

Legislative Analysis



PUBLIC BODY COMMUNICATIONS ABOUT LOCAL BALLOT QUESTIONS

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House Bill 5219 as reported from committee as H-1
Sponsor: Rep. Lisa Posthumus Lyons
Committee: Elections
Revised on 2-9-16

Analysis available at
<http://www.legislature.mi.gov>

BRIEF SUMMARY: House Bill 5219 would amend the rules for communications by local units of government about ballot questions recently introduced in Public Act 269 of 2015, and remove the prohibition on communication within 60 days of an election.

FISCAL IMPACT: The bill would have an indeterminate impact on state and local government. The Department of State could see increased complaints under the changes made in the bill, but a calculation of that cost, if any, cannot be determined at this time.

The bill could impact future revenues of local governments by impacting the educational efforts local public bodies and officials can and cannot take around future ballot questions. However, there is no way to calculate a fiscal impact for local governments due to the number of hypothetical factors involved.

THE APPARENT PROBLEM:

In response to concerns that the language introduced in Public Act 269 of 2015 (better known as Senate Bill 571) would be more restrictive than intended, this bill intends to clarify the rules for communication by public bodies about local ballot questions.

THE CONTENT OF THE BILL:

House Bill 5219 would amend the Michigan Campaign Finance Act by clarifying that the act does not prohibit all communication about ballot questions by public bodies. Specifically, the bill provides that any limit on communication does not cover certain allowable activity already included in the law, as described below, and also that the term "communication" does not include:

- The language of a local ballot question,
- The date of an election, or
- Factual and strictly neutral information concerning the direct impact of a local ballot question on a public body or the electorate, except if the communication can reasonably be interpreted as an attempt to influence the outcome of a local ballot question.

Other allowable activity cited in the bill that is already protected by the Campaign Finance Act includes:

- The production or dissemination of debates, interviews, commentary, meetings of a public body, or information by a broadcasting station, newspaper, magazine, or other periodical or publication in the regular course of broadcasting or publication.

- The use of a public facility owned or leased by, or on behalf of, a public body if any candidate or committee has an equal opportunity to use the facility.
- The use of a public facility owned or leased by, or on behalf of, a public body if that facility is primarily used as a family dwelling and is not used to conduct a fund-raising event.
- An elected or appointed public official or an employee of a public body who, when not acting for a public body but is on personal time, is expressing personal views, expending personal funds, or providing personal volunteer services.

Also, significantly, the bill would remove the prohibition on communication within 60 days of an election where a local ballot question appears on the ballot. Instead, the communication requirement of "factual and strictly neutral information" described above will apply at all times.

MCL 169.257.

BACKGROUND INFORMATION:

Public Act 269 of 2015

Senate Bill 571 was recently enacted as Public Act 269 of 2015; the bill made numerous amendments to the Michigan Campaign Finance Act. Section 57 of Senate Bill 571 provides that, except for an elected official in the performance of duties under the Michigan Election Law, ***a public body or person acting for a public body may not use public funds or resources for certain communications about a local ballot question during the period 60 days before an election.*** It states that the communications cannot take the form of radio, television, mass mailing, or prerecorded telephone message, if those communications refer to a local ballot question and target the relevant electorate where the local ballot question appears on the ballot.

Governor Snyder issued a signing letter when approving the bill in which he said, in part:

[However]recognizing that many local governmental entities and schools have raised concerns regarding confusion with the new language in Section 57, I am calling on the Legislature to enact new legislation to address those concerns, and clarify that the new language does not impact the expression of personal views by a public official, the use of resources or facilities in the ordinary course of business, and that it is intended only to prohibit the use of targeted, advertisement style mass communications that are reasonably interpreted as an attempt to influence the electorate using taxpayer dollars. Local governmental entities and schools should still be allowed to distribute basic information about an election including the proposed or final ballot language and the date of the election. This is keeping within the spirit of the existing restrictions in the Act.

Federal court injunction

On January 26, 2016, seventeen elected leaders and public officials filed a complaint and motion for a preliminary injunction in federal court, alleging that Section 57(3), as amended by PA 269, violates their First and Fourteenth Amendment rights to free speech and their Fifth and Fourteenth Amendment rights to due process. Accordingly, they sought

a declaration that the statute is unconstitutional on its face, and applied for an injunction prohibiting the enforcement of the amended Section 57(3).

On February 5, 2016, Judge John Corbett O'Meara (US District Court, Eastern District of Michigan, Southern Division) granted the injunction, finding that (1) the elected officials had a strong likelihood of ultimate success in showing the statute to be unconstitutional on its face; (2) they would suffer irreparable injury if he did not grant the injunction (as "[T]he infringement of constitutional rights inherently causes irreparable injury"); (3) the injunction would not cause substantial harm to the State of Michigan; and (4) the public interest would be served by the issuance of an injunction (as the public interest "favors the upholding of constitutional rights[.]")

Because all four factors of the test to determine whether to grant an injunction weighed in favor of the elected officials, the judge found that injunctive relief in the form of a prohibition of enforcement of Section 57(3) was appropriate. The provision of the statute that prohibits the use of public funds to advocate for ballot measures remains in effect, with no 60-day time limit on communication.

If this bill is enacted before March 8, the date of the Michigan primary election, it would apply to communication regarding local ballot questions and effectively negate the injunction.

Please see the following for the full text of the injunction order.

<https://cases.justia.com/federal/district-courts/michigan/miedce/5:2016cv10256/307754/27/0.pdf?ts=1454761241>

ARGUMENTS:

For:

Proponents argued that a change to Section 57 of the Michigan Campaign Finance Act was necessary because local bodies were disseminating supposedly factual information which was actually advocacy for a certain ballot question outcome. Taxpayer funds should not be used to advocate for or advance an agenda. While Senate Bill 571 might have gone further than intended, they see the purpose of protecting taxpayer money from abuse as important, and advance this legislation as a fair compromise.

Moreover, any limit on communication applies only to public funds. Private citizens who support or oppose a certain measure may form a private ballot committee and advocate their position. This way, people are able to personally decide which positions to support or oppose monetarily, rather than having those decisions made for them by their local officials.

Against:

Opponents argue that the pre-Senate Bill 571 language, allowing "the production or dissemination of factual information concerning issues relevant to the function of the public body" was sufficient to prevent abuse. They point to the fact that of the hundreds of local ballot questions presented since 2012, there were only 24 complaints of abuse, with just 13 of those found to be in violation. Of these, only five were found to be in

violation of Section 57 specifically. They argue that the legislature is attempting to solve a problem which does not exist.

Additionally, while the language in House Bill 5219 may be an improvement over that in Senate Bill 571, the additional language actually creates more confusion around Section 57. The addition of "strictly neutral," "direct impact" on a local body, and the invocation of the reasonable person standard will create misunderstandings in local communities and an increase in legal challenges.

In the federal court's injunction on enforcement of Section 57, the court found Section 57(3)'s language "broad" and "vague", and stated that it "appears inconsistent with the stated purpose of prohibiting 'electioneering' conduct with taxpayer funds." Critics argue that the updated language in 5219 is no better, and would precipitate the very legal challenges the court predicted with the previous language.

POSITIONS:

The positions for the organizations listed below have been confirmed following adoption of the H-1 substitute in the House Committee on Elections.

A representative of the West Michigan Talent Triangle testified in support. (2-3-16)

The Michigan Secretary of State is neutral on this bill. (1-20-16)

The Michigan Association of School Boards testified in opposition. (1-20-16)

The Michigan Municipal League testified in opposition. (2-3-16)

The Michigan Townships Association testified in opposition. (2-3-16)

The League of Women Voters opposes the bill. (1-20-16)

Oakland Schools opposes this bill. (1-20-16)

The Conference of Western Wayne opposes the bill. (1-20-16)

The Michigan Association of Counties opposes this bill. (1-20-16)

The County Road Association of Michigan opposes the bill. (1-20-16)

Wayne County Regional Education Service Agency opposes the bill. (2-3-16)

Michigan Freedom Fund opposes this bill. (2-3-16)

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.