

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,

vs.

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

Defendants and Appellants.

**BRIEF OF *AMICI CURIAE* MONTANA CHAMBER OF COMMERCE,
MONTANA FARM BUREAU FEDERATION, MONTANA WOOD
PRODUCTS ASSOCIATION, MONTANA BANKERS ASSOCIATION,
AND MONTANA ASSOCIATION OF REALTORS**

On Appeal from the Montana First Judicial District, Lewis and Clark County,
Cause No. ADV-2023-388,
The Honorable Mike Menahan, Presiding

Appearances on next page.

Austin Knudsen
Montana Attorney General
Brent Mead
Deputy Solicitor General
Michael Noonan
Assistant Attorney General
PO Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Brent.mead2@mt.gov
Michael.noonan@mt.gov

Attorneys for Defendants/Appellants

Dale Schowengerdt
Timothy Longfield
Landmark Law PLLC
7 W. 6th Ave., Ste. 518
Helena, MT 59601
406-4575496
dale@landmarklawpllc.com
tim@landmarklawpllc.com

Attorneys for Amici Curiae

John Meyer
Cottonwood Environmental Law
Center
PO Box 412
Bozeman, MT 59771
Phone: 406:546-0149
john@cottonwoodlaw.org

Attorney for Plaintiffs/Appellees

Table of Contents

Table of Authorities	ii
Statement of Interest.....	1
Summary of Argument	1
Argument.....	4
I. The power of initiative and referendum belong to “the People,” not to any individual issue proponent or opponent. The test should therefore ask whether a law facilitates the “People’s” power to enact laws.....	4
A. The Constitution reserves a power of initiative to the People of Montana, not an individual right.	4
B. This Court should reject the District Court’s equal footing test and instead adopt a test that assesses the law’s impact on the People’s collective lawmaking power.	11
II. S.B. 93’s resubmission clause facilitates the People’s power to make law by preventing voter fatigue and protecting the People’s ability to propose, debate, and fully consider new initiatives.	15
A. The resubmission clause promotes higher turnout and voter decision-making by preventing voter fatigue.....	16
B. S.B. 93’s resubmission clause will help proponents and opponents get their political message out by keeping advertising costs down.....	20
Conclusion	23
Certificate of Compliance	24

Table of Authorities

Cases

<i>Am. Trad. P’ship, Inc. v. Bullock</i> , 567 U.S. 516 (2012)	20
<i>Alexander v. United States</i> , 509 U.S. 544 (1993).....	10
<i>W. Trad. P’ship, Inc. v. Attorney General</i> , 2011 MT 328, 363 Mont. 220, 271 P.3d 1	20
<i>Cobb v. State</i> , 278 Mont. 307, 924 P.2d 268 (1996)	10
<i>Cottonwood Env’t L. Ctr. v. Knudsen</i> , 2022 MT 49, 408 Mont. 57, 505 P.3d 837.....	8
<i>Cottonwood Env’t L. Ctr. v. State</i> , 2024 MT 313, 419 Mont. 457, 560 P.3d 1227	4, 6
<i>Cross v. VanDyke</i> , 2014 MT 193, 375 Mont. 535, 32 P.3d 215	6
<i>Held v. State</i> , 2024 MT 312, 419 Mont. 403, 560 P.3d 1235.....	9
<i>In re Interrogatories Propounded by Senate Concerning House Bill 1078</i> , 189 Colo. 1, 536 P.2d 308 (1975)	15
<i>Loonan v. Woodley</i> , 882 P.2d 1380 (Colo. 1994)	9, 12
<i>McLaughlin v. Mont. State Legislature</i> , 2021 MT 178, 405 Mont. 1, 493 P.3d 980	10
<i>MEA-MFT v. McCulloch</i> , 2012 MT 211, 366 Mont. 266, 291 P.3d 1075	10

<i>Meyer v. Knudsen</i> , 2022 MT 109, 409 Mont. 19, 510 P.3d 1246	10
<i>Monforton v. Knudsen</i> , 2023 MT 179, 413 Mont. 367, 539 P.3d 1078.....	10
<i>Mont. Democratic Party v. Jacobsen</i> , 2024 MT 66, 416 Mont. 44, 545 P.3d 1074.....	4
<i>Montanans for Just. v. State</i> , 2006 MT 277, 334 Mont. 237, 146 P.3d 759	4
<i>N.Y. State Rifle & Pistol Ass’n v. Bruen</i> , 597 U.S. 1 (2022)	10
<i>Nat’l Pork Producers Council v. Ross</i> , 598 U.S. 356 (2023).....	14
<i>Nelson v. City of Billings</i> , 2018 MT 36, 390 Mont. 290, 412 P.3d 1058.....	7
<i>Sawyer Stores v. Mitchell</i> , 103 Mont. 148, 62 P.2d 342 (1936)	passim
<i>Stanwitz v. Reagan</i> , 245 Ariz. 344, 429 P.3d 1138 (2018)	12
<i>State ex rel. Ethics First-You Decide Ohio Pol. Action Committee v. Dewine</i> , 147 Ohio St.3d 373, 66 N.E.3d 689 (2016)	12
<i>State ex rel. Harper v. Waltermire</i> , 213 Mont. 425, 691 P.2d 826 (1984)	4, 11
<i>Town of Whitehall v. Preece</i> , 1998 MT 53, 288 Mont. 55, 956 P.2d 743	4, 7
<i>Utah Safe to Learn-Safe to Worship Coalition, Inc. v. State</i> , 2004 UT 32 (2004)	12
Other Authorities	
Mont. Code Ann. § 13-27-201.....	9

Mont. Code Ann. § 13-27-221	passim
Mont. Const. art. III, § 1	6
Mont. Const. art. III, § 4	3, 6
Mont. Const. art. III, § 5	3
Mont. Const. art. V, § 1	1, 2, 6, 7
Mont. Const. art. V, § I	3
Mont. Const. art. XI, § 8	6
<i>The Separation of Legislative Powers in the Initiative Process,</i> 101 NEB. L. REV. 125 (2022)	passim

Statement of Interest

Amici Montana Chamber of Commerce, Montana Farm Bureau Federation, Montana Wood Products Association, Montana Bankers Association, and Montana Association of Realtors represent thousands of businesses, large and small, across Montana. *Amici* work to create and sustain an optimal business climate and strong economy in Montana through advocacy, education, and collaboration. That work includes educating the public on candidates, issues and, legal developments that impact Montana businesses and agricultural and rural communities. *Amici* have an interest in maintaining a fair and transparent ballot initiative process. S.B. 93 advances those goals.

Summary of Argument

Since 1906, the People of Montana have reserved to themselves the power to make law by initiative. *See Sawyer Stores v. Mitchell*, 103 Mont. 148, 62 P.2d 342, 344 (1936); 1889 Mont. Const. art. V, § 1. That power is not self-executing. The Legislature must enact a regulatory framework that facilitates and safeguards the initiative and referendum process to ensure “the result shall represent the will of a majority of the voters.” *Sawyer Stores*, 62 P.2d at 358. This appeal is about a District Court decision that has the potential to upend the long-standing symbiotic

relationship between the two fonts of lawmaking power in Montana—the People and the Legislature.

S.B. 93, the law at issue, enacted several common-sense measures that promote the People’s ability to make law effectively. But the District Court discarded three of these common-sense regulations because, in its view, they represented restrictions that are not present in the Montana Legislature’s lawmaking process and had no legitimate purpose. *Amici* agree with the State that the District Court used the wrong analytical framework *en route* to the wrong conclusion about these common-sense measures. *Amici* write to stress two additional points.¹

1. The initiative and referendum are a power that belongs to “the People,” not an individual right. *See* Mont. Const. art. V, § 1; *see generally* Anthony Johnstone, *The Separation of Legislative Powers in the Initiative Process*, 101 NEB. L. REV. 125 (2022). Treating the initiative power as an individual right, rather than a collective power, strains against the text and structure of the Montana Constitution. It would upend many longstanding regulations. And, as a practical matter, it simply would not work. The initiative and referendum power belong not to any individual issue

¹ This brief focuses on section 13-27-221, MCA. *Amici* agree with the State’s arguments regarding the other challenged provisions of S.B. 93.

proponent, opponent, or voter, but to the entire “[P]eople.” Mont. Const. art. III, §§ 4, 5; art. V, § I.

Two corollaries follow. First, when reviewing a law regulating the initiative and referendum process, courts should scrutinize the law’s impact on the *People’s* power to make law, not its impact on one individual proponent. Just as a rule for making law through the legislative process might momentarily impede an individual lawmaker or faction within the state legislature, a law facilitating lawmaking through the initiative process might slow down an individual proponent. Thus, the appropriate test should look to whether a regulation facilitates the *People’s* power to make law. Second, the Court should reject the District Court’s equal footing test, which would require any ballot issue regulation to have a twin in the legislative process.

2. Section 13-27-221, MCA, facilitates the People’s power to make law by requiring a measure rejected by the People to wait four years before being resubmitted. This measure reduces the impact of voter fatigue—a recognized phenomenon in the scientific literature that leads to higher abstention and less informed voting. In doing so, it promotes high turnout and engaged citizen democracy, and creates breathing room for proponents, opponents, and voters to fully debate and consider new ideas. It also will reduce the cost for proponents in an

era when elections are becoming nine-figure affairs. These are legitimate purposes, and they facilitate the People’s power to make law.

Argument

I. The power of initiative and referendum belong to “the People,” not to any individual issue proponent or opponent. The test should therefore ask whether a law facilitates the “People’s” power to enact laws.

A. The Constitution reserves a power of initiative to the People of Montana, not an individual right.

This Court has sometimes described the initiative and referendum as a power. *See, e.g., Cottonwood Env’t L. Ctr. v. State*, 2024 MT 313, ¶¶ 12–14, 419 Mont. 457, 560 P.3d 1227; *Town of Whitehall v. Preece*, 1998 MT 53, ¶¶ 14–24, 288 Mont. 55, 956 P.2d 743; *State ex rel. Harper v. Waltermire*, 213 Mont. 425, 429–30, 691 P.2d 826, 828–29 (1984). Other times, it has described them as a right. *See, e.g., Montanans for Just. v. State*, 2006 MT 277, ¶ 9, 334 Mont. 237, 146 P.3d 759. And sometimes, it has used both terms. *See Mont. Democratic Party v. Jacobsen*, 2024 MT 66, ¶ 24, 416 Mont. 44, 545 P.3d 1074. Understandably, the parties and the District Court here also oscillated between analyzing these issues as individual rights and powers, leading to confusion about the appropriate analytical framework. *See* Doc. 30 at 5, 11; Doc. 51 at 9, 18, 19.

As now-judge Anthony Johnstone explained, framing the initiative process as a right, rather than a power, “is incorrect as a matter of constitutional text and structure, and of limited analytical force as a matter of constitutional doctrine.” Johnstone, *Separation of Legislative Powers in the Initiative Process*, 101 NEB. L. REV. at 128; *see also id.* 139–47. Treating the initiative power as a right might also place the interests of individual proponents at odds with the interests of the People. *See* Johnstone, *The Separation of Powers in the Legislative Process*, 101 Neb. L. Rev. at 139 (framing “the initiative as a constitutional right ... does not protect the function of the initiative power as a power, and may even weaken the initiative power by protecting [individual] petitioners’ rights to *propose* initiatives at the expense of the *people’s* power to enact them.”) (emphasis added). Business *amici* agree.

Start with the Constitution’s text and structure. The Constitution makes clear when it is discussing individual rights. Article II contains the Montana Constitution’s “Declaration of Rights.” *See generally* Mont. Const. art. II. That Article lists more than thirty individual rights on a vast array of topics, including religious and speech rights, personal autonomy and abortion, environmental rights, employment rights, and rights of the accused in criminal proceedings. The initiative and referendum power first appear not in Article II, but in Article III, which begins by describing the separation of powers before outlining the general structure and

powers of Montana’s government. *See, e.g.*, Mont. Const. art. III, § 1. Article III, Section 4(1) provides that “[t]he [P]eople may enact laws by initiative on all matters except appropriations of money and local or special laws,” and Section 5(1) provides that the People may “approve or reject by referendum any act of the legislature except an appropriation of money.” *See Cottonwood Env’t L. Ctr.*, ¶ 12, (citing the “well-established rule that constitutional provisions bearing on the same subject matter [must] be read and construed together”); *Cross v. VanDyke*, 2014 MT 193, ¶¶ 17–18, 375 Mont. 535, 32 P.3d 215 (same).

Initiative and referendum next appear in Article V, Section 1, which provides that the legislative power is vested “in a legislature consisting of a senate and a house of representatives,” with the proviso that “[t]he [P]eople reserve to themselves the **powers** of initiative and referendum.” Mont. Const. art. V, § 1 (emphasis added). Article XI, Section 8, of the Montana Constitution “extend[s] the initiative and referendum **powers** reserved to the [P]eople by the constitution to the qualified electors of each local government unit.” (emphasis added). From a textual and structural standpoint, these are powers, not rights.

Constitutional history confirms that initiative and referendum are a power, not an individual right. The 1972 Constitution was not “the beginning of law for the state,” and carried forward many provisions of the 1889 constitution. *Nelson v. City*

of Billings, 2018 MT 36, ¶ 15, 390 Mont. 290, 412 P.3d 1058 (citation and quotation marks omitted). Montana’s 1889 Constitution reserved to the People not an individual right, but the “**power** to propose laws, and to enact or reject the same at the polls.” Art. V, § 1, 1889 Mont. Const. (emphasis added). And the 1905 amendment that added that power to the 1889 Constitution specifically called for enabling legislation to facilitate those powers. *See Sawyer Stores*, 62 P.2d at 345 (quoting 1889 Mont. Const. art. V, § 1 and 1905 Mont. Laws ch. 61, § 2). Such legislation plays a critical role in “safeguarding the ballot and giving notice to the voter of the nature and purpose of the initiative measure, to the end that the result **shall represent the will of a majority of the voters.**” *Sawyer Stores*, 62 P.3d at 352 (emphasis added). From the beginning, the Legislature has been a necessary partner in protecting the People’s collective power to make law. *See Johnstone*, The Separation of Legislative Powers in the Initiative Process, 101 Neb. L. Rev. 125, 126 (2022).

The Framers of the 1972 Constitution sought to carry forward the same principles. *See Mont. Constitutional Convention Tr.*, Vol. VII, p. 2717 (“This provision is parallel to the present referendum provisions as contained in Article V, Section 1, of the [1889] Constitution.”) (Del. Etchart); *accord Town of Whitehall*, ¶ 23. When discussing the initiative and referendum process, the Delegates called

them a power, not a right. *See* Mont. Constitutional Convention, Committee Proposals, Vol. II, Committee Proposals, Vol. II, p. 799 (“Committee Proposals”) (arguing it was “essential that local residents have **the powers** of initiative and referendum”) (emphasis added). The Convention delegates wanted to “prevent frivolous legislative efforts by a small minority” while allowing “serious, popular measures to be initiated by the [P]eople.” Committee Proposals, p. 820. And since 1977, the Legislature has enacted legislation facilitating the initiative and referendum processes under the 1972 Constitution. *See Cottonwood Env’t L. Ctr. v. Knudsen*, 2022 MT 49, ¶ 3, 408 Mont. 57, 505 P.3d 837.

Common sense confirms what is apparent from the Constitution’s text, structure, and history. Conceiving of the collective power to make law as an individual right simply doesn’t make sense. When a legislative power is vested in a body, there are restrictions on individual members of that body that are necessary to facilitate the collective legislative process. An individual member of the Montana House of Representatives or Senate does not have an individual “right” to use the legislative process as he or she wills. Rather, each legislator is a member of a body that wields the collective lawmaking power. And to facilitate that body’s power, there must be rules, order, and a regular process that yields legislation that represents the will of the entire body. *See, e.g.,* Montana Legislature, “Diagram of

How a Bill Progresses Through the Legislative Process.”² An individual legislator cannot assert her “right” to use that process in a way that impedes the function of the collective legislative body. *See* Johnstone, *The Separation of Powers in the Legislative Process*, 101 *Neb. L. Rev.* at 139

The same is true in the People’s lawmaking process. Many long-standing ballot regulations in Montana might, in some sense, “hinder” one individual proponent’s desire to see a petition become law. For instance, there have been statutes on the books for over a century requiring that the title of a ballot measure “enlighten[] the voter as to the nature and purposes of [a] measure” rather than deceive him.

Sawyer Stores, 62 P.2d at 349–50. Since 1979, proponents have been required to follow bill drafting rules to ensure code clarity and uniformity. *See* § 13-27-201(2), MCA (1979). These laws inevitably impose minor burdens on initiative proponents. After all, “any formal requirements increase the potential for omission of required information or scrivener error, or otherwise serve to channel initiative activity.”

Loonan v. Woodley, 882 P.2d 1380, 1387 (Colo. 1994). And laws that impede fundamental rights, no matter how slightly, must survive strict scrutiny. *See, e.g., Held v. State*, 2024 MT 312, ¶¶ 57–68, 419 Mont. 403, 560 P.3d 1235. Yet this

²https://archive.legmt.gov/content/Bills/How_A_Bill_Becomes_A_Law_Handout.pdf.

Court has never subjected these common-sense ballot regulations to strict scrutiny, or anything like it. *See Sawyer Stores*, 62 P.2d at 347–55; *see also Monforton v. Knudsen*, 2023 MT 179, ¶¶ 8–18, 413 Mont. 367, 539 P.3d 1078; *Meyer v. Knudsen*, 2022 MT 109, ¶¶ 5–8, 17, 409 Mont. 19, 510 P.3d 1246. Adopting the District Court’s rights-focused framework would call all this into question.

Treating the initiative process as an individual right would also cast doubt on this Court’s power to exercise pre-election judicial review of initiatives and referenda. *See, e.g., MEA-MFT v. McCulloch*, 2012 MT 211, ¶ 18, 366 Mont. 266, 291 P.3d 1075; *Cobb v. State*, 278 Mont. 307, 311, 924 P.2d 268, 270 (1996); *Sawyer Stores*, 62 P.2d at 352. Courts aren’t usually in the business of imposing a prior restraint on a person’s ability to wield his fundamental, individual rights. *Cf. Alexander v. United States*, 509 U.S. 544, 553–54 (1993) (discussing history of prior restraints); *see also N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 25 (2022) (analogizing Second Amendment protections to First Amendment). But if the initiative is a *power*, then judicial review of certain obviously defective initiatives makes sense—and accords with judicial oversight of how other branches exercise their powers to ensure they remain within constitutional constraints. *Compare, e.g., McLaughlin v. Mont. State Legislature*, 2021 MT 178, 405 Mont. 1, 493 P.3d 980 (quashing legislative subpoenas because they exceeded the Legislature’s power);

with State ex rel. Harper v. Waltermire, 213 Mont. 425, 429, 691 P.2d 826, 829 (1984) (intervening pre-election to block initiative that exceeded People’s power by purporting to compel Legislature to “reach a specific result under threat of confinement and no pay”).

In sum, the initiative and referendum are a collective power, not an individual right. And it has always been the job of the Legislature to facilitate the People’s power. As Judge Johnstone put it: direct “democracy cannot implement itself.” Johnstone, *The Separation of Legislative Powers in the Initiative Process*, 101 Neb. L. Rev. 125, 125 (2022).

B. This Court should reject the District Court’s equal footing test and instead adopt a test that assesses the law’s impact on the People’s collective lawmaking power.

A simple corollary follows. Because the initiative power belongs not just to any individual, but to the entire People, the test should assess the impact of a law on the People’s collective lawmaking power. If a law, on balance, facilitates the People’s power, then it is constitutional. If it impinges or hinders that power, then it may not be. It will depend on the justifications for, and effects of, each law.

Other state supreme courts have reached this understanding, and this Court can draw from their jurisprudence in constructing the appropriate analytical framework. Arizona’s courts ask whether the law “unreasonably hinder[s] or restrict[s] the

initiative process” and “reasonably supplements the constitutional purpose” of the initiative process “by fostering the integrity of the process.” *Stanwitz v. Reagan*, 245 Ariz. 344, 346, 348, 429 P.3d 1138, 1140, 1142 (2018) (cleaned up). Ohio asks if a “statute facilitates the initiative process” and holds that a statute is constitutional if “the purpose of the requirement is not to restrict the power of the people to vote or to sign petitions, but to ensure the integrity of and confidence in the process.” *State ex rel. Ethics First-You Decide Ohio Pol. Action Committee v. Dewine*, 147 Ohio St.3d 373, 377, 66 N.E.3d 689, 693 (2016) (cleaned up). Utah and Colorado use comparable standards. See *Utah Safe to Learn-Safe to Worship Coalition, Inc. v. State*, 2004 UT 32, ¶¶ 24–37 (2004); *Loonan v. Woodley*, 882 P.2d 1380, 1387 (Colo. 1994).

These tests hew a middle path between heightened scrutiny and extreme deference. They do not “purport to require the legislature to find the least restrictive manner of furthering its purpose.” *Utah Safe to Learn*, 2004 UT 32, ¶ 37 (cleaned up). Nor do they “allow such wide latitude as to virtually abandon judicial review.” *Id.* (cleaned up) Instead, they require the court to “consider the burden imposed by the measure and the importance of the underlying legislative purpose.” *Id.* They allow the State to justify the law by producing evidence of how it facilitates

the initiative power but allow proponents to prove that the burdens exceed the State's purported justifications.

Unlike these jurisdictions, the District Court used an "equal footing" test and required the State to prove that the challenged S.B. 93 provisions have a parallel in the legislative process. *See* Doc. 30 at 8–9; Doc. 51 at 5, 8, 12, 15–16, This Court should reject that test.

To be sure, the "features of the initiative power situate it as a constitutional equal, at least, to the power vested in the legislature." Johnstone, *The Separation of Legislative Powers in the Initiative Process*, 101 Neb. L. Rev. at 129. Yet while these powers are equal in degree, they are utterly different in kind. As this Court recognized in 1936, these differences derive from basic differences in how the Legislature and the People make law. When the legislators gather in session, "considering legislation ..., with a few exceptions, is their sole business." *Sawyer Stores*, 62 P.2d at 352–53. But the "voter to whom a measure is submitted" is already "devoting a very large part of his time and energy to the conduct of his business, to the performance of the divers and sundry duties which devolve upon the citizen in the management of his affairs, in the earning of a livelihood, or in caring for a home." *Id.* The People cannot create a process like the legislative rules; the Constitution entrusts this task to the Legislature. *See* Johnstone, 101 Neb. L.

Rev. at 136–37 (listing Montana as one of six states whose constitutions have an initiative process but do not expressly allow the state legislature to facilitate this process). There can be no single time and place where the nearly 800,000 registered voters in Montana can conference together and debate legislation. The People cannot organize themselves into committees with structured leadership hierarchies, hearing dates, and procedural rules. In effect, direct democracy makes each of the qualified voters in Montana his or her own legislator.

These processes are simply incommensurable. And comparing a law that facilitates the initiative process to a rule that facilitates a legislative session is like asking “whether a particular line is longer than a particular rock is heavy.” *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356, 381 (2023) (plurality opinion) (citation omitted). Moreover, the unique circumstances through which the People make law call for greater protection, not less: “If it be wise (and experience has proven that it is) that so many safeguards be thrown about the Legislature in connection with the enactment of a measure into a law, *how much more necessary* is it that those safeguards surrounding the submission of a proposed measure to the vote of the electorate be observed.” *Sawyer Stores*, 62 P.3d at 352 (emphasis added).

In short, for the People’s initiative power to be effective, there must be an orderly and fair way of exercising it. And for practical reasons, that system cannot

be the same as the Legislature's. This Court should reject the District Court's "equal footing" test and instead adopt a test that asks whether the law, on balance, facilitates the People's lawmaking power to ensure that the result provides "expression of the predominant will of the people." *In re Interrogatories Propounded by Senate Concerning House Bill 1078*, 189 Colo. 1, 8, 536 P.2d 308, 314 (1975); *accord Sawyer Stores*, 62 P.3d at 352 (emphasis added).³

II. S.B. 93's resubmission clause facilitates the People's power to make law by preventing voter fatigue and protecting the People's ability to propose, debate, and fully consider new initiatives.

Business *amici* submit that section 13-27-221, MCA, S.B. 93's resubmission clause, facilitates the People's power to make law. With the resubmission clause, Montana joined several other states who temporarily restrict the placement of a measure on the ballot if the voters of the state have recently rejected the same, or a substantially similar, measure. This statute advances several important goals, all of which promote the People's power to make law through the initiative process.

³ Because the District Court applied a mishmash of standards below, this Court should consider remanding for further proceedings in the District Court under the appropriate standard.

A. The resubmission clause promotes higher turnout and voter decision-making by preventing voter fatigue.

As humans are presented with more choices, we tend to take decision shortcuts or simply to opt out of deciding altogether. For example, studies have found that car buyers customizing an Audi tend to rely on factory defaults after making more complicated decisions and judges impose harsher sentences the longer they go without a break. Jonathan Levav, et al., “Order in Product Customization Decisions: Evidence from Field Experiments,” 118 J. Pol. Econ. 274–299 (2010); Shai Danziger, et al., “Extraneous factors in judicial decisions,” 108 Proc. Nat’l Acad. Sci. 6889-6892 (2011).

The same phenomenon occurs in democracy, causing what the literature refers to as “voter fatigue.” Consider one study of voter fatigue by Ned Augenblick of Berkeley and Scott Nicholson of Stanford, which analyzed California voting patterns over several years. Ned Augenblick & Scott Nicholson, *Ballot Position, Choice Fatigue, and Voter Behaviour*, 83 Rev. Econ. Studies 460 (Apr. 2016).⁴ The Augenblick study examined the effect of ballot placement on voter behavior and found that “making more decisions prior to a particular decision increases the

⁴ A free copy of the article is available at <https://lims.minneapolismn.gov/Download/FileV2/26909/Ballot-Position-and-Voter-Behavior.pdf>

likelihood of [voter] abstention” and leads voters who do participate to rely on decision shortcuts like voting for the status quo or the first listed candidate. *Id.* at 460. The authors found that without the effects of choice fatigue, voter abstention “would decrease by 8%, and **6% of the propositions in our data set would have passed rather than failed.**” *Id.* (emphasis added). Augenblick and Nicholson note that their study “clearly cautions against policies intended to lengthen the ballot.” *Id.* at 24.

Another study found that as voters are faced with more choices, they spend “significantly less time learning about individual pieces of candidate information.” J. Drew Seib, “Coping with lengthy ballots,” 43 *J. Electoral Stud.* 115, 116 (2016). These significant effects of fatigue affected voters’ decisions on a *presidential* ballot—“[t]he most salient and most familiar of all the contests on the ballot, and yet even here voters have to compensate for the complexity of the choice environment.” *Id.* at 122. For down-ballot decisions, the impact of voter fatigue would likely be greater, “as the competition for voter’s attention as salience decreases.” *Id.* Others have found that as the number of ballot measures in an election year increases, voters are less likely to be aware of propositions on the ballot. *See* Stephen P. Nicholson, “The Political Environment and Ballot Proposition Awareness,” 47 *Am. J. Pol. Sci.* 403–410 (2003); *see also, e.g.*, Filip

Kostelka, et al., *Election Frequency and Voter Turnout*, 56 *Comparative Pol. Stud.* 2231 (Mar. 10, 2023) (finding that election frequency is inversely correlated with voter turnout and party mobilization even in the most significant elections).⁵

These studies yield valuable insight about why S.B. 93’s resubmission clause makes sense and facilitates the People’s initiative power. Democracy works best when the citizen is most engaged. *See Univ. of Pa. Center for High Impact Philanthropy*, “5 Elements of a Strong Democracy.”⁶ But as the scientific literature shows, voter fatigue increases with the number of choices, leading to a result that is less representative of the People’s will. *See Augenblick, Choice Fatigue* at 477 (“If voters’ decisions are distorted by choice fatigue, elections will not elicit the true preferences of voters.”). And as the Augenblick study suggests, the democracy-distorting effects of voter fatigue can be significant enough to change the outcome in a contest. *Id.* at 460. By limiting the repeated forcing of rejected measures, S.B. 93 limits the effects of voter fatigue. This will help voters more fully consider the measures before them. It will increase turnout. And it will limit voters’ reliance on incumbency bias and other decision shortcuts. In sum, it will ensure that the result

⁵ <https://cadmus.eui.eu/handle/1814/75636>

⁶ <https://www.impact.upenn.edu/framework-for-healthy-democracy/>

of the initiative process “shall represent the will of a majority of the voters.” *Sawyer Stores*, 62 P.2d at 352.

Concerns about voter fatigue are amplified in today’s political information environment. Voters today are besieged with more political messages—backed by more dollars—than at any other time in American or Montanan history. *See* Alex Ford, NBC News, “Billions of political text messages were sent last year,” (Jan. 26, 2023) (“Americans received more than **15 billion** political texts in 2022, after a Supreme Court decision paved the way for ‘unlimited’ political texting.”) (emphasis added)⁷; Jonathon Ambarian, KVTQ, “Montana organizations stepping up campaign texts this election season,” (Oct. 29, 2020).⁸

As the marketplace of political ideas becomes oversaturated, the value of each message is diluted, and voters become more likely to tune out all political speech. *See* Alex Slawson, Note, *Political Spam: Why it Sucks and How to Fix It*, 102 N.C. L. REV. 1223 (2024) (discussing costs of political spam, including costs of a “false positive” in which a voter ignores a legitimate, important message after mistaking it as spam). This oversaturation will harm proponents as well, as

⁷ <https://www.nbcnews.com/data-graphics/15-billion-political-text-messages-sent-2022-rcna64017>

⁸ <https://www.ktvq.com/news/election-2020/montana-organizations-stepping-up-campaign-texts-this-election-season>

convincing voters to disrupt the status quo bias will be harder the more initiatives are on a ballot each year. As one scholar explains, “the opportunity to learn about candidates decreases as campaigns vie for voters’ attention. In choosing to learn about a piece of information for a candidate in one election, a voter may be giving up the opportunity to learn information about a candidate for another election. After all, a voter cannot watch two campaign commercials at once or attend two campaign rallies at the same time.” Seib, “Coping with lengthy ballots,” 43 J. Electoral Studies at 116. In short, competing for voter attention is winner take all. There is a basic fairness to S.B. 93’s idea that if you lose, someone else gets a turn.

Section 13-27-221 prevents voters from being inundated with too many measures in one election cycle. In doing so, it protects the People’s ability to fully consider, debate, and decide whether to enact the measures before them. It also protects proponents and opponents by preventing the marketplace of political ideas from becoming oversaturated and diluting the value of their message.

B. S.B. 93’s resubmission clause will help proponents and opponents get their political message out by keeping advertising costs down.

For better or worse, direct democracy requires spending money. *Cf. W. Trad. P’ship, Inc. v. Attorney General*, 2011 MT 328, 363 Mont. 220, 271 P.3d 1, *rev’d sub nom Am. Trad. P’ship, Inc. v. Bullock*, 567 U.S. 516 (2012). But getting the message out to voters costs more today than perhaps ever before. According to the Montana

Free Press, registered political committees spent more than \$106 million on statewide ballot issues since 2023. Montana Free Press, “What we know about the election money deluge,” (Nov. 11, 2024).⁹ In support of CI-128, Montanans Securing Reproductive Rights (MSSR) needed to spend \$3.6 million on broadcast advertising and \$1.1 million on a door-knocking campaign focused on voter outreach through a Salt Lake City-based political firm. *Id.* Much of this money is coming from out-of-state dark money groups. Victoria Eavis, Carly Graft, Helena Independent Record, “MT’s constitutional initiatives bank rolled by national orgs” (Sep. 16, 2024).¹⁰

Basic supply and demand principles dictate that as the number of issues on the ballot increases, the costs of promoting an initiative increases while the impact of political messaging on voters decreases. *Cf.* Hailey Monaco, “2024 political ad spending breaks records in Montana, but does it work?”, (Nov. 4, 2024) (“According to the [F.C.C.], candidates are paying anywhere from around \$2,000 to over \$5,000 for an ad spot during some evening newscasts in Montana.”).¹¹

⁹ <https://montanafreepress.org/2024/11/12/what-we-know-about-the-election-money-deluge-2/>

¹⁰ https://helenair.com/news/state-regional/government-politics/elections/article_bd4b9eca-713a-11ef-b91c-63eeae097e00.html

¹¹ <https://www.ktvq.com/news/montana-news/2024-political-ad-spending-breaks-records-in-montana-but-does-it-work>

These cost increases may not impact wealthy political action committees, but they do make it more costly for regular Montanans to promote their ideas to their fellow citizens. If S.B. 93's resubmission clause is upheld, proponents of new ideas will have lower startup costs. The District Court is correct that political environment "is not static," *see* Doc. 51 at 5, but that does not mean it is unfair to give new proponents a chance for a time once the voters have rejected a measure. By preventing an initiative that voters rejected from monopolizing the marketplace of ideas, section 13-27-221 facilitates the People's initiative power.

In sum, section 13-27-221 protects voters' ability to focus on, research, debate, and persuade their neighbors about new initiatives. It reduces the scientifically recognized effects of voter fatigue in each election cycle, promoting higher turnout and democratic engagement. It gives proponents of new initiatives a fair chance to persuade the public to support their measure without the incumbency-favoring effects of voter fatigue. And it gives opponents a better chance to persuade voters, too. Section 13-27-221 is a legitimate attempt to promote the People's initiative power and ensures that the result of that process truly represents the will of the People. *See Sawyer Stores*, 62 P.2d at 352; *Committee Proposals*, p. 820. It is constitutional.

Conclusion

Amici respectfully urge this Court to reverse.

Dated: May 2, 2025

/s/ Timothy Longfield

Timothy Longfield
Landmark Law PLLC
7 W. 6th Ave., Ste. 518
Helena, MT 59601
tim@landmarklawpllc.com
Attorney for Amici Curiae

Certificate of Compliance

Pursuant to Rule 11(4) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with proportionally spaced Equity A text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 4,854 words, excluding those sections exempted under Rule 11(4)(d).

Dated: May 2, 2025

/s/ Timothy Longfield

Timothy Longfield
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I, Timothy Longfield, hereby certify that I have served true and accurate copies of the foregoing Brief - Amicus to the following on 05-02-2025:

John Phillip Meyer (Attorney)

P.O. Box 412

Bozeman MT 59771

Representing: Evan Barrett, Bob Brown, Mae Nan Ellingson, Hal Harper, Jerome T. Loendorf, Carole Mackin, Mark Mackin, Jonathan Motl, C.B. Pearson, Arlyne Reichert

Service Method: eService

Brent A. Mead (Govt Attorney)

215 North Sanders

Helena MT 59601

Representing: Greg Gianforte, Christi Jacobsen, Austin Miles Knudsen, State of Montana

Service Method: eService

Michael Noonan (Govt Attorney)

215 N SANDERS ST

HELENA MT 59601-4522

Representing: Greg Gianforte, Christi Jacobsen, Austin Miles Knudsen, State of Montana

Service Method: eService

Dale Schowengerdt (Attorney)

7 West 6th Avenue, Suite 518

Helena MT 59601

Representing: Montana Chamber of Commerce, Montana Farm Bureau Federation, Montana Wood Products Association, Montana Bankers Association

Service Method: eService

Michael D. Russell (Govt Attorney)

215 N Sanders

Helena MT 59620

Representing: Greg Gianforte, Christi Jacobsen, Austin Miles Knudsen, State of Montana

Service Method: eService

Electronically Signed By: Timothy Longfield

Dated: 05-02-2025