

# OPPOSE HB 1/SB 484



Alicia Devine/Tallahassee Democrat

The ACLU of Florida opposes this bill because it is designed to further silence, punish, and criminalize those advocating for racial justice and an end to law enforcement's excessive use of force against Black and brown people.

## Silencing Dissent and Punishing Protesters Seeking Racial Justice

The murders of George Floyd, Breonna Taylor, and so many others at the hands of police reinvigorated Floridians' calls for police reform and accountability. Millions took to the streets to exercise their First Amendment rights and demand justice.

*Under existing law*, these peaceful protests were met with tear gas, rubber bullets, and mass arrests.

*Under existing law*, armed officers in full riot gear repeatedly used excessive force against peaceful unarmed protesters.

Florida's militaristic response against Black protesters and their allies demanding racial justice stands in stark contrast to the lackluster, and at times complicit, police response we saw to the failed coup by white supremacist terrorists in D.C.

This bill would further exacerbate the disparate police treatment of

protesters and the injustices of our criminal legal system.

Floridians wishing to exercise their constitutional rights would have to weigh their ability to spend a night in jail if the protest is deemed an "unlawful assembly." Peaceful protesters could be arrested and charged with a third-degree felony for "committing a riot" even if they didn't engage in any disorderly and violent conduct.

Floridians need justice – real police accountability and criminal justice reform. Florida's law enforcement and criminal legal system have no shortage of tools to keep the peace and punish violent actors, and they've proven their tendency time and time again to misapply these tools to punish Black and brown peaceful protesters.

**Vote NO on HB 1/SB 484.**

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## The Bill is Overbroad and Vague and Will Chill Speech and Assembly

As we have seen over the last year, people’s interpretation of where to draw a line between protest and riot depends heavily on their interpretation of dissenters’ positions. Vague and overly broad key definitions in this bill will only further the discriminatory use of police tactics on protesters and unconstitutionally threaten our First Amendment rights of free speech and assembly. The bill will chill protected speech and result in widespread discretionary arrests and prosecutions disproportionately impacting Black Floridians.

### Committing a “Riot”

*HB 1/SB 484, Section 15*

This bill creates a new statutory definition for “riot” that is so broad and unworkable that it allows for an individual to be arrested for “committing a riot” without any requirement that the individual’s conduct be disorderly and violent or that they commit any actual damage or injury.

Under the bill, a person “commits a riot” if he or she “participates” in a public disturbance which involves an assembly of three or more people engaging in violent conduct resulting in injury or damage or creating a clear and present danger of personal injury or property damage.

It is important to note that the bill’s definition is broader than under current case law. As outlined by the Florida Supreme Court, “the term “riot” at common law is defined as a “*tumultuous disturbance of the peace* by three or more persons, assembled and acting with a common intent, either in

*executing a lawful private enterprise in a violent and turbulent manner, to the terror of the people, or in executing an unlawful enterprise in a violent and turbulent manner.”<sup>3</sup> (emphasis added). Under current law, to be guilty of a riot the individual and at least three others need to intentionally execute a tumultuous disturbance of the peace by acting in a violent and turbulent manner to the terror of the people.*

In contrast, under the bill, mere participation in an otherwise peaceful protest where there are three other people engaging in disorderly and violent conduct would subject all those present at the protest to a third-degree felony, punishable by up to five years in prison, a \$5,000 fine, felony disenfranchisement, and all the lifelong collateral consequences of a felony conviction – including significant barriers to employment, education, and housing.

Under the bill, once an assembly is deemed a “riot” *anyone participating* in the assembly, regardless of the individual’s intent or conduct, is captured by the bill’s harsh consequences. It does not matter whether the assembly was mostly peaceful or peaceful at its inception, whether any property damage or personal injuries actually occurred, or the role – or lack thereof – the participant had in any disorderly and violent conduct. It is enough that a peaceful protest was infiltrated by a group of three people intent on creating disorder. This framework applies many of the injustices of the felony murder rule to the exercise of First Amendment rights to assemble and dissent, while going even further in not requiring any criminal intent at all.

The bill would result in the arrest of nonviolent individuals lawfully exercising their First Amendment rights for “committing a riot” based on the riotous conduct of some others in attendance at the event. The impact of this is to chill speech and discourage individuals from publicly speaking out against systemic racism, as we know too well who will be arrested under this broadly worded bill.

Instead of clearly requiring intentionally violent and destructive conduct, the bill’s definitions leave it entirely discretionary for law enforcement to determine who is and who is not “participating” in a riot, and thus who is and who is not subject to the harsher penalties. As we know from what we witnessed in the violent attempted takeover of our nation’s Capitol, the “rule of law” is enforced against some more readily than others.

### **“Aggravated Rioting”**

*HB 1/SB 484, Section 15*

The bill creates a new second degree felony offense of “aggravated rioting,”<sup>ii</sup> so broadly and incoherently defined that an individual could be punished by up to 15 years in prison for participating in a public disturbance of ten or more people even though the individual did not engage in any violent acts or injure any person or property and no person or property was injured by anyone else.

Additionally, under the bill, an individual could be arrested for “aggravated rioting” by merely participating in a public disturbance of three or more people deemed a “riot” and blocking traffic by “threat of force.” Threat of force is undefined in the bill. If a protester were to yell “if you drive into my fellow protesters, I’m going to kick your car?,” could

they be arrested for a second-degree felony? What if they stood firm in the street and refused to let a car pass? Is that preventing the safe movement of a vehicle? Under the bill, large groups of nonviolent protesters or ones that block traffic, even temporarily, could face up to 15 years in prison.

This means that a large group of people that block traffic, even momentarily, would be subject to the same criminal penalty as if they had committed a sexual assault. The potential of a peaceful protest turning violent or being deemed a riot and exposing someone to criminal sanctions, including up to 15 years in prison, would lead any reasonable person to reconsider marching for causes they are passionate about – an unacceptable chilling of constitutionally protected speech.

### **Encouraging a Riot**

*HB 1/SB 484, Section 15*

The bill criminalizes mere encouragement of someone else’s participation in a public assembly, rather than actual incitement of riotous conduct, and thus goes beyond what is constitutionally permissible.<sup>iii</sup>

Under the broadly worded bill, a person would be guilty of inciting a riot (a third-degree felony, punishable by up to 5 years in prison), if they “encourage” another person to “participate” in a public disturbance deemed a “riot,” even if the individual did not intend for anyone to engage in any disorderly and violent acts. Encouraging an individual’s participation in an event is not akin to directly inciting imminent lawless and violent action and should not be penalized as if they were the same.<sup>iv</sup>

## “Mob Intimidation”

*HB 1/SB 484, Section 8*

Mob Intimidation, a newly created first-degree misdemeanor, is defined even more broadly, covering any group of three or more acting together to “compel or induce, or attempt to compel or induce, another person by force, or threat of force, to do any act or to assume or abandon a particular viewpoint.”

“Force” is not defined by Florida statute. Black’s Law Dictionary defines “force” as “power, violence, or pressure directed against a person or thing.” The bill could be read to include physical force, verbal or physical threats, intimidation, or even peer pressure.

It is telling, and problematic, that the “force” required by this provision is open to interpretation. It is intended to silence otherwise constitutionally protected speech and to give police a highly discretionary “tool” for arrest. It is entirely within the words of this definition that the following could be deemed mob intimidation if done by a group of three or more: picketing that blocks a person’s path to a health clinic or business, a threat to mount a legal - or political - challenge, a public relations pressure campaign, three students pressuring another person to join a fraternity, cheat on an exam, drink a beer, wear a mask, or break up with a girlfriend.



Allison Shelley/ACLU

## The Bill Thwarts Criminal Justice Reform Efforts

This bill would result in more people, primarily Black and brown individuals, being incarcerated in jails and prisons for longer periods of time.

We are in the midst of a worldwide pandemic, wherein thousands of Floridians have lost loved ones and livelihoods. Nearly 200 people have died in Florida’s prisons of COVID, and over 17,000 incarcerated individuals (approximately 1 in 5 individuals in prison) have been infected. Jails and prisons are petri-dishes for COVID infection as it is nearly impossible to prevent spread and maintain CDC social distance guidelines.

This has only complicated the dire situation in our prisons, jails and communities, as our outsized, overly crowded jails and prisons are already buckling under decades of unwillingness to correct the failed overincarceration policies of the 1980s and 1990s that disparately impacted marginalized communities. As a result, Black Floridians make up 47 percent of the prison population, yet comprise only 17 percent of Florida’s overall population. Adding to this travesty of justice, the Governor wants to send more people to prison for longer periods of time – all to silence calls for racial justice and police accountability.

We know from experience of Florida law enforcement’s militaristic tactics at BLM protests, these burdens will disproportionately fall on Black and brown people and their families. Police have, and will, respond to Black protesters with violence, then use these new statutory ‘tools’ when they are met with resistance or outrage.

Specifically, among other things, the bill would create higher level felonies and misdemeanors for the already existing offenses of simple assault (Section 1), battery (Section 3), theft (Section 13), and burglary (Section 11); it would increase sentencing points by ranking offenses one level higher on the criminal scoresheet<sup>v</sup> for aggravated assault and aggravated battery (Sections 2 and 4); and it would establish a new minimum mandatory sentence for battery on law enforcement or other officials (Section 6, 7) – if any of these offenses were committed during a protest that was labeled a “riot,” regardless of whether the individual had engaged in any riotous conduct.

The supposed justification for these sentencing enhancements and increased criminal sanctions is that they occur during a “riot.” However, as discussed above, the newly created definition of committing a riot is so broad and vague that it would appear to capture any person who participates in a peaceful protest that turns violent, even if the individual did not engage in any riotous or violent conduct.

Under the bill’s overly broad definitions, even if the individual did not engage in any riotous conduct, prison sentences would be doubled or tripled, and fines would increase by thousands of dollars. Misdemeanor offenses would be reclassified as felonies and result in all of the life-long collateral consequences of a felony conviction – loss of voting rights, inability to serve on a jury or run for public office, significant barriers to employment, housing, education, and financial loans.

See page 12 for a section-by-section breakdown of the impacts of SB 484/HB 1. The below are just a few examples:

## Creates Harsher Misdemeanors and Felonies for Existing Offenses

If committed during a gathering deemed a “riot” under the bill’s broad definition:

- A simple assault, which is typically a second-degree misdemeanor (punishable by up to 60 days in jail), would be a first-degree misdemeanor (***punishable by up to an additional 300 days in jail***) (Section 4).
- A simple battery, which is typically a first-degree misdemeanor (punishable by up to 1 year in jail), would be a third-degree felony (***punishable by up to 5 years in prison, \$5,000 fine***) (Section 6).

Thus, an additional 4 years of incarceration, and up to approximately \$80,000 (\$20,000 per/year x 4 years) more in taxpayer spending on incarceration if a misdemeanor battery took place during a peaceful protest where violence erupted. Additionally, the individual would be saddled with a felony conviction for life, including loss of voting rights and all other collateral consequences of a felony conviction – housing, employment, educational opportunities, etc.

- Burglary that is a second-degree felony (up to 15 years) would be a first-degree felony (punishable by up to 30 years, ***thus an additional 15 years in prison – at taxpayer expense of up to \$300,000 (\$20,000 x 15 years)***) (Section 12).
- Burglary that is a third-degree felony (up to 5 years) would be a second-degree felony (***punishable by up to an additional 10 years in prison) – at taxpayer expense of up to \$200,000 (\$20,000 x 10 years)***) (Section 12).

- **Theft** that is a second-degree felony (up to 15 years) would be a first-degree felony (punishable by up to 30 years, *an additional 15 years in prison – at taxpayer expense of up to \$300,000 (\$20,000 x 15)*) (Section 13).
- **Theft** that is a third-degree felony (up to 5 years) would be a second-degree felony (punishable by up to 15 years in prison, *an additional 10 years in prison) – at taxpayer expense of up to \$200,000 (\$20,000 x 10 years)*) (Section 13).

### Creates Several Brand-New Offenses

Below are a few of the new offenses created:

- **Mob Intimidation** punished by up to one year in jail: A group of 3 or more that tries to compel others by force or threat of force to do any act or assume or abandon a viewpoint (Section 8).
- **Destroying a Memorial**, second-degree felony punished by up to 15 years in prison: Destroying or pulling down a confederate or other memorial, including a flag (Section 11).
- **Damaging a Memorial**, third-degree felony punished by up to 5 years in prison: Causing \$200 in damage to a confederate or other memorial (Section 10).
- **Cyberintimidation**, punished by up to a year in jail: Publishing a person’s identifying information, such as name, with the intent to intimidate or have others intimidate or harass (Section 14).
- **Aggravated Riot**, second-degree felony punished by up to 15 years in prison: a “riot” that includes one of the following: at least 10 people; displays deadly weapons; endangers traffic by force or threat of force; causes more than \$5,000 in

property damage; or causes great bodily harm to a nonparticipant (Section 15).

- **Inciting a Riot**, third-degree felony punished by up to 5 years in prison for “encouraging” another to “participate” in a riot.
- **Aggravated Inciting a Riot**, punished by up to 15 years in prison: encouraging a riot that results in more than \$5,000 in property damage OR great bodily harm OR supplies a deadly weapon or teaches another person to prepare a deadly weapon with the intent that it be used in a riot (Section 15).

### Raises the Felony Ranking Level and Increases Sentencing Points

Additionally, the bill raises the felony offense level thus increasing sentencing points for numerous offenses that Black individuals are disproportionately arrested for, if they are done during an assembly deemed a riot.

- **Aggravated Assault**: offense level raised from 6 to 7 on the sentencing scoresheet and mandates at least 21 months of prison. Under current law, there is no mandatory prison time and probation is permissible.
- **Aggravated Battery**: offense level raised from 7 to 8 on the sentencing scoresheet, resulting in an increase of more than 13 months in prison for the same offense.
- **Theft & Burglary**: offense level increased in addition to being reclassified as a higher degree felony.

By harshly increasing penalties and prison sentence lengths and creating new felonies and deeming misdemeanors to be felonies resulting in felony disenfranchisement and

all the collateral consequences of felony convictions, this heavy-handed bill will exacerbate our overly high incarceration rates and undermine our criminal justice reform efforts.

## The Bill is Unnecessary: Florida Statutes Already Criminalize Violence and Destruction of Property

This bill is unnecessary. The vast majority of protests, including those in Florida, in the wake of George Floyd’s murder were overwhelmingly peaceful, save for excessive force by law enforcement in dispersing peaceful protests and arresting individuals for curfew and traffic and permit violations.<sup>vi</sup>

Moreover, current Florida law already criminalizes unlawful assembly, violence, property damage, traffic violations, violence directed at law enforcement, riots and sedition. This bill increases penalties on these already illegal offenses when they occur in the context of a protest, making it easier for law enforcement and prosecutors to have unbridled discretion to charge harsher penalties during a protest where law enforcement disagrees with the protesters’ message (e.g., police accountability in the wake of George Floyd’s murder) and chilling vital First Amendment speech.

Police officers and prosecutors do not need more tools to impose harsher penalties. Current statutes already criminalize unlawful assembly (section 870.02, Fla. Stat.), riots (sections 870.01 and 870.03), assault (section 784.011), aggravated assault (section 784.021), battery (section 784.03), aggravated battery (section 784.045), assault or battery of law enforcement (section 784.07), criminal mischief/property damage

(section 806.13), theft (section 812.014), burglary (section 810.02), and defacing a flag (section 876.52). Law enforcement has no shortage of tools at their disposal, as evidenced by the mass arrests this summer of peaceful BLM protesters.

While the state has a responsibility to maintain public safety, Florida has more than enough laws currently on the books that punish the behaviors described in SB 484/HB 1, highlighting how unnecessary this bill is for any legitimate public safety purpose.

To be clear, under current law, rioting is a third-degree felony, punishable by up to five years in prison. What this bill does is allows law enforcement to arrest you for “rioting,” punishable by up to five years in prison, for merely being present at a protest that turns violent or destructive, even if you did not engage in any riotous, violent, or destructive conduct.

Additionally, under this bill a person can be arrested and imprisoned for “aggravated riot,” punishable by up to 15 years in prison, even if they did not engage in any violent or riotous conduct.

As to the Governor’s disingenuous rebranding of his priority bill to crack down on racial justice protesters as necessary in light of the attempted white supremacist coup on our nation’s capital, in addition to the above, Chapter 876, Florida Statutes, “Criminal Anarchy, Treason, and Other Crimes Against Public Disorder” provide law enforcement with all the tools they need to punish those who seek to violently overthrow our government. Tellingly, this bill does not touch these statutes.



## The Bill Protects Confederate Monuments

Further evidencing the bill's effect of punishing those calling for racial justice and sustaining white supremacy, the bill seeks to protect confederate monuments by creating a new second-degree felony offense, punished by up to 15 years imprisonment, for pulling down or destroying 'memorials' that honor or recount "the military service of any past or present United States Armed Forces military personnel," or public service of a resident of the United States. 'Memorial' is defined broadly to include everything from flags and religious symbols to tombstones and statues. (Sections 10 and 11).

Additionally, the bill provides that any person who defaces or otherwise damages a memorial resulting in over \$200 or more damage would be subject to a third-degree felony, punishable by up to 5 years in prison. As "deface" is not defined in the bill, protesters who apply paint or graffiti to a monument at a protest could face up to five years in prison.

It is beyond ridiculous that while the rest of the country is acknowledging the harms caused by state displays of confederate monuments and many localities are actively removing such symbols of white supremacy, Florida's governor has made it his number one priority to protect monuments honoring those who were willing to die to defend the institution of slavery.

Current statutes already protect against damage to property; the purpose of this bill is to elevate the protection of confederate monuments and criminalize and disenfranchise those who seek their removal.



## The Bill Prohibits Release Until First Appearance for Individuals Exercising Their First Amendment Rights

The bill divests local circuit courts of the authority to adopt a local bond schedule allowing county sheriffs to release people who've been arrested but pose no risk to the community. Typically, courts and law enforcement have discretion to decide which offenses are dangerous enough to require a "cooling off" period after a person is arrested. This bill eliminates that discretion and requires mandatory custody until first appearance. (Sections 8, 12-13, 15-17).

Most outrageously, under SB 484/HB 1, people arrested for the minor offense of unlawful assembly "shall be held in custody until brought before the court for admittance to bail." Thus, under this bill, anyone peacefully protesting should be prepared to spend the night in jail.

As a result, the bill would fill up our jails with people who do not need to be there, aggravating the spread of COVID-19 and unnecessarily disrupting families. It would also chill dissent by further intimidating individuals from exercising their First Amendment rights out of fear that they will end up in jail without the option to post bail.

## The Bill Usurps Local Control of Policing Decisions and Waives Sovereign Immunity

This bill usurps local authority over public safety decisions. It allows the Governor, with the Cabinet, to essentially reject a city budget and amend it to their liking at the appeal of *any* city resident, regardless of whether the local police chief approves changes in the police budget (Section 1).

This provision will require municipalities to spend taxpayer and staff resources to defend any appeal that is brought by any resident for any reduction in funding, even if requested by law enforcement. With the current economic realities, municipalities need flexibility to address public health and safety. The local budget process should not be made into a platform for statewide political posturing.

The bill also waives sovereign immunity for municipalities deemed to interfere with law enforcement's ability to provide "reasonable" protection during a riot or unlawful assembly (Section 3). This would allow individuals to bring civil lawsuits against municipalities for any amount of damages for personal injury, wrongful death or property damage based on an after-the-fact determination of whether law enforcement's response to the unlawful assembly or riot was reasonable.

Rather than damages being capped at \$200,000, as is typical, this bill would expose municipalities to unlimited amounts of damages. This is likely intended to pressure municipalities to adopt overly militaristic law enforcement responses to peaceful protests in order to avoid the prospect of civil liability for unlimited damages.

## The Bill Will Increase Violence Against Protesters

The bill will embolden and encourage violence against protesters peacefully exercising their First Amendment rights. It allows a counter-protester to escape civil liability for injuring or killing a protester.

It specifically creates an affirmative defense for a counter-protester to raise in any civil action for damages against them for personal injury, wrongful death or property damage, if the injury arose from the protester's participation in an unlawful assembly or an assembly deemed a "riot" (Section 18).

Under this bill, an individual peacefully protesting who is injured or killed or whose property is damaged by a counter-protester would be unable to recover damages in a civil action. A white supremacist who maliciously drove his car into protesters, for example, like the one in Charlottesville that killed Heather Heyer, would be able to assert an affirmative defense under this bill.<sup>vii</sup>

We have seen time and time again that white supremacists are emboldened by law enforcement's complicity with their violent actions toward Black protesters. They know they will likely not be held criminally liable for their actions, either through lack of police action or Florida's broad stand your ground statute. However, under current law, they can still be held civilly liable, and thus there is an incentive to not act on their worse instincts. This bill would remove that incentive.

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<sup>i</sup> See State v. Beasley, 317 So. 2d 750, 752 (Fl. Sup. Ct. 1975) (“The term “riot” at common law is defined as a *tumultuous disturbance of the peace* by three or more persons, assembled and acting with a common intent, either in *executing a lawful private enterprise in a violent and turbulent manner, to the terror of the people, or in executing an unlawful enterprise in a violent and turbulent manner.* (emphasis added).

<sup>ii</sup> The bill deems a riot “aggravated” if an assembly deemed a riot meets *only one* of the following:

- a. ten or more people assembled,
- b. traffic endangered by force or threat of force,
- c. deadly weapons, such as firearms, present,
- d. property damage of more than \$5,000, or
- e. great bodily harm to a nonparticipant.

<sup>iii</sup> See United States v. Miselis, 972 F.3d 518, 537 (4th Cir. 2020); see also Dakota Rural Action v. Noem, 416 F. Supp. 3d 874, 885 (D.S.D. 2019) (providing that statutory provision criminalizing encouraging participation in a riot was unconstitutionally overbroad; “The many words or expressive activities that arise within these three terms, to advise, encourage or solicit, might in some instances be offensive to some or to many people, but they are protected by the First Amendment and cannot be the subject of felony prosecution or of tort liability and damages.”).

<sup>iv</sup> See United States v. Miselis, 972 F.3d 518, 540 (4th Cir. 2020) (“Having found that the Anti-Riot

Act is overbroad vis-à-vis *Brandenburg* insofar as it proscribes speech tending to “encourage” or “promote” a riot, as well as speech “urging” others to riot or “involving” mere advocacy of violence, we turn now to consider whether the amount of overbreadth is substantial, “not only in an absolute sense, but also relative to the statute's plainly legitimate sweep.” *Williams*, 553 U.S. at 292, 128 S.Ct. 1830. We conclude that it is.”)

<sup>v</sup> Section 921.0022, Florida Statutes (Criminal Punishment Code; offense severity ranking chart).

<sup>vi</sup> Armed Conflict Location & Event Data Project (ACLED), “Demonstrations & Political Violence in America: New Data for Summer 2020,” Sept. 9, 2020,

<https://acleddata.com/2020/09/03/demonstrations-political-violence-in-america-new-data-for-summer-2020/>

<sup>vii</sup> See Asher Stockler, “Heather Heyer's Mom Files \$12 Million Lawsuit to Ensure James Fields Doesn't “Profit” From Daughter's Killing,” Newsweek (Sept. 5, 2019),

<https://www.newsweek.com/susan-bro-heather-heyer-james-fields-lawsuit-wrongful-death-1457922> (Heather Heyer’s mom, saying she hopes to send “a strong message to others who would use murder as a hate crime, that there are ongoing financial consequences on top of criminal consequences,” brought a civil lawsuit for \$12 million damages against the white supremacist who drove into and killed her daughter who was peacefully protesting for racial justice).

## Section-By-Section Breakdown

### Section 1: Prevents Municipalities from Reallocating Funding from Law Enforcement

Summary: Allows any resident of a municipality to file an appeal with the Executive Office of the Governor if the proposed municipal budget contains a funding reduction to the municipal law enforcement agency. The Governor's Office reviews the budget, provides for a hearing, and issues a report and recommendation to the Administration Commission (Governor and Cabinet). The Administration Commission then can amend the budget, which is final.

Analysis/Impact: Bill will effectively prevent municipalities from reallocating any amount of funds from law enforcement agencies to other municipal agencies or community priorities and will embolden and empower a single resident to bring an appeal of the municipal budget to the Office of the Governor. Raises concerns over local law enforcement and municipality's ability to set their own budgets and allows any resident in the municipality to set in motion a budget appeal process to overturn the budget priorities set by the municipality, regardless of the position of local law enforcement.

This provision will require the municipality to spend taxpayer and staff resources to defend any appeal that is brought by any resident with regard to any amount of reduction in funding. The provision contains strict timelines requiring the municipality to file a reply within 5 days to the Governor, and thereafter the municipality will need to defend their budget at a hearing, whereby their originally proposed budget will ultimately be approved, amended, or modified by the Administration Commission.

Given the economic realities stemming from COVID, municipalities need flexibility within their budget to address public health and safety, and do not need to be spending additional resources at the bequest of any resident who is unhappy with the municipality's budgetary decisions.

### Section 2: Makes it Easier for Law Enforcement to Issue Citations to Protesters

Summary: Current law requires that obstruction of traffic must be "willfully" done in order violate Florida's traffic obstruction statute, this bill lowers the threshold by deleting the willful requirement and replacing it with the lesser "may not intentionally" requirement.<sup>1</sup> Additionally, the language is so broad that it appears to allow for law enforcement to issue pedestrian citations to any and all individuals peacefully protesting by merely standing on a street and temporarily hindering traffic.

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<sup>1</sup> See Thunderbird Drive-In Theatre, Inc. v. Reed By & Through Reed, 571 So. 2d 1341, 1344 (Fla. Dist. Ct. App. 1990) (providing that "Prosser and Keeton's definition of willfulness requires that three elements be established: (1) the actor do an intentional act of an unreasonable character (2) in disregard of a *known or obvious risk* that was great (3) as to make it *highly probable* that harm would follow.") (emphasis in original).

Also appears to repeal statutory authority for local governments to issue permits to allow pedestrian use of roads.

Analysis/Impact: These changes will make it much easier for officers to cite protesters for “pedestrian violations” by lowering the necessary threshold from willful obstruction to allowing the citation for merely intentionally standing in a street or road or highway as compared to willfully and purposely obstructing traffic. The provision is vulnerable to discretionary enforcement aimed at suppressing protesters whose views the local authorities disagree with and panhandlers.

### Section 3: Waives Sovereign Immunity for Municipalities and Opens Door to Civil Liability

Summary: Creates a previously unavailable civil cause of action against a city for a person who is injured or suffers property damage during an unlawful assembly when the city interfered with the law enforcement’s ability to respond. The bill waives any sovereign immunity that would otherwise protect the city and eliminates any cap on the amount of damages.

Analysis/Impact: Opens the door to civil lawsuits against the city for unlimited damage liability. Significantly increases costs to the city to defend against such lawsuits and allocate resources to satisfy judgments and settlements. For example, a city’s decision to sell an armored vehicle or instructions to police about using less-lethal force may result in civil liability, including punitive damages.

### Section 4: Increases Penalties for Assault

Summary: The bill increases the penalty for assault from a 2<sup>nd</sup> degree misdemeanor to a 1<sup>st</sup> degree misdemeanor if the assault is done in furtherance of a “riot” or “aggravated riot.”

Analysis/Impact: Under current law, the maximum penalty for an assault (e.g., threat of violence) is 60 days in county jail. SB 484/HB 1 provides that the maximum penalty for an assault (threat of violence) is 365 days (1 year) if committed during a “riot.” That’s approximately 300 days more jail time for a threat of violence if committed during a “riot,” which is defined broadly in SB 484/HB 1 to consist of three or more people engaging in disorderly and violent conduct that would likely result in property damage.

To be clear, current law already provides tools for law enforcement to arrest individuals for assault and hold them in jail for up to 60 days. This bill allows police to arrest and jail individuals for up to 365 days.

## Section 5: Increases Penalties for Aggravated Assault

Summary: This bill increases the penalty for aggravated assault if done in furtherance of a riot or aggravated riot. Aggravated assault is a third-degree felony punishable by up to 5 years in prison and a \$5,000 fine. Under SB 484/HB 1, for the purpose of sentencing and gain-time eligibility, aggravated assault would be ranked one level above the ranking for the offense committed.

Analysis/Impact: Under current law, the maximum penalty for aggravated assault is 5 years in prison and there is no minimum sentence. This bill would require at least 21 months in prison if the assault happened during a riot. While SB 484/HB 1 provides that the maximum penalty of five years in prison for an aggravated assault would remain the same, the felony level would go from a 6 to a 7 on the sentencing scoresheet. Practically, that means that a crime that would normally give someone 36 points (allowing, but not requiring prison) on their scoresheet would now give someone 56 points (requiring prison). As a level 7 crime worth 56 points, the lowest permissible prison sentence, if this were the only crime on the person's scoresheet, would be 21 months in prison. Whereas before someone could potentially get probation for the crime, now they would face at least 21 months in prison.<sup>2</sup>

Current law already provides tools for law enforcement to arrest individuals for aggravated assault and hold them in jail or prison, but it doesn't mandate prison. The change in law would now raise someone's scoresheet points to be so high that prison is required for at least 21 months.

## Section 6: Makes Battery a Felony Instead of a Misdemeanor

Summary: Increases the penalty for a battery from a 1<sup>st</sup> degree misdemeanor to a 3<sup>rd</sup> degree felony if it is committed in furtherance of a "riot" or "aggravated riot," whereby "riot" is broadly defined in the bill to include 3 or more people engaging in disorderly or violent conduct.

Analysis/Impact: Under current law, a battery is a misdemeanor with the maximum penalty of 1 year in county jail. SB 484/HB 1 provides that the battery would be a felony with a maximum penalty of 5 years in prison if committed during a "riot." That's 4 more years of prison and a felony record for the same offense (battery) if committed during a "riot," which, as mentioned above, is defined broadly in SB 484/HB 1 to consist of three or more people engaging in disorderly and violent conduct that would likely result in property damage.

Current law already provides tools for law enforcement to arrest individuals for battery and incarcerate them in jail for 1 year. This bill would make it a felony, which has lifelong consequences in terms of voting rights, ability to get a job, get loans, housing, education, etc. Additionally, the individual may be sentenced to up to 5 years in prison, rather than 1 year in county jail. It costs the state approximately \$20,000 for each year an individual is incarcerated. Thus, the costs to the state for this provision could be an additional \$80,000-\$90,000 for each individual arrested for simple battery during a "riot."

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<sup>2</sup> See the Criminal Punishment Code, [http://www.dc.state.fl.us/pub/sen\\_cpcm/cpc\\_manual.pdf](http://www.dc.state.fl.us/pub/sen_cpcm/cpc_manual.pdf).

## Section 7: Increases Penalties for Aggravated Battery

Summary: This bill increases the penalty for aggravated battery if done in furtherance of a riot or aggravated riot. Aggravated battery is a second-degree felony punishable by up to 15 years in prison and a \$10,000 fine. Under SB 484/HB 1, for the purpose of increasing the sentencing and limiting gain-time eligibility, aggravated battery would be ranked one level above the ranking under s. 921.0022 for the offense committed.

Analysis/Impact: Aggravated battery is currently a level 7 on the scoresheet, worth 56 points and requiring a minimum of 21 months in prison. This proposed bill would change it from a level 7 to a level 8 on the scoresheet, which is worth 74 points, or a minimum of 34.5 months in prison, for an increase of 13.5 months in prison for the same crime.

## Section 8: Creates New Crime of “Mob Intimidation”

Summary: Creates a new crime of “mob intimidation,” whereby it is a first-degree misdemeanor, punishable by up to one year in county jail, for a person, assembled with two or more people, to compel or attempt to compel another by force or threat of force to do any act or assume/abandon a particular viewpoint. Further provides that the individual must be held in custody and not released until brought before the court for a bail hearing.

Analysis/Impact: Unnecessary and overly broad and vague. There is no need to create a new crime called “mob intimidation” to criminalize threats of force. Threats of force are already criminalized under “assault,” which is a second-degree misdemeanor punishable by up to 60 days in jail. SB 484/HB 1 could result in an individual serving an additional 300 days in jail, at taxpayer expense, for the same offense.

- Confusing application/discretionary enforcement: If one person threatens “give me your backpack or else” it’s an “assault” and up to 60 days in jail, but if that person is with two others and they make the same threat: “give me your backpack or else,” it’s considered “mob intimidation” and up to 365 days in jail?

## Section 9: Creates a New Mandatory Minimum

Summary: Creates a mandatory minimum sentence of 6 months in prison for individuals convicted of battery on a law enforcement officer if the battery is in furtherance of a riot.

Under SB 484/HB 1, for the purpose of increasing the sentence and limiting gain-time eligibility, battery on a law enforcement officer during a riot would be ranked one level above the ranking under s. 921.0022 for the offense committed.

Analysis/Impact: Under current law, assault and battery on law enforcement officers are prohibited under Section 784.07, Florida Statutes. Battery on a law enforcement officer is a felony in the third degree, punishable by up to 5 years in prison. Judges have discretion depending on the

specific individual circumstances to sentence the individual to five years in prison. This bill takes away the judge's ability to sentence the defendant according to the individual circumstances presented and requires the judge to incarcerate the individual for a minimum of six months.

## Section 10: Creates a Third-Degree Felony for Damaging a Confederate Memorial

Summary: Expands criminal mischief statute to provide that any person who willfully and maliciously defaces, injures, or otherwise damages a “memorial,” with damage in excess of \$200, commits a third-degree felony, punishable by up to five years in prison. Additionally, requires restitution of the full cost of repair or replacement.

SB 484/HB 1 defines “memorial” broadly 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” that “*honors or recounts the military service of any past or present United States Armed Forces Military personnel*” or any past or present public service of a United States resident.

Analysis/Impact: Current statutes already provide that damage to property of over \$200 is a misdemeanor in the first degree, punishable by up to one year in county jail. SB 484/HB 1 would make it a third-degree felony, punishable by up to five years in jail, if the property that was damaged is considered a “memorial,” as broadly defined in the bill. Thus, under SB 484/HB 1, an individual could spend an additional four years in prison at taxpayer expense of up to \$80,000 (\$20,000/year x 4 years) if the property damaged was a confederate memorial. Additionally, because the offense would be a felony conviction (instead of a misdemeanor), the individual would be subject to the numerous life-long collateral consequences of voting disenfranchisement, difficulty securing loans, housing, education, and employment.

As “deface” is not defined in the bill, protesters who apply paint or graffiti to a monument during a peaceful protest could face up to 5 years in prison.

## Section 11: Creates a Second-Degree Felony for Destroying a Confederate Memorial

Summary: Creates new crime of destroying or demolishing a “memorial” that *honors or recounts the military service of any past or present United States Armed Forces Military personnel*” or any past or present public service of a United States resident. Provides that such offense is a second-degree felony, punishable by up to 15 years in prison, and \$10,000 fine. Requires restitution of the full cost of repair or replacement.

Analysis/Impact: Current Florida statutes already protect against destruction of property, and penalties are commensurate with the value of the damage to the property. SB 484/HB 1 would make it a second-degree felony, punishable up to 15 years and prison, and \$10,000 fine, if the property that was damaged was a confederate memorial or other memorial honoring past military



personnel or service, regardless of the assessed value of the property damage. Additionally, because the offense would be a felony conviction, the individual would be subject to the numerous life-long collateral consequences of voting disenfranchisement, difficulty securing loans, housing, education, and employment.

## Sections 12 & 13: Increases Penalties for Burglary and Theft

### Summary:

**Burglary** - Enhances the criminal penalty for burglary if committed during a riot or aggravated riot from a second-degree felony to a first-degree felony, or from a third degree felony to a second degree felony, depending on the circumstances. Requires individual to be held in custody and cannot be released on bail until first appearance. (Treats burglary during a riot the same as enhanced penalty for burglary during a state of emergency).

**Theft**- Enhances penalty for theft during a riot or aggravated riot from a second degree to a first-degree felony, or from a third degree to a second-degree felony, depending on the circumstances. Requires individual to be held in custody and cannot be released on bail until first appearance. (Treats theft during a riot the same as enhanced penalty for theft during a state of emergency).

Analysis/Impact: Burglary is already punishable by up to 15 years in prison, and \$10,000 fine. SB 484/HB 1 would double that sentence, forcing the individual to be imprisoned up to 30 years – an additional 15 years – at taxpayer expense of up to \$300,000 (\$20,000 x 15) just because it occurred while three or more people were engaged in disorderly and violent conduct. Same with theft.

Treats a “riot” of three or more people the same as a “state of emergency” for the purpose of imposing harsher penalties on protesters. There is no rational or legitimate basis to equate three or more people engaged in disorderly conduct to “a state of emergency declared by the Governor under chapter 252.” The Governor declares a “state of emergency,” whereas the determination of whether an assembly is deemed a riot is entirely up to the discretion of law enforcement and prosecutors.

## Section 14: Creates a New Crime of “Cyberintimidation by Publication”

Summary: Creates a new first-degree misdemeanor for the electronic publication of a person’s personal identification information with the intent to threaten, intimidate, incite violence, etc.

Analysis/Impact: This bill is unnecessary as current criminal statutes already protect against threats, harassment, and inciting violence. Additionally, “intimidate” is undefined, vague, overly broad, and thus likely to chill protected speech.

## Section 15: Broadly Defines “Riot” and Creates New Felony “Aggravated Riot.”

Summary: Provides that a person commits a riot if he or she “*participates* in a public disturbance involving an assembly of three or more people acting with a common intent to mutually assist each other in disorderly and violent conduct resulting in injury or damage to another person or property or creating a clear and present danger of injury to another person or property.” (emphasis added). Provides that it’s a third-degree felony, punishable by up to 5 years in prison.

Creates a new crime of “aggravated rioting,” which includes rioting with any of the following: (a) 9 or more people, (b) causing great bodily harm to nonparticipant, (c) causing property damage >\$5,000, (d) displaying deadly weapons, or (e) endangering traffic by force or threat of force. Provides that it’s a second-degree felony, punishable by up to 15 years in prison.

Creates new crime of inciting or encouraging “another to participate” in a riot. Provides that it’s a third-degree felony.

Creates new crime of aggravated inciting or encouraging a riot. (Second degree felony).

Individuals arrested under these sections are required to be held until a bail hearing.

Analysis/Impact: Overbroad and vague; already covered by existing Florida law. Current Florida statutes provide that those guilty of a riot or inciting a riot are guilty of a third-degree felony, but the statutes do not define “riot.” Instead, riot is defined through case law. The definition in SB 484/HB 1 is unclear and confusing. It provides that someone commits a riot if they participate in a public disturbance involving three or more people engaging in violent and disorderly conduct, but it does not define what it means to participate. Is attending a protest that turns violent participating in a riot? Under this definition it is unclear and entirely discretionary for law enforcement to determine who is and who is not “participating” in a riot, and thus who is and who is not subject to the harsher penalties.

This same problematic language arises with regard to the new offense of inciting or “encouraging” “another to participate” in a riot. What does it mean to encourage another to participate?

## Section 16 & Section 17: Requires First Appearance Before Release on Bail

Summary: Adds language to the existing unlawful assembly and riot statutes requiring that individuals arrested for unlawful assembly or riot be held in custody without bail until brought before a judge for a bail determination.

Analysis/Impact: Chills speech/requires individuals be held in custody for protesting. Unlawful assembly is a second-degree misdemeanor, the lowest level state criminal offense. There is no rationale or legitimate reason that a person should be held in custody and denied bail for this low-level offense. Being denied the right to post bail before going in front of a judge is usually reserved for more serious or violent crimes, not low-level offenses such as unlawful assembly.

## Section 18: Allows Counter-Protester to Avoid Liability for Civil Damages for Injuring or Killing a Protester

Summary: Creates affirmative defense in a civil action for personal injury, wrongful death, or property damage if the action arose from injury sustained in furtherance of a riot or unlawful assembly. When a defendant raises the affirmative defense, the action is stayed pending the outcome of the criminal action.

Analysis/Impact: Endangers peaceful protesters and chills dissent by emboldening counter-protesters to injure or kill protesters by shielding them from civil damages liability. Under this bill, counter-protesters who drive their car into protesters injuring or killing them, or otherwise inflict violence or damage personal property will be able to escape liability from a civil lawsuit brought by protesters they injured.

## Section 19: Increases Sentencing Offense Level

Increases sentencing points by increasing the sentence severity level ranking for offense of defacing or removing monuments if committed in furtherance of a “riot” or “aggravated riot.”

## Section 20: Adds the New Crimes Created in SB 484/HB 1 to the Criminal Punishment Code

Adds as a Level 2 offense: Third degree felony for battery during a riot or aggravated riot; third degree felony damage of \$200 or more to a memorial in honor of United States Armed Forces.

Adds as a Level 3 offense: Third degree felony of encouraging or inciting a riot.

Adds as a Level 4 offense: Second degree felony destroying memorial; third degree felony aggravated riot; third degree felony aggravated encouraging or inciting a riot.

## Resources:

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