

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, Appellees, and Cross-Appellants,

v.

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

Defendant, Appellant, and Cross-Appellees.

**APPELLANTS'/CROSS-APPELLEES' REPLY BRIEF AND
ANSWER TO CROSS-APPEAL**

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County,
The Honorable Mike Menahan, Presiding

(Appearances on the following page)

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INTRODUCTION

This case highlights the need for this Court to establish a reasonable, coherent standard applicable to constitutional challenges to the Legislature’s regulation of ballot initiatives. The district court struggled in evaluating Ellingson’s claims against SB 93 without such a test, resulting in its erroneous findings challenged herein. State’s Br. at 2-3. However, when applying the test all parties agree is proper in this context, each provision of SB 93 subject to this appeal passes constitutional muster. For the reasons set forth in the State’s Opening Brief and below, this Court should reverse.

Conversely, this Court should affirm the district court’s denial of Ellingson’s request for attorneys’ fees. Ellingson simply failed to satisfy the requisite factors under the Private Attorney General Doctrine, and she provides no valid reason for this Court to find otherwise. This Court should therefore affirm the district court’s denial of fees as explained further below.

ARGUMENT

I. The State properly appealed.

Ellingson first argues that the Court should either require an amended notice or “the Court can do so” because the State did not directly appeal the final judgment. Ellingson’s Br. at 7. But, under the Rules, “[t]he notice of appeal . . . shall designate the final judgment or order or part thereof from which the appeal is taken. M. R.

App. P. 4(4)(a) (emphasis added). The State did “designate ... [the] order or part thereof” which it appealed, specifying the two orders on summary judgment in the record. *See* Defendants’ Notice of Appeal at 3.

Ellingson also claims appealing those orders is “untimely” because the State’s Notice of Appeal was “not within 60 days of either summary judgment order.” Ellingson’s Br. at 7n.4. But the State could *not* initiate its appeal until the district court “conclusively determine[d] the rights of the parties and settle[d] all claims in controversy” herein, including “the amounts of costs and attorney fees awarded[.]” M. R. App. P. 4(1)(a). Because neither order on summary judgment was a final judgment, neither triggered the 60-day clock under Mont. R. App. P. 4(5)(a)(i).

Ellingson ultimately concedes the State could appeal as a final judgment the district court’s December 20, 2024, Order on Attorney Fees and Costs. Ellingson’s Br. at 7n.4. Doing so, then, would necessarily “draw[] into question all previous orders ... which led up to and resulted in the judgment.” M. R. App. P. 4(4)(a). If the Court determines the State should have appealed that particular order, the State could amend its notice, or “the Court could do so” as Ellingson asserts. Ellingson’s Br. at 7 (citing M. R. App. P 4(4)(e)). Nonetheless, the district court’s summary judgment orders are properly before the Court here, and the Court should reject Ellingson’s argument.

II. The Court should provide guidance regarding the applicable standard.

The State, Ellingson, and Appellee Amici¹ agree this Court should clarify the scope of the People’s power of initiative and referendum under Article III of the Montana Constitution, and its interplay with the Legislature’s Article V, Section 1 power.

Ellingson argues the Montana Constitution provides the People a power of lawmaking that is “separate” from the Legislature. Ellingson’s Br. at vii, 9-10. While the People’s power *is* separate (as in a separate vehicle), it is not entirely insulated from legislative involvement. The powers of initiative and referendum are not only devoid of enabling provisions, but are also inextricably tied to elections. Elections are controlled by the Legislature: “The legislature shall provide by law the requirements for . . . administration of elections.” Mont. Const. Art. IV, Sec. 3. And although the Framers did not include any “enabling provision[.]” specifically allowing the Legislature to regulate the initiative process, the “absence of an enabling provision should not be read to disable the legislature from enacting statutes to facilitate the initiative process, which would disable the initiative process itself.” Anthony Johnstone, *The Separation of Legislative Powers in the Initiative Process*, 101 Neb. L. Rev. 125, 136 (2022). Consistent with this, this Court has acknowledged

¹ Planned Parenthood Advocates of Montana and Montana Public Interest Research Group. (“Appellee Amici”).

that the Montana Legislature has long been tasked with enacting enabling legislation “to facilitate this process.” *Cottonwood Env’t L. Ctr. v. Knudsen*, 2022 MT 49, ¶ 3, 408 Mont. 57, 505 P.3d 837 (*Cottonwood I*). Thus, the logical conclusion is that the People indeed have the power to create law. But that power is not equivalent to the Legislature’s because that power depends on the Legislature’s creation of laws and procedures to facilitate it.

The State, Ellingson, and Appellee Amici also agree that the appropriate test should be “whether the regulation at issue facilitates the People’s initiative and referendum power or impedes that power.” State’s Br. at 11; Ellingson’s Br. at 13; Appellee Amici’s Br. at 14. Should the Court also agree, it should reject the district court’s application of the “equal footing” test, such as when it considered the \$3700 waivable filing fee. State’s Br. at 10-11. The district court should have employed only one test, not two separate tests, to determine whether SB 93’s provisions infringed on the powers of initiative and referendum. *Id.* The “equal footing” test contradicts this Court’s precedent and would destabilize the initiative and referendum process by opening the door to the invalidation of many longstanding regulations and procedures. *Id.* at 11-12.

Ultimately, the parties agree that the proper test evaluates a law’s specific purposes and determines whether it facilitates or impairs the People’s lawmaking power.

III. The District Court erred in invalidating SB 93’s resubmission and advisory legislative committee provision.

The Court should reverse the district court’s finding that Mont. Code Ann. §§ 13-27-221 (“resubmission clause”) and 13-27-228, -238(1)(d) (collectively “legislative committee advisory statement”) impaired the initiative process. (Doc. 51 at 5, 15-16). As to Ellingson and Appellee Amici’s arguments concerning SB 93’s Attorney General legal review provisions (Ellingson’s Br. at 11-12, 29-30; Appellee Amici’s Br. at 24-25), the State did not challenge the district court’s rulings on the same. The Court should accordingly disregard those arguments as unnecessary distractions.

A. The resubmission procedures are constitutional.

The district court found, without citation to any evidence, that SB 93’s resubmission clause “creates an arbitrary hurdle to participation” because “the legal and political landscape which informs voters’ decisions is not static,” and that “[t]here is no similar restriction on the legislature’s ability to reintroduce proposed bills from one session to the next.” (Doc. 51 at 5). The latter point evokes the “equal footing” test, which this Court should reject. The former points neither demonstrate the purported impairment on the process nor contend with the State’s contrary arguments in any meaningful way. (Doc. 39 at 10-11) (the resubmission clause prevents inundation of previously rejected measures; reduces voter confusion; ensures state resources are not consumed by already-rejected proposals; and aligns

with other states' similar prohibitions); State's Br. at 16-21 (same). That the legal and political landscape can be dynamic, rather than static, does not mean that some or most voters would change their vote if presented with "substantially the same" ballot question in consecutive elections. The resubmission clause facilitates the process by giving proponents of new measures a better chance to advocate for their ideas without having to compete against prior rejected measures, and it aids the voter by giving them the space to focus on and research the new measures that are presented to them. State's Br. at 17-18.

Ellingson and the district court also inexplicably conflate substance with procedure. Ellingson's Br. at 19; (Doc. 51 at 6-7). Article III, Section 4 of the Montana Constitution confers a substantive right to enact laws on any subject, except for the appropriation of money and local or special laws. But a substantive right is not a procedural rule like the resubmission clause. Substantive rights define *what* can be done, while procedural rules address *how* it is done. A law limiting how often a proposal can be introduced is purely procedural: it regulates the timing and frequency to ensure efficient governance, but it doesn't bar any matter from eventual consideration or enactment. This distinction is fundamental. For instance, the Legislature can create procedural limitations (like litigation deadlines) without interfering with substantive rights (like initiating litigation), provided they don't

make the right illusory.² Here, the frequency limitation doesn't eliminate the ability to submit a proposal on any matter; it merely prevents abuse of the process through unreasonable repetition. The resubmission clause imposes no indefinite ban; it sets a reasonable interval for resubmission. Therefore, the resubmission clause's procedural rule cannot violate the substantive right in Article III, § 4.

Ellingson also argues that her three “uncontested facts” were not challenged by the State in its Opening Brief. Ellingson's Br. at 18. However, none of those facts are dispositive. This is especially true regarding Ellingson's assertion that “no such prohibition exists as to bills are refiled in consecutive Legislative sessions.” *Id.* at 18. This assertion pertains to the “equal footing” test that Ellingson disclaims. Ellingson also challenges the State's citation to multiple other states' similar prohibitions because those “rely on constitutional authority that does not exist in Montana's Constitution.” *Id.* at 19. This is immaterial. The point is that such prohibitions are common, and their justifications are reasonable. State's Br. at 19-20. Moreover, the Montana Constitution does not forbid the Legislature from enacting legislation concerning initiatives and referendums; it clearly permits it.

² Free speech provides another example. That right is near absolute, but “time, place, and manner” restrictions—like noise ordinances or permit requirements for protests—are permissible if content-neutral and narrowly tailored. A frequency limitation on submissions is content-neutral: it applies equally to all matters, regardless of topic.

Cottonwood I, ¶ 3. The resubmission clause facilitates the initiative process, and the Court should reverse the district court’s contrary finding.

B. The legislative committee advisory statement and its procedure encourage public participation.

Including the legislative committee advisory statement on the ballot petition and its procedure facilitate the initiative process by encouraging more public participation. The district court concluded the statement was “unconstitutional on its face” because its inclusion allows “legislators [to] unlawfully insert[] themselves into the people’s independent lawmaking process” and “serves no purpose other than to provide an unsolicited opinion on the substance of the proposal.” (Doc. 51 at 15). The district court was also “unconvinced” that the statement aided the public. (*Id.* at 16). These conclusions lacked meaningful analysis and failed to properly consider the provision’s underlying rationale.

The Legislature irrefutably “governs the form of initiatives and the procedures.” *Cottonwood I*, ¶ 3. *See also* Mont. Const. art. IV, § 3; (Doc. 39 at 18); State’s Br. at 22-23. The legislative committee advisory statement evokes both the form of initiatives and its procedure—the statement appears on the face of the ballot petition (the form), and the attendant process (the procedure) includes public hearings. Specifically, the procedure encourages public participation, requiring a live, publicly-accessible (also live-streamed) hearing that “allows the public to express their opinions through testimony and public comment, and for sponsors to

appear and explain their proposal.” (Doc. 39 at 19); *see also* State’s Br. at 23 (“a hearing on I-193 allowed tribal members to express concerns that the measure would likely have caused significant legal issues in Indian Country”). SB 93’s legislative committee advisory statement and the predicate procedure facilitate the initiative process by creating a forum for public participation.

Ellingson again responds that the State “did not contest” several of her “uncontested facts.” Ellingson’s Br. at 21. Ellingson’s first “fact” is a statement about the challenged statute’s requirements. *See* Mont. Code Ann. § 13-27-238(1)(d). The second ignores the State’s briefing regarding the Constitution having conveyed this power to the Legislature. *See* State’s Br. at 22-23; (Doc.39 at 18). The third again evokes the “equal footing” test that Ellingson rejects. Ellingson’s Br. at 13. None of these “facts” have any bearing on the legislative committee advisory statement’s impact on the initiative process.

Ellingson then posits that the language required under Mont. Code Ann. § 13-27-238(1)(d) is “unquestionably argumentative,” and the contemplated hearing and testimony do not facilitate the initiative process. Ellingson’s Br. at 21-22. “Argumentative” is defined as “[e]xpressing not only facts, *but also* inferences and

conclusions drawn from facts.”³ This provision contains no inferences or conclusions:

(d) Voters are advised that either an interim committee or an administrative committee of the legislature in accordance with 5-5-215 or 5-11-105 reviewed the content of this initiative and [did] or [did not] support the placement of the proposed text of this initiative on the ballot. The outcome of the vote was [x] in favor of placing the measure on the ballot and [x] against placing the measure on the ballot.

Mont. Code Ann. § 13-27-238(1)(d). Ellingson also alleges the procedure does not facilitate the process, but she fails to explain *how*. Ellingson’s Br. at 22-23. That the Constitution does not explicitly establish this procedure is of no consequence. *Id.* at 23. Ultimately, Ellingson fails to contend with the benefits of a public process that permits testimony and comment from interested voters. *See* (Doc. 39 at 19-20); State’s Br. at 23-24. Any concerns about delaying the overall process can easily be relieved by proponents pursuing their initiatives earlier. *See* Mont. Code Ann. §§ 13-27-104, -228, -243; *Meyer v. Knudsen*, 2022 MT 109, ¶ 18, 409 Mont. 19, 510 P.3d 1246. The district court committed reversible error in ruling otherwise.

IV. Ellingson had no standing to challenge the waivable fee, and she nonetheless failed to prove its facial unconstitutionality.

Ellingson never had standing to challenge SB 93’s waivable filing fee, codified at Mont. Code Ann. § 13-27-215, and even if she did, she failed to prove its

³ Argumentative, Black’s Law Dictionary (12th ed. 2024) (emphasis added).

unconstitutionality in every application. The district court found Ellingson had “standing to bring this claim because the challenged fee prevented them from participating in the constitutionally established ballot issue process.” (Doc. 30 at 5). It further concluded “the State ha[d] not demonstrated a legitimate interest in imposing a filing fee” and that the fee was an impairment because it “simply restricts access based on a person’s ability or willingness to pay.” (*Id.* at 10-11). However, the district court failed to consider the State’s interest in defraying costs, State’s Br. at 29, refused to contemplate a plain meaning of “substantial hardship,” (Doc. 30 at 11); State’s Br. at 31-32, and failed to hold Ellingson to her burden of proof. (*Id.* at 10-11). This Court should reversed the district court.

Ellingson could have opted out of the waiver process but deliberately chose not to. Ellingson’s Br. at 26 (“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[.]”). Ellingson emphasizes “she ‘was not eligible for’” a waiver, so there was no reason to try. Ellingson’s Br. at 26-27. While it is incumbent on the proponent to make the request, Mont. Code Ann. § 13-27-215(3), the Secretary of State’s Office decides whether to grant the waiver:

The proponent can seek a waiver by indicating their desire to seek such in either an email in connection to their ballot issue submission or in a letter in connection to their ballot issue submission. As long as the Secretary of State's Office receives the ballot issue submission and Plaintiff s desire to seek a waiver, then that satisfies the requirements laid out in SB 93.

[...]

To the best of my knowledge, out of the two separate submissions requesting a fee waiver to the \$3,700 filing fee, each of the two fee waivers were granted.

(Doc. 23. Angela Nunn Decl. at ¶¶ 11, 17). Ellingson simply never sought a waiver and therefore cannot establish that she would have been denied one. *Madsen v. Boise State Univ.*, 976 F.2d 1219, 1220-21 (9th Cir. 1992) (per curiam) (“[A] plaintiff lacks standing to challenge a rule or policy to which he has not submitted himself by actually applying for the desired benefit.”). Questions now as to eligibility and potential receipt of a waiver are pure speculation. *Mitchell v. Glacier Cnty.*, 2017 MT 258, ¶ 10, 389 Mont. 122, 406 P.3d 427 (injury cannot be conjectural or hypothetical.) Ellingson deflects by speculating about possible misdemeanors or complaints, Ellingson’s Br. at 27, but the statute’s only punishment for requesting an unwarranted waiver is simply to “pay the fee.” Mont. Code Ann. § 13-27-215(3). That’s it. The logical conclusion is Ellingson refused to seek a waiver to manufacture her own alleged injury. (Doc. 19 at 13–14); (Doc. 18) Motl Decl., ¶ 9. Ellingson lacked standing to challenge the fee.

Even if Ellingson had standing, she failed to show that the fee was unconstitutional in every application. Ellingson’s arguments, at best, support an ultimately meritless “as-applied” challenge. Ellingson’s Br. at 26-27; (Doc. 19 at 10-14). The waivable filing fee cannot truly burden everybody and cannot “simply

restrict[] access based on a person’s ability or willingness to pay,” (Doc. 30 at 10-11), when 100% of requested waivers were granted. Neither Ellingson nor the district court grappled with this uncontested fact. (Doc. 23 at ¶ 17). Indeed, “substantial hardship” was not so vague or difficult to understand so as to prevent proponents from obtaining waivers by demonstrating exactly that. (Doc. 30 at 11); (Doc. 23 at ¶ 17). Ellingson’s speculation falls far short of establishing that the waivable filing fee is facially unconstitutional. *See* State’s Br at 30-31.

Contrary to the district court’s finding, (Doc. 30 at 10), the State has a legitimate “interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent” proposals. *Bullock v. Carter*, 405 U.S. 134, 145 (1972) (citation omitted); (Doc. 22 at 12-13). The State also has “a legitimate interest to ensure the seriousness” of proponents that submit ballot issues. *Andress v. Reed*, 880 F.2d 239, 242 (9th Cir. 1989); State’s Br. at 30; (Doc. 22 at 13-14). Both interests are implicated here. For example, in 2022, the Secretary of State’s Office received 34 proposed ballot initiatives. (Doc. 23 at 18). Not one made it to the general election ballot.⁴ Only four proceeded to signature gathering, while the rest either stalled out waiting for the submitter to respond to the Secretary of State’s Office or Legislative Services Division, were withdrawn, or were deemed legally insufficient.⁵ Similarly,

⁴ https://sosmt.gov/elections/ballot_issues/proposed-2022-ballot-issues/ (the two issues qualified for the ballot were both referred by the Legislature).

⁵ *Id.*

in 2024, only three of 15 proposed ballot issues made it on the ballot.⁶ Four failed at the signature gathering phase, and the rest were withdrawn or found legally insufficient.⁷ Each submission costs the State time and resources to review, and repeated withdrawals demonstrate a lack of seriousness, if not frivolousness, further burdening the State.

Furthermore, it is a “legitimate state objective” to require a “filing fee[.]...to relieve the State treasury of the cost of conducting” the initiative process, *Bullock*, 405 U.S. at 147, so long as the State provides a “reasonable alternative means of ballot access[.]” *Lubin v. Panish*, 415 U.S. 709, 718 (1974) (Doc. 22 at 13). The Legislature determined that \$3,700 would “help defray the costs of review[.]” specifically requiring \$700 to be allocated to the Secretary of State’s Office, \$2,000 to the Legislative Services Division, and \$1,000 to the Department of Justice.⁸ SB 93 §4(6); (Doc. 23 at ¶ 6); State’s Br. at 29. The Legislature then established a fee waiver process to provide a “reasonable alternative means of ballot access” for those who face substantial hardship. Mont. Code Ann. § 13-27-215(3); *Lubin*, 415 U.S. at 718.

⁶ https://sosmt.gov/elections/ballot_issues/proposed-2024-ballot-issues/

⁷ *Id.*

⁸ The Attorney General’s legal sufficiency review takes an average of 20 hours to complete. (Doc. 22 at 14). From August 2021 to April 2022, Legislative Services expended approximately 220.5 hours of attorney time reviewing initiative proposals. (*Id.*)

Anyone can apply, and those proponents who have sought a waiver to date have received one.

The waivable filing fee furthers legitimate state interests and is constitutional. It facilitates the initiative process by weeding out unserious and frivolous proposals, it directs finite State resources to and expedites the process for legitimate proponents, and it shifts the attendant costs from the Montana taxpayer to the proponent, all the while exempting those who cannot pay the fee. This Court should reverse, as Ellingson failed to show that the fee was unconstitutional in every application.

V. The Court should affirm the district court’s denial of attorneys’ fees.

On Cross-appeal, Ellingson challenges the district court’s denial of attorneys’ fees under the private attorney general doctrine (“PAGD”). Ellingson’s Br. at 30-35; (Doc. 70). Montana follows the American Rule, under which a prevailing party generally may not recover its attorneys’ fees. *Trs. Of Ind. Univ. v. Buxbaum*, 2003 MT 97, ¶ 19, 315 Mont. 210, 69 P.3d 663. There are equitable exceptions to the American Rule, *Id.* ¶ 19, but they must be construed narrowly “lest they swallow the [R]ule.” *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶ 23, 351 Mont. 464, 215 P.3d 649. To determine whether fees under the PAGD are warranted, a Court must consider “(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.” *Barrett v. State*, 2024 MT 86, ¶ 55, 416 Mont. 226, 547 P.3d 630 (citations omitted). “The court must also consider whether awarding attorneys’ fees would be unjust under the circumstances.” *Barrett*, ¶ 55 (citations omitted). But the Court does not have a duty to “‘conduct legal research on behalf of a party’ or ‘develop legal analysis that might support a party’s position.’” *State v. Oliver*, 2022 MT 104, ¶ 42, 408 Mont. 519, 510 P.3d 1218 (citation omitted).

A. The first and third factors weigh against Ellingson.

The district court erroneously determined that Ellingson “could likely satisfy” the first and third factors, (Doc. 70 at 4-5), despite failing to demonstrate the strength or societal importance of the public policy vindicated by this litigation and how all Montana citizens benefit from the district court’s decision.

On the first factor, Ellingson resorts to threadbare statements, simply concluding that “[t]his litigation vindicated important public policy—the protection of the Peoples’ constitutional power from unlawful infringement.” (Doc. 60 at 5); Ellingson’s Br. at 33 (“And the litigation likewise vindicated an issue of statewide importance.”). This is insufficient. Ellingson must have stated *how* her litigation vindicated important public policy, more than simply invoking that this litigation involved a constitutional issue. *See, e.g., Bitterroot River Protective Ass’n v. Bitterroot Conserv. Dist.*, 2011 MT 51, ¶ 22, 359 Mont. 393, 251 P.3d 131 (*BRPA*)

(not all constitutional claims satisfy this factor). This is a deficiency the Court cannot correct, nor can Ellingson argue anew in subsequent briefing. *Barrett*, ¶ 61; *Oliver*, ¶ 42.

On the third factor, Ellingson failed to provide any basis for *how* their litigation benefited all Montanans. For example, in *Burns v. Cty. of Musselshell*, the county stipulated to election recount procedures with Burns that clearly contravened Montana Code after the people of the county voted and selected Burns’ opponent for county sheriff by a narrow margin. 2019 MT 291, ¶¶ 6, 23, 398 Mont. 140, 454 P.3d 685. This action forced Burns’ opponent to intervene and defend the electoral process for everyone in the County. *Burns*, ¶ 23. In the case here, no voter was at risk of disenfranchisement. In *Bitterroot*, “[t]he court reasoned that the decision clarified the status of other public waters in the state apart from the [public water at issue].” *BRPA*, ¶ 34. In *Forward Montana v. State*, the litigation involved constitutional restraints upon the Legislature—namely the Single Subject Rule and the Rule on Amendments—which “affect[ed] all Montanans.” ¶¶ 27-28, 42. And in *Barrett*, a divided Court found that the issue affected “[t]ens of thousands of [Montana University System] students.” *Barrett*, ¶ 62. These cases are distinguishable from this case.

To establish that their “successful litigation against the State in this case benefits all Montanans,” Plaintiffs at minimum must demonstrate that the voting

public has been denied certain ballot issues because they were hamstrung by SB 93. (Doc. 60 at 6). No such evidence exists. Even while SB 93 was in full effect, several ballot issues qualified for signature gathering, and some appeared on the general election ballot. It remains unknown how many people (aside from Plaintiffs) benefitted from this litigation.

Because Ellingson failed to assert specific facts on both the first and third factors, they “could [not] likely satisfy” them. (Doc. 70 at 4-5). Accordingly, the Court should decline to make Ellingson’s arguments for her and affirm the denial of fees. *Barrett*, ¶ 61.

B. The district court correctly decided the second factor.

The district court correctly found that “the magnitude of the burden on Plaintiffs in bringing an action to enforce their rights [did] not support an award of attorney fees.” (Doc. 70 at 5). The district court cited several reasons. First, the case hinged entirely on questions of law, rendering discovery unnecessary. (*Id.*) After the State filed its Answer, (Doc. 16), Ellingson promptly filed her first motion for summary judgment on two sections of SB 93. (Docs. 17-19). Following the district court’s first order, (Doc. 30), Ellingson sought summary judgment on the remaining provisions. (Docs. 32-33). Without time-intensive and costly discovery or court appearances, resolution of the issues was relatively straightforward.

Second, the district court correctly scrutinized Ellingson’s litigation decisions: “Instead of addressing all Plaintiffs’ legal arguments in one motion, the parties were required to complete two briefing cycles, and the Court was required to issue two orders. The State was not responsible for this increased burden.” (Doc.70 at 5). Ellingson claims the district court “overlooked the necessity of this approach” but fails to explain this purported necessity. Ellingson’s Br. at 34. Ultimately, had Ellingson proceeded more efficiently, her claims could have been completely resolved around February 5, 2024, (Doc. 30), rather than August 13, 2024. (Doc. 51). This Court should not reward Ellingson’s choice to extend the litigation into two briefing cycles just to later decry the resultant burden on her.

Lastly, the district court found that “the parties’ ability to reach an agreement for a stipulated dismissal less than a month after the Court’s second summary judgment order significantly reduced the burden of litigation.” (Doc. 70 at 5). Through two dispositive motions, Ellingson only saw success on four of her eleven claims—seven were dismissed. (Doc. 67 at 4). The district court noted that any fees accrued pursuing those dismissed claims “would not be recoverable under the private attorney general doctrine.” (Doc. 70 at 5-6). Ellingson having succeeded on only 36% of her claims “necessarily reduces the burden on Plaintiffs attributable to vindicating their constitutional rights.” (*Id.* at 6). The district court properly found that Ellingson failed to satisfy this factor.

C. Equity does not support an award of attorneys' fees.

Ellingson's final shot effectively hinges on a one-sentence justification for fees. Ellingson's Br. at 35. Ellingson fails to provide any coherent explanation for why the Montana taxpayer should pay Ellingson's fees or why her case wasn't a "garden variety" constitutional case. *W. Tradition P'ship v. AG of Mont.*, 2012 MT 271, ¶ 21, 637 Mont. 112, 291 P.3d 545 (*WTP*); *Mont. Immigrant Justice All. v. Bullock*, 2016 MT 104, ¶ 53, 383 Mont. 318, 371 P.3d 430; (Doc. 67 at 11-13). As this Court has stated, "[t]he Court does not award attorneys' fees in routine cases seeking declaratory and injunctive relief based only on the purported unconstitutionality of a challenged statute." *WTP*, ¶ 13. This is exactly such a case. (Doc. 1 at 1). It did not "involve[] unique issues regarding the State's breach of fiduciary duties imposed under the Montana Constitution." *Barrett*, ¶ 56 (quoting *WTP*, ¶ 19). Nor did it involve a legislative process that created "an obviously unlawful Bill adopted through willful disregard of constitutional obligations." *Forward Mont.*, ¶ 20. And Ellingson did not claim bad faith by the State, nor did the district court reach the issue when it denied the fee request. (Doc. 70). This case was a straightforward constitutional challenge to a legislative act that the State defended in good faith.

* * *

The Court should not burden Montana’s taxpayers with the expense Ellingson incurred litigating this only partially successful “garden variety” constitutional challenge. And, further, no justification exists to extend the presumption of fees in right-to-know cases to the PAGD. Ellingson’s Br. at 32 (citing *Mont. Env’t Info. Ctr. v. Office of the Governor for State*, 2025 MT 112, ¶ 44, 422 Mont. 136, 569 P.3d 555) (“*MEIC*”).⁹

CONCLUSION

This Court should reverse the district court’s determinations on the resubmission clause, legislative committee advisory statement, and waivable filing fee, and affirm its denial of attorneys’ fees.

Respectfully submitted this 15th day of September 2025.

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⁹ Ellingson argues that this Court created a presumption to attorney fees that should be applied in this case. *MEIC* was about attorney fees in a right-to-know action, not the PAGD. *MEIC*, ¶ 8 (“Whether a party who successfully vindicates its right to know under Article II, Section 9, of the Montana Constitution is entitled to a presumption towards awarding attorney's fees”). The Court should decline to extend its presumption beyond the confines of Art. II, Sec 9 of the Montana Constitution. That aside, Ellingson raises this argument for the first time on appeal. Should this Court find it necessary to reach that question, it should remand for full briefing and argument before the District Court.

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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 Times New Roman 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 4,925 words, excluding cover page, tables of contents and authorities, certificates of service and compliance, signatures, and any appendices.

/s/ Michael Noonan
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I, Michael Noonan, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant Reply and Answer to Cross Appeal to the following on 09-15-2025:

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