

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 25-0142

MAE NAN ELLINGSON; JEROME LOENDORF; ARLYNE REICHERT; HAL
HARPER; BOB BROWN; EVAN BARRETT; C.B. PEARSON; CAROLE
MACKIN; MARK MACKIN; JONATHAN MOTL,

Plaintiffs and Appellees,

v.

STATE OF MONTANA; GREG GIANFORTE, GOVERNOR OF THE STATE
OF MONTANA; AUSTIN KNUDSEN, MONTANA ATTORNEY GENERAL;
CHRISTI JACOBSEN, SECRETARY OF STATE,

Defendants and Appellants.

APPELLEES'/CROSS-APPELLANTS' REPLY BRIEF

On Appeal from the Montana First Judicial District Court, Lewis and Clark County
Cause No. DV-25-2023-0000388-DK
Honorable Mike Menahan

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INTRODUCTION

The Court should grant attorney fees because Plaintiffs have vindicated important constitutional rights that benefit all Montanans. Counsel for Plaintiffs handled this litigation *pro bono* and the purpose of the Private Attorney General Doctrine is to provide an incentive for parties to bring this type of public interest litigation. The district court determined “Plaintiffs could likely satisfy the first and third *Montrust* factors based on the nature of the policy vindicated” but denied fee recovery on the narrow grounds that the “magnitude of the burden on Plaintiffs in bringing an action to enforce their rights does not support an award of attorney fees.” This Court should reverse because the district court did not consider the significant amount of effort that Plaintiffs’ counsel exerted and the time necessary to secure the meaningful results obtained in this case. Equity also favors granting fees because this is the second time in three years that one of the challenged provisions has been struck as unconstitutional. Plaintiffs’ counsel in both cases is the same.

ARGUMENT

I. Ellingson Should Be Awarded Attorney Fees under the Private Attorney General Doctrine.

A. The First and Third *Montrust* Factors Favor Awarding Attorney Fees.

The district court determined “[p]rotecting Montanans’ constitutional rights is of the utmost societal importance and stands to benefit all.” App’x 1, Ex. C at 4 (Doc. 71). Defendants argue the district court was wrong when it determined this litigation

satisfied the first and third *Montrust* factors—the strength or societal importance of the public policy vindicated by the litigation and the number of people standing to benefit from the decision.” *Montanans for the Responsible Use of the Sch. Tr. v. State ex rel. Bd. Of Land Comm’rs*, 1999 MT 263, ¶66, 296 Mont. 402, 989 P. 2d 800 (hereinafter “*Montrust*”).

Regarding the first *Montrust* factor, “the strength or societal importance of the public policy vindicated by the litigation,” this Court has previously held that the “right of the people to amend the Constitution by initiative is a unique and important retained power.” *State ex rel. Montana Sch. Bd. v. Waltermire*, 224 Mont. 296, 299 (1986). Plaintiffs satisfied the standard of vindicating an important public policy by striking as unconstitutional a law that conferred power on the Attorney General to infringe upon the people’s constitutional right of initiative. This litigation clearly meets the first *Montrust* factor because it vindicated “an important public policies that is grounded in Montana’s constitution.” *Montrust*, ¶67; *Barrett v. State of Montana*, 2024 Mt. 86, ¶59.

Regarding the third *Montrust* factor, the number of people standing to benefit from the decision, Defendants argue Plaintiffs were required to “demonstrate that the voting public has been denied certain ballot issues because they were hamstrung by SB 93.” Br. at 16-17. That is not the standard. As the district court noted, all Montanans stand to benefit when unlawful infringements on their constitutional power is removed. App’x 1, Ex. C at 4 (Doc. 71).

B. The Second Montrust Factor Favors Awarding Attorney Fees.

The District Court work in this Matter by Ellingson’s attorney met the magnitude of burden standard. When deciding whether to award attorney fees, court must consider “the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff.” *Montrust*, ¶67. Excluding procedural filings, the District Court work involved over 100 pages of original substantive writing of Briefs and Declarations spanning a 21-month period. The substance of the writing involved, or was addressed to, the nuanced and original concept that ballot issues in Montana should be universally examined and measured by application of the word “power” as that power applies to ballot issues. The work by Ellingson’s counsel was the only work that argued, briefed and defined ballot issue power and it allowed the District Court to issue the two summary judgment orders that now place the concept of a defined ballot issue power squarely before the Court. *See* Statement of Case, Appellee’s Initial Brief.

Ellingson’s first motion for summary judgment isolated and addressed two applications of, and infringement on, ballot issue power. These applications were ballot issue language filing (with the infringement being a filing fee) and review by the attorney general (infringement being attorney general substantive review authority). Ellingson argued that the facts necessary for summary judgment on those two issues were not in dispute supporting that argument with one Declaration and an exhibit. *See* Statement of Case, Appellee’s Initial Brief, Docs. 17, 18 , 19. Montana responded with

three Declarations. *See* Statement of Case, Docs 22, 23, 24 ,25. Montana’s Declarations raised collateral factual issues concerning “ballot cluttering” and a waiver of the filing fee. *Id.* The District’s Court’s Order recognized and discussed these factual issues in issuing its summary judgment order. The District Court’s Order adopted and applied the concept of a ballot issue power. *See* Statement of Case, Doc 30.

Ellingson’s second summary judgment motion raised and addressed infringements on the remaining nine applications of ballot issue power set out in the Complaint. Ellingson filed a brief supporting the motion with the Declarations of Ellingson, Barrett, Motl, Pearson and Mackin. *See* Statement of Case, Doc. 33. Montana responded with the Declarations of Evans, Mead, Coles and Nunn. *See* Statement of Case, Docs. 33. 34, 35 and 36. Ellingson filed a reply brief [*See* Statement of case, Doc. 47] along with a Brief opposing Montana’s motion to strike the Ellingson Declarations. *See* Statement of Case, Doc. 46. The District Court’s second Summary Judgment Order [*See* Statement of Case, Doc. 51] reviewed the facts set out in the Declarations including whether the Legislature had a similar law-making restriction [Doc. 51, pp. 4, 5], whether state resources are excessively used [Doc. 51, p. 5], whether voter confusion is caused [*Id.*]; whether independent agency authority is created [Doc., p. 7]; how the harm to business statement is applied [Doc. p. 10]; how the Legislative Committee reviewed a proposed ballot issue [Doc. pp. 15-16]; and the

length of administrative agency review time [Doc. pp. 16-17]. The Summary Judgment Order again adopted and applied the concept of a ballot issue power.

The work production by the Ellingson attorney was substantial in sheer volume. The Complaint was 14 pages in length and the briefing over a 15 month period culminated in the District Court's second summary judgment order of August 13, 2024. Ellingson's attorney wrote and filed 68 pages of briefs supporting summary judgment on the issues set out in the Complaint. Those briefs were supported by 45 pages of Declarations, with several Declarations carefully addressing each allegation of the Ellingson complaint. [See Statement of Case, Doc. 18; Doc. 33, Motl, Pearson and Barrett]. The total of 113 pages of originally written, coordinated briefing documents shows, by itself, a significant legal drafting burden.

Importantly, the District Court briefing involved first time legal issues. The Ellingson litigation platform was unique in Montana's history of ballot issue litigation. It was not built around a single initiative and therefore based on the way a certain initiative or referendum was treated by state statutes or administrative agencies. Instead, it was based on the manner in which the recent statutes and/or agency actions applied to and affected the initiative and referendum process in general. See Complaint, Doc. 1.

Accordingly, Ellingson's Complaint and District Court briefing sought to define the basis for initiative action as a "power", thereby allowing that power, no matter what the initiative, to be measured in contrast to legislative and executive powers.

This was not an easy task as prior Supreme Court Decisions used language appropriate to a single initiative decision rather than the decision dealing with the actual initiative process. Montana struggled with this concept in its briefing. As the Ellingson Amici noted: “[t]he State Defendants largely ignored ‘power’ in Article III at the District Court and instead used the word ‘right’ in connection with citizen’s initiatives. They argued that alternative authority, such as election law, allowed the Legislature to adopt restrictions on the People’s Article III lawmaking.” Ellingson Amici Brief. P. 7. Ellingson’s District Court Briefs and Declarations took on and carried the burden of persuasion and argument of the necessity of new language to determine whether state statutes and/or administrative agency actions were infringing on the people’s ballot issue power.

It now appears that Montana and the Montana Amici have been persuaded and agree with the concept of a power of initiative and referendum and the concept of measuring how that power is affected by legislation or administrative agency action. If this Court agrees, all Montanans will enjoy a newly defined constitutional power of initiative and referendum. Unearthing, beginning to define, and now defending this power of the people has required a high magnitude of concentrated work. The District Court did not consider and address these issues in its Opinion denying attorney fees. Ellingson submits that its District Court work meets the magnitude of burden standard and the District Court should be reversed on attorney fees.

C. Intervening Law and Equity Favor Granting Attorney Fees.

After the District Court issued its order denying Plaintiffs attorney fees, this Court issued a decision stating, “we are simply holding that whenever the State forces its citizens to assume the burden of litigation to obtain what the citizens are entitled to under the Montana constitution, the citizens are entitled to a presumption in favor of attorney fees.” *See MEIC v. MT*, 2025 MT 112, ¶44 (Shea, J., concurring). The directive in *MEIC* is “to provide basic guidance that works to encourage and strengthen the people’s exercise of a fundamental constitutional right.” *Id.*, ¶ 18.

Montanans’ constitutional right to ballot initiatives is fundamental. “All political power is vested in and derived from the people.” Art. II, Sec. 1. The people enjoy a fundamental right of suffrage. Art. II, Sec. 13. “The right of suffrage is a fundamental right.” *Willems v. State*, 2014 MT 82, ¶32 (citation omitted). “The people reserve to themselves the powers of initiative and referendum.” Art. V, Sec. 1. No civil law may interfere in the free exercise of suffrage. Art. II, Sec. 13. Plaintiffs in this case protected the people’s fundamental constitutional power of initiative.

This Court should either apply the newly established presumption in favor of attorney fees and reverse the district court or remand for application of the newly established presumption in favor of attorney fees in the first instance. *See Mont. State Univ.-Bozeman v. Mont. First Judicial Dist. Court*, 2018 MT 220, ¶15 (“conclusions of law, questions of law, and legal components of ultimate facts or mixed questions of law and fact [are] reviewed de novo for correctness.”) (citation omitted).

“It is not uncommon for courts to reference other equitable considerations that could support the award of fees against the State—whether that be the bad faith of the Attorney General in defending the law, the bad faith of the Legislature in enacting the law, the State's breach of fiduciary duties, or some other.” *Barrett v. State*, 2024 MT 86, ¶73 (McGrath, C.J., concurring) (citations omitted). Equity supports granting attorney fees in this case because this Court has previously struck as unconstitutional a nearly identical provision that was challenged as unconstitutional in this case.

In 2022, then Chief Justice McGrath wrote a special concurrence warning that the Attorney General “lacks the power to reject a proposed ballot initiative based on an opinion about its constitutionality” and “the Legislature equally lacks the power to confer it upon him.” *Cottonwood Emtl. Law Ctr. v. Knudsen*, 2022 MT 49, ¶¶28; 32. The district court in this case similarly held that “[t]he legislature has no authority over constitutional review questions and therefore cannot grant such authority to a third party, including the Attorney General.” App’x 1, Ex. C at 7 (Doc. 71). The last time this Court struck the provision challenged here, Chief Justice McGrath stated “[a]ny future determination by the Attorney General that bases legal deficiency on a matter of constitutional interpretation cannot stand.” *Cottonwood Emtl. Law. Ctr.*, ¶36.

Defendants knew the law it was passing was unconstitutional. Awarding attorney fees is equitable and appropriate. *See Forward Mont v. State*, 2024 MT 75, ¶ 34 (“the Legislature was well aware that what they were doing was unconstitutional, which

serves as a strong showing of bad faith, a factor we consider as a guidepost in determining that fees are proper here.”)

CONCLUSION

For the foregoing reasons, the Court should reverse the district court and grant attorney fees. In the alternative, the Court can remand to the district court to apply new intervening law in the first instance.

Respectfully submitted this 29th day of September, 2025.

/s/ John Meyer
JOHN MEYER

Attorney for Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Garamond text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 2,089 words, excluding cover page, tables of contents and authorities, certificates of service and compliance, signatures, and any appendices.

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CERTIFICATE OF SERVICE

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