



The Freedom to Write

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February 11, 2025

Honorable Ben Albritton
President, Florida Senate
404 S. Monroe Street
Tallahassee, FL 32399-1100

**Re: PEN America's opposition to SB 100: Display of Flags by
Governmental Entities**

Dear President Albritton:

As Director of the PEN America Florida office, I write to express PEN America's opposition to SB 100: Display of Flags by Governmental Entities (SB100). PEN America is a nonpartisan, nonprofit organization which stands at the intersection of literature and human rights to support free expression in the United States and worldwide. As currently proposed, SB100 explicitly targets racial and LGBTQ+ identities and symbols, and attempts to ban flags reflecting these symbols from all governmental agencies, specifically naming public schools, public colleges, and public universities. SB100's emphasis on banning flags that represent certain "political viewpoints" including "racial" or "sexual orientation and gender" is overly vague and infringes on Floridians' self expression protected under the First Amendment. While striving to display nonpartisanship in government agencies and public schools, colleges, and universities is a noble goal, nonpartisanship cannot be achieved through censorship.

Flags are critical expressions of our identity. They are an ancient method of naming and showing pride and belonging for ourselves and our communities. As the Supreme Court noted, "Flags are almost as old as human civilization. Indeed, flags *symbolize* civilization." *Shurtleff v. City of Bos., Massachusetts*, 596 U.S. 243, 253 (2022) (emphasis in original). Thus, it is no small thing to impose viewpoint-based restrictions on the display of flags in all government settings, specifically including schools and higher education institutions.

Perhaps most concerning is the chilling effect that SB100 will likely have on universities across Florida. While SB100 makes an exception for "a private individual to express private speech," the lines between public and private are often blurred at public colleges and universities. Universities and

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colleges in Florida display any number of flags in manners and locations that likely would not be considered government speech. Professors may have varied items including flags on display in an office where students come in for meetings; students, including residence hall employees, may put signs and flags on display on their doors or outside their windows in places that are publicly visible; student groups may have events or protests and wish to message through the use of flags on state property. It is unclear if the bill would consider these examples of government speech.

SB100 includes no guidance or definition for private versus public space in a public school, college, or university setting, which may chill university, college, and school employees and students' speech for fear of violating the statutory prohibitions. Constitutional jurisprudence regarding government speech is different with regard to colleges and universities as opposed to K-12 schools, yet this bill treats the two identically, without regard to those crucial differences. Failing to make these critical distinctions between K-12 and higher education and between government speech and individual forms of expression in public settings imposes viewpoint-based restrictions on Floridians. It would leave them to wade through this confusion and vagueness without direction.

Making determinations of what is public and private speech is not always an easy task, and it is often left to the courts to consider a number of factors. *See, e.g., Shurtleff*, 596 U.S. at 255, ("Next, then, we consider whether the public would tend to view the speech at issue as the government"). Based on the complexity of these determinations and lack of guidance included in SB100, the legislature should be concerned with the likely over-application of this bill and the chilling effect it will have across the state.

Such chilling effects and potential over-application create specific risks for Floridians of color and LGBTQ+ individuals, especially our youth. Because SB100 directly prohibits "racial" and "sexual orientation and gender" viewpoints and directly names public schools, colleges and universities, people of color and LGBTQ+ individuals that attend, use, work, or live at these institutions could be deprived of visibility, expression, and connection to community.

The vagueness and confusion in SB100 does not end there. The Florida legislature makes a troubling leap in designating all flags that reflect racial, gender, and sexual orientation as expressing "political viewpoints." This

adds to the risk of overapplication and misuse. The inclusion of these terms also suggests that the true target of this bill may very well be the prohibition of flags expressing particular views disfavored by some elected officials in the legislature, such as the LGBTQ+ pride flag or flags reflecting pride or identification of communities of color.

Such vagueness is almost guaranteed to be met with litigation and bring a hefty fine upon your constituents. PEN America found that in 2022, Florida taxpayers paid roughly \$17 million in legal bills across 15 different lawsuits, challenging legislation with similar constitutional concerns. It is in the best interest of this legislature and all Floridians to ensure that this body does not pass inherently unconstitutional legislation purely out of a sense of party loyalty, and instead consider the very real costs that bills like this have on Florida citizens, government and fundamental First Amendment rights.

By rejecting the previous iteration of this bill during the last legislative session, SB1120 (2024), this legislature recognized that this bill contained incurable First Amendment violations. SB100 makes no attempt to rectify these errors or clear up any of the confusion its precursor created.

We urge the Florida legislature to reject SB100 based on its likely First Amendment violations and the specific harm it will cause Floridians of color and LGBTQ+ individuals. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Katie Blankenship". The signature is fluid and cursive, with a large loop at the end.

Katie Blankenship
Director, PEN America Florida

Cc: Members of the Florida Senate