

## 1 HOUSE BILL NO. 735

2 INTRODUCED BY M. HOPKINS

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4 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING LAWS RELATED TO EXPRESSION ON  
5 THE CAMPUSES OF PUBLIC POSTSECONDARY INSTITUTIONS; PROVIDING PROTECTIONS FOR FREE  
6 EXPRESSION AND EXPRESSIVE ACTIVITY ON PUBLIC POSTSECONDARY INSTITUTION CAMPUSES;  
7 PROHIBITING DISCRIMINATION AGAINST RELIGIOUS, POLITICAL, OR IDEOLOGICAL STUDENT  
8 ORGANIZATIONS; REQUIRING PUBLIC POSTSECONDARY INSTITUTIONS TO ADOPT POLICIES AND  
9 PROVIDE STAFF TRAINING; REQUIRING REPORTING TO THE GOVERNOR AND THE LEGISLATURE;  
10 PROVIDING PENALTIES FOR VIOLATIONS; PROVIDING DEFINITIONS; AND PROVIDING AN IMMEDIATE  
11 EFFECTIVE DATE."  
12

13 WHEREAS, the First Amendment of the United States Constitution and Article II, sections 5 through 7,  
14 of the Montana Constitution protect the rights of freedom of speech, freedom of the press, freedom of religion,  
15 freedom of association, and to petition the government for all citizens; and

16 WHEREAS, the United States Supreme Court has called public universities "peculiarly the 'marketplace  
17 of ideas,'" where young adults learn to exercise these constitutional rights necessary to participate in our system  
18 of government and to tolerate others' exercise of the same rights, and therefore there is "no room for the view  
19 that ... First Amendment protections should apply with less force on college campuses than in the community at  
20 large", *Healy v. James*, 408 U.S. 169, 180 (1972); and

21 WHEREAS, the Montana legislature views the exercise of First Amendment rights on public  
22 postsecondary institutions' campuses in Montana as a critical component of the education experience for students  
23 and requires that each public postsecondary institution in Montana ensures free, robust, and uninhibited debate  
24 and deliberations by students whether on or off campus; and

25 WHEREAS, the Montana legislature finds that public postsecondary institutions in Montana and  
26 elsewhere are failing to provide adequate safeguards for the First Amendment rights of their students, leading  
27 to a stifling of expression on campus; and

28 WHEREAS, the United States Supreme Court has warned that if public universities stifle student speech  
29 and prevent the open exchange of ideas on campus, "our civilization will stagnate and die", *Sweezy v. New  
30 Hampshire*, 354 U.S. 234, 250 (1957); and

1 WHEREAS, the Montana legislature has determined that a significant amount of taxpayer dollars is  
2 appropriated to public postsecondary institutions each year and therefore the Montana legislature must ensure  
3 that all postsecondary institutions receiving state funds recognize freedom of speech as a fundamental right for  
4 all.

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6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

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8 NEW SECTION. **Section 1. Definitions.** As used in [sections 1 through 10], the following definitions  
9 apply:

10 (1) "Benefit" means gain or advantage, including but not limited to:  
11 (a) recognition;  
12 (b) registration;  
13 (c) use of facilities of the public postsecondary institution for meetings or speaking purposes;  
14 (d) use of channels of communication; and  
15 (e) funding sources that are otherwise available to student organizations at the public postsecondary  
16 institution.

17 (2) "Campus community" means the students, administrators, faculty, staff, and invited guests at a public  
18 postsecondary institution.

19 (3) "Harassment" means only that expressive activity that is unwelcome and is so severe, pervasive, and  
20 subjectively and objectively offensive that a student is effectively denied equal access to educational opportunities  
21 or benefits provided by a public postsecondary institution.

22 (4) (a) "Materially and substantially disrupt" means conduct by a person who acts purposely or knowingly  
23 to:

24 (i) significantly hinder the expressive activity of another person or group;  
25 (ii) prevent the communication of an expressive activity; or  
26 (iii) prevent the transaction of business at a lawful meeting, gathering, or procession by:  
27 (A) engaging in fighting or other violent or unlawful behavior; or  
28 (B) physically blocking or using threats of violence to prevent another person from attending, listening  
29 to, viewing, or otherwise participating in an expressive activity.

30 (b) The term does not include conduct that is protected under the first amendment of the United States

1 constitution or under Article II, section 7, of the Montana constitution, including but not limited to:

2 (i) lawful protests in outdoor areas of campus, except during times an outdoor area of campus has been  
3 reserved in advance for another event; or

4 (ii) minor, brief, or fleeting nonviolent disruption of an event that is isolated or short in duration.

5 (5) (a) "Outdoor area of campus" means a generally accessible outside area of campus where members  
6 of the campus community are commonly allowed, including grassy areas, walkways, or similar common areas.

7 (b) The term does not include an outside area where access is restricted from a majority of the campus  
8 community.

9 (6) "Public postsecondary institution" means:

10 (a) a unit of the Montana university system as defined in 20-25-201; or

11 (b) a Montana community college, defined and organized as provided in 20-15-101.

12 (7) "Student" means a person who is enrolled full-time or part-time at a public postsecondary institution.

13 (8) "Student organization" means an officially recognized group or a group seeking official recognition  
14 at a public postsecondary institution that is comprised of students who receive or are seeking to receive a benefit  
15 through the public postsecondary institution.

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17 **NEW SECTION. Section 2. Protected expressive activities.** Expressive activity protected under the  
18 provisions of [sections 1 through 10] includes but is not limited to any lawful oral, written, audio-visual, or  
19 electronic means by which individuals may communicate ideas to one another, including all forms of peaceful  
20 assembly, protests, speeches, guest speakers, distribution of printed materials, carrying signs, and circulating  
21 petitions.

22

23 **NEW SECTION. Section 3. Public campus as public forum -- free speech zone prohibited.** (1) An  
24 outdoor area of campus of a public postsecondary institution is a public forum for the campus community. A public  
25 postsecondary institution may not create a free speech zone or other designated outdoor area of campus outside  
26 of which expressive activity is prohibited.

27 (2) A public postsecondary institution may maintain and enforce reasonable restrictions on the time,  
28 place, or manner of expressive activity. The restrictions must be narrowly tailored to serve a significant  
29 institutional interest. The restrictions must employ clear, published, content-neutral, and viewpoint-neutral criteria  
30 while providing for ample alternative means of expressions. The restrictions must allow members of the campus

1 community to spontaneously and contemporaneously assemble and distribute printed materials.

2 (3) This section may not be construed to limit the right of student expressive activity elsewhere on the  
3 public postsecondary institution's campus.

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5 **NEW SECTION. Section 4. Noncommercial expressive activities -- certain prohibitions allowable.**

6 (1) A public postsecondary institution shall permit a person to engage freely in noncommercial expressive activity  
7 on campus, subject to the provisions of [section 3], as long as the person's expressive activity:

- 8 (a) is not unlawful; or
- 9 (b) does not materially and substantially disrupt the functioning of the public postsecondary institution.

10 (2) A public postsecondary institution may impose restrictions pursuant to [section 3] on noncommercial  
11 expressive activity. Any restrictions imposed must allow for members of the campus community to spontaneously  
12 and contemporaneously assemble, speak, and distribute printed materials.

13 (3) This section may not be construed to prevent a public postsecondary institution from prohibiting  
14 harassment or from prohibiting, limiting, or restricting expressive activity that is not protected by the first  
15 amendment of the United States constitution or Article II, section 7, of the Montana constitution.

16 (4) This section may not be construed to permit a person to engage in conduct that materially and  
17 substantially disrupts another person's expressive activity if:

- 18 (a) the expressive activity is occurring in a campus space;
- 19 (b) the campus space was reserved for the expressive activity; and
- 20 (c) the campus space is under the exclusive use or control of a particular person or group.

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22 **NEW SECTION. Section 5. Discrimination against student organizations prohibited.** A public

23 postsecondary institution may not deny a religious, political, or ideological student organization a benefit or  
24 privilege available to other student organizations or otherwise discriminate against a student organization based  
25 on the student organization's expressive activity, including any requirement that a leader or member:

- 26 (1) affirm and adhere to the student organization's sincerely held beliefs;
- 27 (2) comply with the student organization's standards of conduct; or
- 28 (3) further the student organization's mission or purpose, as defined by the student organization.

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30 **NEW SECTION. Section 6. Policies protecting free expression required -- staff training.** (1) A

1 public postsecondary institution shall adopt policies to implement the provisions of [sections 1 through 10]. The  
2 policies must address students' expectations and provide appropriate regulations regarding free expression and  
3 expressive activities on campus consistent with [sections 1 through 10].

4 (2) A public postsecondary institution shall develop materials, programs, and procedures to ensure that  
5 any person who has responsibility for the discipline or education of students, including administrators, campus  
6 security officers, residence life officials, and professors, understands the policies, regulations, and duties of the  
7 public postsecondary institution regarding free expression and expressive activities on campus consistent with  
8 [sections 1 through 10].

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10 **NEW SECTION. Section 7. Public accountability.** (1) A public postsecondary institution shall prepare  
11 a report to identify the course of action to be taken by the public postsecondary institution to implement the  
12 requirements of [sections 1 through 10]. The report must be revised and republished whenever the public  
13 postsecondary institution makes any changes or updates to the policies and procedures related to free expression  
14 and expressive activity on campus.

15 (2) The report must be posted to the public postsecondary institution's website. The report must be:

16 (a) accessible within three links from the institution's website homepage;

17 (b) searchable by keywords and phrases; and

18 (c) accessible to the public without having to register or use a username, password, or other user  
19 identification.

20 (3) The contents of the report must include:

21 (a) a description of any barriers to or incidents of disruption of expressive activity on campus, including  
22 but not limited to any attempt to block or prohibit a speaker;

23 (b) the nature of the barrier or disruption;

24 (c) information about any disciplinary action taken against any member of the campus community who  
25 was responsible for a specific barrier or disruption, without disclosing personally identifiable information of any  
26 student found to be responsible; and

27 (d) any other information the public postsecondary institution considers valuable for the public to evaluate  
28 whether the free expression rights of all members of the campus community have been protected equally and  
29 enforced consistently with the provisions of [sections 1 through 10].

30 (4) (a) The public postsecondary institution shall submit the report biennially to the governor and to the

1 legislature at least 30 days prior to the start of each regular legislative session.

2 (b) If the public postsecondary institution is sued for an alleged violation of the complainant's first  
3 amendment rights, the public postsecondary institution shall prepare and submit a supplementary report along  
4 with a copy of the complaint and any amended complaint to the governor and the legislature within 30 days of  
5 receiving the complaint or amended complaint.

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7 **NEW SECTION. Section 8. Remedies.** (1) A person or student organization who is aggrieved by a  
8 violation of [sections 1 through 10] may bring an action against a public postsecondary institution and any  
9 employees acting in their official capacities who were responsible for the violation and may seek appropriate  
10 relief, including but not limited to injunctive relief, monetary damages, reasonable attorney fees, and court costs.

11 (2) If a court finds that a public postsecondary institution has violated [sections 1 through 10], the court  
12 shall award damages of at least \$5,000 to the aggrieved person or student organization.

13 (3) A person or student organization may assert a violation of [sections 1 through 10] as a defense or  
14 counterclaim in any disciplinary action or civil or administrative proceeding brought against the person or student  
15 organization.

16 (4) This section may not be construed to limit any other remedy available to any person or student  
17 organization.

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19 **NEW SECTION. Section 9. Statute of limitations.** An action brought for a violation of [sections 1  
20 through 10] must be commenced within 1 year after the day the cause of action accrues. For purposes of this  
21 section, each day that a violation of [sections 1 through 10] persists or a policy that violates [sections 1 through  
22 10] is in effect constitutes a continuing violation and the statute of limitations is tolled until the violation ceases.

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24 **NEW SECTION. Section 10. Waiver of immunity.** (1) The state waives immunity under the 11th  
25 amendment of the United States constitution and consents to suit in a federal court for an action arising out of  
26 [sections 1 through 10].

27 (2) A public postsecondary institution has no immunity from suit arising out of a violation of [sections 1  
28 through 10].

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30 **NEW SECTION. Section 11. Codification instruction.** [Sections 1 through 10] are intended to be

1 codified as an integral part of Title 20, chapter 25, and the provisions of Title 20, chapter 25, apply to [sections  
2 1 through 10].

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4 NEW SECTION. **Section 12. Severability.** If a part of [this act] is invalid, all valid parts that are  
5 severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications,  
6 the part remains in effect in all valid applications that are severable from the invalid applications.

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8 NEW SECTION. **Section 13. Effective date.** [This act] is effective on passage and approval.

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