

## LEGAL REVIEW NOTE

**Bill No.:** HB 440

**LC#:** LC 3338, To Legal Review Copy, as  
of January 15, 2025

**Short Title:** Montana food first

**Attorney Reviewer:** Todd Everts  
Jaret Coles

**Date:** February 7, 2025

### 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 440, as drafted, amends 15-30-2120 to allow for an exclusion of “50% of the net income from the sale of Montana-produced food as defined in 15-31-113 generated at the point of sale by the retailer to the ultimate consumer”. HB 440 also inserts a new subsection (10) in 15-30-2120 that provides: “For the subtractions provided for in subsection (3)(p), the taxpayer shall report the net income from food identified by the vendor as Montana-produced food as defined in 15-31-113.”

HB 440 also amends the definition of gross income in 15-31-113 to exclude “50% of the net income from the sale of Montana-produced food generated at the point of sale by the retailer to the ultimate consumer.”

The term “Montana-produced food” is defined in HB 440 as:

"Montana-produced food" means articles normally used by humans as food or drink, including alcoholic and nonalcoholic beverages, and articles used for components of articles normally used by humans as food or drink, that is planted, cultivated, grown, harvested, raised, collected, processed, or manufactured in the state. The term does not include food prepared for onsite consumption.

HB 440 as drafted may raise potential federal constitutional issues related to the Commerce Clause under Article II, section 8, of the United States Constitution. The Commerce Clause provides that Congress has the power "to regulate Commerce ... among the several States." The United States Supreme Court has stated:

One of the fundamental principles of Commerce Clause jurisprudence is that no State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." This antidiscrimination principle "follows inexorably from the basic purpose of the Clause" to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution.

*Maryland v. Louisiana*, 451 U.S. 725, 754 (1981) (citations omitted).

HB 440 as drafted provides exemptions from state and corporate income tax for a percentage of income derived from the "sale of Montana-produced food". The term "Montana-produced food" means “articles normally used by humans as food or drink, including alcoholic and nonalcoholic beverages, and articles used for components of articles normally used by humans as food or drink, that is planted, cultivated, grown, harvested, raised, collected, processed, or manufactured in the state". The legislation does not provide an exemption for food produced out of state. Given that the legislation provides a commercial advantage for entities that sell a product produced in Montana, the legislation may raise potential constitutional conformity issues with the Commerce Clause under Article II, Section 8, of the United States Constitution.

### **Requester Comments:**

The Court's interpretation of the Commerce Clause regarding taxation is not as black and white as this report suggests. First, the United States Supreme Court's interpretation of the Commerce Clause, both generally and in relation to the State's power to tax interstate commerce, has evolved substantially and fitfully over the years. There is nothing to prevent the current Supreme Court, which has an enthusiasm for overturning long standing precedent in the name of "State's rights,"

from overturning another precedent. The Court's attitude toward state taxation of interstate commerce has alternated between a blanket prohibition and varying degrees of accommodation. In 1977, the Court fashioned a four-part test that governs the validity of state taxes under the Commerce Clause. Today, a tax will survive a Commerce Clause challenge if it (1) is applied to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to services provided by the state. See *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). As such, the Court has rejected the interpretation that state taxes levied on interstate commerce are *per se* invalid. *Id.*; see also *Washington Revenue Dept. v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734 (1978).