

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

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

BILL: SB 1120

INTRODUCER: Senators Martin and Perry

SUBJECT: Display of Flags by Governmental Entities

DATE: January 26, 2024

REVISED: _____

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

I. Summary:

SB 1120 prohibits a governmental agency, local government, or other unit of local government, including public schools, colleges, and universities, from erecting or displaying a flag that represents a political viewpoint, including a politically partisan, racial, sexual orientation, gender, or political ideology viewpoint.

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

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

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

The bill takes effect July 1, 2024.

II. Present Situation:

United States Flag Code

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

¹ 4 U.S.C. § 4-10.

² 36 U.S.C. § 301.

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

Display of Flags

Flag of the United States

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

State law requires the flag of the United States to be displayed:

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

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

State of Florida Flag

Section 256.015, F.S., directs the Governor to adopt a flag display protocol. The protocol must provide guidelines for the proper display of the state flag and for the lowering of the state flag to half-staff on appropriate occasions, such as on holidays and upon the death of high-ranking state officials, uniformed law enforcement and fire service personnel, and prominent citizens.¹³

³ 4 U.S.C. § 5.

⁴ 4 U.S.C. § 10.

⁵ 4 U.S.C. § 6.

⁶ Section 256.01, F.S.

⁷ Section 256.011, F.S.

⁸ Section 256.11, F.S.

⁹ *Id.*

¹⁰ Section 1000.06(1), F.S.

¹¹ Section 1000.06(2), F.S.

¹² Florida Department of State, *Flag Protocols and Display*, <https://dos.myflorida.com/about-the-department/flag-and-seal-protocol/flag-protocols-and-display/#:~:text=Chapter%20256%20of%20the%20Florida,be%20exposed%20to%20public%20view> (last visited Jan. 26, 2024).

¹³ Section 256.015(1), F.S. See also Executive Office of the Governor, *Flag Protocol*, <https://www.flgov.com/wp-content/uploads/2022/11/2022-EOG-Flag-Protocol.pdf> (last visited Jan. 26, 2024).

In practice, the state flag protocol requires the official flag of Florida to be displayed on a daily basis, when weather permits, at each state educational institution, every county school building, and each elementary and secondary public school, except when it is closed for vacation.¹⁴

POW-MIA Flag

The National League of Families POW-MIA flag is designated as the symbol America's concern and commitment to resolving as fully as possible the fates of Americans still prisoner, missing, and unaccounted for in Southeast Asia.¹⁵ A POW-MIA flag must be displayed at:

- Each state-owned building at which the U.S. flag is displayed, if the POW-MIA flag is available free of charge to the agency that occupies the building and if the display is in accordance with federal laws and regulations;¹⁶
- Each rest area along an interstate highway in the state; and¹⁷
- Each state park where the U.S. flag is displayed.¹⁸

Honor and Remember Flag

The mission of the Honor and Remember Flag is “to perpetually recognize the sacrifice of America's military fallen service members and their families.”¹⁹ The state designated the Honor and Remember Flag as its emblem of service and sacrifice of the brave men and women of the United State Armed Forces.²⁰ The flag may be displayed at any of the following locations:

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

The flag must be displayed on the following days:

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

Firefighter Memorial Flag

The Division of State Fire Marshal of the Department of Financial Services is directed by law to design, produce, and implement the creation and distribution of an official state Firefighter Memorial Flag to honor firefighters who died in the line of duty.²² The flag may be displayed at memorial or funeral services of firefighters who have died in the line of duty, at firefighter memorials, at fire stations, at the Fallen Firefighter Memorial located at the Florida State Fire

¹⁴ See, Sections 256.032 and 1000.06(1), F.S. and DOS *Flag Protocols and Display*, *supra* note 12.

¹⁵ 36 U.S.C. § 902(2).

¹⁶ Section 256.12, F.S.

¹⁷ Section 256.13, F.S.

¹⁸ Section 256.14, F.S.

¹⁹ Honor and Remember, *Our Mission*, <https://honorandremember.org/mission> (last visited Jan. 26, 2024).

²⁰ Section 256.16, F.S.

²¹ Section 256.16(2), F.S.

²² Section 256.15, F.S.

College in Ocala, by the families of fallen firefighters, and at any other location designated by the State Fire Marshal.²³

Other Government-Sponsored Flags

Various counties, municipalities, universities, colleges, and K-12 schools have adopted “flags” in an attempt to garner support for the various institutions. Cities that have their own flags include Orlando,²⁴ Mount Dora,²⁵ and Tampa.²⁶ Florida counties that have their own flags include Orange County²⁷ and Osceola County.²⁸ These flags are a symbol of the local history and a source of pride to help individuals feel more connected to their city and county.

Other government-sponsored flags include the warning and safety flags displayed at public beaches.²⁹ The purpose of the flags are to improve public safety. The flags provide general warnings about the overall conditions of the water.³⁰

Mutilation of Flag

Section 876.52, F.S., penalizes as a first-degree misdemeanor, the mutilation, defacement, or trampling upon or burning with intent to insult any flag, standard, colors, or ensign of the United States or of Florida.³¹

The determination of the reasonableness of use of force in the course of an arrest is based on the Fourth Amendment’s reasonableness standard, which examines the “nature and quality of the intrusion on the individual’s Fourth Amendment [right of freedom from unreasonable searches and seizures] interests’ against the countervailing governmental interests at stake.”³²

Freedom of Speech and Expression

The First Amendment protects freedom of speech, the press, assembly, and the right to petition the Government for redress of grievances.³³ A government cannot restrict speech on the basis of the message expressed;³⁴ content-based restrictions are presumptively invalid.³⁵

²³ Section 256.15(1), F.S. *See also* R. 69A-62.050(6), F.A.C.

²⁴ City of Orlando, *Flag*, <https://www.orlando.gov/News/Our-New-City-of-Orlando-Flag> (last visited Jan. 26, 2024).

²⁵ City of Mount Dora, *City Flag*, <https://ci.mount-dora.fl.us/854/City-Flag> (last visited Jan. 26, 2024).

²⁶ City of Tampa, *Flag*, <https://www.tampa.gov/city-clerk/info/archives/city-of-tampa-flag> (last visited Jan. 26, 2024).

²⁷ Orange County Government, *A Story Worth Flagging: The Origination of Orange County’s Official Flag*, <https://newsroom.ocfl.net/2020/06/a-story-worth-flagging-the-origination-of-orange-countys-official-flag/> (last visited Jan. 26, 2024).

²⁸ Osceola County, *History of Osceola County*, <https://www.osceola.org/about-osceola-county/history/> (last visited Jan. 26, 2024).

²⁹ Section 380.276, F.S.

³⁰ Florida Department of Environmental Protection, *Beach Warning Flag Program*, available at <https://floridadep.gov/rcp/fcmp/content/beach-warning-flag-program> (last visited Jan. 26, 2024).

³¹ A first degree misdemeanor is punishable by up to imprisonment not to exceed 1 year, and a fine not to exceed \$1,000. See ss. 775.082 and 775.083, F.S.

³² *Graham v. Connor*, 490 U.S. 386, 395 (1989).

³³ U.S. CONST. Amend. 1.

³⁴ *Texas v. Johnson*, 491 U.S. 397 (1989); *State v. T.B.D.*, 656 So.2d 479 (Fla. 1995).

³⁵ *See, e.g., Police Dept. of Chicago v. Mosely*, 408 U.S. 92 (1972).

A flag may be deemed symbolic speech. Regulations that cover symbolic content will be upheld if they:³⁶

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

The First Amendment protects citizens' speech from government regulation, but its restrictions do not extend to government speech itself.³⁷ The government speech doctrine is the principle that a government can freely "select the views that it wants to express"³⁸ which includes the freedom not to speak, and speaking through the removal of speech that the government disapproves.³⁹ The U.S. Supreme Court has prescribed the following inquiries to determine whether a government action amounts to its own speech, or a regulation of private expression:⁴⁰

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

The U.S. Supreme Court has stated about the act of flying flags, particularly at the seat of government, tends toward an expression of government speech because "[f]lags evolved as a way to symbolize communities and governments. ... Flying a flag other than a government's own can also convey a governmental message..."⁴¹ However, when the city allowed private groups to fly flags that it "neither actively controlled these flag raisings nor shaped the messages the flags sent," it was not exercising government speech, but allowing private speech to occur.⁴² In these instances of such private speech, the government cannot discriminate against the speakers based on their viewpoint in violation of the First Amendment.⁴³

III. Effect of Proposed Changes:

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

³⁶ *United States v. O'Brien*, 391 U.S. 367, 377 (1968). See also, *Firestone v. News-Press Pub. Co.*, 538 So.2d 457, 459 (Fla. 1989).

³⁷ *N.A.A.C.P. v. Hunt*, 891 F.2d 1555, 1565 (11th Cir. 1990), citing *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 (1973).

³⁸ *Pleasant Grove City, Utah v. Summum*, 555 U.S. at 467 (2009), quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000).

³⁹ *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1012 (9th Cir. 2000).

⁴⁰ *Shurtleff v. City of Boston, Ma.*, 596 U.S. 243, 244 (2022).

⁴¹ *Id.* at 244.

⁴² *Id.* at 244-245.

⁴³ *Id.* at 247, citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828-830 (1995).

For purposes of the bill, a “governmental entity” is a governmental agency, local government, or other unit of local government, including public schools, public colleges, and public universities.

The bill further provides that it does not limit a private individual’s expression of private speech or viewpoints, or his or her rights otherwise protected by the First Amendment of the United States Constitution. The bill also expressly states that it does not limit a governmental entity’s ability to display or erect a flag that is required or authorized by general law.

The bill adopts as law the current requirement in Florida’s flag protocol that a governmental entity that displays the United States flag must display it in a prominent position that is superior to any other flag that is also displayed.

The bill provides that an active or retired member of the United States Armed Forces or National Guard may use reasonable force to prevent the desecration, destruction, or removal of the United States flag, or to replace it to a prominent position, except when directly ordered not to do so by a law enforcement officer who is acting in the scope of his or her employment. This may not comport with the bill’s statement that it does not limit a private individual’s expression of private speech or viewpoints, as even the burning of a flag is protected speech under the First Amendment.⁴⁴ This provision allows a member of the United States Armed Forces or National Guard to interfere, using reasonable force, with that private speech to prevent the desecration (burning) of a United States Flag.

The bill takes effect July 1, 2024.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

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

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

⁴⁴ *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

E. Other Constitutional Issues:

If a law fails to give persons fair notice as to what is prohibited, it may violate the Due Process Clause. A law must clearly delineate prohibited conduct so that a person of ordinary intelligence is not forced to guess about the statute's meaning or application. Where a law fails to provide such notice, it violates the void for vagueness doctrine.⁴⁵ Additionally, a law may be unconstitutionally vague where it authorizes or even encourages arbitrary and discriminatory enforcement.⁴⁶ The vagueness of content-based regulation of speech raises special First Amendment concerns because of its “obvious chilling effect on free speech.”⁴⁷

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

If a court determines that the law impermissibly regulates speech in a vague manner, the law may be invalidated.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

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

VI. Technical Deficiencies:

Section 256.08, F.S., defines the term “flag” as applied to ss. 256.05-256.07, F.S., as “any flag, standard, color, ensign or shield, or copy, picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purporting to be such

⁴⁵ *Connally v. Gen. Constr. Co.*, 269 U.S. 385 (1926).

⁴⁶ *Hill v. Colorado*, 530 U.S. 703 (2000).

⁴⁷ *Reno v. Am. C.L. Union*, 521 U.S. 844 (1997).

flag, standard, color, ensign or shield of the United States or of this state, or a copy, picture or representation thereof.” This definition will not apply to s. 256.045, F.S., created by the bill. The Legislature may wish to consider a definition as it is unclear whether artistic representations (such as a mural or artwork) will be affected by the bill.

VII. Related Issues:

It is unclear how enforcement of this bill by active or retired member of the United States Armed Forces or National Guard will occur. Without any consistent training, these members may not be aware of what constitutes impermissible desecration, destruction, or removal of a United States flag. Additionally, the bill leaves to individual discretion what “reasonable force” to use. This may result in the use of excessive force that is punishable by criminal penalties for assault.

VIII. Statutes Affected:

This bill substantially amends section 256.045 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.