MEMORANDUM

TO: Senate Democratic Leader Anthony Hensley

FROM: Will Lawrence, Legislative Counsel, Senate Democratic Leader

RE: Constitutionality of 2015 House Bill 2345

DATE: March 3, 2015

QUESTION PRESENTED

Whether or not 2015 House Bill 2345, restricting individuals who may run for and be elected to local school boards through a broad definition of "conflict of interest" is a constitutional and proper regulation of local elections?

SHORT ANSWER

No. The provisions of 2015 House Bill 2345 are not a constitutional and proper regulation of local elections under either a strict scrutiny or rational basis analysis.

BACKGROUND

On February 13, 2015, the House Judiciary committee introduced 2015 House Bill 2345 (hereinafter "HB 2345") as a committee bill.[1] It was referred to the House Education committee on February 16, 2014, and a hearing was subsequently scheduled for Thursday, March 5, 2014, in the House Education committee.[2] On February 26, 2015, the bill was withdrawn from the House Education committee and referred to the House committee on Appropriations.[3]

K.S.A. 25-2020 applies to local school district elections and sets the standards for individuals seeking to be candidates for such local school boards. K.S.A. 25-2022 relates to the filling of vacancies in local school board positions through appointments. HB 2345 seeks to modify both of these statutes by providing a restriction on who is qualified to seek election or appointment to such local school boards.

Section 1 of HB 2345 states that "[a] person who has a conflict of interest shall not be qualified to be a candidate for election pursuant to K.S.A. 25-2020 or appointment pursuant to K.S.A. 25-2022." The bill then defines "conflict of interest" as:

(3) a person who:

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[1] 2015 House Journal, pg. 229.
[2] 2015 House Journal, pg. 237.
[3] 2015 House Journal, pg. 307.

(A) has a substantial interest in any business that works directly with or provides services to this state or the local district in which such person resides;

(B) holds a position of administration, teacher or employee of a school district or the state department of education;

(C) resides in a home where an employee of a school district or the department of education also resides; or

(D) has a spouse, sibling or parent who is an employee of a school district or the department of education.

(c)(3)(A)-(D). The bill then defines "substantial interest" as:

(7) any of the following:

(A) An individual or an individual's spouse, either individually or collectively, has owned within the preceding 12 months a legal or equitable interest.

(B) An individual or an individual's spouse, either individually or collectively, has received during the preceding calendar year compensation which is or will be required to be included as taxable income on federal income tax returns of the individual and spouse in an aggregate amount of $2,000.

(C) An individual or an individual's spouse receives compensation which is a portion or percentage of each separate fee or commission paid to a business or combination of businesses that works directly with or provides services to the state of Kansas or the school district where such individual resides, provided the aggregate amount of such fees or commissions the individual or the individual's souse, either individually or collectively, received is $2,000 or more in the preceding calendar year.

(c)(7)(A)-(C). The bill would take effect upon publication in the statute book.

DISCUSSION AND ANALYSIS

Standard of review for ballot access questions

At the outset, it must be noted that the United States Supreme Court has never held that there is a fundamental right to candidacy. *See Bullock v. Carter*, 405 U.S. 134, 143 (1972). Thus, ballot access questions center on the infringement on the rights of voters, not candidates. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 786-87 (1983); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). However, the Supreme Court has stated that the rights of candidates and voters do not lend themselves to neat separation. *Bullock*, 405 U.S. at 143 (stating "laws that affect candidates always have at least some theoretical, correlative effect on voters"); *Anderson*, 460 U.S. at 786

(stating "[t]he impact of candidate eligibility requirements on voters implicates basic constitutional rights").

The standard of review for ballot access challenges was set out in *Anderson* and has been consistently applied in these cases since its inception in 1983. The test requires courts to evaluate the constitutionality of these election laws by weighing the following factors:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiffs seek to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Id at 789. In 1992, the Court confirmed the *Anderson* standard but clarified that not every restriction on voting rights is subject to strict scrutiny. *See Burdick v. Takushi*, 112 S. Ct. 2059, 2062-63 (1992). The *Burdick* Court stated that "only if a voting restriction places a severe burden on the First and Fourteenth Amendment interests will it be examined to determine whether it is 'narrowly drawn to advance a state interest of compelling importance.' On the other hand, if the contested legislation imposes a 'reasonable, nondiscriminatory restriction [ ]' on a voter's rights, it will be upheld as long as the state can advance an important regulatory interest. *See* CONSTITUTIONAL LAW – FIRST AMENDMENT – NO CONSTITUTIONAL RIGHT TO VOTE FOR DONALD DUCK: THE SUPREME COURT UPHOLDS THE CONSTITUTIONALITY OF WRITE-IN VOTING BANS IN BURDICK V. TAKUSHI, Western New England Law Review, Vol. 15: 129 (1993) (quoting *Burdick*).

Justice Harlan, in *NAACP v. Alabama ex rel. Patterson*, stated that "it is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Anderson*, 460 U.S. at 787 (quoting 357 U.S. 449, 460 (1958)). The *Anderson* Court stated that the "right to vote is 'heavily burdened' if that vote may be cast only for major-party candidates at a time when other parties or other candidates are 'clamoring for a place on the ballot." *Id* (quoting *Williams*, 393 U. S. at 31). Further, the "exclusion of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for likeminded citizens." *Id*.

The provisions of HB 2345 under a strict scrutiny analysis

As stated above, if the voting restriction places a severe burden on the First and Fourteenth Amendment interests, the restriction must be narrowly drawn to advance a state interest of compelling importance. The Court has recognized that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S.

724, 730 (1974). Of compelling importance is the state's interest in ensuring the integrity of the electoral system and prevent corruption. On its face, addressing conflicts of interest seems to be of compelling importance to the state. However, where the definition of conflicts of interest is overly broad or vague, it is not narrowly drawn to advance such state interest.

Here, HB 2345 excludes any individual from being a candidate who has a "conflict of interest" as defined by the bill. A "conflict of interest" is defined as being an administrator, teacher or employee of the school district or state school board, being a child, sibling or spouse of one of those identified individuals, or residing with one of those identified individuals. Additionally, the bill excludes anyone having a "substantial interest" in any business who does business with the local school district from being a candidate for the local school board. An individual has a "substantial interest" if such individual makes $2,000 or more from a local business who provides goods or services to the local school district.

First, it must be noted that individuals seeking election to local offices, including school board, are required to file a statement of substantial interest under Kansas law. *See e.g.*, K.S.A. 75-4301a; K.S.A. 75-4302a. This proposal goes beyond mandatory disclosure and inserts a blanket ban. Second, this proposal vastly expands the definition of "substantial interest" to the extent that a part-time minimum wage employee of a local lumber yard who provides building materials for the school's shop class would likely be prohibited from running for the local school board.[4] Addressing the issue of substantial interest has the goal of preventing individuals doing business with the school district from lining their own pockets. A part-time minimum wage employee does not run the risk of lining his own pockets as he is paid a fixed rate not tethered to any increase in business.

Additionally, while the bill seeks to prohibit individuals with potential conflicts of interest from serving on the board, it assumes such a conflict exists and, based on that assumption, provides a blanket ban without an established conflict of interest existing. This is the proverbial burning down the house to make a slice of toast. While there are times that conflicts of interest could surface, those interests are easily managed through public disclosure and recusal of participation in such issue. A blanket ban over public disclosure eliminates qualified individuals from candidacy for a school board in which they may have great passion for and knowledge of. Further, this disproportionately impacts small and rural towns in which local schools are the main employer.

The provisions of HB 2345 under a rational basis analysis

Where contested legislation imposes a reasonable, nondiscriminatory restriction on a voter's rights, it will be upheld as long as the state can advance an important regulatory interest. As stated above, it is clear that the state has a legitimate interest in regulating this area. However, where the provisions of HB 2345 seem to come to fatal blows with the Constitution is in the reasonableness of the proposed restrictions. The broadening of the definition of "substantial interest" to the extent it likely includes a part-time minimum wage employee of a

[4] An individual making $7.25 per hour for 20 hours per week over the course of a calendar year would earn $7,540.00 gross income from the lumber yard. This would be in excess of the $2,000.00 aggregate total under (c)(7)(B) of the bill.

local store and a blanket ban on any and all individuals connected to educators and administrators of the local school district falls short of reasonable.

Additionally, while the bill targets teachers, administrators and employees of the local school district and board of education, it also targets siblings, parents, spouses and roommates. The blanket ban on individuals residing with a school administrator, teacher or other employee bears no rational relationship to preventing corruption. There is not a sufficient nexus between the prohibited individual and the roommate to justify such a restriction. Further, parents and siblings are far enough removed that a sufficient nexus to justify such a blanket prohibition does not exist.

CONCLUSION

The right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively, are rights that rank among our most precious freedoms. While the state has a recognized interest in regulating access to the ballot, such interest must not be overly restrictive as to infringe upon First and Fourteenth Amendment rights.

Under a challenge to a ballot access measure, provisions that are overly burdensome and restrictive must be narrowly tailored to a compelling government interest. Where the provisions are reasonable and nondiscriminatory, they must simply bear a rational relationship to the recognized interest. For the reasons stated above, the provisions in HB 2345 clearly fail under a strict scrutiny analysis and, in all likelihood, fail under a rational basis review. Therefore, HB 2345 places an unconstitutional barrier to the voting rights of the qualified electors of Kansas's local school boards.