

## LEGAL REVIEW NOTE

Bill No.: HB 528

LC#: LC 3632, To Legal Review Copy, as  
of January 20, 2023

**Short Title:** Generally revise election laws

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**Date:** February 14, 2023

### 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 528, as drafted, may raise potential constitutional conformity issues associated with the First Amendment. HB 528 prohibits the endorsing of judicial candidates by partisan elected officials and political parties. It provides:

**Section 1. Partisan endorsement of nonpartisan judicial candidate unlawful.** (1) A partisan elected official may not endorse, campaign for, or otherwise electioneer for a judicial candidate in a nonpartisan race.

(2) A political party may not endorse, campaign for, or otherwise electioneer for a judicial candidate in a nonpartisan race.

As drafted, HB 528 appears to conflict with case law from the Ninth Circuit Court of Appeals that addressed the First Amendment and a statute very similar to the one proposed in LC 3632.

In Sanders Cnty. Republican Cent. Comm. v. Bullock, 698 F.3d 741 (9th Cir. 2012), the Sanders County Republican Central Committee (the Committee) sought to endorse judicial candidates and to enable the expenditures that would make its views publicly known. However, at the time, Montana law expressly prohibited a political party from endorsing a candidate. Specifically, section 13-35-231, MCA provided:

**Unlawful for political party to endorse judicial candidate.** A political party may not endorse, contribute to, or make an expenditure to support or oppose a judicial candidate.

The Committee filed suit in federal court and sought a preliminary injunction to enjoin the state from enforcing 13-35-231. The federal district court denied the preliminary injunction and the Committee appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit reversed the federal district court and granted the Committee a preliminary injunction. The Ninth Circuit concluded that 13-35-231 was "on its face, a content-based restriction on political speech and association" which threatened to abridge the fundamental right of free speech guaranteed by the First Amendment. Therefore, 13-35-231 was subject to a strict scrutiny analysis which required Montana to prove both that its restriction under 13-35-231: (1) furthered a compelling interest; and (2) was narrowly tailored to achieve that interest. Sanders Cnty., 698 F.3d at 764. (citing Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 882 (2010)).

The Ninth Circuit ultimately concluded that Montana lacked a compelling interest in forbidding political parties from endorsing judicial candidates and that even if Montana did have a compelling interest, the law was not sufficiently narrowly tailored.

Later, in a clarifying ruling, Sanders Cnty. Republican Cent. Comm. v. Fox, 717 F.3d 1090 (9th Cir. 2013), the Ninth Circuit revised the permanent injunction to enjoin only the statute's ban on endorsements and expenditures, and not the ban on contributions. Sanders Cnty., 717 F.3d at 1092.

As drafted, HB 528 prohibits either a partisan elected official or a political party from endorsing, campaigning for, or otherwise electioneering for a judicial candidate in a nonpartisan race. Therefore, HB 528 raises potential conformity issues with the requirements of the First Amendment of the U.S. Constitution based on the ruling in Sanders Cnty. Republican Cent. Comm. v. Bullock.

## Requester Comments:

The legal note fails to account for subsequent case law that abrogated *Sanders County Republican Central Committee v. Bullock*, 698 F.3d 741 (9th Cir. 2012). In *French v. Jones*, the Ninth Circuit recognized that the United States Supreme Court’s Decision in *Williams-Yulee v. Florida Bar* “flatly rejected the[] arguments” underpinning the *Sanders County* decision. 876 F.3d 1228, 1234 (9th Cir. 2017) (citing *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 448 (2015)). Since the “significant changes” ushered in by the United States Supreme Court with the *Williams-Yulee* decision, the Ninth Circuit sitting *en banc* upheld two Arizona restrictions on judicial candidates endorsing or making contributions to political candidates. *Id.* at 1235 (citing *Wolfson v. Concannon*, 811 F.3d 1176 (9th Cir. 2016) (*en banc*)). In that case, the Ninth Circuit expressly rejected the central basis of its decision in *Sanders County*, which it held “was no longer persuasive in light of *Williams-Yulee*.” *Id.* (citing *Wolfson*, 811 F. 3d at 1183). Accordingly, it seems likely that post *Williams-Yulee*, the proposed restriction would withstand constitutional scrutiny and that a reviewing court would uphold it.