LEGAL REVIEW NOTE

Bill No.: HB 570

LC#: LC 791, To Legal Review Copy, as of February 16, 2021

Short Title: Prohibit infringement of constitutional right to nullify certain federal legislation

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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 570, as drafted, may raise potential federal constitutional issues related to the Supremacy Clause under Article VI, clause 2, and Article III, section 2, of the United States Constitution.

The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Supremacy Clause provides that the United States Constitution and federal law "made in pursuance thereof" is the "supreme law of the land." According to the United States Supreme Court, the "Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." *Gonzales v. Raich*, 545 U.S. 1, 29, 125 S. Ct. 2195, 2212 (2005). The United States Supreme Court has further held that "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Gade v. National Solid Wastes Mgmt. Assoc*., 505 U.S. 88, 108 (1992) (citations omitted).

HB 570, as drafted, provides for a new interim committee entitled the Legislative Constitutional Review Committee. Under the provisions of the bill, this committee may recommend nullification of any current or previously enacted "federal statute, mandate, or executive order" if the committee believes the "federal law or regulation . . . is outside the scope of the powers delegated by the people to the federal government in the United States constitution." Section 2, HB 570. HB 570 provides that "[d]uring the time between the recommendation for nullification and the legislative vote on nullification, the issue in question remains out of force or effect until the legislative vote can be taken." *Id.* The Secretary of State is charged with conducting a poll of the Legislature within 60 days of receiving the recommendation. *Id.* If, pursuant to the poll, the Legislature "votes by simple majority to nullify a federal statute, mandate, or executive order on the grounds of constitutionality, the state and its citizens may not recognize or be obligated to obey the nullified statute, mandate, or executive order." Section 3, HB 570. In addition, HB 570 provides that the Legislature "shall enact all measures necessary to prevent the enforcement of federal laws or regulations nullified within the boundaries of this state." Section 4, HB 570.

Although a state cannot be compelled to administer or enforce a federal regulatory program, state officials must "enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law, and [state officials must observe] the attendant reality that all state actions constituting such obstruction, even legislative Acts, are *ipso facto* invalid." *Printz v. U.S.*, 521 U.S. 898, 913 (1997). HB 570 requires that a federal law receiving a nullification recommendation be "out of force or effect" until the legislative poll is concluded, and if the Legislature determines the law is outside the scope of federal powers under the Constitution, the state and its citizens "may not recognize" the nullified federal statute, mandate, or order. However, attempts by states to unilaterally determine the applicability of federal law, specifically in response to federal judicial opinions, have been soundly rejected. *See e.g., U.S. v. Peters*, 9 U.S. 115 (1809); *Cooper v. Aaron*, 358 U.S. 1 (1958). Disputes between the states and the federal government concerning the constitutionality of federal powers fall to the federal judiciary. [I]t is emphatically the province and duty of the Judicial Department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Because HB 570 attempts to unilaterally

resolve conflicts with federal law rather than using recourse to the federal judiciary, HB 570, as drafted, may present potential constitutional conformity issues with respect to Article VI, clause 2, of the United States Constitution.

HB 570 also provides that the "proper jurisdiction for these issues lies with the supreme court of the United States *alone*, as state in Article III, section 2, of the United States constitution" (emphasis added). Section 4, HB 570. Article III, section 2, of the United States Constitution, in part, provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . —to Controversies to which the United States shall be a Party . . .
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> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

In implementing this section, Congress has provided that the Supreme Court has "original *but not exclusive* jurisdiction of . . . [a]ll controversies between the United States and a State." 28 U.S. Code §1251 (emphasis added).

In construing Article III's original jurisdiction requirements, in *Cohens v. Virginia*, 19 U.S. 264 (1821), the United States Supreme Court noted that:

> The constitution declares, that in cases where a State is a party, the Supreme Court shall have original jurisdiction; but does not say that its appellate jurisdiction shall not be exercised in cases where, from their nature, appellate jurisdiction is given, whether a State be or be not a party. It may be conceded, that where the case is of such a nature as to admit of its originating in the Supreme Court, it ought to originate there; but where, from its nature, it cannot originate in that Court, these words ought not to be so construed as to require it. There are many cases in which it would be found extremely difficult, and subversive of the spirit of the constitution, to maintain the construction, that appellate jurisdiction cannot be exercised where one of the parties might sue or be sued in this Court."

The United States Supreme Court has recognized its original constitutional jurisdiction in cases and yet declined to hear them. In *Ohio v. Wyandotte Chemicals Corporation*, the United States Supreme Court acknowledged that the facts of the case "lea[d] almost ineluctably to the conclusion that we are empowered to resolve [the] dispute in the first instance", yet it concluded that it "should nevertheless declin[e] to exercise that jurisdiction." 401 U.S. 493, 495-496 (1971). While the Supreme Court may exercise original jurisdiction over a matter in which a state is party, it considers its jurisdiction nonexclusive, and it has refused several original jurisdiction cases. In one such case, the Supreme Court declined to exercise its original jurisdiction and noted

that the matter could be "settled in the lower federal courts" because the Constitution does not forbid a matter of original but nonexclusive jurisdiction from being heard in another court with jurisdiction over the parties or subject matter. *U.S. v. Nevada*, 412 U.S. 534, 540 (1973); *see also Wash v. GM Corp.*, 406 U.S. 109 (1972). Indeed, the Supreme Court has adopted a test to determine whether it should hear a particular matter of original jurisdiction. *South Carolina v. Regan*, 465 U.S. 367, 400-401 (1984). Under the test, a plaintiff must demonstrate through clear and convincing evidence that it has suffered an injury of a serious magnitude and that it would be without an alternative forum. *Id.*

For the foregoing reasons, the provisions in HB 570, as drafted, that prescribe the sole venue for a matter in which the state and the federal government are parties, may present potential constitutional conformity issues with the provisions of Article III, section 2, and Article VI, clause 2, of the United States Constitution.

Requester Comments: