



# OHIO LEGISLATIVE SERVICE COMMISSION

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## Bill Analysis

Holly Cantrell Gilman

### **H.B. 363**

132nd General Assembly  
(As Introduced)

**Reps.** Goodman and Brenner, McColley, Wiggam, Perales, Merrin, Brinkman, Riedel, Keller, Schaffer, Thompson, Dever, Stein, Retherford, Zeltwanger, Sprague, Young, Dean, Butler, Koehler, Roegner, Henne, Scherer, Johnson, Pelanda, Hood, Becker, Kick, Romanchuk, Gavarone, Antani, Green, Lang

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## **BILL SUMMARY**

### **I. Regulation of expression**

- 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.
- Prohibits a state institution or its administrators from taking any official action that limits or chills expression on the basis of the expression's content.
- Prohibits a state institution or any of its administrators from prohibiting or restricting the speech of an invited guest on the basis of reaction, opposition, offense, or irritation taken to the content of the expression.
- Permits a state institution to establish sexual harassment policies, restrict expression that is subject to limited or diminished protection, and maintain and enforce reasonable time, place, and manner restrictions.
- Requires each state institution to develop, adopt, publish, and disseminate a policy regarding free expression that complies with the bill's provisions.
- 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.

- 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.

## II. Regulation of use of campus facilities

- Removes two provisions of current law regarding a state university or college Board of Trustees' specific authority to prohibit certain people from using its facilities but retains the Board's general authority regarding all matters relative to the administration of that college or university.

## III. Collection of student activity fees

- Prohibits a state institution of higher education from collecting mandatory student activity fees and requires that any voluntary student activity fees must be distributed in a manner that is viewpoint neutral.
- Specifies that all meetings regarding the allocation of student activity fees are public meetings and requires each state institution to provide an appeals process when it denies or reduces a student group's funding request.

## IV. Title

- Entitles the bill the "Campus Free Speech Act."

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## CONTENT AND OPERATION

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).<sup>1</sup> 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, entitled the "Campus Free Speech Act," 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. In summation, the bill: (1) prohibits a state institution from limiting or restricting expression of students, student groups, faculty, staff, employees, and invited guests of the institution made in public areas of campus, unless an exception applies, (2) makes minor changes to the administrative authority of an institution's board of trustees regarding use of facilities, and (3) prohibits mandatory student activity fees.

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<sup>1</sup> See e.g., *Sweezy v. New Hampshire*, 345 U.S. 250 (1957) and *Healy v. James* 408 U.S. 180 (1972).



## I. Regulation of expression

### Restrictions or limitations on expression prohibited

Subject to certain exclusions and exceptions described below, the bill prohibits a state institution of higher education 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 free expression in generally accessible areas.<sup>2</sup> For purposes of this prohibition:

(1) "Campus community" includes students, officially recognized student groups, student groups seeking official recognition in compliance with established policies of the state institution, staff, employees, and any invited guests of these individuals;<sup>3</sup>

(2) "Expression" includes, but is not limited to, any lawful verbal or written communication of ideas, including all forms of peaceful assembly, protests, speeches, distribution of literature, carrying and displaying signs, and circulating petitions;<sup>4</sup> and

(3) "Generally accessible area" means an area of campus where members of the campus community are commonly allowed, but does not include areas where access is restricted to a majority of the campus community. The bill specifies that all generally accessible areas are "traditional public forums" for expression by members of the campus community.<sup>5</sup> As such, under the U.S. Supreme Court's jurisprudence, speech there may not be restricted unless narrowly tailored to serve a compelling government interest. (See "**Free speech jurisprudence**" under "**V. Background**" below.)

#### Content-based official action

The bill further prohibits a state institution or any of its administrators from taking any official action that limits or chills expression on the basis of the content of that expression. While this prohibition is one of general application, it expressly applies to content-based disciplinary action, issued warnings, any communication that directly or indirectly targets a member of the campus community, or dissemination of information to the entire student population.<sup>6</sup>

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<sup>2</sup> R.C. 3345.023(C).

<sup>3</sup> R.C. 3345.023(A)(1)(b).

<sup>4</sup> R.C. 3345.023(A)(1)(c).

<sup>5</sup> R.C. 3345.023(A)(1)(d).

<sup>6</sup> R.C. 3345.023(D).



## **Limitations based on offense or irritation to content of invitee's speech**

The bill specifies that offense or irritation taken to the content of expression is not, under any circumstances, an actionable harm. It expressly prohibits a state institution or any of its administrators from doing any of the following on the basis of reaction, opposition, offense, or irritation taken to the content of expression of an invited guest of a member of the campus community: (1) revoking the invitation of the invitee, (2) placing a restriction on the expression of the invitee, or (3) establishing a barrier to the expression of the invitee, including but not limited to imposing an unreasonably high registration or security fee as compared to other registration and security fees.<sup>7</sup>

## **Exclusions, exceptions, and permissible restrictions**

### **Exclusions: nonmembers and nongenerally accessible areas**

The prohibitions described above expressly do not apply to the lawful limitation or restriction of (1) the free expression rights of nonmembers of the campus community or (2) the free expression rights of members or nonmembers in areas that are *not* generally accessible.<sup>8</sup>

On the other hand, the bill also states that its provisions do not apply to, limit, or abrogate any rights to free expression (constitutional or statutory) to which nonmembers of the campus community are entitled or any rights to expression by members or nonmembers in areas that are not generally accessible.<sup>9</sup>

### **Exceptions: violations of law and sexual harassment**

The bill specifies that nothing contained within its free speech provisions prevents or limits a state institution from establishing sexual harassment policies that are consistent with the U.S. Constitution, the Ohio Constitution, or both.<sup>10</sup> Nor does it prevent or limit a state institution from lawfully prohibiting, limiting, or restricting expression by members and nonmembers of the campus community that is a violation of state or federal law.<sup>11</sup>

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<sup>7</sup> R.C. 3345.023(E).

<sup>8</sup> R.C. 3345.024(A)(1) and (2).

<sup>9</sup> R.C. 3345.024(B).

<sup>10</sup> R.C. 3345.024(A)(3).

<sup>11</sup> R.C. 3345.024(A)(4).



## **Exceptions: expression subject to limited or diminished protection**

Under the bill, a state institution may lawfully prohibit, limit, or restrict expression by members and nonmembers of the campus community that is subject to limited or diminished protection under the U.S. Constitution, the Ohio Constitution, or both, if the expression has been given a specific classification by the United States Supreme Court, the Ohio Supreme Court, or both. Those classifications include:

- (1) Unprotected defamation;
- (2) Severe and pervasive illegal harassment;
- (3) Expression of a serious intent to commit an act of unlawful violence against a particular individual or group that constitutes a true threat;
- (4) Unjustifiable invasion of privacy or confidentiality not involving a matter of public concern;
- (5) Commercial speech;
- (6) Employee speech that is either in violation of the code of employee conduct or otherwise subject to the contractual authority of the institution or its employees; and
- (7) All other expression that is subject to diminished protection under the U.S. Constitution, the Ohio Constitution, or both.<sup>12</sup>

An institution that prohibits, limits, or restricts any of these classified forms of expression must do so in a way that allows the maximum extent of protection under the U.S. Constitution, the Ohio Constitution, or both. The bill specifies that any resulting ambiguity regarding these classified forms of expression must be resolved in favor of the speaker.<sup>13</sup> (See "**Speech subject to limited or diminished protection**," under "**V. Background**" below.)

## **Permissible restrictions: time, place, and manner**

Under the bill, a state institution may maintain and enforce reasonable time, place, and manner restrictions, provided that each restriction:

- (1) Is narrowly tailored to serve a compelling interest;
- (2) Is the least restrictive means available;

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<sup>12</sup> R.C. 3345.024(A)(5)(a).

<sup>13</sup> R.C. 3345.024(A)(5)(b).



(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 for expressive purposes.<sup>14</sup>

The bill expressly prohibits time, place, or manner restrictions that are: (1) vague or ambiguous, (2) have the purpose or effect of segregating the expression from any particular audience or person, (3) unnecessarily limit the space for expression within generally accessible areas, or (4) based on reaction or opposition to the content of expression by any person.<sup>15</sup>

## **Policy making and reporting requirements**

### **Policy on free expression**

Within 90 days after the bill's effective date, each state institution must develop and adopt a policy regarding free expression that complies with the bill's provisions. That policy must contain the following statement:

Under the Ohio Revised Code, it is not the proper role of a state institution of higher education to shield individuals from expression protected by the United States and Ohio Constitutions, including, without limitation, ideas and opinions that the institution finds unwelcome, disagreeable, or even deeply offensive.

Each institution must publish the policy in any handbooks, websites, regulations, and written expectations of student conduct, and provide it to each student during student orientation. The bill also requires each institution to develop materials, programs, and procedures to ensure that its administrators, campus police, residence life officials, professors, and any other employees or agents who are responsible for the discipline or education of students understand the policies, regulations, and duties regarding free expression on campus.<sup>16</sup>

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<sup>14</sup> R.C. 3345.024(C)(1).

<sup>15</sup> R.C. 3345.024(C)(2).

<sup>16</sup> R.C. 3345.025(A) and (B).

## Report on policy implementation

Within 180 days after the bill's effective date, and to the extent it complies with federal privacy laws, each state institution must publish on its website and submit to the Governor and the General Assembly 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.

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 supplementary report containing the information outlined above and a copy of the complaint, within 30 days after commencement of that action.<sup>17</sup>

## 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.<sup>18</sup>

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 "**V. Background**" below).

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<sup>17</sup> R.C. 3345.025(C).

<sup>18</sup> R.C. 3345.026(A).



## **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 other individual 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.<sup>19</sup> The bill expressly provides that this right 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.<sup>20</sup>

## **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.<sup>21</sup>

## **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 agency. Accordingly, it specifies no rule, policy, action, communication, or requirement may contradict or diminish the effect of those provisions and requirements.<sup>22</sup>

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."<sup>23</sup> The general

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<sup>19</sup> R.C. 3345.026(B).

<sup>20</sup> R.C. 3345.026(B) through (D).

<sup>21</sup> R.C. 3345.026(E).

<sup>22</sup> R.C. 3345.023(A)(2).

<sup>23</sup> R.C. 3345.023(A)(3).



provisions of the Revised Code already require severing an invalid provision from a related provision that can be given effect.<sup>24</sup>

## **II. Regulation of use of campus facilities**

### **Adopting and enforcing rules**

Under continuing law, the board of trustees of each "state college or university" must regulate the use of grounds, buildings, equipment, and facilities of its college or university and the conduct of its students, staff, faculty, and visitors of the campus in a manner that: (1) maintains law and order, and (2) allows the college or university to pursue its educational objectives and programs. To that end, each board of trustees must adopt rules for conduct and provide for the administration and enforcement of its rules.<sup>25</sup> Continuing law states that those rules must not restrict freedom of speech or the right of persons on the campus to assembly peacefully.

The bill specifies that the rules also must comply with the bill's provisions.

### **Prohibiting use of facilities by certain persons**

The bill removes a provision of law that *specifically permits* a board of trustees, pursuant to its "full power and authority" on all administrative matters, 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 government and its free 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.

The bill also removes a provision specifying that a board of trustees' ability to delegate its authority specifically includes the delegation of the enforcement of rules or regulations regarding the use of facilities for speaking purposes.

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<sup>24</sup> See. R.C. 1.50, not in the bill.

<sup>25</sup> R.C. 3345.21.

The bill retains the "full power and authority" of a board of trustees regarding *all matters relative to the administration* of a college or university and its authority to delegate *any of those matters* to the president or other administrative personnel.<sup>26</sup>

### **III. Collection of student activity fees**

#### **Mandatory fees prohibited**

The bill prohibits a state institution of higher education from collecting any student activity fee unless the following conditions are satisfied: (1) the student is notified that the fee is voluntary, (2) the student agrees to pay the fee, and (3) the state institution itemizes the fee. The bill also prohibits an institution from requiring payment of a student activity fee as a condition to graduate or earn a degree.<sup>27</sup> For these purposes, a "student activity fee" means any fee charged to students by a state institution, the proceeds of which are used to support and facilitate the expression and activities of students or student groups. Fees charged for the support of either the following are not student activity fees: (1) common buildings and rooms, student centers, theaters, pools, and other facilities of common use to all students, and (2) meetings and official responsibilities of the student government.<sup>28</sup>

#### **Standards for distribution and allocation of fees**

A state institution that collects student activity fees in accordance with the bill's requirements must distribute those fees to student groups in a manner that is neutral to each student group's viewpoint. In doing so, each institution must publish clear, objective, nonideological, and nonpartisan standards for the allocation of student activity fees.<sup>29</sup> The bill also requires an institution to disqualify from decision-making authority, regarding the allocation of student activity fees, any individual who has previously violated those standards.<sup>30</sup>

#### **Meetings regarding allocation of fees**

The bill specifies that, to the extent permissible under the Open Meetings Law, all meetings regarding the allocation of student activity fees must be open to the public.

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<sup>26</sup> R.C. 3345.021.

<sup>27</sup> R.C. 3345.02(C)(1) and (2).

<sup>28</sup> R.C. 3345.02(A)(3).

<sup>29</sup> R.C. 3345.021(C)(3)(a).

<sup>30</sup> R.C. 3345.021(C)(3)(c).

In addition, it requires an institution to provide public notice at least 24 hours in advance of the meetings.<sup>31</sup>

## **Denial or reduction of requests for funding**

When a request for funding from a student group has been denied or reduced in amount, the state institution must:

- (1) Identify in writing the specific reason for the denial or reduction; and
- (2) Provide for an appeals process.<sup>32</sup>

Under continuing law, each state institution of higher education is already required to include in each student's statement of estimated or actual charges an itemized list of the instructional fees, general fees, special purpose fees, service charges, fines, *and any other fees* or surcharges applicable to that student.<sup>33</sup>

## **IV. Title**

The bill is entitled the "Campus Free Speech Act."<sup>34</sup>

## **V. 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.<sup>35</sup> 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

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<sup>31</sup> R.C. 3345.021(C)(3)(b).

<sup>32</sup> R.C. 3345.02(C)(3)(d) and (e).

<sup>33</sup> R.C. 3345.02(B).

<sup>34</sup> Section 3.

<sup>35</sup> See, for example, *Widmar v. Vincent*, 545 U.S. 263 (1981).

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.<sup>36</sup>

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.<sup>37</sup>

### **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.<sup>38</sup> 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."<sup>39</sup>

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<sup>36</sup> 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).

<sup>37</sup> *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

<sup>38</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) and *Virginia v. Black*, 538 U.S. 343 (2003).

<sup>39</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (*per curiam*).



### **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.<sup>40</sup> 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.<sup>41</sup>

### **Limited protection: commercial speech**

Commercial speech is "speech that *proposes* a commercial transaction" and is afforded lesser protection than other constitutionally guaranteed expression.<sup>42</sup> 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.<sup>43</sup>

### **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.<sup>44</sup> 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.<sup>45</sup>

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<sup>40</sup> *New York Times v. Sullivan*, 376 U.S. 254 (1964).

<sup>41</sup> *Gerts v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

<sup>42</sup> See, for example, *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 482 (1989) (emphasis in original).

<sup>43</sup> *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980).

<sup>44</sup> *Pickering v. Board of Education*, 391 U.S. 563 (1968).

<sup>45</sup> See, for example, *Rankin v. McPherson*, 483 U.S. 378 (1987).

## 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.<sup>46</sup> 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.<sup>47</sup> One of several exceptions to that immunity includes civil claims based upon violations of the Constitution or statutes of the United States.<sup>48</sup>

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.

The bill adds to that list civil relief by a member of the campus community against the state, a state institution of higher education (including state universities, community colleges, and technical colleges), or any other individual for injunctive relief, compensatory damages, reasonable attorney's fees, and court costs.

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## HISTORY

### ACTION

### DATE

Introduced

09-26-17

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<sup>46</sup> R.C. Chapter 2743., not in the bill.

<sup>47</sup> R.C. Chapter 2744., not in the bill.

<sup>48</sup> R.C. 2744.09, not in the bill.

