Montana Legislative Services Division

Legal Services Office

PO BOX 201706
Helena, MT 59620-1706
(406) 444-3064
FAX (406) 444-3036

LEGAL MEMORANDUM

TO: Ms. Sue O'Connell, Research Analyst

FROM: David S. Niss, Staff Attorney

RE: Constitutionality of Legislation Creating Experimental Mail Ballot Election

DATE: October 17, 2007

I
INTRODUCTION

As part of your work on House Joint Resolution No. 46 (interim study of election laws), you've requested an opinion regarding possible legislation authorizing a short-term, experimental, mail-ballot-only election for some Montana counties. This opinion is provided in response to your request.

As I understand the potential legislation, it would become effective some time after the 61st Legislature and would be effective for only one election, the 2010 general election. The legislation would require or allow only certain counties to participate in a mail-ballot-only election, while all other voters in all other counties would cast their ballots by the usual method chosen by the county in which they reside. After the mail-ballot-only election in those limited number of counties, the efficacy of the mail-ballot-only election system used in those counties for the one general election would be assessed by the Secretary of State and the counties involved. Finally, I understand that based on the efficacy of that experimental mail-ballot-only election, a decision would then be made by the Secretary of State or another interest group or groups whether to request legislation allowing any county to conduct a mail-ballot-only election in subsequent primary, general, or special elections.

II
DISCUSSION

It's a cardinal principle of constitutional law that enacted legislation is presumed to be constitutional and persons challenging legislation as unconstitutional must prove beyond a reasonable doubt that the legislation is constitutionally unsound. St. v. Price, 2002 MT 229, 311 M 439, 57 P3d 42 (2002). Any doubt about a statute's constitutionality is to be resolved in favor of the statute. St. v. Martel, 273 M 143, 902 P2d 14 (1995). However, there are two provisions of the Montana Constitution that may be implicated by the legislation being considered, the equal protection provision in Article II, section

4[1], and the prohibition against special legislation contained in Article V, section 12[2]. Each of these provisions is considered in turn below.

A. Equal Protection

The first step in determining whether an impermissible classification has been made by law in violation of the equal protection provision of the Montana Constitution is to determine whether persons or entities in similar situations are treated differently. Reesor v. Mont. St. Fund, 2004 MT 370, 325 M 1, 103 P3d 1019 (2004). In the potential legislation providing for a mail-ballot-only election, the legislation would divide counties and electors into those counties and electors who will use their usual method for casting a general election ballot and those who will use a mail ballot only. Once the class of persons has been identified, the next step in an equal protection analysis is to determine the level of scrutiny to be given the statute: strict scrutiny (used in cases in which a fundamental right is implicated or involves a suspect class, such as race or religion), middle-tier scrutiny (used for cases involving constitutional rights that are not fundamental rights), or rational relationship scrutiny (used for all other cases). Farrier v. Teachers' Retirement Bd., 2005 MT 229, 328 M 375, 120 P3d 390 (2005), citing Powell v. St. Comp. Ins. Fund, 2000 MT 321, 302 M 518, 15 P3d 877 (2000). In this case, although a fundamental right[3], the right of suffrage provided for in Article II, section 13, is involved, in the sense that the legislation concerns the right to vote, the Montana Supreme Court opinions strongly indicate that strict scrutiny of a statute is used only for those statutes that "burden" or "interfere with" a fundamental right. Oberg v. Billings, 207 M 277, 674 P2d 494 (1983), Nick v. Dept. of Highways, 219 M 168, 711 P2d 795 (1985), D & F Sanitation Serv. v. Billings, 219 M 437, 713 P2d 977 (1986), Roosevelt v. Dept. of Revenue, 1999 MT 30, 293 M 240, 975 P2d 295 (1999), and McCabe Petroleum Corp. v. N Bar Ranch, LLC, 2004 MT 73, 320 M 384, 87 P3d 995 (2004).

In the case of the contemplated legislation, I fail to see how an elector who, by virtue of the elector's county of residence, is required to cast a ballot in the same manner in which the elector has always cast a ballot (because the elector resides in a county not chosen to use mail ballots) or an elector who is required to complete a mail ballot (by virtue of the elector's residence in a county that is chosen to use a mail ballot), rather than drive to a polling place and stand in line, is "burdened" by the use of one type of ballot or the other. For this reason, I believe that the use of the ballots as you've

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[1]Art. II, sec. 4, Mont. Const., provides in part: "... No person shall be denied the equal protection of the laws."

[2]Art. V, sec. 12, Mont. Const., provides: "The legislature shall not pass a special or local act when a general act is, or can be made, applicable."

[3]The Montana Supreme Court has held that a constitutional right is a fundamental right if it is provided for in Art. II of the Montana Constitution. See, e.g., Butte Community Union v. Lewis, 219 M 426, 712 P2d 1309 (1986).

described them do not constitute a "burden" on or an "interference with" the fundamental right to vote.

Additionally, with regard to the protection of the right to vote and the method of voting, both the U.S. Supreme Court and the Montana Supreme Court have held that both voting and the "manner of its exercise" are protected by the due process clause. See Bush v. Gore, 531 U.S. 98 (2000), followed in Big Spring v. Jore, 2005 MT 64, 326 M 256, 109 P3d 219 (2005). That protection of the "manner" of voting, however, does not include a constitutional preference for one form of ballot over another if the recording and counting of the votes by any method are performed in a manner that lawfully counts each vote. I've found no reported judicial decisions holding that the U.S. Constitution or Montana Constitution requires that all ballots cast within a state must be cast in the same manner, such as by using only a voting machine or by using only a paper ballot. In a factual situation similar to that involving the potential legislation that you've suggested, the Supreme Court of Louisiana, in Peck v. City of New Orleans, 199 La. 76, 5 So. 2d 508 (1941), ruled on an equal protection issue presented by a law requiring the use of voting machines within the city of New Orleans, while allowing the use of those machines elsewhere in the state. In holding the law constitutional, the Supreme Court pointed out that the plaintiff had not been deprived of the right of suffrage. That point is germane to this case because an elector in any county, regardless of whether the elector was required to use a mail ballot or other type of ballot, would, under the legislation that you're considering, be deprived only of the elector's use of a particular type of ballot and not the right to vote, and I can find no right to use any particular ballot expressed or implied in the Montana Constitution. Because a fundamental right is not interfered with or burdened and because it's clear that a suspect classification or suspect criteria is not an issue, I believe, all other equal protection considerations being equal between the types of voting methods available to the counties, that strict scrutiny would not be used in a due process analysis by the courts to determine the constitutionality of the contemplated legislation. The issue then becomes which of the remaining two levels of scrutiny must be applied to the contemplated legislation. Because the Montana Supreme Court has held that midtier scrutiny is to be used in the case of rights mentioned in the constitution other than in Article II[4], I believe that the level of scrutiny properly used to analyze any equal protection issues in the contemplated legislation is the rational basis test.

This conclusion, that the rational basis test should be used to analyze any equal protection issues in the contemplated legislation, is supported by other case law as well. You've indicated, as discussed above, that the contemplated legislation would require only a temporary experiment with the use of mailed ballots. Legislation enacting experimental programs has long been given a wide birth by the courts in the face of equal protection challenges. In Marshall v. U.S., 414 U.S. 417 (1974), a plaintiff challenged the constitutionality of the Narcotic Addict Rehabilitation Act of 1966

[4]Id.

(NARA), charging that the exclusion from more favorable sentencing of persons with two or more prior drug-use convictions violated his right to equal protection of the laws. In upholding the constitutionality of the NARA, the Supreme Court wrote:

> It should be recognized that the classification selected by Congress is not one which is directed "against" any individual or category of persons, but rather it represents a policy choice in an experimental program made by that branch of Government vested with the power to make such choices. The Court has frequently noted that legislative classifications need not be perfect or ideal. The line drawn by Congress at two felonies, for example, might, with as much soundness, have been drawn instead at one, but this was for legislative, not judicial choice.

Likewise, in Aguayo v. Richardson, 473 F.2d 1090 (2d Cir. 1973), the court noted that "the Equal Protection clause should not be held to prevent a state from conducting an experiment designed for the good of all, including the participants, on a less than statewide basis". In Marshall and other cases, such as Eastman v. Atlantic Richfield Co., 237 M 332, 777 P2d 862 (1989), Matter of Jericho Jewish Center v. P.S.C. of New York, 208 AD 2d 1152 (1994), and N.V. v. Sybinski, 724 NE 2d 1103 (2000), the courts have indicated strongly that the proper level of scrutiny for experimental programs created by the legislature is the less-exacting scrutiny of whether the legislation bears a rational relationship to a lawful governmental purpose. In this case, that relationship surely exists because, as you've described it, the purpose of the classification of counties into those using a mail ballot only and those counties not using the mail ballot is to determine the efficacy of mail-ballot-only elections in order to save the counties some money, and it can hardly be argued that conducting elections in a less expensive manner is not a legitimate purpose of the Legislature or government generally. Other rationale, such as that the Secretary of State would like to observe the effect of the election on a less than statewide basis before all counties are allowed to participate in mail-ballot-only elections, is also a valid rationale for not extending the mail-only ballot to all counties in the state at once.

Even if the contemplated legislation were of a more permanent nature in specifying that less than all of the counties should be allowed to conduct mail-ballot-only elections, the equal protection provision of the Montana Constitution would not interfere in that determination unless there was no set of circumstances that could justify legislation authorizing less than all of the counties to participate. The Legislature has a good deal of discretion in selecting the counties to which to apply the legislation, as long as it has a rational basis for determining those counties. The fact that fewer than all of the counties will be included does not make the classification unconstitutional because the Legislature has a good deal of discretion to address state issues on a step-by-step basis and need not go as far as it might in addressing those issues. St. v. Safeway Stores, 106 M 182, 76 P2d 81 (1938).

B. Special Legislation

Finally, it might be argued that the contemplated legislation is "special" or "local" in nature and therefore prohibited by Article V, section 12, of the Montana Constitution.[5]

Because there were no changes made to the language of Article V, section 12, except grammatical changes, from the text of that section as it appeared in Article V, section 26, of Montana's 1889 Constitution, cases decided under section 26 are still applicable under the 1972 Constitution. Cases decided under section 26 show that the test for whether a statute is a "special" or "local" statute and therefore prohibited if a general statute cannot be made applicable are similar to cases decided under the equal protection provision of Article II, section 4, in that cases under section 26 hold that when a classification enacted by a statute is not capricious, arbitrary, or without proper basis, the classification will be upheld as constitutional. Blackford v. Judith Basin County, 109 M 578, 98 P2d 872 (1940). Stated another way, a classification does not amount to special legislation if the classification is germane to the purpose of the law, is reasonable in nature, and operates equally on every person or thing within the given class. State ex rel. Fisher v. School District No. 1, 97 M 358, 34 P2d 522 (1934). With regard to the contemplated legislation, it would divide the counties into two classifications, those that may hold a mail-ballot-only election and those that may not. The purpose of the classification would be to test the efficacy of a by-mail-only voting system with less than all of the counties participating so that the ease and expense of that voting method could be compared to voting by other methods. The purpose would also be to allow the offices involved in the mail-only balloting, principally the Office of the Secretary of State and the county offices of those counties allowing balloting by mail only, ample opportunity to review the efficacy of that balloting system without becoming overwhelmed with election administration issues as might be the case if the system would be inaugurated on a statewide basis all at once. These reasons for the classification system appear to be directly related to the classification itself, the potential legislation appears to be reasonable, and there is no indication that the legislation would not apply equally to all persons in either of the two classes involved. The contemplated legislation therefore would likely be held not to constitute special or local legislation.

III
CONCLUSION

The equal protection provisions of the Montana and U.S. Constitutions prohibit classifications from being made in legislation unless the legislation satisfies at least one of several tests. The test applicable under the Montana Constitution to the legislation being considered, to allow only certain counties to participate in a one-time-only, mail-ballot-only general election, is that the classification must bear a rational relationship to

[5]The text of Art. V, sec. 12, is quoted at note 2, supra.

a lawful governmental purpose. The contemplated legislation would divide all of the Montana counties into two groups: those that may hold a mail-ballot-only election and those counties that may not. This classification scheme seems to bear a rational relationship to a legitimate governmental purpose, the purpose of the legislation being to test the efficacy of the mail-ballot-only election by determining the amount of money that it saves a county versus the difficulties that the mail-ballot-only voting system presents the Secretary of State and concerned county officials. Because of the rational relationship and because of the heavy burden that a plaintiff would bear to prove the legislation unconstitutional, the classification of the counties for the purposes of the voting experiment authorized by the contemplated legislation would in all likelihood be found to be a constitutional classification by an equal protection analysis under both the Montana and U.S. Constitutions[6] and would also not constitute special legislation prohibited by the Montana Constitution.

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[6]The Montana Supreme Court has held in Emery v. St., 177 M 73, 580 P2d 445 (1978), and In re C.H., 210 M 184, 683 P2d 931 (1984), that the Montana Constitution and U.S. Constitution provide generally equivalent protections to Montanans.