

LEGAL REVIEW NOTE

Bill No: SB284

LC#: LC0686, To Legal Review Copy, as of February 13, 2019

Short Title: Revise required disclosures on election material about candidate's voting record

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Date: February 13, 2019

CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

*This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review IS NOT dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See *Alexander v. Bozeman Motors, Inc.*, 356 Mont. 439, 234 P.3d 880 (2010); *Eklund v. Wheatland County*, 351 Mont. 370, 212 P.3d 297 (2009); *St. v. Pyette*, 337 Mont. 265, 159 P.3d 232 (2007); and *Elliott v. Dept. of Revenue*, 334 Mont. 195, 146 P.3d 741 (2006).*

Legal Reviewer Comments:

LC0686, as drafted, may raise potential constitutional concerns associated with the First Amendment to the U.S. Constitution as incorporated against the states by the Fourteenth Amendment. The First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

LC0686 revises section 13-35-225(3), MCA. This subsection concerns vote-reporting requirements for printed election material, and several versions of this subsection have been challenged and found constitutionally lacking. Each time the section has been challenged, the Court has struck down the implementation of this section.

An earlier version of this subsection required printed election material that discussed a candidate's voting record to include on the face of the material (or, if the face of the material was too small to fit the required disclosures, the information had to be sent to the Commissioner of Political Practices) a reference to the particular vote on which the information was based, a disclosure of contrasting votes known to have been made by the candidate "on the same issue if closely related in time", and a signed statement that the statements about the other candidate's voting record were true and accurate. Section 13-35-225(3), MCA (2003).

In *Lair v. Murry*, plaintiffs alleged the section was unconstitutionally vague, overbroad, and failed strict scrutiny. 817 F. Supp. 2d 1058 (D. Mont. 2012). The Court agreed, finding the phrases "closely related in time" and the "same issue" to be unconstitutionally vague. *Id.*

Following this case, the Legislature revised the vote-reporting statute by substituting "the same issue if the contrasting votes were made in any of the previous 6 years" for "the same issue if closely related in time". Section 13-35-225(3), MCA (2013). This did not address the Court's determination of unconstitutional vagueness concerning the term "the same issue", and after plaintiffs brought another suit challenging the section, the District Court again permanently enjoined the statute. *Montforton v. Motl*, 2014 U.S. Dist. LEXIS 190170 (D. Mont. 2014).

In a third amendment, the Legislature substituted "all votes made by the candidate on the same legislative bill or enactment" for "contrasting votes known to have been made by the candidate on the same issue if the contrasting votes were made in any of the previous 6 years". Section 13-35-225(3), MCA (2015).

Plaintiffs again challenged the vote-reporting statute under the First Amendment in *Natl. Assn. for Gun Rights v. Motl*, 188 F. Supp. 3d 1020 (D. Mont. 2016). In granting a preliminary injunction, the federal District Court determined that this subsection prescribed speech based on the topic discussed or the idea or message expressed. *Id.* at 1034-1035. Being a content-based restriction, it was "presumptively invalid". *Id.* (citation omitted). The Court noted that content-based restrictions are subject to strict scrutiny, stating that a "law survives strict scrutiny only if it is narrowly tailored to a compelling state interest." *Id.* (citations omitted). The District Court rejected the state's argument that because the disclosures provided information to the voters, they were subject to the lesser standard of "exacting scrutiny." *Id.* at 1034.

Although the Court noted that providing accurate information to voters was "an important interest" and it "[might] well be compelling", the Court found that the "means employed by this statute are not narrowly tailored to achieve this goal." *Id.* at 1035. The Court went on to say:

This finding is anchored primarily in the Court's concerns about the accessibility of this information to the voter. . . . Ironically, speakers would have to mail this

information to the COPP's office in Helena, Montana, even though it was unclear how the voter would actually access this information. For a system with a stated purpose of providing information to the voter, the Court finds that it does not do it well. This is in addition to the fact that access to this information already exists through a publicly supported website. The Montana Legislature, *Bills*, <http://leg.mt.gov/css/Default.asp> (accessed May 19, 2016), see also *United States v. Alvarez*, 132 S. Ct. 2537, 2551, 183 L. Ed. 2d 574 (2012) (finding that a statute regulating speech was not necessary when an internet database provided an alternative means to regulation).

Id. The Court further noted that, “the focus of this statute is to provide information to the voters. However, this information is not secret and is publicly available to the electorate.” *Id.* at 1036. The Court then granted a preliminary injunction enjoining the enforcement of 13-35-225(3). *Id.*

The next year, finding that it violated the First Amendment, the Court granted a permanent injunction after the defendants declined to defend the challenge. *Natl. Assn. for Gun Rights v. Motl*, 279 F. Supp. 3d 1100 (D. Mont. 2017).

As drafted, LC0686 requires certain disclosures, including publicly available information, to be placed on the face of political advertisements under a content-based restriction. Like previous versions of the vote-reporting statute, this draft requires certain information to be disclosed on the face of the election material based on the content of the that election material or, if the printed election material is too small for the requirements, the information must be sent to the Commissioner of Political Practices to be put on file. Similar to the previous versions, the disclosure concerns a candidate's voting record which is publicly available through the Montana Legislature's website. As discussed by the District Court in *Natl. Assn. for Gun Rights v. Motl*, 279 F. Supp. 3d 1100, and under the *Alvarez* standard as cited by the District Court (above), this draft may raise potential questions about whether it conforms with the First Amendment of the U.S. Constitution.

Requester Comments: