

**LFC Requester:**

**Scott Sanchez**

**AGENCY BILL ANALYSIS  
2024 REGULAR SESSION**

**SECTION I: GENERAL INFORMATION**

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

*Check all that apply:*

**Original**      X      **Amendment**    \_\_\_\_\_  
**Correction**    \_\_\_\_\_    **Substitute**    \_\_\_\_\_

**Date Prepared:**      1/23/2024  

**Bill No:**      SB 38  

**Sponsor:**      Sen. Bill B. O’Neill and  
                  Sen. Natalie Figueroa  

**Agency Name and**      305 – New Mexico  
                          Code Number:        Department of Justice  

**Short Title:**      Primary Election Changes  

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**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	FY25		

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY24	FY25	FY26		

(Parenthesis ( ) Indicate Expenditure Decreases)

**ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:  
 Duplicates/Relates to Appropriation in the General Appropriation Act

**SECTION III: NARRATIVE**

*This analysis is neither a formal Opinion nor an Advisory Letter issued by the New Mexico Department of Justice. This is a staff analysis in response to a committee or legislator’s request. The analysis does not represent any official policy or legal position of the NM Department of Justice.*

**BILL SUMMARY**

Senate Bill (“SB”) 38 seeks to change New Mexico’s primary election system from a “closed primary” system to an “open to unaffiliated voters primary” system by allowing a voter who is not affiliated with a major political party to vote in the primary of a major political party by requesting the primary ballot for a major political party. “Major Political Party” is defined in § 1-7-7(A) as a qualified political party who has a candidate for governor or president of the United States who received as many as five percent of the total votes cast in the last election and whose membership totals not less than one-third of one percent of the statewide registered voter file on the day of the governor's primary election proclamation.

In our state’s current closed primary system, a voter who has not designated affiliation with a major political party “shall not vote in a primary election.” NMSA § 1-12-7(B). SB 38 would allow a voter to participate in a primary election by requesting the ballot of one of the parties participating in that primary election if the voter either:

1. has not designated a party affiliation on their certificate of registration; or
2. who designated affiliation with a party other than a major political party.

SB 38 accomplishes the above change to the primary voting system by adjusting the election code in the subsections covering registration (NMSA § 1-4-15), mail ballots (NMSA §§ 1-6-4 and 22.1), election conduct (NMSA §§ 1-12-7, 7.1, 7.2 and 12) and presidential primaries (NMSA §1-15A-2).

**FISCAL IMPLICATIONS**

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

**SIGNIFICANT ISSUES**

Any system where a state statute can be construed as interfering with a party’s right to choose their nominee for a general election may be considered an unconstitutional violation of the major

political parties' First Amendment right of association if the system is challenged by one of those parties. The US Supreme Court has struck down state statutes imposing blanket, open primaries as well as state statutes mandating closed primaries. *See generally California Democratic Party v. Jones*, 530 U.S. 567, 583, 120 S. Ct. 2402, 2413, 147 L. Ed. 2d 502 (2000) (“a ‘nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications.’”) (*quoting Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 216, 107 S. Ct. 544, 549, 93 L. Ed. 2d 514 (1986)); *See also Miller v. Brown*, 503 F.3d 360, 371 (4th Cir. 2007) (ruling that Virginia’s interest in encouraging voter participation cannot overcome the severe burden placed upon a political party when it is forced to associate with those who may not share its views.).

In the *Tashjian* case, the Republican Party of the State of Connecticut adopted a Party rule permitting independent voters to vote in the Republican primaries for federal and state-wide offices. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 210–11, 107 S. Ct. 544, 546, 93 L. Ed. 2d 514 (1986). But Connecticut election law contained a provision similar to New Mexico’s, requiring voters in any party primary to be registered members of that party, that the US Supreme Court found to “impermissibly burden the rights of the Party and its members protected by the First and Fourteenth Amendments.” *Id.* at 556-557.

#### **PERFORMANCE IMPLICATIONS**

N/A

#### **ADMINISTRATIVE IMPLICATIONS**

N/A

#### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

None.

#### **TECHNICAL ISSUES**

None.

#### **OTHER SUBSTANTIVE ISSUES**

None.

#### **ALTERNATIVES**

None.

#### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Status Quo of a closed primary system.

#### **AMENDMENTS**