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Primary Sponsor: Sens. Brenner and McColley

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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 adopt a policy on harassment consistent with the bill's provisions.
- 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.

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.
- Prohibits a state institution of higher education from charging security fees to a student or student group based on the content of expression or the anticipated reaction to that content.

Title

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

DETAILED ANALYSIS

I. Regulation of expression on college campuses

In accordance with the 1st and 14th 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 (generally referred to as "state institutions of higher education" in Ohio law).[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 a 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, or speeches, distribution of literature, carrying and displaying signs, and circulating petitions.

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. (See

[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).

"**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.[3]

Policy making and reporting requirements

Policy on harassment

The bill requires each state institution of higher education to adopt a policy on harassment that is consistent and strictly adheres to the bill's definition, which specifies that harassment is unwelcome conduct that is so severe, pervasive, and objectively offensive that it effectively denies an individual equal access to the individual's education program or activity.[4]

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

[3] R.C. 3345.0213(A)(3).

[4] R.C. 3345.0211(A) and 3345.0212(C).

[5] R.C. 3345.0212(C).

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.

The bill requires each institution to publish the 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, the institution must submit an additional supplementary report containing the information outlined above and a copy of the complaint, within 30 days after commencement of that action.[6]

Other provisions

The bill expressly states that its free speech provisions "supersede" any rule, policy, action, communication, or requirement of any institution of higher. Accordingly, it specifies no rule, policy, action, communication, or requirement may contradict or diminish the effect of those provisions and requirements.[7]

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.[8] 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.[9]

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

[6] R.C. 3345.0214.

[7] R.C. 3345.0211(B).

[8] R.C. 3345.0213(A)(1) and (2).

[9] R.C. 3345.0211(A)(6).

3. Persons whose presence is not conducive to high ethical and moral standards or the primary educational purposes and orderly conduct of the institution.[10]

Collection of security fees

The bill prohibits a state institution of higher education from charging security fees to a student or student group based on the content of expression, the content of expression of an invited guest, or the anticipated reaction to an invited guest's expression.[11]

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 against the constitutional standard that applies in that forum.[12] Property that historically has been devoted to assembly and debate, such as a park or sidewalk, is a "traditional public forum." Where property is not a "traditional public forum," an entity may create a "limited public forum" and may draw distinctions that relate to the special purpose for which the property is used. Finally, public property that has been neither used historically for purposes of expression nor intentionally opened for use by the public for expression is called a "nonpublic forum." By its own terms, the bill applies only to "traditional public forums," designating outdoor areas of state institutions of higher education as such, 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) 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.[13]

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

[10] R.C. 3345.021.

[11] R.C. 3345.0212(B).

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

[13] 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).

interest, and (3) leave open ample alternative channels for communication of that information.[14]

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". 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.[15] 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."[16]

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 may not recover damages for defamation unless they prove the statement was made with actual malice.[17] 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.[18]

Limited protection: commercial speech

Commercial speech is "speech that proposes a commercial transaction" and is afforded lesser protection than other constitutionally guaranteed expression.[19] 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

[14] *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

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

[16] *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (*per curiam*).

[17] *New York Times v. Sullivan*, 376 U.S. 254 (1964).

[18] *Gerts v. Robert Wlch, Inc.,* 418 U.S. 323 (1974).

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

also directly advance the government interest and be not more extensive than necessary to serve that interest.[20]

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.[21] 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.[22]

HISTORY

Action	Date
Introduced	02-12-19
Reported, S. Education	01-28-20
Passed Senate (33-0)	01-28-20

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

[21] *Pickering v. Board of Education*, 391 U.S. 563 (1968).

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