

LEGAL REVIEW NOTE

Bill No.: HB518

LC#: LC 4027 To Legal Review Copy, as of
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Short Title: Authorize standing for legislature to
bring lawsuit

Attorney Reviewer: Todd Everts
Julie Johnson

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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:

HB 518, as drafted, enacts a statute that establishes that Legislature has standing to sue or defend a lawsuit on its own behalf. HB 518 also provides a precise process for determining when the Legislature may sue or defend a lawsuit.

Section 1 of HB 518 provides as follows:

NEW SECTION. Section 1. Legislative standing to institute or defend lawsuit -- compelling enforcement of legislative enactments. (1) The legislature has standing to sue or defend a lawsuit on behalf of the legislature in the courts of this state when:

(a) a challenge to the constitutionality of legislation enacted by the legislature is at issue in a lawsuit; or

(b) legislation enacted is not being implemented by an entity with the duty to execute the law thereby impeding compliance with legislation, session law, or a statute.

(2) (a) Before the legislature may pursue the remedy provided in subsection (1)(b), a demand letter provided for in subsection (2)(b) must be provided to the entity with the duty to execute or implement the law. If the public officer of the entity fails to respond in writing within 30 days of receipt of the letter by indicating that it will address the concerns in the letter immediately, the legislature may provide consent through the procedure in subsection (3) to initiate a lawsuit to ensure compliance with a statutory duty through a petition for mandamus. The provisions of Title 26 related to mandamus and related caselaw do not apply to this section. To prevail, the legislature is not required to prove that it or other parties have no alternative adequate remedy to obtain compliance with statutory duties.

(b) The demand letter provided for in subsection (2)(a) must:

(i) be in writing and reference the legislation, session law, or statute that is not being implemented by the entity;

(ii) provide any relevant information for the entity to consider regarding the alleged failure to comply with the law;

(iii) be signed by one or more sitting legislators; and

(iv) provide notice that it is issued pursuant to the authority of this section.

(3) Legislative consent to initiate an action under this section may be obtained by:

(a) a majority vote in each house on a joint resolution during a regular or special session of the legislature; or

(b) a majority vote in each house through a poll of the legislature when the legislature is not in session as provided for under subsection (4).

(4) (a) When the legislature is not in session, 20 legislators may, in writing, request the secretary of state to poll the members of the legislature to determine if a majority of the members of the house of representatives and a majority of the members of the senate are in favor of a legislative declaration to pursue an action under subsections (1)(a) or (1)(b).

(b) The request must:

(i) state the conditions warranting the poll;

(ii) if applicable, contain the demand letter sent to the entity provided for in subsection (2) and any written response from the entity; and

(iii) contain a legislative declaration that addresses the action sought or issue to be addressed and the type of action to be pursued in subsection (1).

(c) Within 3 calendar days after receiving a request, the secretary of state shall send a ballot to all legislators by using any reasonable and reliable means, including electronic delivery, that contains:

(i) the legislative declaration subject to the vote; and

(ii) the date by which legislators shall return the ballot, which may not be more than 10 calendar days after the date the ballots were sent.

(d) A legislator may cast and return a vote by delivering the ballot in person, by mailing, or by sending the ballot by facsimile transmission or electronic mail to the office of the secretary of state. A legislator may not change the legislator's vote after the ballot is received by the secretary of state. The secretary of state shall tally the votes within 1 working day after the date for return of the votes. If a majority of the members of each house vote to approve the declaration, the declaration that was sent with the ballot has the force and effect authorizing the action requested in the declaration. A ballot that is not returned by the deadline established by the secretary of state is considered a vote against the declaration.

(5) Nothing in this section supersedes the authority of the attorney general to represent the state of Montana.

(Emphasis added). The preamble of HB 518 explains that "when an enactment of the Legislature is not defended or executed the Legislature suffers an institutional injury through the nullification of the Legislature's ability to enact enforceable laws, thus rendering the Legislature unable to effectively fulfill its legislative obligations in a representative democracy and a Republican form of government." The preamble also states that "compliance with existing statutory requirements is fundamental to the faithful execution of the laws" and that "the responsibilities of the Legislature extend to ensuring implementation of mandatory duties in statute and rule which are not being implemented or on which the compliance responsibility has not occurred."

The question of whether a legislator, not a legislative body, has standing has been previously considered by the U.S. Supreme Court in Coleman v. Miller, 307 U.S. 433 (1939). In Coleman, 21 Kansas state senators sued the Secretary of the Senate of the State of Kansas in an attempt to stop an endorsement of an amendment to the U.S. Constitution. Standing to bring the lawsuit was challenged on the ground that the legislators did not have an adequate interest in the dispute. Nevertheless, the U.S. Supreme Court determined that given the fact that the legislators' votes should have defeated the measure, there was a "plain, direct and adequate interest in maintaining the effectiveness of their votes." Coleman at 438.

Over five decades after Coleman, the U.S. Supreme Court considered legislative standing again in Raines v. Byrd, 521 U.S. 811 (1997). In Raines, four Senators and two Congressmen who voted against the Line Item Veto Act challenged it as unconstitutional. The Act passed in the Senate by a vote of 69-31, and it passed in the House of Representatives by a vote of 232-177. The Court held that the Congressmen lacked standing. In making this determination the United States Supreme Court stated: "We have consistently stressed that a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him." Raines at 819.

Most recently, in Bullock v. Fox, 2019 MT 50, 395 Mont. 35, 435 P.3d 1187, the Montana Supreme Court ruled that the Governor had standing to file a suit seeking a declaration that the Attorney General's recent opinion on interpreting a statute was incorrect as a matter of law.

In its ruling, the Montana Supreme Court considered both the Coleman and Raines cases and noted the contrasting injuries alleged in each. The Montana Supreme Court noted that the injury alleged in Raines was an "abstract institutional injury" in that it was a "dilution of institutional legislative power", whereas in Coleman, the legislators were faced with the concrete personal injury of having their votes nullified. Bullock at ¶ 38.

In Bullock v. Fox, the Montana Supreme Court ultimately determined that: "The injury alleged in this proceeding, that the A.G. Opinion blocks the Governor and FWP Director from effectuating the duties of their respective offices, is a concrete injury in line with Coleman, whereas the injury alleged in Raines was the abstract diminution of legislative power." The Court also noted that the Governor did not claim the A.G. Opinion reduces political power across the entire executive, but that the A.G. Opinion personally prevents him from carrying out his constitutional and statutory duties. Bullock at ¶ 39.

Consequently, HB 518's statutory authorization of the legislature to have standing to sue and defend may potentially conflict with the United States Supreme Court case in Raines depending on the circumstances in which the statute is triggered. The question of whether the legislative body as a whole has suffered a "concrete injury" or an "abstract institutional injury" as in Raines must be determined on a case-by-case basis.

In addition, HB 518's statutory authorization of the legislature as a body having standing to file suit or defend in a lawsuit may raise potential conformity issues with the separation of powers doctrine explicitly provided for in Article III, section 1, of the Montana Constitution. It provides:

The power of the government of this state is divided into three distinct branches-- legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

The Montana Supreme Court has stated that the purpose of the separation of powers doctrine is to constitute each branch as an exclusive trustee of the power vested in it, accountable to the people alone for its faithful exercise, so that each may act as a check upon the other and may prevent the tyranny and oppression that would be the result of a lodgment of all power in the hands of one body. State ex rel. Smith v. District Court, 50 Mont. 134, 145 P. 721 (1914).

To the extent the Legislature would file suit to enforce its laws, it may raise constitutional conformity issues with Article VI, section 4(1), of the Montana Constitution that provides that the Governor "shall see that the laws are faithfully executed."

Therefore, as drafted, HB 518 raises a potential constitutional conformity question as to whether this legislation conflicts with the separation of powers doctrine provided for in Article III, section 1, of the Montana Constitution.

Requester Comments:

The Legal Review note discusses two U.S. Supreme Court cases - - *Coleman v. Miller*, 307 U.S. 433 (1939) and *Raines v. Byrd*, 521 U.S. 811 (1997) - - and *Bullock v. Fox*, 2019 MT 50. These cases do not establish that the statute is facially unconstitutional. Nor should it be the case that it would be unconstitutional as applied.

First, standing may be established by statute. *See* § 46-5-612, MCA.

The bill is narrow and does two things:

(1) It would allow the Legislature to bring a mandamus action if:

a law is not being implemented by an entity with the duty to execute the law;

the injury to the legislature due to the failure to implement a statute is distinguishable from the injury to members of the public even if they suffer an injury; and

the injury to the legislature would effectively be immunized from review if the legislature does not have standing.

(2) It would allow the Legislature to defend the constitutionality of a statute if it doubted whether the Attorney General would do so.

The provision could not be used unless:

(1) One or more legislators submits a written demand to the entity with enforcement responsibility that the law be enforced; and

(2) If there is no commitment within thirty days to undertake enforcement, a majority vote occurs in both the Senate and the House during a legislative session or through a poll to authorize filing of a mandamus case to obtain compliance with the statutory duty.

In *Bullock v. Fox*, the Montana Supreme Court discussed both case or controversy standing and prudential standing. *Bullock v. Fox*, 2019 MT 50, ¶¶ 28-49. With respect to case or controversy standing, the Court noted that the Attorney General's arguments misread *Raines* because *Coleman* held that members of Congress had standing to sue in their official capacities, which was not overturned by *Raines*. *Id.* at ¶ 40. The Court also cited its analysis in *Missoula City-County Air Pollution Control Bd. V. Bd. Of Env'tl. Rev.*, 282 Mont. 255, 260 (1997), where it noted the Board's "interest in the effective discharge of the obligations imposed upon it by law [wa]s the equivalent of the personal stake which would support standing of a private citizen." When the Legislature and the Executive Branch take collective action to create laws, the Legislature has a significant interest to ensure the collective action is not a nullity. As House Bill 518 states, "when an enactment of the Legislature is not defended or executed the Legislature suffers an institutional injury through the nullification of the Legislature's ability to enact enforceable laws, thus rendering the Legislature unable to effectively fulfill its legislative obligations in a representative democracy and a republican form of government." A number of Montana statutes allow private parties that have a demonstrable interest which is harmed to bring

lawsuits when the Executive Branch fails to ensure compliance with statutes. The Legislature has a similar interest, but one that cannot be vindicated if failure to enforce or implement a law would effectively be immunized from review if the Legislature does not have standing.

The Court also discussed prudential standing. It discussed the Montana Constitution's limitation on usurpation of power by one branch from another. *Mont. Const. art. III, § 1*. It also noted that prudential policy limitations are not defined by "hard and fast rules." *Bullock v. Fox*, ¶ 45. However, factors to be considered are the rights and immunities at issue, whether the injury is distinguishable from any injury to the public, the importance of the issue, and whether it would evade review in the absence of standing.

As noted throughout the debate in both houses, an example of the problem is the history of SB 160 (2003), which is codified in Title 2. It requires DPHHS to promulgate a strategic plan. It also defined certain required elements of the plan, including outcomes, outputs, and performance measures. The legislative history makes clear that the Legislature was concerned that the State's largest department and the one with the greatest budget needed to have documented, published, transparent, and measurable goals and objectives. The Legislature is the interested party with respect to the plan. It sought the information in order to understand the operations and programs of DPPHS, yet there was no compliance with the requirements of the bill until publication of a strategic plan for 2019-2024. There are other parts of the bill for which there has never been compliance. No member of the public could establish standing to bring a challenge due to an injury because of agency inaction on implementing the statute. Therefore, the failure to faithfully execute the law would evade review. As the Supreme Court noted in *Bullock v. Fox*, see ¶ 45, "this Court has recognized prudential standing where 'the statute at issue would effectively be immunized from review if the plaintiff were denied standing'".