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' RESPONSE AND OPENING BRIEF

On Appeal from the Montana First Judicial District Court, Lewis and Clark County
Cause No. ADV-2023-388

Honorable Mike Menahan

Appearances on following page.

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1. Is Appellant required to make its appeal from the final Judgment?
2. Does Article III, Sections 4 and 5 of Montana Constitution confer to the People a constitutional power of lawmaking through initiative and referendum that is separate from the Legislature, and, if so, what is the judicial standard for determining the constitutionality of legislative and agency interference with that constitutional power?
3. Does this Court affirm the District Court's November 6, 2024 final Judgment in this Matter, which found:
   A. Article III, Sections 4 and 5 of Montana's Constitution prohibit the imposition of a $3700 filing fee for a proposed Montana initiative or referendum.
   B. Article III, Section 4 of Montana's Constitution prohibit the imposition of certain refiling requirements on a proposed Montana initiative.
   C. Article V, Section 1 of Montana's Constitution prohibits a legislative committee from inserting itself into the process of preparing a Montana initiative petition for signature presentation to Montana electors.
   D. Article III, Sections 4 and 5 of Montana's Constitution prohibit the Attorney General from engaging in substantive legal review of proposed ballot issues.

4. The Issue on the Cross-Appeal is whether the District Court's attorney fee denial should be reversed:

   A. Did the District Court abuse its discretion when it denied Appellee's request for attorney fees?

   B. Should the attorney fee issue be returned to District Court for application of the presumption of attorney fees?

STATEMENT OF THE CASE

The Montana Constitution reserves to Montana Citizens ("the People") the power of initiative and referendum. The district court entered Judgement in favor of Plaintiffs and found that the challenged statutes unconstitutionally infringe upon the People's power of lawmaking. This appeal presents a matter of first impression—whether Montana unlawfully impaired upon the powers granted to the People under Article III, Sections 1, 4 and 5 of Montana's Constitution and protected by Article V, Section 1.

On May 23, 2023, Plaintiff Jonathan Motl and 9 additional citizen sponsors (collectively "Ellingson") submitted an email to the Montana Secretary of State ("SOS") introducing "the text, including a ballot statement, of an initiative proposed for the 2024 ballot" and asking to "advance this document to the next step, that being review by Legislative Services." (*See* App'x 3, Ex. A). On May 24, 2023 the SOS, by email, declined to advance the proposed ballot issue for review by Legislature Services because "[w]ith the passage of SB 93, submission of a ballot issue requires a filing fee of $3700." *Id.* The SOS noted the possibility of a waiver of the fee "by demonstrating a financial inability to pay without substantial hardship. If you intend to seek a waiver, please attest to your financial inability to pay." *Id.* Motl's May 24, 2023 response was that "[t]he citizen sponsors do not wish to seek a waiver **and are not eligible for one**." *Id.* (Emphasis added). The SOS did not accept the proposed initiative because a $3700 filing fee was not paid. App'x 1, Ex. D at 2.

On May 26, 2023, Mae Nan Ellingson, a delegate to the 1972 Constitutional Convention, and nine other Plaintiffs filed the Complaint in this Matter. (Doc. 1).[1] The Complaint named the State of Montana, the Governor, the Attorney General, and the Secretary of State (SOS) as Defendants. On October 10, 2023, the named Defendants, all appearing through representation by the Attorney General (collectively "Montana"), filed their Answer. (Doc. 16).

On October 20, 2023, *Ellingson* filed a motion for partial summary judgment, accompanied by a brief and a declaration from Plaintiff Motl. (Docs. 17, 18, 19). On November 22, 2023, Montana filed its response brief accompanied by the declarations of Angela Nunn, Brent Mead and Jaret R. Coles. (Docs. 22, 23, 24, 25). On December 15, 2023, *Ellingson* filed a reply brief, along with an exhibit showing bill statistics for the Montana Legislature. (Doc. 28). The partial summary judgment motion sought a decision as to the constitutionality of the $3700 filing fee requirement and Montana's authority to reject an initiative and/or referendum based on the substantive legality. There was no request for oral argument and the partial summary judgment motion was noticed for decision. On February 5, 2024, the District Court issued its Order granting "Plaintiffs' motion for partial summary judgment." App'x. 1, Ex. D (Doc. 30). The two claims that *Ellingson* prevailed on in

[1] Citations to documents in parenthesis refer to the docket number in the district court.

the first motion for Summary Judgment appear as paragraphs 1 and 2 of the Judgment entered by the District Court on November 8, 2024. App'x. 1, Ex. B (Doc. 61, ¶¶ 1,2).

The February 5, 2024 partial summary judgment order, at page 5, recognized that the SOS rejected three proposed ballot issues because the $3700 fee was not paid. On February 12, 2024, *Ellingson* served a notice of the summary judgment order on Defendants, specifically providing notice to the SOS. (Doc. 31, ¶ 4). Under that authority, *Ellingson* successfully filed the proposed ballot issue language that had previously been rejected by SOS.

On March 22, 2024, *Ellingson* filed a motion for summary judgment on the remaining issues challenged in the Complaint. (Doc. 32). The motion was supported by a brief accompanied by the declarations/expert opinions of Plaintiffs Pearson, Motl and Barrett, along with the declarations of Plaintiffs Ellingson and Mackin. (Doc. 33). On May 13, 2024, Montana filed its brief in opposition, accompanied by the declarations of Angela Nunn, Jaret Coles, Brent Mead, and Ryann Evans. (Docs. 40, 41, 42, 43). Montana's response brief incorporated argument from an unfiled motion to strike the declarations/expert opinions accompanying the *Ellingson* Brief.[2] On June 7, 2024, *Ellingson* filed a reply brief in support of the motion for summary judgment (Doc. 47). Ellingson also filed a separate response brief opposing the

[2] There is no motion to strike in the record filed with the Clerk of the Supreme Court.

unfiled motion to strike. (Doc. 46). On June 21, 2024, Montana filed a reply brief in support of its unfiled motion to strike the declarations/expert. (Doc. 48).

On August 13, 2024, the District Court issued its Order granting Ellingson summary judgment on two additional claims and denying summary judgment on all remaining claims. App'x. 1, Ex. E (Doc. 51). The unfiled motion to strike was not addressed in the Order and that issue has not been appealed. The two claims that Ellingson prevailed on in Doc. 51 appear as paragraphs 3 and 4 of the Judgment entered by the District Court on November 8, 2024. App'x. 1, Ex. B (Doc. 61, ¶¶ 3,4).

Ellingson and Montana stipulated that the remaining complaint issues (those for which summary judgment was denied) would be dismissed *without* prejudice and filed that stipulation with the District Court on September 11, 2024. (Doc. 52). On September 23, 2024, *Ellingson* moved for dismissal without prejudice of all claims not decided by summary judgment. (Doc. 53). On September 24, 2024, the District Court entered its Order dismissing all remaining claims without prejudice. (Doc. 54). That dismissal without prejudice was repeated in the District Court's Judgment of November 8, 2024. App'x. 1, Ex. B. (Doc. 61).

On November 4, 2024, *Ellingson* filed a bill of costs (Doc. 57) and on November 7, 2024, a motion for attorney fees. (Doc. 59). Those issues were fully briefed and the District Court denied costs and attorney fees in an Order dated December 20, 2024. App'x. 1, Ex. C. The Judgment became final upon the

December 20, 2024 denial of the attorney fee motion. *See* M. R. App. P. 6(5)(b). On February 18, 2025, Montana filed it notice of appeal. (Doc. 72). *Ellingson* filed an amended notice of cross-appeal on February 19, 2025. App'x. A, Exhibit 1.

STATEMENT OF FACTS

On May 19, 2023, Montana Governor Greg Gianforte signed into law Senate Bill 93 (SB 93) App'x. 2, Ex. A. The relevant provisions of SB 93 are:

1. SB 93 required a proponent of a ballot initiative or referendum to pay $3700 before the Secretary of State's office forwarded the proposed ballot language for review by Legislative Services.
2. SB 93 prohibited the refiling of ballot issue language that was rejected by voters in the previous election.
3. SB 93 authorized a legislative committee to temporarily hold, consider, and vote on proposed a ballot issue and further authorized the placement of that legislative committee vote on the face of the ballot petition.
4. SB 93 required the Montana AG to determine the substantive constitutionality of a ballot issue without a court proceeding.

STANDARD OF REVIEW

Ellingson accepts the standard of review of constitutional issues and summary judgment orders as set out in Montana's opening brief. On cross-appeal, the Court reviews the district court's denial of attorney fees for an abuse of discretion. *City of Helena v. Svee*, 2014 MT 311, ¶ 7, 377 Mont. 158, 339 P.3d 32. "An abuse of

discretion occurs if a discretionary ruling is based on a mistake of law, clearly erroneous finding of fact, or arbitrary reasoning, lacking conscientious judgment or exceeding the bounds of reason, resulting in substantial injustice." *Mont. State Univ.-Bozeman v. Mont. First Judicial Dist.*, 2018 MT 220, ¶15, 392 Mont. 458, 426 P.3d 541 (citation omitted); *Montanans for the Responsible Use of the Sch. Tr. v. State ex rel. Bd. Of Land Comm'rs*, 1999 MT 263, ¶ 68, 296 Mont. 402, 989 P. 2d 800. Citizens are entitled to a "presumption" in favor of attorney fees "whenever the State forces its citizens to assume the burden of litigation to obtain what the citizens are entitled to under the Montana Constitution." *See MEIC v. MT*, 2025 MT 112, ¶ 44 (Shea, J., concurring).

SUMMARY OF THE ARGUMENT

The Court should not entertain this appeal because Montana did not appeal a final judgment. If the Court considers Montana's appeal, it should sustain the District Court's two summary judgment orders, recognize the Peoples' power of lawmaking by initiative and referendum under Article 3, Sections 4 and 5, and the constitutional protection of those powers found in Article V, Section 1. The Court should further articulate a judicial standard for determining whether laws passed by the legislature facilitate or unconstitutionally impair the Peoples' lawmaking power. After delineating the correct legal standard, the Court should sustain the District Court's Judgment that Ellingson prevailed on all four claims for relief.

The Court should reverse the District Court's denial of attorney fees and return this issue to District Court for consideration of attorney fees.

ARGUMENT

I. Montana Is Required to Appeal From a Final Judgment

Montana's Notice of Appeal only purports to appeal "from the two summary Judgment Orders filed on February 5, 2024 and August 13, 2024." App'x. 1, Ex. F at 3. Montana did not list the Judgment in its Statement of the Case or include the Judgment in an appendix.[3] "Montana's Rules of Appellate Procedure make clear that appeal can be taken only from a final judgment or a special order made after final judgment." *Kirchner v. Western Mont. Regional Community Mental Health Ctr.*, 261 Mont. 227, 229 (1993). Montana Rule of Appellate Procedure 6(5)(b) states "[o]rders denying motions for summary judgment" are not appealable. The Court should require the Attorney General to amend Montana's Notice of Appeal or the Court can do so. *See* M.R.A.P. 4(4)(e).[4]

The Judgment is essential to place Montana's argument in context because it states that on September 24, 2024, "this Court entered its Order dismissing all remaining claims in this Matter without prejudice." App'x. 1, Ex. B at 2 (Emphasis added). Despite the "without prejudice" language, Montana's opening brief attempts

[3] The Judgment was appealed by *Ellingson*. *See Ellingson* amended notice of appeal, Appendix A, Ex. 1.

[4] Montana's appeal of the summary judgment orders is also untimely under M. R. App. P. 4(5)(a)(1) because the February 18, 2025 Notice of Appeal is not within 60 days of either summary judgment order. The only District Court decision that Montana can timely appeal in this Matter is the final Judgment.

to mislead the Court by stating, "[t]he district court upheld the other seven challenged provisions of S.B.93." Br. at 2. Montana's brief incorrectly states, "[t]he District Court upholds seven provisions and strikes four" and "[t]hereafter the Parties stipulated to, and the District Court ordered, the dismissal of the seven claims challenging provisions found constitutional." Br. at 4, 6. The assertion that the District Court upheld the challenged provisions of S.B 93 on which Plaintiffs/Appellees did not prevail is incorrect. The district court did not grant either side summary judgment on seven claims and they were dismissed without prejudice. App'x. 1, Ex. B at 2. Contrary to Montana's assertion, claims dismissed without prejudice are not "upheld" or "found constitutional." Br. at 2, 4, 6. As this Court has held:

> A dismissal without prejudice leaves the parties free to re-file an action at any time. It does not act as a bar to a further suit on the same action. On the contrary, normal use of the phrase would lead us to believe that a dismissal "without prejudice," means that no right or remedy of the parties is affected, the use of the phrase simply shows that there has been no decision in the case upon the merits and prevents the defendant from setting up the defense of res judicata."

Schmitz v. Engstrom, 2000 MT, 275, ¶ 11, 302 Mont. 121, 13 p. 3d 38. (Emphasis added).

II. Article III, Sections 4 and 5 of Montana's Constitution Confers on the People a Separate Constitutional Power of Lawmaking Through Initiative and/or Referendum and the Legislature and Agencies Must Interact Only As Necessary to Facilitate That Power.

A. The Article III People's Power of Lawmaking Must be Judicially Defined.

Montana's opening brief and the Amicus Brief supporting Montana argue that Article III, Sections 4 and 5 of Montana's constitution confers upon Montana's People a separate constitutional power of lawmaking co-equal with that of the Legislature. Br. at 7. Article III, section 4(1) defines the People's power of lawmaking by initiative: "[t]he people may enact laws by initiative on all matters except appropriations of money and local or special laws." The "Power and Structure" section of the Constitution reserves the People's power from the power granted to the Legislature: "[t]he legislative power is vested in a legislature consisting of a senate and house of representatives. The people reserve to themselves the powers of initiative and referendum." Mont. Const. Art. V, § 1 (emphasis added). The People's power is protected by the Constitution's separation of powers clause: "[n]o person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted." Mont. Const. Art. III, § 1.

The first District Court Order granting Ellingson summary judgment followed the language of the Constitution and determined that "[u]nder Article V, Section I, the people's powers of initiative and referendum exist on equal footing with the legislature's legislative powers." App'x. 1, Ex. D at 9 (Doc. 30). Montana's opening brief in this Court concedes that Article III of the Montana Constitution confers power on the People to make laws. Br. at 1. The Amicus brief supporting Montana agrees that "[t]he power of initiative and referendum belong to the People." Br. at 4.

Montana makes the limited argument that the Legislature retains the ability to "enact regulatory frameworks that facilitate the People's lawmaking power." Br. at 1. Montana adds that "[t]his appeal presents novel questions about (1) what methods the Montana Legislature may use to facilitate the People's lawmaking powers and (2) the standards courts should use to review the constitutionality of such legislation." Br. at 2.

The Court should now begin to delineate the People's constitutionally conveyed and reserved power of lawmaking. While this Court has resolved ballot issue cases on numerous occasions, it has not resolved a case on the basis of the People's Article III lawmaking powers. The recent case of *Cottonwood v. Knudsen*, 408 Mont. 57, 2022 MT 49, 505 P.3d 837 is illustrative. A proposed ballot issue had been submitted to the SOS, passed by SOS to Legislative Services, reviewed by Legislative Services, returned to SOS, and passed by SOS to the AG. *Id.*, ¶10. The AG's review then rejected the proposed ballot issue based on a substantive legality determination that the proposed ballot issue language constituted an unconstitutional regulatory taking of private property. *Id.*, ¶11. Cottonwood challenged the determination and this Court reversed, finding the AG's opinion to be erroneous as a matter of law. *Id.*, ¶23. At no point in the majority opinion was an Article III People's power argument raised or addressed. Chief Justice McGrath's concurrence did raise Article III, Section 4 constitutional concerns (*Id.*, ¶ 31), but went on to discuss constitutionality solely in

terms of Article III, §1 separation of powers between the Judicial and Legislative branches of government. *Id.*, ¶¶ 32-34.

The *Cottonwood* decision reflects long-standing Montana cultural practices. For decades, Montana's administrative agencies and the legislature have implicitly respected the People's powers of initiative and referendum. It is only recently, primarily since 2021, that the Legislature and administrative agencies have disregarded the People's Constitutional power. The McGrath concurrence describes this change in attitude toward ballot issues:

> Because Article III, Section 4 of the Montana Constitution ensures the public's right to "enact laws by initiative" it is unclear what the Legislature contemplated when it reversed the provision to review the "substantive legality" of a *new enactment of law*. (Emphasis in original.) What is clear, however, is that the Attorney General took this directive to mean that he could determine a proposed ballot issue's validity based on his view of its constitutionality.
>
> But the Attorney General lacks such power, and the Legislature equally lacks the power to confer it upon him.

Cottonwood, ¶¶ 31-32.

The 2021 Montana Legislature's unlawful conveyance of legal authority on the AG to decide the substantive legality of ballot issues led to a comprehensive law review article on legislative encroachments into ballot issue power by Anthony Johnstone, former University of Montana Constitutional Law Professor recently turned Ninth Circuit Judge: *The Separation of Legislative Powers in the Initiative Process*, 101 NEB. L REV. 125, 129-130 (2022). App'x. B, Ex. 2. Despite the warnings in Justice

McGrath's 2021 *Cottonwood* concurrence and the cautionary language in the 2022 Johnstone article, the 2023 Legislature doubled down on the ballot issue restrictions, passing SB93 which reorganized but continued the 2021 Legislature's grant to the AG of "substantive legality" review authority on ballot issues, along with the additional issues *Ellingson* challenged in this Matter. SB93's broad impairment on the People's lawmaking powers galvanized Montana supporters of initiative and referendum, resulting in a cast of *Ellingson* plaintiffs consisting of three delegates to the 1972 Constitutional convention, three legislative/local government leaders from both parties and four of the most active ballot issue proponents over the past 30 years. (Doc. 1, ¶¶ 2-11).

The *Ellingson* plaintiffs now ask the Court to acknowledge the People's constitutional powers set out in Article III, Sections 4 and 5 and reserved from legislative power under Article V, Section 1. Culture no longer protects the Peoples' ballot issue powers. The law must step in. The first order of business is for the Court to begin referring to the People's constitutional "powers," not constitutional "rights." Article V, §1 of the Montana Constitution explains that "[t]he people reserve to themselves the *powers* of initiative and referendum." (Emphasis added). Johnstone makes it clear that the word "power" was deliberately chosen: "[m]ost importantly, the initiative power is 'reserved' to the people, the origin of 'all political power' as expressed in nearly every state constitution." Johnstone, *supra*, at 129-130. The District Court's summary judgment orders use the word "power" and this Court

should do the same when determining whether challenged statutes unconstitutionally infringe upon the People's power.

B. Challenged Legislation Should be Measured by Whether It Facilitates or Impairs the People's Power of Initiative and Referendum.

The Court should adopt a judicial standard that measures laws and actions affecting the Peoples' powers of initiative and referendum by determining whether the challenged laws or actions facilitate or impair the People's power of lawmaking. Johnstone discussed the need for such a standard: "as with other state constitutional separations of powers between and within branches, courts must develop workable doctrines to police the line between facilitation and impairment of the initiative power." Johnstone, *supra*, at 150. The District Court adopted the terms "facilitation" and "impairment" in its summary judgment orders. *See* App'x 1, Ex. D; Ex. E. This Court should adopt the District Court's approach and determine the constitutionality of legislative and agency actions on the basis of whether they facilitate or impair the People's lawmaking powers.

Montana and its Amici incorrectly argue that the District Court developed and applied both a "facilitate vs. impair test" and an "equal footing" test. Montana Br. at 11; Amicus Br. at 11. The "equal footing" test was applied as part of the District Court's measure of whether a particular SB93 ballot issue requirement, such as the $3700 filing fee, facilitated or impaired the People's power. App'x. 1, Ex. D at 9. For example, there are statutory requirements that Legislative Services review a proposed

Montana law, whether it be a legislative bill or a proposed ballot issue, before it can be introduced to the Legislative body or voting electors. Because the People and the Legislature both have lawmaking power and are treated the same when Legislative Services reviews proposed laws or initiatives, there should be a presumption of facilitation as to Legislative Services' review. Johnstone, *supra* at 151.

However, when one lawmaking entity, the People, is assessed a filing fee before it can submit a ballot issue proposal while the other lawmaking entity, the Legislature, is not assessed such a fee for filing a bill drafting request, there should be a presumption of impairment. As Johnstone put it: "[r]egulation of the initiative process that imposes substantially greater burdens on the people's legislative power than the legislature imposes on its own should be presumed to impair rather than facilitate the power." Johnstone, *supra* at 151.

Montana's opening brief attempts to compare the argument approach found in voter information pamphlets to the SB 93 approach. Br. at 9. But the laws that the District Court found unconstitutional all concern burdens placed on a ballot issue sponsor's ability to write a proposed law, take the ballot issue language through facilitating review, or present a ballot issue petition for elector signature. It is only after sufficient signatures have been obtained that a ballot issue can be voted on in an election. This lawsuit only challenges impairments of the "making of law," not impairments on electors voting in an election.

III. The Court Should Affirm the District Court's Determination that the Challenged Statutes Unconstitutionally Interfere with the Peoples' Power of Lawmaking by Initiative and Referendum.

This Court should sustain the District Court's Judgment that the four challenged statutes and related administrative actions are unconstitutional infringements of the People's power of initiative and referendum because they impaired and did not facilitate the Peoples' lawmaking power. App'x. 1, Ex. B. The District Court's Judgment was based on two summary judgment decisions. *Id.* Summary judgment is warranted when no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c)(3). It is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c)(3). The party moving for summary judgment must establish the absence of any genuine issue of material fact and that the party is entitled to judgment as a matter of law. *Tin Cup County Water &/or Sewer Dist. V. Garden City Plumbing*, 2008 MT 434, ¶ 22, 347 Mont. 468, 200 P.3d 60.

Once the moving party has met its burden, the party opposing summary judgment must present affidavits or other testimony containing material facts which raise a genuine issue as to one or more elements of its case. *Id.*, ¶ 54 (citing *Klock v. Town of Cascade*, 284 Mont. 167, 174, 943 P.2d 1262 (1997)). To avoid summary judgment, the opposing party's evidence "must be substantial, 'not mere denial,

speculation, or conclusory statements.'" *Hadford v. Credit Bureau, Inc.*, 1998 MT 179, ¶ 14, 962 P.2d 1198, 1201 (quoting *Klock* at 174). "Conclusory statements and assertions are not enough to defeat a motion for summary judgment." *Vainio v. State*, 2014 Mont. Dist. LEXIS 19 at *4 (citation omitted). "The mere denial of a fact does not satisfy the non-moving party's burden of establishing a genuine issue of material fact and is not a proper basis for denial of a motion for summary judgment." *Id.* (citation omitted).

In reviewing a constitutional challenge to a statute, courts must "avoid an unconstitutional interpretation if possible." *State v. Nye*, 283 Mont. 505, 510, 943 P.2d 96 (1997); *Brown v. Gianforte*, 2021 MT 149, ¶ 32, 404 Mont. 269, 488 P.3d 548. However, "[n]either statutory nor constitutional construction should lead to absurd results, if reasonable construction will avoid it." *Nelson v. City of Billings*, 2018 MT 36 ¶ 16, 390 Mont. 290, 412 P.3d 1058.

The Montana Constitution expressly articulates requirements for statutory and constitutional amendments and referendum. Article III, Sections 4-5.; Art. XIV, Sections 9-11. These constitutional provisions are self-executing, meaning legislation is not required to give them effect. *In re Lacy*, 239 Mont. 321, 325, 780 P.2d 186, 1989 Mont. LEXIS. 264. This fact is evidenced by dozens of citizen initiatives that have

been proposed since the 1972 Constitution was adopted.[5] Johnstone describes the parameters of a summary judgment review:

> State constitutions also recognize the difference between helping and hindering the initiative power, as well as the legislature's inherent temptation to do the latter disguised as the former. So it is common for state constitutions to prohibit legislation to impair or otherwise restrict the initiative power. As with other relationships between and within branches, the initiative power requires the legislature to provide the support necessary for a functioning initiative process, while respecting the constitutional independence of that process from legislative control.

Johnstone, *supra* at 150. The District Court, likely borrowing Johnstone's language, framed the standard as "whether the filing fee exists to facilitate the people's exercise of power or to impair it." App'x. 1, Ex. D at 8 (Doc. 30). As explained below, the challenged statutes and administrative actions are unconstitutional under any set of facts because they impair the Peoples' power and are not necessary to facilitate a functioning initiative process.

A. A Law Prohibiting the Refiling of Proposed Initiative Language Interferes with the People's Power to Enact Laws on All Matters and is Facially Unconstitutional Under Article III, section 4 of Montana's Constitution.

SB 93, at new section (4)(7), [now codified at §13-27-221, MCA] is unconstitutional because it conflicts with, and infringes upon, the Peoples' use of their expressly reserved Constitutional power of initiative. *See Bd. of Regents of Higher Educ. of Mont. v. State*, 2022 MT 128, ¶¶19; 24, 409 Mont. 96, 512 P.3d 748. The District

[5] *See* "Elections" Montana Secretary of State Website. Available at: https://sosmt.gov/elections/ (last visited June 25, 2025).

Court, citing to the People's constitutional power to "enact laws on all matters", determined that "§13-27-221's restriction on refiling proposed initiative language is unconstitutional because it prohibits submission of proposed ballot initiatives in violation of Article III, Section 4 of the Montana Constitution." App'x 1, Ex. D at 6 (Doc. 30). If the framers had wanted to prevent an initiative from being proposed a second time in four years, they would have expressly said as much in the constitution. *See* Article III, §4(2) (placing requirements on ballot initiatives).

The following uncontested facts were listed by *Ellingson* and not challenged by Montana in district court briefs: 1) that Section 13-27-221, MCA, prohibited the refiling of ballot issue language that was rejected by voters in the previous election; 2) that no such prohibition appears in the clauses of the Constitution defining the people's ballot issue power, and, 3) that no such prohibition exists as to bills that are refiled in consecutive Legislative sessions. *See* Doc. No. 33, pp 2-3, uncontested Facts 1, 1A, 1B. The District Court used these facts in making its decision.

Montana's opening brief does not challenge these facts. Instead, Montana [pp. 17-18] and the Amici [pp. 16-20] argue that the District Court reasoning was wrong because §13-27-331 facilitates an initiative process by preventing the "clogging" of elections "through perennial ballot initiatives the People continually reject." Montana's brief cites no facts in support of this argument and provided none to the District Court, which determined that "there is no evidence ballot issues have

cluttered the ballot and created confusion in past elections." App'x 1, Ex. D at 10 (Doc. 30). This clogging argument should be rejected.

Montana argues that §13-27-331 facilitates the initiative process because it prevents "frivolous legislative efforts." Br. at 17 (citation omitted). To support its argument, Montana miscited as authority sections of the Constitutional transcript and a concurrence by Justice Roberts that deal with the number of signatures necessary to show a base line of popular support. Br. at 17 (citation omitted). There is no shortcut for a resubmitted initiative as it must again secure the same required number of signatures of Montana electors before it qualifies for the ballot. This argument should be rejected.

Montana argues eight other states "impose similar requirements" prohibiting the refiling of an initiative measure defeated at election by voters. Br. at 20. Those states, however, rely on constitutional authority that does not exist in Montana's Constitution. Montana's opening brief notes the constitutions of six states—Massachusetts, Nebraska, Mississippi, New Jersey, Oklahoma, and Wyoming all have constitutional provisions setting out or allowing a refiling prohibition. Br. at 20, N.4. In contrast, Article III, §4 of the Montana Constitution grants citizens power to "enact laws on all matters." The District Court found this language to include refiling an initiative. App'x 1, Ex. E at 6.

This leaves Montana to rely on the state constitutions of Utah and North Dakota. Br. at 20, N.4. The constitutions of these two states do not lend support for

the constitutionality of §13-27-331. Johnstone notes that Utah's very succinct constitutional language on initiatives "amount[s] to broad delegations of power over the initiative process to the legislative branch." Johnston, *supra* at 138. Montana's Constitution is the opposite: "The people reserve to themselves the powers of initiative and referendum." Art. V, § 1.

The North Dakota Constitution states, "[l]aws may be enacted to facilitate and safeguard [initiatives], but not to hamper, restrict or impair those powers." N. D. Const. art III, §1. In turn, the Code section cited by Montana applies generically: "More than two elections on the same general matter may not be held within twelve consecutive calendar months." N.D. Cent. Code Ann. §16.1-01-11. This law is aimed at bond issue votes and would have no effect on a Montana ballot issue as Montana's Constitution requires that "[t]he people shall vote initiative and referendum measures at the general election unless the legislature orders a special election." Article III, §6. General elections occur every two years meaning a one-year prohibition would have no effect on a proposed ballot issue. More importantly, though, the North Dakota law applies to "elections on the same general matter" rather than just "initiatives", as does Montana's §13-27-331.

B. A Law Allowing a Legislative Committee to Insert Itself into the Peoples' Process of Preparing an Initiative Petition for Signature Gathering is Facially Unconstitutional.

The District Court correctly held that "[t]he initiative and referendum process established in the Montana Constitution is intentionally separate from the legislature's

lawmaking authority. By requiring ballot proponents to include the legislature's position on the face of their petitions, legislators have unlawfully inserted themselves into the people's lawmaking authority." App'x 1, Ex. E at 15. (Doc. 51). §§13-27-228; 13-27-238(1)(d) MCA are facially unconstitutional because they insert legislative involvement and legislative power into the Peoples' use of their expressly reserved Constitutional power of initiative.

In the District Court, Montana did not contest that SB 93 authorized a legislative committee to consider and vote on ballot issues and authorized the SOS to place language summarizing that vote on the face of the ballot petition. *See* Doc. No. 33 at 4 (Uncontested Facts 7, 7A, 7B). Montana did not dispute the "uncontested fact" that the Constitution does not convey authority on a legislative committee to vote on the merits of a ballot issue and put the vote tally on the face of the petition. *Id.* Montana did not dispute the "uncontested fact" that the Legislature subjects itself to no such review of its bills by a power outside of Legislative power. *Id.* Montana's opening brief does not dispute these facts.

Instead, Montana argues that impairment does not exist because the language placed on the initiative petition is non-argumentative and the process by which the legislative committee vote takes place facilitates the initiative process. Br. at 22; 23. Montana is wrong on both arguments.

First, the language is unquestionably argumentative because §13-27-238(1)(d) requires language be placed on the face of the initiative petition advising voters that a

legislative committee did or did not "support the placement of the proposed text of this initiative on the ballot." The votes "in favor" and "against" are listed. *Id.* Contrast this outright "for or against" advocacy with the careful language of 13-27-212(1) MCA, the statute under which an assistant attorney general has for decades read the text of the proposed initiative and prepared the statement of purpose and implication for an initiative petition:

> 13-27-212 Statement of purpose and implication. (1) A statement of purpose and implication expresses the true and impartial explanation of the proposal in plain, easily understood language. The statement of purpose and implication may not be argumentative or written so as to create prejudice for or against the issue.

Under §13-27-212 the language of the statement of purpose and implication cannot, by law, take a position for or against the ballot issue. The language of §13-27-238(1)(d) is the opposite as it requires a Legislative committee statement of support or opposition to placing the issue on the ballot and places that statement on the face of ballot issue petition. No matter how Montana tries to spin this issue, the "for" or "against" ballot petition language required by §13-27-238(1)(d) is argumentative and cannot be seen to facilitate.

Second, adding a legislative process of hearing and testimony, controlled by the Legislative Committee, does not facilitate the initiative process. The initiative lawmaking process is one of "direct" democracy where individuals carry ballot issue petitions and engage Montana electors face-to-face, seeking their signatures on a

ballot issue petition. If the constitutionally required number of electors sign a ballot issue petition, a formal initiative "petition" is certified [§13-27-308] and the law proposed by the ballot petition is placed on the ballot for a vote by all electors. §13-27-502, MCA. There is nothing in the direct democracy process that is helped by the legislature seizing control of the ballot issue petition process for 14 days [§13-27-228(3)(b), MCA] and subjecting the Peoples' direct democracy process to control, review and vote by a legislative committee. There is nothing in the Constitution that allows the legislature to take control and time from the People like this. Indeed, the Peoples' power of lawmaking is reserved to the People under Article V, §1 and the Legislature impairs that power when it steals time and control from the People.

Finally, Montana makes several specious arguments. Montana equates election speech (the voter information pamphlet) to speech on the face of the ballot petition. Br. at 23. This Matter is not about election speech. It is about putting an issue up for election. The voter information pamphlet is an election publication with speech designed to present for and against positions on issues appearing for a vote on the ballot. The speech on the ballot petition was, prior to the SB93 changes, limited to the neutral ballot issue statement. The speech issues are not the same.

Montana erroneously claims that the District Court's dismissal without prejudice of *Ellingson's* facial claim challenging the unconstitutionality of SB93's imposition of a financial harm statement on a ballot petition "upholds" the validity of the statement. Br. at 22. As a matter of law and as explained above, a dismissal

without prejudice does not "uphold" the validity of the challenged item. *Schmitz*, ¶ 11. Instead, the SB93 language placing a "harm to business" warning on a ballot issue petition remains constitutionally suspect, with any future challenge necessitating a hearing with witness testimony. Johnstone cautions that if this warning "imposes an additional subject matter regulation on the initiative power not expressed in the state constitution or imposed by the legislature upon itself, it may impair the reserved power of the initiative." Johnstone, *supra* at 154; 155. Montana can claim no precedent from the dismissal without prejudice of the business warning claim in this Matter. This warning issue awaits a full hearing at a later date.

C. The Filing Fee Imposed by Senate Bill 93 is Facially Unconstitutional Because it Places An Impermissible Monetary Impairment On the People of Montana's Constitutionally Guaranteed Power to Enact Laws Through the Initiative and Referendum Processes.

The District Court correctly held that SB93's $3700 filing fee requirement [codified at §13-27-215, MCA] is facially unconstitutional because it infringes upon and impairs the Peoples' Article III §4 power to propose ballot measures "on any matter". App'x. 1, Ex. B at 2. This Article III power of the People is explicitly protected from intrusion by other sources of power: "[n]o person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted." Mont. Const. Art. III, § 1.

The District Court correctly held that, "[w]hile the legislature may create statutes facilitating the exercise of those [ballot issue] powers, it may not create arbitrary hurdles to discourage participation. Imposing a [filing] fee simply restricts access based on a person's ability or willingness to pay. The Court finds the filing fee is an impairment on the exercise of the powers of initiative and referendum under Article III, sections 4 and 5." App'x. 1, Ex. D at 11 (Doc. 30). The District Court's Judgment (App'x. 1, Ex B, ¶2) should be affirmed because the regulation impairs the People's initiative power by imposing a filing fee not expressed in the Constitution or imposed by the legislature on itself.

Montana argues that the *Ellingson* plaintiffs lost standing to challenge the $3700 filing fee "when she refused to apply for a waiver". Br. at 27. The Montana Constitution conferred power on all Montanans (the People) to file proposed initiatives and referendums and the Legislature cannot prevent Montanans from using their power by making them pay for an application fee. The People's power is not some sort of privilege that can be gained or denied by paying or refusing to pay an application fee.

Ripeness is the temporal dimension of standing. *Advocates for Sch. Trust Lands v. State,* 2022 MT 46, ¶19, 408 Mont. 39, 505 P.3d 825 (citation omitted). This facial challenge is ripe because it does not depend upon the development of a factual record. *Id.*, ¶29 (citations omitted). "The question presented is purely one of law, and

no additional facts will aid the court in its inquiry." *Reichert v. State,* 2012 MT 111, ¶60, 365 Mont. 92, 278 P.3d 455 (citation omitted).

Section 13-27-215, MCA was in fact applied to reject 2024 ballot issue proposals. The *Ellingson* plaintiffs, acting as ballot issue sponsors, submitted full draft initiative language, complete with proposed ballot statements, and ready for review by Legislative Services. The Secretary of State refused to accept the draft language because it was not accompanied by a $3700 Filing. *Id.* Plaintiffs responded that they did not seek a waiver of the Filing Fee, were not eligible for a waiver, and would not pay the Filing Fee because they viewed it "as an improper legislative/agency impairment . . . to the explicit peoples' power to enact laws by initiative." *Id.*, ¶ 9.

Montana argues that the $3700 fee may not be unconstitutional under a certain set of circumstances. Br. at 29. Yet *Ellingson* (and any other ballot issue proponent) had only three choices in responding to §13-27-215: 1) pay the fee; 2) determine whether she could "demonstrat[e] a financial inability to pay without substantial hardship"; or 3) refuse to pay. App'x. 3, Ex. A at 1. Any one of those options impairs the People's constitutionally protected power to submit proposed ballot language to SOS/Legislative Services free of legislative interference. Section 13-27-215 is *facially* unconstitutional because it impairs, regardless of the level or degree of impairment, the People's expressly reserved Article III constitutional power of lawmaking.

It is worth noting that *Ellingson* responded to the waiver option by stating she "was not eligible for" and would not seek a waiver. Montana characterized Ellingson's

response as "mere speculation" and claims to have granted "every waiver application" made because only those with lots of money should pay. Br. at 29-32. Section 13-27-215 is part of Title 13, "Elections". Section 13-27-215 allows a ballot issue proponent to "seek" a waiver by "demonstrating a financial inability to pay without substantial hardship." This law places the responsibility for seeking and receiving this hardship waiver on the ballot issue proponent, not the SOS. A ballot issue proponent who cannot demonstrate financial inability is ill advised to submit a waiver request. There is no specified penalty for submitting a false waiver request so a complaint brought against the ballot issue proponent for submitting a false waiver form would be brought under 13-35-103 MCA, the generic catch-all punishment provision of Title 13: "A person who knowingly violates a provision of the election laws of this state for which no other penalty is specified is guilty of a misdemeanor." Further, because the investigative powers of the Commissioner of Political Practices (COPP), at 13-37-111(2)(a), specify that the Commissioner "shall investigate any other alleged violation of the provisions of Chapter 35 of this title [13]", a ballot proponent could also face a COPP complaint based on claim of filing a false waiver form. These concerns are not imagined. Ballot issues are often contentious, featuring litigation and COPP complaints. Section 13-27-215 adds another level of potential complaints (and impairment), ironically for attempting to file a proposed initiative, something that is a constitutionally protected power.

Montana attempts to justify the filing fee as necessary to recover the costs of agency review work. Br. at 29. The District Court heard and rejected Montana's argument:

> Under Article V, Section 1 the people's powers of initiative and referendum exist on an equal footing with the Legislature's legislative power. Yet the legislature has created a system whereby their own law-making processes are funded by levying taxes while citizens must fund their own participation.

App'x. 1, Ex. D at 9 (Doc. 30).

Further, the District Court determined that the people's lawmaking proposals (at 15%) were at an efficiency par with Legislative bills (17.3%) and that "[t]here is no evidence ballot issues have cluttered the ballot and created confusion in past elections." App'x. 1, Ex. D at 10 (Doc. 30).

In that regard *Ellingson* notes that in the last three election cycles (2020, 2022 and 2024) the legislature has placed five legislative lawmaking proposals (3 constitutional changes and 2 statutory referendum) on the ballot for elector voting while citizens also placed five initiative proposals (4 constitutional and 1 statutory) on the ballot for elector voting. *See* "Elections" "Ballot Issues" Montana Secretary of State Website. Available at: shttps://sosmt.gov/elections/]. Yet, a filing fee is only required of citizen ballot sponsors and the "clogging" argument is directed only to the citizen ballot issues. This shows impairment because, as Johnstone put it, "[r]egulation of the initiative process that imposes substantially greater burdens on the

people's legislative power than the legislature imposes on its own should be presumed to impair rather than facilitate the power." Johnstone, *supra* at 151.

D. The Montana Legislature Cannot Confer Constitutional Powers Upon the Montana Attorney General That It Does Not Have the Power to Convey.

This Court should affirm the District Court's Judgment that holds "to the extent SB 93 provides the Attorney General authority to engage in substantive legal review of proposed ballot issues, those sections of the statute are void." App'x 1, Ex. B at ¶1 (Doc. 61). Section 13-27-226(2), MCA directs that the AG "shall… prepare an opinion as to the proposal's legal sufficiency." Section 13-27-110(7), MCA defines "legal sufficiency" as meaning "that a petition complies with statutory and constitutional requirements governing submission of the proposed issue to the qualified electors and the substantive legality of the proposed issue if approved by voters." Paragraph 1 of the District Court's Judgment voids the underlined substantive legality part of §13-27-110(7).

The District Court noted the Legislature's 2021 grant of power to determine the substantive legality of the AG in finding 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. D at 7 (Doc. 30). The District Court further determined that "Montana's case law continues to support the conclusion [that] substantive legal review by the Attorney General as part of the ballot issue process is unconstitutional. Constitutional provisions governing separation of

power issues may not be legislated." *Id.* Further, the District Court found that "substantive legal review" by the AG is facially unconstitutional "under any set of facts." *Id.* at 6 (Doc. 30).

Montana's Constitution provides only the Courts with the power to make a substantive legal review, including that of ballot issues. *Cottonwood.,* ¶32. In turn, Mont. Const. Art. III, § 1 prohibits the Legislature from intruding on the power of the Courts. Yet, despite the Constitution and the language of the Court's 2022 *Cottonwood* decision, the 2023 legislature passed SB 93 with language again delegating substantive legal review authority to the AG. It is time for this Court to definitively define the People's Article III ballot issue power and definitively state that Article III, § 1 prohibits the Legislature and agencies from impairing that power. A statement that the Montana Constitution protects the People's power is necessary to deter continued and repeated power grabs by the Legislature. *See Cottonwood,* ¶ 22. Montana states the District Court's "substantive legality" decision "is not subject to this appeal" and therefore did not brief this issue. Br. at 2, N. 1. The issue of whether the Legislature can confer Constitutional power that it does not possess is directly before this Court.

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

"[A] prevailing party in a civil case is generally not entitled to attorney fees." *Burns v. Cty. of Musselshell,* 2019 MT 291, ¶13, 398 Mont. 140, 454 P.3d 685 (citation

omitted). "The private attorney general doctrine, however, is an equitable exception to this general rule, 'when the government, for some reason, fails to properly enforce interests which are significant to its citizens' and private citizens must take up litigation to vindicate those interests." *Id.* (quoting *Montanans for the Responsible Use of the School Trust v. State ex rel. Bd. of Land Comm'rs*, 1999 MT 263, ¶64) (hereinafter "*Montrust*"). "The purpose of the [Private Attorney General] Doctrine is to provide an incentive for parties to bring public interest litigation that might otherwise be too costly to bring." *Barrett v. State of Montana,* 2024 MT 86, ¶54 (citing *Forward Montana v. State*, ¶ 24, 2024 MT 75, 416 Mont. 175, 546 P. 3d 778). "If the Doctrine was eliminated where the Legislature has willfully disregarded its constitutional duties and purposefully passed unconstitutional laws, vindicating these important constitutional rights through litigation would not be feasible." *Forward Montana,* ¶24.

"In determining whether to award attorney fees under the private attorney general doctrine, a court must consider the following factors: (1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, (3) the number of people standing to benefit from the decision." *Musselshell,* ¶13 (quoting *Montrust*, ¶66). The District Court's attorney fee order in this Matter determined that "[t]he statutory provisions the Court struck down in this litigation interfered with Montana citizens' constitutional powers of initiative and referendum. Protecting

Montanans' constitutional rights is of utmost societal importance and stands to benefit all." App'x 1, Ex. C at 4 (Doc. 71).

A district court's determination of whether legal authority exists for an award of attorney fees is a conclusion of law, which we review for correctness. *Musselshell*, ¶10 (citation omitted). 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. 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. This Court can return the attorney fee issue to the District Court for application of the newly established presumption in favor of attorney fees. *See Mont. State Univ.-Bozeman*, ¶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).

The Court may also choose to address this issue under prior law. The applicable law, prior to *MEIC*, is best reviewed and defined by reference to two applicable private AG attorney fee decisions issued in *Forward Montana* and *Barrett v. State*. One decision (*Forward Montana*) awarded and the other (*Barrett*) denied attorney fees under the Private AG Doctrine. The opinions issued in each case reviewed all

prior Supreme Court decisions dealing with the Private AG Doctrine, incorporating the three threshold *Montrust* factors.

The litigation in *Ellingson* clearly meets the 1st and 3rd *Montrust* factors because it too vindicated "important public policies that are grounded in Montana's constitution." *Barrett* ¶59, citing *Montrust,* ¶67. And the litigation likewise vindicated an issue of statewide importance. The *Ellingson* attorney fee claim should be found to have met the 1st and 3rd *Montrust* factors. The District Court decided the attorney fee issue using the three *Montrust* factors, focusing on "the second factor—the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff." App'x 1, Ex. C at 4.

The second *Montrust* factor requires a showing of the "necessity" of private litigation, coupled with facts showing the litigation constituted a "resultant burden" to the Plaintiff. In *Forward Montana,* a majority of Justices found that the plaintiffs met the second *Montrust* factor and in doing so reversed the district court and agreed to grant attorney fees. *Forward Montana,* ¶¶ 1, 41. In *Barrett* that majority split, with two justices finding that the plaintiffs failed to meet the second *Montrust* factor and therefore attorney fees were denied. *Barrett,* ¶62. Here, unlike *Barrett,* there was and is no independent public enforcement entity protecting the constitutional power of citizens to enact laws through the ballot issue process. Instead, the public entities are Defendants. No entity or persons, other than *Ellingson,* emerged before, during or after the start of litigation to litigate and vindicate the constitutional powers ultimately

protected by the Judgment in this Matter. The facts of this Matter show the necessity of private litigation by *Ellingson* at least comparable to the second factor necessity analysis of *Forward Montana*: "[s]ince the only government entity involved in this case was defending the statute, private enforcement was necessary." *Forward Montana*, ¶41. The litigation in this Matter meets the necessity requirement of the 2nd *Montrust* factor.

The District Court found, however, that *Ellingson* failed the "resultant burden" portion of the second *Montrust* factor, in particular faulting *Ellingson* for creating work by filing two summary judgment motions. App'x. 1, Ex. C at 6 (Doc. 70). The District Court, however, overlooked the necessity of this approach as the litigation in this Matter began 6 days after the SOS rejection of *Ellingson*'s proposed ballot issue. *See* Statement of Case, *supra*, at 1-2. The first partial summary judgment motion was made in lieu of a motion seeking a restraining order and was far more efficient than a restraining order approach as it raised law and factual issues that that were compatible with the Parties briefing and the Court's consideration of the second summary judgment motion. *Id.* The work on briefing these motions and preparing supporting Declarations involved hundreds of hours of attorney time, a heavy lift for the volunteer citizen plaintiffs and their unpaid lawyer. The Plaintiffs clearly met the resultant burden test and the purpose behind the private AG doctrine: "[t]he purpose of the Doctrine is to provide an incentive for parties to bring public interest related litigation that might otherwise be too costly to bring." *Forward Montana*, ¶24.

Lastly, equity favors granting attorney fees as this litigation did not address a "garden variety" issue, such as one involving the unconstitutionality of a single law regulating the use money in political campaigns. *See Forward Montana*, ¶ 25. Instead, the litigation vindicated the entire separate sphere of the People's law-making power from the corrosive, intrusive, and unconstitutional actions of Montana's government – specifically the Legislature and agencies. As this Court has previously decided, "the ultimate determination of whether the government, for some reason, failed to properly enforce interests which are significant to its citizens, remain[s] dispositive to the question of whether an award of fees under the private AG doctrine is available." *Barrett*, ¶ 57.

CONCLUSION

The Court should determine the underlying Peoples' power of lawmaking and set appropriate standards. The Court should affirm the District Court Judgment on the merits. The Court should reverse the district court's denial of attorney fees and remand for further consideration.

Respectfully submitted this 25 day of June, 2025.

/s/ John Meyer
JOHN MEYER

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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 8,737 words, excluding cover page, tables of contents and authorities, certificates of service and compliance, signatures, and any appendices.

/s/ John Meyer
JOHN MEYER