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Bill Analysis

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Primary Sponsors: Sens. Brenner and McColley

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CORRECTED VERSION*

Summary

Regulation of expression on college campuses

- Generally prohibits a state institution of higher education from taking any action or enforcing any policy that limits or restricts the free expression rights of its students, student groups, faculty, staff, employees, and invited guests in public areas of campus.
- Requires each state institution to report and publish the courses of action implemented in accordance with the bill's provisions, and to update that report whenever a cause of action is brought against the state institution for a violation of free expression.
- Requires each state institution to make public the policies, regulations, and expectations of students regarding free expression in its handbook, on its website, and in its student orientation programs.
- Waives the state's 11th Amendment immunity from suit in federal court, including any immunity granted to a state institution of higher education and permits a student, student group, faculty or staff member, employee, or invited guest to bring an action for violation of free expression rights for one year after the action accrues.

Regulation of use of campus facilities

- Declares that outdoor areas of campuses of state institutions of higher education are public forums for campus communities and prohibits institutions from creating “free speech zones” or designating other outdoor areas where expression is restricted.

Title

- Entitles the bill the “Forming Open and Robust University Minds Act” (or “FORUM Act”).

* Corrects entities amenable to suit described on page 4.

Detailed Analysis

I. Regulation of expression on college campuses

In accordance with the First and Fourteenth Amendments of the U.S. Constitution, private citizens in public places are entitled to speak freely, express opposing viewpoints, and peacefully assemble. This protection extends to professors and students of state-funded colleges and universities (referred to as “state institutions of higher education” in Ohio).¹ Likewise, Ohio's Constitution and laws generally prohibit state institutions of higher education from restricting freedom of speech or the right to peacefully assemble. However, the right to free expression on public campus is not absolute and depends on “where, when, and how” the expression is made. For example, a content-based restriction might be permitted when it is narrowly tailored to serve a compelling government interest, whereas most other restrictions must be reasonable and content-neutral.

The bill prescribes the manner in which state institutions of higher education must comply with these constitutional principles and addresses “where, when, and how” they may restrict expression.

Restrictions or limitations on expression prohibited

The bill generally prohibits a state institution of higher education, or any of its administrators acting in their official capacity, from taking any action or enforcing any policy that limits or restricts the constitutional right of a member of the campus community to engage in noncommercial expressive activity. The bill further states that its prohibition applies only so long as that activity is lawful and does not disrupt the functioning of the state institution.²

For purposes of its prohibition the bill specifies that:

1. “Campus community” includes students, student groups, faculty, staff, and employees of a state institution and their invited guests; and
2. “Expressive activity” includes any lawful verbal, written, audiovisual, or electronic communication of ideas, including all forms of peaceful assembly, protests, speeches, distribution of literature, carrying and displaying signs, and circulating petitions.³

Exclusions, exceptions, and permissible restrictions

Generally

Under the bill, an institution may lawfully prohibit, limit, or restrict expressive activities that are not protected under the U.S. Constitution. It also states that an individual may not engage in conduct that intentionally and substantially disrupts another individual's expressive activity occurring in a campus space reserved for exclusive use of a particular group.

¹ See for example, *Sweezy v. New Hampshire*, 345 U.S. 250 (1957) and *Healy v. James* 408 U.S. 180 (1972).

² R.C. 3345.0212(A).

³ R.C. 3345.0211(A).

(See **“Speech subject to limited or diminished protection,”** under **“III. Background”** below.)

Time, place, and manner restrictions

A state institution also may maintain and enforce reasonable time, place, and manner restrictions, provided that each restriction:

1. Is developed in service of a “significant” institutional interest;
2. Employs clear, published, viewpoint- and content-neutral criteria;
3. Provides for ample means of expression by members of the campus community; and
4. Allows members of the campus community to assemble spontaneously and contemporaneously and to distribute literature.⁴

Policy making and reporting requirements

Distribution of policy on free expression

The bill requires each state institution of higher education to make public the policies, regulations, and expectations of students regarding free expression in its handbook, on its website, and in its student orientation programs. Each institution also must develop and distribute materials, programs, and procedures on free expression for its administrators, campus police, residence life officials, and professors, and any other employees or agents responsible for student discipline or education.⁵

Report on policy

Within 180 days after the bill's effective date, and to the extent it complies with federal privacy laws, each state institution must submit to the Governor, the Speaker of the House of Representatives, and the President of the Senate a report detailing the courses of action implemented in accordance with the bill's free speech provisions. The report must contain all of the following information:

1. A description of any barriers to or incidents of disruption of free expression occurring on campus, including, but not limited to, attempts to block or prohibit speakers and any investigation of students or student groups on the basis of expression; and
2. Any other information the institution finds necessary and appropriate for the public to evaluate whether the free expression rights of members of the campus community have been adequately protected and enforced.

The bill requires each institution to publish its report on its website. The report must be accessible from an institution's main webpage within three links, be word-searchable, and be accessible to the public without requiring any kind of user registration.

If an action is brought against a state institution for an alleged violation of expression rights (see **“Civil action permitted”** below), the institution must submit an additional

⁴ R.C. 3345.0213(A)(3).

⁵ R.C. 3345.0212(B).

supplementary report containing the information outlined above and a copy of the complaint, within 30 days after commencement of that action.⁶

Violations of the right to free expression

Waiver of immunity

The bill expressly waives the state's 11th Amendment immunity from suit in federal court and specifies that the state consents to the jurisdiction over its civil liability and the civil liability of a state institution of higher education, for any violation of the bill's free speech and assembly provisions. It expressly provides that a state institution is not immune from suit or liability for violations of that nature.⁷

The 11th Amendment to the U.S. Constitution states “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” (See “**Waivers of immunity**” under “**III. Background**” below).

Civil action permitted

The bill specifies that a member of the campus community may file a civil action against the state, a state institution, or any of its employees acting in their official capacities responsible for a violation of the free expression rights afforded under the bill. The plaintiff may seek and obtain appropriate relief, including injunctive relief, compensatory damages, reasonable attorney's fees, and court costs. The bill specifies that if a court finds a violation of the bill's provisions, an award of at least \$1,000 must be issued to the plaintiff.⁸ The bill expressly provides that the right to seek relief must not be interpreted to limit any other remedies available to a member of the campus community.

A member of the campus community may also assert a violation of free speech rights as a defense or counterclaim in any disciplinary action or any civil or administrative proceedings brought against the member.⁹

Statute of limitations

The bill specifies that a member of a campus community must file suit for an alleged free speech violation within one year after the cause of action accrues. However, the bill permits a court to waive the statute of limitations if the court determines there is just cause for a delay in bringing the suit.¹⁰

Other provisions

The bill expressly states that its free speech provisions “supersede” any rule, policy, action, communication, or requirement of any institution of higher education or other state

⁶ R.C. 3345.0214.

⁷ R.C. 3345.0215(A).

⁸ R.C. 3345.0215(B).

⁹ R.C. 3345.0215(C).

¹⁰ R.C. 3345.0215(D).

agency. Accordingly, it specifies no rule, policy, action, communication, or requirement may contradict or diminish the effect of those provisions and requirements.¹¹

Furthermore, it also states that if any provision or requirement “is declared unconstitutional, or the applicability thereof to any person or circumstances is held invalid, the remainder” of the provisions and requirements and “the applicability thereof to other persons or circumstances shall not be affected thereby.”¹² The general provisions of the Revised Code already require severing an invalid provision from a related provision that can be given effect.¹³

II. Regulation of use of campus facilities

Prohibiting use of facilities by certain persons

The bill declares that outdoor areas of state university and college campuses are public forums for all members of the campus community. The bill prohibits state institutions from creating “free speech zones” or designating other outdoor areas where expressive activities are restricted.¹⁴ For purposes of this prohibition, “outdoor areas” are the generally accessible outside areas of a campus where members of the campus community are commonly allowed, such as grassy areas, walkways, and common areas. It does not include restricted areas where a majority of the campus community generally is not allowed.¹⁵

The bill also removes a provision of law that permits a state institution of higher education to prohibit the use of facilities for meeting or speaking purposes by any of the following:

1. Members of the Communist Party;
2. Persons who advocate for, hold membership in, or support organizations which advocate the overthrow of the U.S. government and its institutions by force or violence; or
3. Persons whose presence is not conducive to high ethical and moral standards or the primary educational purposes and orderly conduct of the institution.¹⁶

III. Background

Free speech jurisprudence

“Generally accessible areas” and “Public Forum Doctrine”

Under the “Public Forum Doctrine” of the U.S. Supreme Court, government property is typically categorized as either a “traditional public forum,” a “limited public forum,” or a “nonpublic forum.” Accordingly, a court must categorize the location to which a speaker seeks access for the purpose of expression, and then must analyze the government's restriction

¹¹ R.C. 3345.0211(B).

¹² R.C. 3345.0211(C).

¹³ See. R.C. 1.50, not in the bill.

¹⁴ R.C. 3345.0213(A)(1) and (2).

¹⁵ R.C. 3345.0211(A)(6).

¹⁶ R.C. 3345.021.

against the constitutional standard that applies in that forum.¹⁷ Where property has been historically devoted to assembly and debate, such as a park or sidewalk, it is a “traditional public forum.” Where property is not a “traditional public forum,” an entity may create a “limited public forum” and draw distinctions that relate to the special purpose for which the property is used. Finally, public property that has neither been used historically for purposes of expression nor intentionally opened by an entity for use by the public for expression is called a “nonpublic forum.” By its own terms, the bill applies only to “traditional public forums” and does not implicate expression in limited or nonpublic forums.

Under U.S. Supreme Court jurisprudence, a state entity, including a state institution of higher education, that establishes a content-based restriction on speech in a traditional public forum must prove that there exists a compelling government interest and that the restriction: (1) actually furthers that interest, (2) is limited to speech that implicates the interest, (3) covers all implicated speech, and (4) is the least restrictive alternative that will serve the interest equally well.¹⁸

A state entity that is unable to establish a valid content-based restriction may still impose reasonable time, place, or manner restrictions on expression, provided that those restrictions: (1) are content neutral, (2) are narrowly tailored to serve a significant government interest, and (3) leave open ample alternative channels for communication of that information.¹⁹

Speech subject to limited or diminished protection

Unprotected: “fighting words” and “true threats”

The U.S. Supreme Court has identified categories of speech that are unprotected and may be prohibited entirely. This category includes “true threats” and “fighting words,” both of which are addressed by the bill. The Supreme Court has held that “fighting words” and “true threats” by their very utterance inflict injury or tend to incite an immediate breach of the peace and may be punished consistent with the First Amendment.²⁰ Limits on this category of speech require the threat of an immediate breach of the peace. For example, the Supreme Court struck down an Ohio statute that criminalized advocating violent means to bring about social and economic change by finding that the statute failed to distinguish between advocacy and incitement to “imminent lawless action.”²¹

Limited protection: defamation

The Supreme Court has granted limited First Amendment protection to defamation, which is the intentional communication of a falsehood about a person, to someone other than that person that injures the person's reputation. For example, public officials and public figures

¹⁷ See, for example, *Widmar v. Vincent*, 545 U.S. 263 (1981).

¹⁸ See, for example *Meyer v. Grant*, 486 U.S. 414 (1988), *Simon & Schuster*, 502 U.S. 105 (1991), *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), and *Sable Communications*, 492 U.S. 115 (1989).

¹⁹ *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

²⁰ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) and *Virginia v. Black*, 538 U.S. 343 (2003).

²¹ *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (*per curiam*).

may not recover damages for defamation unless they prove the statement was made with actual malice.²² Further, a private figure who sues a media defendant for defamation related to a matter of public concern must show actual malice in order to recover presumed or punitive damages.²³

Limited protection: commercial speech

Commercial speech is “speech that *proposes* a commercial transaction” and is afforded lesser protection than other constitutionally guaranteed expression.²⁴ The test to determine whether regulation of commercial speech is constitutional asks (1) whether the speech at issue concerns a lawful activity and is not misleading and (2) whether the asserted governmental interest in restricting it is substantial. A restriction that meets both of these requirements must also directly advance the government interest and be not more extensive than necessary to serve that interest.²⁵

Limited protection: employee speech

The U.S. Supreme Court has held that, while the government has an interest in regulating speech of its employees and may do so to a greater degree than it may restrict the speech of private citizens, the First Amendment does protect “a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern” without fear of loss of government employment.²⁶ Thus, an employee who uses the employee's position as a platform for speech is likely not protected by the First Amendment, unless that speech does not interfere with workplace functions and is made in private.²⁷

Waivers of immunity

Under the 11th Amendment of the U.S. Constitution, the state and its instrumentalities, including state colleges and universities, are immune from retrospective relief in federal court. The state of Ohio has waived its immunity from liability and consents to be sued in the Court of Claims.²⁸ Separate provisions of Ohio law generally immunize political subdivisions, including community colleges and technical colleges, from liability for money damages in a civil action for injury, death, or loss to person or property in connection with a governmental or proprietary function.²⁹ One of several exceptions to that immunity includes civil claims based upon violations of the Constitution or statutes of the United States.³⁰

²² *New York Times v. Sullivan*, 376 U.S. 254 (1964).

²³ *Gerts v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

²⁴ See, for example, *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 482 (1989) (emphasis in original).

²⁵ *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980).

²⁶ *Pickering v. Board of Education*, 391 U.S. 563 (1968).

²⁷ See, for example, *Rankin v. McPherson*, 483 U.S. 378 (1987).

²⁸ R.C. Chapter 2743., not in the bill.

²⁹ R.C. Chapter 2744., not in the bill.

³⁰ R.C. 2744.09, not in the bill.

Under these provisions, an individual alleging a campus free speech violation may request the following:

1. Injunctive relief against a university officer or employee (but not the university itself) in federal court;
2. Injunctive or monetary relief against state officials in their individual capacities in federal court;
3. Civil relief against the state and its instrumentalities (but not political subdivisions) in the Ohio Court of Claims. The assertion of such right waives any other cause of action based on the same violation;
4. Civil relief against a political subdivision in state or federal court.

History

| Action | Date |
|------------|----------|
| Introduced | 02-12-19 |
