

Amendment - 2nd Reading/2nd House-tan - Requested by: Steve Fitzpatrick - (S) Committee of Whole

- 2023

68th Legislature 2023

Drafter: Jaret Coles, 406-444-4022

HB0518.001.002

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HOUSE BILL NO. 518

INTRODUCED BY B. MERCER, S. FITZPATRICK

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING LEGISLATIVE STANDING TO SUE, TO ENSURE COMPLIANCE WITH LEGISLATIVE ENACTMENTS; CREATING DUTIES AND AUTHORITY TO INTERVENE WHEN THE CONSTITUTIONALITY OF A STATUTE IS CHALLENGED IN A LAWSUIT; PROVIDING STANDING TO THE LEGISLATURE BY JOINT RESOLUTION OR A POLL CONDUCTED BY THE SECRETARY OF STATE; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

WHEREAS, 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; and

WHEREAS, the Legislature's plenary power to enact laws is a great interest of the Legislature as an institution; and

WHEREAS, compliance with existing statutory requirements is fundamental to the faithful execution of the laws; and

WHEREAS, the responsibilities of the Legislature extend to ensuring implementation of mandatory duties in statute and rule that are not being implemented or on which the compliance responsibility has not occurred; and

WHEREAS, the failure to implement statutes with duties may undermine the Legislative Branch's capacity to conduct meaningful oversight of state government, which is one of its core functions; and

WHEREAS, when a law's constitutionality is not defended or when a statute with duties is not executed, the Legislature experiences an injury of greater magnitude than the single instance of vote nullification at issue in *Coleman v. Miller*, 307 U.S. 433 (1939), in which the United States Supreme Court found that 20 Kansas State Senators had standing to sue to maintain the effectiveness of their votes after their votes on a measure

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1 were completely nullified; and

2 WHEREAS, the failure of a law with duties to be implemented is a cognizable injury in fact sufficient to
3 confer standing to the Legislature; and

4 WHEREAS, the statutory authority of the Legislature to institute, intervene, and participate in litigation
5 is not unique, as legislative interim committees have this power in section 2-4-402, MCA, regarding the
6 Montana Administrative Procedure Act.

7 THEREFORE, the Legislature of the State of Montana finds that it is appropriate to grant statutory
8 standing to sue and defend lawsuits to the Legislature in limited circumstances.

9

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

11

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

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

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

19 (ii) the alleged injury to the legislature due to the failure to implement a statute is distinguishable
20 from the injury to members of the public even if they suffer an injury; and

21 (iii) the alleged injury to the legislature would effectively be immunized from review if the legislature
22 did not have standing.

23 (2) (a) Before the legislature may pursue the remedy provided in subsection (1)(b), a demand letter
24 provided for in subsection (2)(b) must be provided to the entity with the duty to execute or implement the law. If
25 the public officer of the entity fails to respond in writing within 30 days of receipt of the letter by indicating that
26 the entity will address the concerns in the letter immediately, the legislature may provide consent through the
27 procedure in subsection (3) to initiate a lawsuit to ensure compliance with a statutory duty through a petition for

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1 mandamus. The provisions of Title 27 related to mandamus and related case law do not apply to this section.
2 To prevail, the legislature is not required to prove that it or other parties have no alternative adequate remedy to
3 obtain compliance with statutory duties.

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

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

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

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

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

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

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

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

16 (4) (a) When the legislature is not in session, if 20 or more legislators ~~may, request a poll~~ in writing,
17 ~~request pursuant to subsection (3)(b)~~, the secretary of state ~~to shall~~ poll the members of the legislature to
18 determine if a majority of the members of the house of representatives and a majority of the members of the
19 senate are in favor of a legislative declaration to pursue an action under subsection (1)(a) or (1)(b).

20 (b) The request must:

21 (i) state the conditions warranting the poll;

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

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

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

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- 1 (i) the legislative declaration subject to the vote; and
- 2 (ii) the date by which legislators shall return the ballot, which may not be more than 10 calendar
- 3 days after the date the ballots are sent.
- 4 (d) A legislator may cast and return a vote by delivering the ballot in person, by mailing, or by
- 5 sending the ballot by facsimile transmission or electronic mail to the office of the secretary of state. A legislator
- 6 may not change the legislator's vote after the ballot is received by the secretary of state. The secretary of state
- 7 shall tally the votes within 1 working day after the date for return of the votes. If a majority of the members of
- 8 each house vote to approve the declaration, the declaration that was sent with the ballot has the force and
- 9 effect authorizing the action requested in the declaration. A ballot that is not returned by the deadline
- 10 established by the secretary of state is considered a vote against the declaration.
- 11 (5) Nothing in this section supersedes the authority of the attorney general to represent the state of
- 12 Montana.

13

14 **NEW SECTION. Section 2. Codification instruction.** [Section 1] is intended to be codified as an

15 integral part of Title 5, chapter 2, part 1, and the provisions of Title 5, chapter 2, part 1, apply to [section 1].

16

17 **NEW SECTION. Section 3. Severability.** If a part of [this act] is invalid, all valid parts that are

18 severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications,

19 the part remains in effect in all valid applications that are severable from the invalid applications.

20

21 **NEW SECTION. Section 4. Effective date.** [This act] is effective on passage and approval.

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23 **NEW SECTION. Section 5. Applicability.** [This act] applies to proceedings initiated on or after [the

24 effective date of this act].

25 - END -