045(3), F.S., for charitable solicitation activities on or along streets or roads that are not maintained by the state under conditions prescribed in the statute.⁴⁶

⁴² *Id.*

⁴³ Section 30.49(10), F.S.

⁴⁴ The violation is a noncriminal traffic infraction punishable by a \$15 fine. Sections 318.14(1) and 318.18(1), F.S.

⁴⁵ Section 316.2045(2), F.S.

⁴⁶ Section 316.2045(3), F.S.

Section 316.2045(4), F.S., provides that nothing in s. 316.2045, F.S., shall be construed to inhibit political campaigning on the public right-of-way or to require a permit for such activity.

Section 316.2045(5), F.S., exempts commercial vehicles collecting solid waste or recycling when displaying amber flashing hazard lights.

Section 316.2045, F.S., Has Been Held Unconstitutional

Speech regulations are generally analyzed as to whether they are content based or content neutral. “Deciding whether a particular regulation is content based or content neutral is not always a simple task.... [The U.S. Supreme Court has] said that the ‘principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.’”⁴⁷

“As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.... By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral[.]”⁴⁸ “Content-based regulations are presumptively invalid”⁴⁹ and may be justified only if the government proves that “they are narrowly tailored to serve a compelling state interest.”⁵⁰ Content-neutral regulations will be sustained if they further “an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”⁵¹

A law may also place an unconstitutional prior restraint on speech. “A prior restraint on expression exists when the government can deny access to a forum for expression before the expression occurs.”⁵² “Although prior restraints are not per se unconstitutional, there is a strong presumption against their constitutionality.”⁵³ A long line of U.S. Supreme Court decisions hold that “a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.”⁵⁴

In 2003, in *Bischoff v. Florida*, the U.S. District Court for the Middle District of Florida (Orlando Division) issued a permanent injunction against enforcement of s. 316.2045, F.S. The Court held that the statute violates the Equal Protection Clause of the Fourteenth Amendment and the First Amendment, finding the statute is content-based because it facially prefers speech by registered charities and those who are engaged in political speech.⁵⁵ The court also held that the statute was void for vagueness, finding that several ambiguous terms in the statute did not

⁴⁷ *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994) (citation omitted), quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

⁴⁸ *Id.* at 643 (citations omitted).

⁴⁹ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (citations omitted).

⁵⁰ *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987).

⁵¹ *U.S. v. O’Brien*, 391 U.S. 367, 377 (1968).

⁵² *U.S. v. Frandsen*, 212 F.3d 1231, 1236-37 (11th Cir. 2000).

⁵³ *Id.* at 1237.

⁵⁴ *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150–51 (1969) (footnote omitted).

⁵⁵ *Bischoff v. Florida*, 242 F. Supp. 2d 1226, 1236 (M.D. Fla. 2003).

“convey sufficiently definite warning as to the unlawful conduct when measured by common understanding.”⁵⁶

The Court further held that the statute is unconstitutionally overbroad because it is not narrowly tailored to meet the compelling state interest in ensuring public safety on roads. The Court found that the defendants did not address the magistrate judge’s conclusion that the statute’s permit scheme serves as a prior restraint on speech, and did not point to anything in the record to convince the Court “that there are procedural safeguards in place to prevent the undue suppression of speech.”⁵⁷

“Although it declined to sever the provisions of the statute, the Court in *Bischoff* noted that Section 1 of Florida Statute 316.2045, standing alone, appeared to be content neutral and did not ‘have the problems created by the preferences’ elsewhere in the statute.”⁵⁸

In 2006, in *Chase v. City of Gainesville*, the U.S. District Court for the Northern District of Florida (Gainesville Division) issued a permanent injunction against enforcement of s. 316.2045, F.S., after the parties agreed to its permanent enjoinder and facial unconstitutionality.⁵⁹

In 2020, in *Vigue v. Shoar*, the U.S. District Court for the Middle District of Florida (Jacksonville Division) found that the Legislature had not addressed the constitutional infirmities identified in *Bischoff*.⁶⁰ The Court agreed with the reasoning in *Bischoff* regarding the unconstitutionality of s. 316.2045, F.S., and permanently enjoined its enforcement.⁶¹

Sovereign Immunity and Immunity Exceptions

Sovereign immunity is a principle under which a government cannot be sued without its consent.⁶² Section 768.28(1), F.S., allows for suits in tort against Florida and its agencies and subdivisions for damages resulting from the negligence of government employees acting in the scope of employment. This liability exists only where a private person would be liable for the same conduct. Section 768.28, F.S., 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”⁶³

⁵⁶ *Id.*

⁵⁷ *Id.* at 1237, 1257-58.

⁵⁸ *Halfpap v. City of West Palm Beach*, No. 05-80900-CIV, 2006 WL 5700261, at *23 n. 47 (S.D. Fla. April 12, 2006), quoting *Bischoff*, at 1258, n. 21. The reference to “Section 1 of Florida Statute 316.2045” is actually a reference to subsection (1) of s. 316.2045, F.S. In this quoted footnote from *Bischoff*, the Court also explained that it was a decision for the Legislature whether to sever the unconstitutional parts of the statute and leave s. 316.2045(1), F.S., standing alone.

⁵⁹ *Chase v. City of Gainesville*, No. 1:06-CV-44-SPM/AK, 2006 WL 3826983 (N.D. Fla. Dec. 28, 2006).

⁶⁰ *Vigue v. Shoar*, No. 3:19-CV-186-J-32JBT, 2020 WL 6020484 (M.D. Fla. Oct. 12, 2020). “In 2007, the Florida Legislature amended s. 316.2045(3) to exempt certain 501(c)(3) organizations from the permit requirements for charitable solicitation and to establish conditions with which the organizations must comply to take advantage of that exemption. Fla. Att’y Gen. Op. 2007-50 (2007). On November 7, 2007, Florida Attorney General Bill McCollum issued an opinion that the amendments did not address the constitutional infirmities identified in *Bischoff* and recommended that the Florida Legislature address those issues. *Id.* To date, the Legislature has not done so.” *Id.*, at *7 (footnote omitted).

⁶¹ *Id.*

⁶² *Sovereign Immunity*, The Legal Information Institute, Cornell Law School, available at https://www.law.cornell.edu/wex/sovereign_immunity (last visited March 24, 2021).

⁶³ Section 768.28(1), F.S.

Section 768.28(5), F.S., limits tort recovery from a governmental entity at \$200,000 per person and \$300,000 per accident. This limitation does not prevent a judgement in excess of such amounts from being entered, but a claimant is unable to collect above the statutory limit unless a claim bill is passed by the Legislature.

Article X, s. 13, of the State Constitution allows the Legislature to waive sovereign immunity but this statutory waiver is not absolute. The Florida Supreme Court has recognized that there are certain functions which are inherent in the act of governing and that “[j]udicial intervention through private tort suits into the realm of discretionary decisions relating to basic governmental functions would require the judicial branch to second guess the political and police power decisions of the other branches of government and would violate the separation of powers doctrine.”⁶⁴ Courts have found governmental entities to be entitled to sovereign immunity in cases involving the decision of whether to enforce the law by making an arrest, tactical deployment of police officers, and providing enforcement protection.⁶⁵

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.

Assault and Battery

Assault and Aggravated Assault

Section 784.011, F.S., provides that it is a second degree misdemeanor to commit an assault, which is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.

Section 784.021, F.S., provides that an aggravated assault is an assault:

- With a deadly weapon⁶⁶ without intent to kill; or
- With an intent to commit a felony.

Aggravated assault is a third degree felony and is ranked in Level 6 of the Code offense severity level ranking chart.⁶⁷

⁶⁴ *Trianon Park Condominium Ass’n v. City of Hialeah*, 468 So.2d 912, 918 (Fla. 1985).

⁶⁵ See, e.g., *Everton v. Willard*, 468 So.2d 936 (Fla. 1985), *Wong v. City of Miami*, 237 So.2d 132 (Fla. 1970), *Elmer v. City of St. Petersburg*, 378 So.2d 825 (Fla. 2d DCA 1979) *Hernandez v. City of Miami*, 305 So.2d 277 (Fla. 3d DCA 1974), and *Carter v. City of Stuart*, 468 So.2d 955 (Fla. 1985).

⁶⁶ 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).

⁶⁷ Section 921.0022(3)(g), F.S.

Battery and Aggravated Battery

Section 784.03, F.S., provides that the offense of battery occurs when a person:

- Actually and intentionally touches or strikes another person against the will of the other; or
- Intentionally causes bodily harm to another person.

Generally, a battery under this statute is punishable as a first degree misdemeanor but a person commits a third degree felony if he or she has one prior conviction for battery, aggravated battery, or felony battery and commits any second or subsequent battery.

Section 784.045, F.S., provides that a person commits aggravated battery who, in committing battery:

- Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement;
- Uses a deadly weapon; or
- The victim of the battery was pregnant at the time of the offense and the offender knew or should have known that the victim was pregnant.

Aggravated battery is a second degree felony and is ranked in Level 7 of the Code offense severity level ranking chart.⁶⁸

Assault or Battery on a Law Enforcement Officer or Other Specified Professional

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);⁶⁹
- 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.

⁶⁸ Section 921.0022(3)(g), F.S. A second degree felony is punishable by up to 15 years in state prison and a fine of up to \$10,000. Sections 775.082 and 775.083, F.S.

⁶⁹ "Law enforcement officer" includes a 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. Section 784.07(1)(d), F.S.

The offenses are reclassified as follows:

- Assault is reclassified from a second degree misdemeanor to a first degree misdemeanor;
- 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 a LEO includes a three-year mandatory minimum sentence.
- Aggravated battery is reclassified from a second degree felony to a first degree felony.⁷⁰
 - The penalty for aggravated battery upon a LEO includes a five-year mandatory minimum sentence.⁷¹

Criminal Mischief

Section 806.13, F.S., provides that a person commits criminal mischief by willfully and maliciously injuring or damaging the real or personal property of another, including by vandalism or graffiti. The penalty for criminal mischief generally corresponds to the cost of the damage. It is a:

- Second degree misdemeanor if the damage is \$200 or less;
- First degree misdemeanor if the damage is greater than \$200 but less than \$1,000; and
- Third degree felony if the damage is greater than \$1,000, or there is interruption or impairment of a business operation or public communication, transportation, supply of water, gas or power, or other public service which costs \$1,000 or more in labor and supplies to restore.⁷²

Criminal mischief may also be enhanced to a third degree felony based on a prior criminal mischief conviction 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;
- Public telephone, regardless of the value of the damage; or
- Sexually violent predator detention or commitment facility, if the damage is valued greater than \$200.⁷³

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 \$1,000.⁷⁴

The third degree felony pertaining to property damage of \$1,000 or more or damage of \$1,000 or more to public communication or any other public service is ranked in Level 2 of the Code offense severity level ranking chart.⁷⁵ The other third degree felonies are not ranked in the chart. They are assigned a Level 1 ranking by “default” under s. 921.0023, F.S.

⁷⁰ A first degree felony is generally punishable up to 30 years in state prison and a fine of up to \$10,000. Sections 775.082 and 775.083, F.S.

⁷¹ Section 784.07(2)(d), F.S.

⁷² Section 806.13(1)(b)1.-3., F.S.

⁷³ Section 806.13(2)-(4), F.S.

⁷⁴ Section 806.13(6)-(8), F.S.

⁷⁵ Section 921.0022(3)(b), F.S.

Burglary and Burglary Facilitated by State of Emergency

Section 810.02(1), F.S., provides that a person commits burglary by:

- 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
- Notwithstanding a licensed or invited entry, 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.⁷⁶

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

- Unarmed burglary of an unoccupied structure or unoccupied conveyance (no assault or battery) is a Level 4 third degree felony.⁷⁷
- Unarmed burglary of an occupied structure (no assault or battery) is a Level 6 second degree felony.⁷⁸
- Unarmed burglary of a dwelling, an occupied conveyance, or an authorized emergency vehicle (no assault or battery) is a Level 7 second degree felony.⁷⁹
- Burglary is a Level 8 first degree felony punishable by a terms of years not exceeding life imprisonment if, in the course of committing the offense, the offender:
 - Makes an assault or battery upon any person;
 - Is or becomes armed within the dwelling, structure, or conveyance, with explosives or a dangerous weapon; or
 - Enters an occupied or unoccupied dwelling or structure, and:
 - Uses a motor vehicle as an instrumentality, other than merely as a getaway vehicle, to assist in committing the offense, and thereby damages the dwelling or structure; or
 - Causes damage to the dwelling or structure, or to property within the dwelling or structure in excess of \$1,000.⁸⁰

The felony degree of certain burglaries is reclassified if the burglary is committed within a county that is subject to a state of emergency declared by the Governor under ch. 252, F.S., after the declaration of emergency is made and the perpetration of the burglary is facilitated by conditions arising from the emergency.⁸¹ The reclassified offense is ranked one level above the ranking of the offense committed.⁸²

⁷⁶ A “forcible felony” is 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. Section 776.08, F.S.

⁷⁷ Sections 810.02(4)(a) and (b) and 921.0022(3)(d), F.S.

⁷⁸ Sections 810.02(3)(c) and 921.0022(3)(f), F.S.

⁷⁹ Sections 810.02(3)(a), (b), (d), and (e) and 921.0022(3)(g), F.S.

⁸⁰ Sections 810.02(2)(a)2. and 921.0022(3)(h), F.S.

⁸¹ The term “conditions arising from the emergency” means civil unrest, power outages, curfews, voluntary or mandatory evacuations, or a reduction in the presence of or the response time for first responders or homeland security personnel.

Section 810.02(3) and (4), F.S. The same definition of the term is used in the theft statute. Section 812.014(2)(b) and (c), F.S.

⁸² Section 810.02(3) and (4), F.S.

Reclassification and re-ranking occur in the following manner:

- Unarmed burglary of an unoccupied structure or unoccupied conveyance (no assault or battery) is reclassified and re-ranked as a Level 5 second degree felony.
- Unarmed burglary of an occupied structure (no assault or battery), which is a Level 6 second degree felony is reclassified and re-ranked as a Level 7 second degree felony.
- Unarmed burglary of a dwelling, an occupied conveyance, or an authorized emergency vehicle (no assault or battery) is reclassified and re-ranked as a Level 8 first degree felony.

A person arrested for a reclassified burglary must remain in custody until he or she appears for a first appearance hearing and a court determines bond.⁸³

Grand Theft and Grand Theft Facilitated by State of Emergency

Section 812.014(1), F.S., provides that 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:

- 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 the use of the property.

The statute, in part, provides for escalating punishment for grand theft based on the property value range applicable to the value of the property stolen in the theft. Grand theft is theft of property valued at \$750 or more. If the property stolen is valued at:

- \$750 or more, but less than \$5,000, it is grand theft of the third degree and a Level 2 third degree felony;⁸⁴
- \$5,000 or more, but less than \$10,000, it is grand theft of the third degree and a Level 3 third degree felony;⁸⁵
- \$10,000 or more, but less than \$20,000, it is grand theft of the third degree and a Level 4 third degree felony;⁸⁶
- \$20,000 or more, but less than \$100,000, it is grand theft of the second degree and a Level 6 second degree felony;⁸⁷ and
- \$100,000 or more, it is grand theft of the first degree and a Level 7 first degree felony.⁸⁸

The felony degree of certain thefts are reclassified if the property is stolen within a county that is subject to a state of emergency declared by the Governor under ch. 252, F.S., the theft is committed after the declaration of emergency is made, and the perpetration of the theft is facilitated by conditions arising from the emergency. The reclassified offense is ranked one level above the ranking of the offense committed.

⁸³ Section 810.02(3) and (4), F.S.

⁸⁴ Sections 812.014(2)(c)1. and 921.0022(3)(b), F.S.

⁸⁵ Sections 812.014(2)(c)2. and 921.0022(3)(c), F.S.

⁸⁶ Sections 812.014(2)(c)3. and 921.0022(3)(d), F.S.

⁸⁷ Sections 812.014(2)(b)1. and 921.0022(3)(f), F.S.

⁸⁸ Sections 812.014(2)(a)1. and 921.0022(3)(g), F.S.

Reclassification and re-ranking occur in the following manner:

- Grand theft of the third degree (\$5,000 or more, but less than \$10,000) is reclassified and re-ranked as a Level 4 second degree felony;
- Grand theft of the third degree (\$10,000 or more, but less than \$20,000) is reclassified and re-ranked as a Level 5 second degree felony; and
- Grand theft of the second degree (\$20,000 or more, but less than \$100,000) is reclassified and re-ranked as a Level 7 first degree felony.⁸⁹

Current law does not require a person arrested for theft during a state of emergency to remain in custody until he or she appears for a first appearance hearing and a court determines bond, unlike burglary during a state of emergency which contains such a requirement.⁹⁰

Doxing

Description

“Doxing” refers to “gathering an individual’s ... [personal identification information], 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.”⁹¹

Doxing victims can include both private citizens and government employees. “Doxers may use hacking, social engineering, or other malicious cyber activities to access personal information.” However, they may also collect information, most of which is probably public information, from “internet sources, such as property records, social media postings, obituaries, wedding announcements, newsletters, public conferences, and web forums.” This information, which is “seemingly innocuous,” can be compiled by the doxxer to create a personal dossier that reveals such sensitive information as a person’s “home address, family members, photos, workplace, and information about the individual’s habits, hobbies, or interests.” “Doxers may also use ‘data brokers’ or people-search sites that compile information from public and commercial sources and then sell this information to companies or the public. These brokers may obtain commercial data from retailers, catalog companies, magazines, and websites (e.g., news, travel).”⁹²

Criminal Use of Personal Identification Information

Florida law punishes criminal use of personal identification information.⁹³ For example, s. 817.568(2)(a), F.S., provides that it is a third degree felony to willfully and without

⁸⁹ This reclassification also applies to stolen cargo, emergency medical equipment, and law enforcement equipment in a specified value. *See* s. 812.014(2)(b), F.S.

⁹⁰ Section 810.02(3) and (4), F.S.

⁹¹ *How to Prevent Online Harassment from Doxing*, U.S. Department of Homeland Security, available at <https://www.dhs.gov/sites/default/files/publications/How%20to%20Prevent%20Online%20Harassment%20From%20Doxing.pdf> (last visited March 24, 2021). All information in this bill analysis, including quoted information, regarding doxing is from this source.

⁹² *Id.*

⁹³ Section 817.568(1)(f), F.S., defines “personal identification information” as 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,

authorization fraudulently use, or possess with intent to fraudulently use, personal identification information concerning another person without first obtaining that person's consent. Further, s. 817.568(4), F.S., provides that it is a first degree misdemeanor to willfully and without authorization possess, use, or attempt to use personal identification information concerning a person without first obtaining that person's consent, and do so for the purpose of harassing that person.

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.”⁹⁴

Section 776.085(1), 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. 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. 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.⁹⁵

Injuring or Removing a Tomb or Monument

Section 872.02(1), F.S., provides that a person commits a third degree felony if he or she:

- Willfully and knowingly destroys, mutilates, defaces, injures, or removes any:
 - Tomb, 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 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.

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.

⁹⁴ *Affirmative Defense*, Legal Information Institute, Cornell Law School, available at https://www.law.cornell.edu/wex/affirmative_defense (last visited March 24, 2021).

⁹⁵ Section 776.085(3), F.S.

Additionally, it is a second degree felony to willfully and knowingly disturb the contents of a tomb or grave.⁹⁶

Neither crime is ranked in the Code offense severity level ranking chart. Therefore, both are assigned a “default” ranking under s. 921.0023, F.S., based on felony degree. A third degree felony offense is ranked as a Level 1 offense and a second degree felony offense is ranked as a Level 4 offense.⁹⁷

The statute 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.⁹⁸

III. Effect of Proposed Changes:

The bill, which takes effect upon becoming a law, addresses public disorder. The following is a detailed explanation of the provisions of the bill.

Defining Affrays and Riots, Creating Aggravated Riot and Aggravated Inciting or Encouraging a Riot Offenses, and Holding Violators in Jail Pending a Bail Hearing

The bill amends s. 870.01, F.S., which punishes affrays and riots, to do all of the following:

- Define the offense of affray. An affray is committed when a person engages, by mutual consent, in fighting with another person in a public place to the terror of the people. The bill codifies the common law elements of “affray” as they are virtually the same as the elements of the offense at common law. *The bill does not change the current penalty for affray, which is a first degree misdemeanor.*
- Define the offense of riot. A riot, which is a third degree felony, is committed when a person willfully participates in a violent public disturbance involving an assembly of three or more persons, acting with a common intent to assist each other in violent and disorderly conduct, resulting in:
 - Injury to another person;
 - Damage to property; or
 - Imminent danger of injury to another person or damage to property.*The bill does not change the current penalty for riot, which is a third degree felony.*
- Create the offense of aggravated rioting. The bill provides that a person commits aggravated rioting, a second degree felony, if, in the course of committing a riot, he or she:
 - Participates with 25 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; or

⁹⁶ Section 872.02(2), F.S.

⁹⁷ Section 921.0023(1) and (2), F.S.

⁹⁸ Section 872.02(3), F.S.

- By force, or threat of force, endangers the safe movement of a vehicle traveling on a public street, highway, or road.
- Define the offense of inciting a riot. Inciting a riot, which is a third degree felony, is committed when a person willfully incites another person to participate in a riot, resulting in a riot or imminent danger of a riot. *The bill does not change the current penalty for inciting a riot, which is a third degree felony.*
- Create the offense of aggravated inciting a riot. The bill provides that a person commits aggravated inciting a riot, a second degree felony, if he or she:
 - Incites a riot resulting in great bodily harm to another person not participating in the riot;
 - Incites a riot resulting in property damage in excess of \$5,000; or
 - 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 for an unlawful purpose.

Except for an affray violation, a person arrested for a violation of s. 870.01, F.S., must be held in custody until brought before the court for admittance to bail in accordance with ch. 903, F.S.

The bill also amends s. 921.0022(3)(d), F.S., to rank the offenses of aggravated rioting and aggravated inciting a riot in Level 4 of the Code offense severity level ranking chart.

Holding Unlawful Assembly Violators in Jail Pending a Bail Hearing

The bill amends s. 870.02, F.S., which punishes unlawful assembly, to provide that a person arrested for a violation of this statute must be held in custody until brought before the court for admittance to bail in accordance with ch. 903, F.S. *The bill does not change the current penalty for unlawful assembly, which is a first degree misdemeanor.*

Repealing s. 870.03, F.S. (Punishing Unlawful Assembly Resulting in Specific Damage)

The bill repeals s. 870.03, F.S., which punishes committing specific types of damage (to dwellings, buildings, ships, or vessels) during an unlawful assembly.

Creating a Budget Appeal Process to Challenge Reductions in Municipal Law Enforcement Agencies' Budgets

The bill amends s. 166.241, F.S., relating to municipal budgets, to create a budget appeal process to challenge reductions in municipal law enforcement agencies' budgets 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, the state attorney for the judicial circuit in which the municipality is located or a member of the governing body of the municipality who objects to the funding reduction 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 conduct a hearing on the appeal and make a recommendation to the Administration Commission which may approve, amend, or modify the municipal law enforcement budget. Under the bill, the decision of the Administration Commission is final.

Redefining the Offense of Obstruction of Roadways

The bill amends s. 316.2045, F.S., which prohibits obstruction of public streets, highways, and roads, to redefine the offense and to remove portions held unconstitutional by federal courts while preserving the state interest of keeping roadways safe. (See “Present Situation” section of this analysis for further details.)

The bill provides that a person commits a pedestrian violation if he or she willfully 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;
- Standing on or remaining on the street, highway, or road; or
- Endangering the safe movement of vehicles or pedestrians traveling thereon.

Currently, the statute provides that a person commits a pedestrian violation if he or she willfully obstructs the free, convenient, and normal use of any public street, highway, or road by impeding, hindering, stifling, retarding, or restraining traffic or passage thereon, by standing or approaching motor vehicles thereon, or by endangering the safe movement of vehicles or pedestrians traveling thereon.⁹⁹

The bill also provides that the previously described offense does not prohibit a local government entity from issuing a special event permit as authorized by law.

The bill also retains the current exception for commercial vehicles collecting solid waste.

Waiving Sovereign Immunity for a Municipality’s Failure to Provide Reasonable Law Enforcement Protection During a Riot or Unlawful Assembly

The bill amends s. 768.28, F.S., relating to waiver of sovereign immunity in tort actions, to provide that a municipality has a duty to allow the municipal law enforcement agency to respond appropriately to protect persons and property during a riot or an unlawful assembly based on the availability of adequate equipment to its municipal law enforcement officers and relevant state and federal laws. If the governing body of a municipality or a person authorized by the governing body of the municipality breaches that duty, the municipality is civilly liable for any damages including damages arising from personal injury, wrongful death, or property damages proximately caused by the municipality’s breach of duty. The sovereign immunity recovery limits in the statute do not apply to such action, meaning the \$200,000 per person or \$300,000 per incident recovery limits do not apply.

Reclassifying the Degree of Assault and Battery Committed in Furtherance of a Riot or an Aggravated Riot

The bill amends s. 784.011, F.S., relating to assault, to provide that it a first degree misdemeanor to assault another person in furtherance of a riot or an aggravated riot. Currently, a simple assault is a second degree misdemeanor.¹⁰⁰

⁹⁹ Section 316.2045(1), F.S.

¹⁰⁰ Section 784.011(2), F.S.

The bill also amends s. 784.03, F.S., relating to battery and felony battery, to provide that it is a third degree felony to commit battery in furtherance of a riot or an aggravated riot. Currently, simple battery is a first degree misdemeanor.¹⁰¹

The bill also amends s. 921.0022(3)(b), F.S., to rank the reclassified battery offense in Level 2 of the Code offense severity level ranking chart.

Providing an Increased Ranking for an Aggravated Assault or Aggravated Battery Committed in Furtherance of a Riot or an Aggravated Riot

The bill amends s. 784.021, F.S. (aggravated assault), and s. 784.045, F.S. (aggravated battery), to provide that aggravated assault or aggravated battery committed in furtherance of a riot or an aggravated riot is ranked one level above the ranking of aggravated assault or aggravated battery in the Code offense severity level ranking chart. If applicable, such aggravated assault would be re-ranked in Level 7¹⁰² and aggravated battery would be re-ranked in Level 8.¹⁰³ The increase in ranking will increase sentence points used to determine the lowest permissible sentence under the Code.

Punishing Mob Intimidation and Holding Violators in Jail Pending a Bail Hearing

The bill creates s. 784.0495, F.S., which punishes mob intimidation. The bill provides that it is a first degree misdemeanor for a person, assembled with two or more other persons and acting with a common intent, to use force or threaten to use imminent force, to compel or induce, or attempt to compel or induce, another person to do or refrain from doing any act or to assume, abandon, or maintain a particular viewpoint against his or her will.

The bill further provides that a person arrested for mob intimidation must be held in custody until brought before the court for admittance to bail in accordance with ch. 903, F.S.

Punishing Assault and Battery Offense Committed on a Law Enforcement Officer or Other Specified Official in Furtherance of a Riot or an Aggravated Riot

The bill amends s. 784.07, F.S., which reclassifies the misdemeanor or felony degree of assault and battery offenses committed upon a law enforcement officer or any other professional listed in the statute. The bill provides for a six-month mandatory minimum sentence for battery on a law enforcement officer if the offense was committed in furtherance of a riot or an aggravated riot.

The bill also provides that a felony violation of s. 784.07, F.S., committed by a person acting in furtherance of a riot or an aggravated riot is ranked one level above the ranking of the offense committed. If applicable, an aggravated assault would be re-ranked as a Level 7 offense, and aggravated battery would be re-ranked as a Level 8 offense if committed in furtherance of a riot

¹⁰¹ Section 784.03(1), F.S.

¹⁰² Aggravated assault is currently ranked in Level 6 of the chart. Section 921.002(3)(f), F.S.

¹⁰³ Aggravated battery is currently ranked in Level 7 of the chart. Section 921.0022(3)(g), F.S.

or an aggravated riot. The increase in ranking will increase sentence points used to determine the lowest permissible sentence under the Code.

Punishing Criminal Mischief Involving Damage to a Memorial or Historic Property and Holding Violators in Jail Pending a Bail Hearing

The bill amends s. 806.13, F.S., which punishes criminal mischief, to provide that it is a third degree felony for any person, without the consent of the owner, to willfully and maliciously deface, injure, or otherwise damage by any means a memorial or historic property, as those terms are defined in s. 806.135, F.S. (see definitions, *infra*), and the value of the damage to the memorial is greater than \$200. The bill also requires restitution, which includes the full cost of repair or replacement of such memorial or historic property.

The bill also amends s. 921.0022(3)(b), F.S., to rank the offense in Level 2 of the Code offense severity level ranking chart.

Punishing Destruction of a Memorial

The bill creates s. 806.135, F.S., which provides that it is a second degree felony for any person to willfully and maliciously destroy or demolish any memorial or historic property, or willfully and maliciously pull down a memorial or historic property, unless authorized by the owner of the memorial or the historic property.

The term “memorial” is defined as a plaque, statue, marker, flag, banner, cenotaph, religious symbol, painting, seal, tombstone, structure name, or display that is constructed and located with the intent of being permanently displayed or perpetually maintained; is dedicated to a historical person, an entity, an event, or a series of events; and honors or recounts the military service of any past or present United States Armed Forces military personnel, or the past or present public service of a resident of the geographical area comprising the state or the United States. The term includes, but is not limited to, the following memorials established under ch. 265, F.S.:

- Florida Women’s Hall of Fame;
- Florida Medal of Honor Wall;
- Florida Veterans’ Hall of Fame;
- POW-MIA Chair of Honor Memorial;
- Florida Veterans’ Walk of Honor and Florida Veterans’ Memorial Garden;
- Florida Law Enforcement Officers’ Hall of Fame;
- Florida Holocaust Memorial;
- Florida Slavery Memorial; and
- Any other memorial located within the Capitol Complex, including, but not limited to, Waller Park.

The term “historic property” is defined as any building, structure, site, or object that has been officially designated as a historic building, historic structure, historic site, or historic object through a federal, state, or local designation program.

The bill also requires restitution, which includes the full cost of repair or replacement of such memorial or historic property.

The bill also amends s. 921.0022(3)(d), F.S., to rank the offense in Level 4 of the Code offense severity level ranking chart.

Punishing Burglary and Theft Committed During a Riot or an Aggravated Riot and Facilitated by Conditions Arising from the Riot

The bill amends s. 810.02, F.S. (theft), and s. 812.014, F.S. (burglary), to reclassify specified theft and burglary offenses committed during a riot or an aggravated riot, when the commission of the offense is facilitated by conditions arising from the riot. Additionally, ss. 810.02 and 812.014, F.S., *currently* require an offense reclassified under either statute to be ranked one level above the ranking of the offense committed.

Reclassification and re-ranking occur in the same manner as would occur if the offense was committed during a state of emergency:

- Unarmed burglary of an unoccupied structure or unoccupied conveyance (no assault or battery), which is a Level 4 third degree felony,¹⁰⁴ is reclassified and re-ranked as a Level 5 second degree felony;
- Unarmed burglary of an occupied structure (no assault or battery), which is a Level 6 second degree felony,¹⁰⁵ is reclassified and re-ranked as a Level 7 first degree felony;
- Unarmed burglary of a dwelling, an occupied conveyance, or an authorized emergency vehicle (no assault or battery), which is a Level 7 second degree felony,¹⁰⁶ is reclassified and re-ranked as a Level 8 first degree felony;
- Unarmed burglary of a structure or conveyance when the offense intended to be committed in the structure is theft of a controlled substance, which is a Level 4 second degree felony,¹⁰⁷ is reclassified and re-ranked as a Level 5 first degree felony;
- Grand theft of the third degree (\$5,000 or more, but less than \$10,000), which is a Level 3 third degree felony,¹⁰⁸ is reclassified and re-ranked as a Level 4 second degree felony;
- Grand theft of the third degree (\$10,000 or more, but less than \$20,000), which is a Level 4 third degree felony,¹⁰⁹ is reclassified and re-ranked as a Level 5 second degree felony; and
- Grand theft of the second degree (\$20,000 or more, but less than \$100,000), which is a Level 6 second degree felony¹¹⁰ is reclassified and re-ranked as a Level 7 first degree felony.

“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 also amends s. 810.02, F.S., to provide that a person arrested for committing a burglary during a riot may not be released until the person appears before a committee magistrate at a first appearance hearing. The statute already provides that a person arrested for committing a burglary

¹⁰⁴ Sections 810.02(4)(a) and (b) and 921.0022(3)(d), F.S.

¹⁰⁵ Sections 810.02(3)(c) and 921.0022(3)(f), F.S.

¹⁰⁶ Sections 810.02(3)(a), (b), (d), and (e) and 921.0022(3)(g), F.S.

¹⁰⁷ Sections 810.02(3)(f) and 921.0023(2), F.S.

¹⁰⁸ Sections 812.014(2)(c)2. and 921.0022(3)(c), F.S.

¹⁰⁹ Sections 812.014(2)(c)3. and 921.0022(3)(d), F.S.

¹¹⁰ Sections 812.014(2)(b)1. and 921.0022(3)(f), F.S. This reclassification also applies to stolen cargo, emergency medical equipment, and law enforcement equipment in a specified value. *See* s. 812.014(2)(b), F.S.

within a county that is subject to a state of emergency may not be released until the person appears before a committee magistrate at a first appearance hearing.¹¹¹

The bill also amends s. 812.014, F.S., to provide that a person arrested for committing a theft during a riot or within a county that is subject to a state of emergency may not be released until the person appears before a committee magistrate at a first appearance hearing.

Punishing Cyberintimidation by Publication

The bill creates s. 836.115, F.S., which punishes cyberintimidation by publication (i.e., “doxing”). It is a first degree misdemeanor to electronically publish another person’s personal identification information with the intent to, or with the intent that a third party will use the information to:

- Incite violence or commit a crime against the person; or
- Threaten or harass the person placing such person in reasonable fear of bodily harm.

The bill provides the following definitions of relevant terms:

- “Electronically publish” means to disseminate, post, or otherwise disclose information to an Internet site or forum.
- “Harass” has the same meaning as provided in s. 817.568(1)(c), F.S., which defines the term as engaging 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 personal identification information for accepted commercial purposes. The term does not include constitutionally protected conduct such as organized protests or the use of personal identification information for accepted commercial purposes.
- “Personal identification information” has the same meaning as provided in s. 817.568(1)(f), F.S.¹¹²

Providing an Affirmative Defense to an Action for Damages if the Action Arose from Injury or Damage Sustained by a Participant Acting in Furtherance of a Riot

The bill creates s. 870.07, F.S., to provide that in a civil action for damages for personal injury, wrongful death, or property damage, it is an affirmative defense that such action arose from an injury or damage sustained by a participant acting in furtherance of a riot. The affirmative defense authorized by this statute must be established by evidence that the participant has been convicted of a riot or an aggravated riot, or by proof of the commission of such crime by a preponderance of the evidence.

In a civil action in which a defendant raises this affirmative defense, the court must, on motion by the defendant, stay the action during the pendency of a criminal action that forms the basis for the defense, unless the court finds that a conviction in the criminal action would not form a valid defense under this statute.

The new s. 870.07, F.S., contains some of the same features of s. 776.085, F.S.:

¹¹¹ Section 810.02(3) and (4), F.S.

¹¹² See footnote 93.

- Creates an affirmative defense in a civil action for personal injury, wrongful death, or property damage;
- A conviction relevant to the defense can be proven by a preponderance of the evidence; and
- If the defense is raised, the civil action is stayed pending conclusion of the criminal proceedings relevant to the defense, unless the court finds a conviction would not be a valid defense.

Increasing the Ranking of Injuring or Removing a Tomb or Monument if the Offense Was Committed in Furtherance of a Riot or Aggravated Riot

Section 872.02, F.S., currently punishes injuring or removing a tomb or monument as a third degree felony (ranked by “default” under s. 921.0023, F.S., as a Level 1 offense). This statute also punishes disturbing the contents of a grave or tomb as a second degree felony (ranked by “default” under s. 921.0023, F.S., as a Level 4 offense).

The bill amends this statute to increase by one level the ranking of the offense if committed in furtherance of a riot or an aggravated riot. Therefore, if applicable, the Level 1 offense would be re-ranked as a Level 2 offense and the Level 4 offense would be re-ranked as a Level 5 offense. *The bill does not change the felony degree of these offenses.* The increase in ranking will increase sentence points used to determine the lowest permissible sentence under the Code.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not appear to require cities and counties to expend funds or limit their authority to raise revenue or receive state-shared revenues as specified by Article VII, s. 18, of the State Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

Inciting a Riot and the First Amendment

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.”¹¹³ The rights guaranteed by the First Amendment apply with equal force to state governments through the due process clause of the Fourteenth Amendment.¹¹⁴

“... [R]egardless of any risk of bodily injury or property damage, acts of violence against others in and of themselves constitute well-recognized forms of unlawful conduct, finding no protection under the first or any other amendment.”¹¹⁵ This is also true for threats of violence.¹¹⁶ However, the government cannot “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.”¹¹⁷

“Imminent” means not only impending or ready to take place, but also expected, likely to occur, or hanging threateningly over one’s head. American Heritage Dictionary of the English Language 658 (1973). That is, the speech or expressive conduct must be directed to producing expected lawlessness and must be likely to incite such action. See *Brandenburg*, 395 U.S. at 447, 89 S.Ct. 1827. “The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.” *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). A statute that fails to recognize this distinction between merely abstract advocacy of force and violence at some indefinite, future time, on the one hand, and actual preparation of a group for an expected, imminent criminal act “and steering it to such action,” on the other hand, treads upon First and Fourteenth Amendment freedoms. *Brandenburg*, 395 U.S. at 448, 89 S.Ct. 1827....¹¹⁸

The inciting a riot offense created by the bill does not contain the type of language in the federal Anti-Riot Act, 18 U.S.C. ss. 2101-02 (“speech tending to ‘encourage’ or ‘promote’ a riot under 18 U.S.C. [s.] 2101(a)(2), as well as speech ‘urging’ others to riot or ‘involving’ mere advocacy of violence under 18 U.S.C. [s.] 2102(b)”)¹¹⁹ that some federal courts have found violates the Free Speech Clause of the First Amendment.¹²⁰

The First Amendment, “True Threats,” and Doxing

The First Amendment does not protect “true threats” as free speech and the government is permitted to restrict such speech.¹²¹ “True threats” are “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”¹²²

¹¹³ Amend. I, U.S. Const.

¹¹⁴ Amend. XIV, U.S. Const. See also Art. I, Fla. Const.

¹¹⁵ *U.S. v. Miselis*, 972 F.3d 518, 540 (4th Cir. 2020).

¹¹⁶ *Id.*

¹¹⁷ *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (emphasis provided by legislative staff).

¹¹⁸ *Enoch v. State*, 95 So.3d 344, 354 (Fla. 1st DCA 2012) (other citations omitted), *review denied*, 108 So.3d 654 (Fla. 2013).

¹¹⁹ *U.S. v. Miselis*, 972 F.3d 518, 530 (4th Cir. 2020).

¹²⁰ *Id.* and *U.S. v. Rundo*, 2021 WL 821938 (9th Cir. 2021).

¹²¹ *Virginia v. Black*, 538 U.S. 343, 344 (2003).

¹²² *Id.*, at 359.

To qualify as a true threat, a communication must be a serious expression of an intention to commit unlawful physical violence, not merely “political hyperbole”; “vehement, caustic, and sometimes unpleasantly sharp attacks”; or “vituperative, abusive, and inexact” statements. *Watts v. United States*, 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (per curiam) (internal quotation marks omitted). It also cannot be determined solely by the reaction of the recipient, but must instead be “determined by the interpretation of a reasonable recipient familiar with the context of the communication,” *United States v. Darby*, 37 F.3d 1059, 1066 (C.A.4 1994) (emphasis added)....¹²³

In 2000, a federal district court in Mississippi dismissed an indictment charging a violation of the federal cyberstalking statute,¹²⁴ holding that the statute was unconstitutional as applied to the defendant.¹²⁵ The defendant was indicted for several Facebook posts, which included allegedly threatening comments and doxing (revealing a narcotics agent’s address and names of family members).

The Court examined implications of the First Amendment protection of speech as applied to this case. The Court examined Fifth Circuit cases, but did not find any case which discussed what the court called a “bulletin board threat” or which discussed doxing. However, the Court found the defendant’s comments were “not ‘true threats’ precluding him from First Amendment protection,” and that “sharing public information, while potentially offensive and disagreeable, does not rise to the level of a true threat.”¹²⁶

The Court found that the defendant was “being prosecuted for the content of his public posts” and that the portion of the federal cyberstalking statute “relied on in the [i]ndictment amounts to a content-based restriction.”¹²⁷ The Court held that the government “did not meet burden of showing that the content-based restriction ‘is necessary to service a compelling state interest,’”¹²⁸ concluding that “the benefit of the content based restriction to shield sensibilities of the listener or reader is just not enough to supplant a citizen’s right to uncomfortable public discourse.”¹²⁹

The cyberintimidation by publication statute created by the bill does not appear to have been patterned on the federal cyberstalking statute or borrow language from that statute.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

¹²³ *Elonis v. U.S.*, 575 U.S. 723, 135 S.Ct. 2001, 2019, 192 L.Ed.2d 1 (2015).

¹²⁴ 18 U.S.C. s. 2261A.

¹²⁵ *U.S. v. Cook*, 472 F.Supp.3d 326 (N.D. Miss. 2020).

¹²⁶ *Id.*, at 334-335.

¹²⁷ *Id.*, at 339.

¹²⁸ *Id.*, quoting *U.S. v. Cassidy*, 814 F.Supp.2d 574, 585 (D. Md. 2011) (other citations omitted).

¹²⁹ *Id.*, at 440.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill may have an indeterminate impact on county jails by creating new misdemeanor offenses relating to public disorder and requiring offenders arrested for certain offenses to be held in custody until appearing for a first appearance hearing.

The bill may have an indeterminate impact on municipalities by providing that a municipality is civilly liable for specified damages proximately caused by the municipality's breach of a duty to allow the municipal law enforcement agency to respond appropriately to protect persons and property during a riot or an unlawful assembly (as specified in the bill).

The appeal process for a municipal law enforcement funding reduction created by the bill may have an indeterminate impact on municipal government budgets.

The Criminal Justice Impact Conference (CJIC), which provides, the final, official estimate of the prison bed impact, if any, of legislation, estimated that the original bill (HB 1) would have a "positive indeterminate" prison bed impact, meaning an unquantifiable increase in prison beds.¹³⁰ Amendments made to the bill since the CJIC estimate do not appear to have significantly changed the prison impact of the bill.

While the CJIC's "positive indeterminate" impact estimate was for the *entire* bill, some provisions of the bill had a "positive insignificant" prison bed impact (an increase of 10 or fewer beds). Provided is more detailed information from the Legislature's Office of Economic and Demographic Research (EDR) regarding the estimated impact of provisions of the bill.¹³¹

The EDR's comments on amendments to statutes relating to aggravated assault (s. 784.021, F.S.), aggravated battery (s. 784.045, F.S.), assault or battery of law enforcement officers and other specified professionals (s. 784.07, F.S.), and battery (s. 784.03, F.S.):

A large number of arrests occur for assault/battery on an annual basis, with 77,698 arrests in 2019 and 78,736 arrests in 2020 for violation of the statutes impacted in this section of the bill. The current statutory language for riots (s. 870.01(2), F.S.) also shows 14 arrests in CY 2019 and 72 arrests in CY 2020. However, it is not known how much these arrests overlap given the language of

¹³⁰ *Criminal Justice Impact Conference* (Complete 2021 Conference Results), Office of Economic and Demographic Research, available at <http://edr.state.fl.us/content/conferences/criminaljusticeimpact/CJIC21.xls> (last visited March 24, 2021).

¹³¹ *HB 1- Combating Public Disorder (Identical SB 484)*, Office of Economic and Demographic Research, available at <http://edr.state.fl.us/content/conferences/criminaljusticeimpact/HB1.pdf> (last visited March 24, 2021). All of the additional the EDR information in this bill analysis is from this source.

the bill. In Florida, May 30th, 2020 was a significant day for protests across the state, particularly in Miami, Tampa, and Jacksonville. This resulted in the arrests of many people related to these incidents. [Florida Department of Law Enforcement or] FDLE provided data for May 29th through May 31st of 2020, as well as May 30th of 2019 in order to better understand changes in arrests for these felonies that might indicate a potential pool of arrests connected to the unrest in Miami-Dade, Hillsborough, and Duval counties. For the statutes listed above, no real changes in arrests were found over these days. While a potential pool cannot be determined from these trends, it is possible that some proportion of the 75 arrests made in these counties during the May 30th, 2020 and May 31st, 2020 time period were connected to the unrest. However, under current language for s. 870.01(2), F.S., only Hillsborough County had arrests for rioting, with 7 on May 30th and May 31st of 2020, and only 3 arrests for statutes impacted by this section of the bill.

ESTIMATED IMPACT: Positive Indeterminate

The EDR's comments on amendments to the statute relating to criminal mischief (s. 806.13, F.S.) and the new statute created by the bill to punish destroying or demolish a memorial (s. 806.135, F.S.):

Per FDLE, for the two misdemeanor offenses under s. 806.13, F.S., in FY 18-19 there were 8,629 arrests, with 3,684 convictions and 1,311 adjudications withheld. In FY 19-20 there were 7,400 arrests, with 2,812 convictions and 975 adjudications withheld. Per [Department of Corrections or] DOC, in FY 18-19 and FY 19-20, there were 5 offenders sentenced for willfully damaging a place of worship, under s. 806.13(2), F.S., or equipment related to public telephones, under s. 806.13(3), F.S., with none of these offenders receiving a prison sentence. Both are unranked, 3rd degree felonies (Level 1 by default). There were 67 admissions to prison in FY 18-19 (mean sentence length=31.8 m, incarceration rate: 9.6%) and 46 admissions to prison in FY 19-20 (mean sentence length=22.8 m, incarceration rate: 9.9%) for violations of s. 806.13(1)(b)3., F.S., related to criminal mischief, with damage of \$1,000 or more to public communication or any other public service. This is a Level 2, 3rd degree felony. It is unknown how many of these incidents capture criminal mischief described in this bill.

In FY 18-19, the incarceration rate for a Level 2, 3rd degree felony was 9.8%, and in FY 19-20 the incarceration rate was 9.5%. The incarceration rate for a Level 4, 2nd degree felony was 28.2% in FY 18-19, and in FY 19-20 the incarceration rate was 28.3%.

ESTIMATED IMPACT: Positive Insignificant

The EDR's comments on amendments to statutes relating to burglary (s. 810.02, F.S.) and theft (s. 812.014, F.S.):

A large number of arrests occur for burglary and theft on an annual basis, with 70,365 arrests in 2019 and 56,612 arrests in 2020 for violation of the statutes impacted in this section of the bill. The current statutory language for riots (s. 870.01(2), F.S.) also shows 14 arrests in CY 2019 and 72 arrests in CY 2020. However, it is not known how much these arrests overlap given the language of this bill. In Florida, May 30th, 2020 was a significant day for protests across the state, particularly in Miami, Tampa, and Jacksonville. This resulted in the arrests of many people related to these incidents. FDLE provided data for May 29th through May 31st of 2020, as well as May 30th of 2019 in order to better understand changes in arrests for these felonies that might indicate a potential pool of arrests connected to the unrest in Miami-Dade, Hillsborough, and Duval counties. For the statutes listed above, no real changes in arrests were found over these days for Miami-Dade and Duval Counties, though it is possible that some proportion of the 24 arrests made in these counties during the May 30th, 2020 and May 31st, 2020 time period were connected to the unrest. However, under current language for s. 870.01(2), F.S., only Hillsborough County had arrests for rioting, with 7 on May 30th and May 31st of 2020, while also having 37 arrests for statutes impacted by this section of the bill. Given that news reports for Tampa indicated more than 40 people arrested for burglary and rioting, it is likely that most of these arrests were in connection to the rioting.¹³²

ESTIMATED IMPACT: Positive Indeterminate

The EDR's comments on amendments to statutes relating to affrays and riots (ss. 870.01, 870.02, and 870.03, F.S.) and injuring or removing a tomb or monument (s. 872.02, F.S.):

Per FDLE, in CY 2019, there were 14 arrests for a riot under s. 870.01(2), F.S., with 3 convictions, and in CY 2020, there were 72 arrests with 1 conviction and 2 adjudications withheld. There were 2 arrests for a violation of s. 872.02, F.S. in CY 2019 and 6 arrests in CY 2020, though it is not known if any of these incidents were in furtherance of a riot under its current definition. There was 1 arrest for a violation of s. 870.03, F.S. in CY 2019 and no arrests in CY 2020. Per DOC, in FY 18-19 and FY 19-20, there was one admission for rioting under s. 870.01(2), F.S. and no admissions to prison for felonies listed under s. 872.02, F.S. and s. 870.03, F.S. While the current numbers impacted by these statutes are low, it is not known how both the expanded definition of rioting and additional higher level/degree felonies might increase the numbers coming to prison. Furthermore, given yearly fluctuations in rioting under current statutory language, as shown in the differences in arrest numbers between CY 2019 and CY 2020, it is not known how consistent the impact will be on prison beds.

ESTIMATED IMPACT: Positive Indeterminate

¹³² The EDR cites Mary Shedden, Daylina Miller, Stephanie Colombini, *Tampa Issues Curfew After Businesses Damaged in Overnight Protests* (May 31, 2021), WUSF Public Media, available at <https://www.wusfnews.wusf.usf.edu/law-order/2020-05-31/tampa-issues-curfew-after-businessesdamaged-in-overnight-protests> (last visited March 24, 2021).

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 166.241, 316.2045, 768.28, 784.011, 784.021, 784.03, 784.045, 784.07, 806.13, 810.02, 812.014, 870.01, 870.02, 872.02, 921.0022.

This bill creates the following sections of the Florida Statutes: 784.0495, 806.135, 836.115, and 870.07.

This bill repeals section 870.03 of the Florida Statutes.

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.