

## HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

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

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

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

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**FINAL HOUSE FLOOR ACTION:** 88 Y's      29 N's      **GOVERNOR'S ACTION:** Approved

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### SUMMARY ANALYSIS

CS/HB 215 passed the House on March 2, 2022, as CS/SB 254.

The State Emergency Management Act (Act) gives the Governor, the Division of Emergency Management, and the state's political subdivisions the authority to issue emergency orders during a state of emergency and provides for the duration of such orders.

The bill provides that no emergency order authorized under the Act may directly or indirectly prohibit religious institutions from conducting regular religious services or activities. However, the bill provides that a general provision in an emergency order that applies uniformly to all entities in the affected jurisdiction may be applied to a religious institution if the provision is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest.

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

The bill was approved by the Governor on June 24, 2022, ch. 2022-208, L.O.F., and will become effective on July 1, 2022.

# I. SUBSTANTIVE INFORMATION

## A. EFFECT OF CHANGES:

### Background

#### State Emergency Management Act

The State Emergency Management Act (Act)<sup>1</sup> establishes the framework for how Florida prepares for, responds to, and recovers from emergencies and disasters. It confers upon the Governor, the Division of Emergency Management,<sup>2</sup> and the governing body of each political subdivision<sup>3</sup> certain powers in the event of emergencies,<sup>4</sup> including public health emergencies<sup>5</sup> and disasters<sup>6</sup> resulting from natural,<sup>7</sup> technological,<sup>8</sup> or manmade<sup>9</sup> causes. These emergency powers are designed to:

- Ensure the state's preparations will be adequate to deal with, reduce vulnerability to, and recover from such emergencies and disasters;
- Provide for the common defense and protect the public peace, health, and safety; and
- Preserve the lives and property of the people of the state.<sup>10</sup>

The individual powers are broad, but also include specific parameters in which they may be executed. Use of funds in response to a declared state of emergency is subject to transparency and auditing requirements, as outlined in the Act.<sup>11</sup>

#### *Governor*

The Act vests the authority to declare a state of emergency in the Governor<sup>12</sup> and authorizes him to assume or delegate direct operational control over all or any part of the emergency management functions in the event of an emergency.<sup>13</sup> This authority includes issuing executive orders, proclamations, and rules that have the force and effect of law.<sup>14</sup> Such orders, proclamations, and rules last for 60 days but may be renewed as necessary throughout the emergency if the renewal specifically states which provisions are being renewed.<sup>15</sup> However, the Legislature may, by concurrent resolution, terminate a declared state of emergency or any order, proclamation, or rule made pursuant thereto.<sup>16</sup>

The Act also authorizes the Governor to order the closure of schools or businesses if the Governor states specific public safety concerns that necessitate such closures and regularly reassesses the

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

<sup>2</sup> S. 14.2016(1), F.S.

<sup>3</sup> The Act defines "political subdivision" as any county or municipality created by law. S. 252.34(10), F.S.

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

<sup>5</sup> "Public health emergency" means any occurrence, or threat thereof, whether natural or manmade, which results or may result in substantial injury or harm to the public health from infectious disease, chemical agents, nuclear agents, biological toxins, or situations involving mass casualties or natural disasters, declared as a public health emergency by the State Health Officer. S. 252.34(11), F.S.

<sup>6</sup> "Disaster" means any natural, technological, or civil emergency that causes damage of sufficient severity and magnitude to result in a declaration of a state of emergency by a county, the Governor, or the President of the United States. S. 252.34(2), F.S.

<sup>7</sup> "Natural emergency" means an emergency caused by a natural event, including, but not limited to, a hurricane, storm, flood, severe wave action, drought, or earthquake. S. 252.34(8), F.S.

<sup>8</sup> "Technological emergency" means an emergency caused by technological failure or accident, including, but not limited to, an explosion, transportation accident, radiological accident, or chemical or other hazardous material incident. S. 252.34(12), F.S.

<sup>9</sup> "Manmade emergency" means an emergency caused by an action against persons or society, including, but not limited to, enemy attack, sabotage, terrorism, civil unrest, or other action impairing the orderly administration of government. S. 252.34(7), F.S.

<sup>10</sup> S. 252.32, F.S.

<sup>11</sup> S. 252.3611, F.S.

<sup>12</sup> S. 252.36(2), F.S. A declaration of a state of emergency must be filed with the Division of Administrative Hearings within five days; otherwise, the declaration is void. S. 252.36(3)(b), F.S.

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

<sup>14</sup> S. 252.36(1)(b), F.S.

<sup>15</sup> *Id.*

<sup>16</sup> S. 252.36(3)(a), F.S.

emergency to determine whether schools and businesses can reopen safely.<sup>17</sup> Further, the Act specifically authorizes the Governor to use all resources of state government and of the state's political subdivisions when reasonably necessary to cope with an emergency.<sup>18</sup>

Although the emergency powers reside in the Governor, the Governor may delegate certain powers to the State Coordinating Officer to manage and coordinate emergency efforts.<sup>19</sup> The Governor must delegate emergency responsibilities to officers and agencies of the state and to political subdivisions before an emergency or threat of an emergency and must use the services and facilities of existing officers and agencies of the state and of the state's political subdivisions as the state's primary emergency management forces. All such officers and agencies must cooperate with and extend their services and facilities to the Division of Emergency Management as it may require.<sup>20</sup>

### *Division of Emergency Management*

The Division of Emergency Management (division), established within the Executive Office of the Governor, is responsible for all professional, technical, and administrative support functions necessary to carry out its responsibilities and emergency powers under ch. 252, part I, F.S. The director of the division, appointed by and serving at the pleasure of the Governor, is the head of the division for all purposes.<sup>21</sup>

The Act charges the division with preparing and implementing a comprehensive emergency management plan that includes components addressing:

- Evacuation;
- Shelter;
- Post-disaster response and recovery;
- Additional provisions for preparedness, response, recovery, and mitigation that the division identifies as necessary;
- Coordinated and expeditious deployment of state resources;
- A system of communications and warnings to the public;
- A schedule for annual preparedness exercises; and
- Assignment of emergency support duties to various state agencies and personnel.<sup>22</sup>

The division also oversees the development and implementation of the emergency preparedness plans of political subdivisions<sup>23</sup> and emergency preparedness coordination with the federal government.<sup>24</sup> In implementing the emergency management plan, the division must make recommendations on:

- Structural emergency preparedness, prevention, and mitigation;<sup>25</sup>
- Ensuring that the state and political subdivisions procure the supplies needed in the event of an emergency;<sup>26</sup> and
- Educating and training the public, as well as state and local emergency management personnel, in emergency response plans.<sup>27</sup>

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<sup>17</sup> S. 252.36(1)(c), F.S.

<sup>18</sup> S. 252.36(6)(b), F.S.

<sup>19</sup> The State Coordinating Officer (SCO) is a representative of the Governor authorized to manage and coordinate state and local emergency response and recovery efforts. The SCO may commit any and all state resources necessary to cope with an emergency and has the authority to exercise powers in accordance with ss. 252.36(4)(a) and 252.36(6)-(11), F.S.

<sup>20</sup> S. 252.36(9), F.S.

<sup>21</sup> S. 14.2016, F.S.

<sup>22</sup> S. 252.35(2)(a), F.S.

<sup>23</sup> S. 252.35(2)(b)-(d), F.S.

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

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

<sup>26</sup> S. 252.35(2)(g), (u), F.S.

<sup>27</sup> S. 252.35(2)(i)-(l), (n), (v), F.S.

During an emergency, the division may delegate and provide for the sub-delegation of duties as necessary and appropriate.<sup>28</sup> Additionally, under ch. 120, F.S.,<sup>29</sup> the division may create, implement, administer, adopt, amend, and rescind rules as needed to carry out its duties.<sup>30</sup> The division must report biennially to the President of the Florida Senate, the Speaker of the Florida House of Representatives, the Chief Justice of the Florida Supreme Court, and the Governor on the status of the emergency management capabilities of the state and its political subdivisions.<sup>31</sup>

### *Political Subdivisions*

The governing body of each of the state's political subdivisions has an innate responsibility to safeguard the life and property of its citizens.<sup>32</sup> To provide effective and orderly governmental control and coordination of emergency operations, political subdivisions also have certain duties and responsibilities, including a county's duty to adopt an emergency management plan that is coordinated and consistent with the state comprehensive emergency management plan and program.<sup>33</sup>

A political subdivision may declare a state of local emergency if an emergency affects only that political subdivision.<sup>34</sup> Declaring a state of local emergency triggers the political subdivision's ability to request state assistance or invoke emergency-related mutual-aid assistance.<sup>35</sup> However, an emergency order issued by a political subdivision must be narrowly-tailored to serve a compelling public health or safety purpose.<sup>36</sup> Further:

- Only a mayor, city manager, or board of county commissioners may declare a state of local emergency.<sup>37</sup>
- A local state of emergency lasts for seven days but may be extended in seven-day increments.<sup>38</sup>
- A local emergency order lasts for seven days but may be extended in seven-day increments for up to 42 days.<sup>39</sup>
- After a local emergency order expires, the political subdivision may not issue a substantially similar emergency order.<sup>40</sup>

Should the Governor determine that a local emergency order unnecessarily restricts individual rights or liberties, the Governor may invalidate the order at any time.<sup>41</sup>

Political subdivisions may also make, amend, and rescind orders and rules as necessary for emergency management purposes if such rules are consistent with any orders or rules adopted by the division or by any state agency exercising a power delegated to it by the Governor or the division.<sup>42</sup> All orders and rules adopted by a political subdivision have the full force and effect of law when filed in the office of the clerk or recorder of the political subdivision within three days of their announcement, but any order or rule inconsistent with the Act or the Florida Emergency Planning and Community Right-to-

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<sup>28</sup> S. 252.35(2)(w), F.S.

<sup>29</sup> Ch. 120, F.S., codifies the Administrative Procedure Act.

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

<sup>31</sup> S. 252.35(2)(x), F.S.

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

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

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

<sup>35</sup> *Id.*

<sup>36</sup> S. 252.38(4)(b), F.S.

<sup>37</sup> State Emergency Response Team, *State of Florida 2020 Comprehensive Emergency Management Plan*, Florida Division of Emergency Management, p. 15 (2020), <https://www.floridadisaster.org/globalassets/cemp/2020-cemp/2020-state-cemp.pdf> (last visited Mar. 8, 2022).

<sup>38</sup> S. 252.38(3)(a), F.S.

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

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

<sup>41</sup> S. 252.38(4)(d), F.S.

<sup>42</sup> S. 252.46, F.S.

Know Act is suspended to the extent that such conflict exists.<sup>43</sup> Furthermore, a person who violates a rule or order issued pursuant to either act commits a second-degree misdemeanor punishable by up to 60 days in jail and a \$500 fine.<sup>44</sup>

### Federal and State Constitutional Law Regarding Religion

The relationship between religion and government in the United States is governed by the First Amendment to the U.S. Constitution,<sup>45</sup> which both prevents the government from establishing religion (through the Establishment Clause) and protects privately initiated religious expression and activities from government interference and discrimination (through the Free Exercise Clause). Specifically, the First Amendment states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Similarly, article I, section 3 of the Florida Constitution contains an Establishment Clause and a Free Exercise Clause. Specifically, article I, section 3 states:

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

### *Establishment of Religion*

Under the Establishment Clause of the First Amendment to the U.S. Constitution, the government must maintain neutrality in its treatment of religion.<sup>46</sup> The same understanding applies under article I, section 3 of the Florida Constitution, as Florida courts have generally held that in any state issue the federal constitution represents the “floor” for basic freedoms, while the state constitution represents the “ceiling.”<sup>47</sup> In general, when a law does not discriminate against any particular religion, courts apply the *Lemon Test*, under which the law must have a secular purpose, its primary effect must not advance or inhibit religion, and it must not result in excessive entanglement between church and state.<sup>48</sup>

Florida’s Establishment Clause differs from its federal counterpart by prohibiting the use of state revenue either directly or indirectly in the aid of any church, sect, or religious denomination or in aid of any sectarian institution.<sup>49</sup>

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<sup>43</sup> S. 252.46(2), F.S. Such emergency orders must also be made available via a conspicuous link on the political subdivision’s website. S. 252.46(3), F.S.

<sup>44</sup> S. 252.50, F.S.

<sup>45</sup> U.S. Const. amend. I.

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

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

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

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

## Free Exercise of Religion

The federal Free Exercise Clause directs that no law may discriminate against some or all religious beliefs or regulate or prohibit conduct undertaken for religious reasons.<sup>50</sup> Florida courts have generally interpreted Florida's Free Exercise Clause as coequal to the federal clause.<sup>51</sup>

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

## Recent Litigation

The constitutionality of emergency orders relating to religious institutions is an evolving matter. Most recently, in April 2021, the U.S. Supreme Court granted injunctive relief to plaintiffs in a challenge to a California emergency order that, in response to the COVID-19 pandemic, restricted religious gatherings, among other activities.<sup>55</sup> The Court found that the restriction violated the Free Exercise Clause and based its findings on three applicable principles:<sup>56</sup>

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

## Effect of Proposed Changes

The bill creates s. 252.64, F.S., within the State Emergency Management Act, to provide that no emergency order authorized under the Act may directly or indirectly prohibit religious institutions from conducting regular religious services or activities. However, the bill provides that a general provision in an emergency order that applies uniformly to all entities in the affected jurisdiction may be applied to a religious institution if the provision is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest.

The bill defines the term "religious institution" to mean a church, ecclesiastical or denominational organization, or established physical place for worship in this state at which nonprofit religious services and activities are regularly conducted and carried on and to include bona fide religious groups that do

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

<sup>51</sup> *Warner*, 887 So. 2d at 1030.

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

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

<sup>54</sup> Whitney K. Novak, Cong. Research Serv., IF11490, *The Religious Freedom Restoration Act: A Primer*, (2020),

<https://crsreports.congress.gov/product/pdf/IF/IF11490> (last visited Mar. 8, 2022).

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

<sup>56</sup> *Tandon*, 141 S. Ct. at 1296.

not maintain specific places of worship. Under the bill, the term also includes a separate group or corporation that forms an integral part of a religious institution that is exempt from federal income tax and that is not primarily supported by funds solicited outside of its own membership or congregation.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

#### 2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None.

#### 2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

### D. FISCAL COMMENTS:

None.