

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 25-0172

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,

Defendant and Appellant.

APPELLANTS' OPENING BRIEF

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

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STATEMENT OF THE ISSUES

1. What is the appropriate test for determining the constitutionality of statutes regulating and facilitating the initiative and referendum process?
2. Does a statute barring the resubmission of failed ballot initiatives for four years facilitate the People's initiative and referendum power by temporarily preventing the constant forcing of rejected questions and protecting the People's ability to thoroughly debate and consider new measures?
3. Does the placement of a non-argumentative legislative interim committee advisory vote on a ballot petition facilitate the People's initiative power and fall under the Legislature's constitutional authority to regulate the form of ballot issue petitions?
4. Did Ellingson have standing to challenge S.B. 93's waivable filing fee when she did not apply for a waiver? Even if she did, did Ellingson prove that a waivable filing fee is unconstitutional in every application when the undisputed record evidence shows that every waiver request has been granted?

STATEMENT OF THE CASE

In Montana, the People and the Legislature both have the power to make law. The Constitution leaves it to the Legislature to enact regulatory frameworks that facilitate the People's lawmaking power by "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 v. Mitchell*, 103 Mont. 148, 168–69, 62 P.2d 342, 351–52 (1936); *see also* Mont. Const. art. IV, § 3. The Legislature has done so for a long time. This 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.

The appeal arises from Appellees’ (“Ellingson’s”) broad constitutional challenge to Senate Bill 93 (“S.B. 93”). *See* Doc. 1. Ellingson claimed 11 provisions of S.B. 93 were facially unconstitutional. *See* Doc. 1; Doc. 19; Doc 33. The district court agreed in part and disagreed in part. In two summary judgment orders, the district court held unconstitutional S.B. 93’s: (1) waivable \$3,700 filing fee; (2) requirement that the Attorney General review the substantive legality of proposed initiatives;¹ (3) placement on the ballot petition the outcome of an advisory vote by an interim legislative committee; and (4) requirement that popularly-rejected ballot issues wait four years before being resubmitted to the ballot. The district court upheld the other seven challenged provisions of S.B. 93.

In reaching these conclusions, the district court employed two distinct tests. At times, the district court used an “equal footing” test, which required the state to justify a ballot issue regulation by identifying an identical regulation or rule

¹ This conclusion is not subject to this appeal.

facilitating the Legislature’s lawmaking process. At other times, the district court asked simply whether the challenged law facilitated or impaired the People’s initiative and referendum powers.

The parties agreed to dismiss all claims except the four on which Ellingson prevailed. The district court then denied Ellingson’s motion for attorney fees. The State appealed and Ellingson cross-appealed the denial of her attorney fees.

STATEMENT OF FACTS

I. The 2023 Legislature enacts S.B. 93.

In May 2023, the Governor signed S.B. 93 into law. S.B. 93 repealed and reorganized Mont. Code Ann. § 13-27-202 (2021) by subdividing it into separate sections of law for each type of ballot issue. *See* Mont. Code Ann. §§ 13-27-216 (Statutory initiative process and procedure); -217 (Statutory referendum process and procedure); -218 (Constitutional initiative process and procedure); -219 (Constitutional convention initiative process and procedure); and -220 (Statewide referendum referred by legislature – process and procedure). S.B. 93’s reorganization included repealing the Attorney General’s review codified at Section 13-27-312 (2021) and moving it to Section 13-27-226. The District Court invalidated the waivable filing fee, codified at Section 13-27-215, in its February 2024 Order. (Doc. 30). Before then, the waivable filing fee hindered no proponent from initiating the ballot issue process with the Secretary of State. (Doc. 22, Ex. A, ¶ 17). The

statutes barring resubmission of failed ballot initiatives (Section 13-27-221) and requiring a legislative interim committee advisory vote placement on a ballot petition (Section 13-27-228) were in effect until August 13, 2024 (Doc. 51), and, like the waivable filing fee, were never alleged to have caused harm to the ballot issue process, nor to voting turnout during the 2024 General Election.

II. Ellingson claims that eleven provisions of S.B. 93 are facially unconstitutional. The District Court upholds seven provisions and strikes four.

On May 26, 2023, Plaintiffs sued to have eleven provisions of S.B. 93 declared facially unconstitutional. (Docs. 1, 19, and 33). These provisions included the following: (1) Attorney General’s substantive legal review of proposed Ballot Issues; (2) \$3,700 waivable filing fee; (3) the bar on resubmitting failed ballot initiatives within four years; (4) Secretary of State review of Ballot Issue language; (5) “Harm to Business Statement” inclusion on Ballot Issue Petition; (6) Budget Director’s inclusion of Fiscal Note on Ballot Issue Petition; (7) Attorney General’s inclusion of 50-word statement of Fiscal Impact on Ballot Issue Petition; (8) Attorney General’s authority to reject Ballot Issue language on the basis of Legal Sufficiency; (9) Requirement for a legislative interim committee advisory vote placement on a ballot petition; (10) Agency review requirements; and (11) Filing fee for Signature Gatherers. (Docs. 19, 33). The supporting facts for their broad demand were few and far between.

According to the declaration attached to Plaintiffs' Complaint, John Motl submitted three draft initiatives to the Secretary of State between May 21 and May 23, 2023. (Doc. 18 at ¶¶ 7-8). When the Secretary of State's office inquired about the \$3,700 filing fee, Motl responded that "[t]he citizen sponsors do not wish to see a see a waiver [of the filing fee] and are not eligible for one. That aside, please be further informed that we will make no payment of \$3700[.]" (Id. at ¶ 9). The process for Plaintiffs, and the facts, ended there.

Despite these sparse facts—and what could only be viewed as a self-inflicted injury—Plaintiffs proceeded on their mission to have the District Court invalidate the eleven provisions of S.B. 93 over two summary judgment motions. (Docs. 19, 33). Defendants not only defended the various provisions, but also repeatedly pointed out that Plaintiffs could, at best, only attribute an alleged injury to the waivable filing fee provision and nothing more because the process for them never proceeded past that point. (Docs. 22, 39). The District Court disagreed, and over the two orders on summary judgment, voided four of the eleven provisions: (1) the \$3,700 waivable filing fee; (2) the Attorney General's substantive legal review of proposed Ballot Issues; (3) the bar on resubmitting failed ballot initiatives within four years; and (4) the requirement for a legislative interim committee advisory vote placement on a ballot petition. (Docs. 30, 51).

Thereafter, the Parties stipulated to, and the District Court ordered, the dismissal of the seven claims challenging provisions found constitutional. (Doc. 61). Plaintiffs' request for costs and attorneys' fees was resolved. (Doc. 70). Defendants then initiated this appeal.

STANDARD OF REVIEW

This Court exercises plenary review of constitutional issues. *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 12, 382 Mont. 256, 368 P.3d 1131 (*M CIA*) (citation omitted). Statutes are presumed constitutional, and the challenger bears the burden of proving their unconstitutionality beyond a reasonable doubt. *City of Missoula v. Mt. Water Co.*, 2018 MT 139, ¶ 21, 391 Mont. 422, 419 P.3d 685. "A statute is presumed constitutional, and a facial challenge must show a law is unconstitutional in all its applications." *Cottonwood Env't L. Ctr. v. State*, 2024 MT 313, ¶ 7, 419 Mont. 457, 560 P.3d 1227 (*Cottonwood II*).

This Court reviews de novo orders granting summary judgment. *Whitefish 57 Commercial, LLC v. City of Whitefish*, 2023 MT 176, ¶ 9, 413 Mont. 349, 536 P.3d 395. Summary judgment is proper when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. M. R. Civ. P. 56(c)(3).

SUMMARY OF THE ARGUMENT

Article V, section 1 of the Montana Constitution reserves to the People the "powers of initiative and referendum," allowing them to "enact laws by initiative on

all matters except appropriations of money and local or special laws,” Mont. Const. art. III, § 4, and “approve or reject by referendum any act of the legislature except an appropriation of money.” Mont. Const. art. III, § 5. 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*). “Subject to constitutional protections, the election process is purely statutory.” *Meyer v. Jacobsen*, 2022 MT 93, ¶ 21, 408 Mont. 369, 510 P.3d 52 (citation and quotation marks omitted).

The Legislature’s scheme has largely gone unchallenged, and this Court has never squarely addressed what test governs constitutional challenges to statutes that regulate the initiative process. *Cf. Monforton v. Knudsen*, 2023 MT 179, ¶ 8, 413 Mont. 367, 539 P.3d 1078; *Meyer v. Knudsen*, 2022 MT 109, ¶ 17, 409 Mont. 19, 510 P.3d 1246. But here, the district court struck certain provisions of S.B. 93 because they did not have a perfect analogue in the legislative process. It thus created a perfection rule from whole cloth. This Court should clarify that ballot regulations need not have a perfect twin in the legislative process. The initiative and legislative processes are too different for any perfect comparison to be meaningful.

Instead, the appropriate analysis should require the State to prove that a ballot regulation has a legitimate purpose of facilitating the People’s initiative power, has a reasonable relationship to that goal, and does not unduly burden the initiative

process. This Court should look to the well-reasoned decisions of the Colorado Supreme Court in *Loonan v. Woodley*, 882 P.2d 1380 (Colo. 1994), and the Utah Supreme Court in *Utah Safe to Learn-Safe to Worship Coal., Inc. v. State*, 2004 UT 32, 94 P.3d 217 (2004), as guides in articulating the correct standard.

Ellingson first challenges the constitutionality of S.B. 93 § 4(7), codified at § 13-27-221, MCA, which provides that a “statewide initiative filed under the provisions of this chapter may not be filed if it is substantially the same as a measure defeated by the voters in an election within the preceding 4 years.” This common-sense provision facilitates the People’s lawmaking power by preventing previously rejected measures from clogging the ballot. Voter fatigue—a scientifically recognized phenomenon—reduces voter turnout and harms voters, whether proponents or opponents of new issues. As this Court recognized in *Sawyer Stores*, voters must exercise their constitutional power to make law through the initiative process while engaging with the demands of daily life. Continually forcing rejected measures oversaturates the marketplace of political ideas, making it more difficult and expensive to propose, debate, and consider new ideas. The power to make law belongs to “the People” of Montana, not to any individual issue proponent or opponent. Creating a temporary waiting period to resubmit a measure that the voters have already rejected protects the People’s lawmaking power by respecting that

decision, creating space for new ideas, and preventing usurpation of the People through attrition.

Ellingson next challenged S.B. § 13, codified at § 13-27-228, MCA, which requires the relevant interim legislative committee to hold a public hearing and vote whether to recommend placing a proposed initiative on the ballot. The secretary of state then must place the results of this vote on the ballot petition. Placing neutral, non-argumentative language like this will not harm ballot proponents, opponents, or electors deciding whether to sign the ballot petition. It is also consistent with Montana tradition. By statute, legislators participate in the committees that write pro and con arguments in the voter information pamphlet once an initiative qualifies for the ballot. The district court believed that the Legislature's and People's lawmaking powers are "intentionally separate," Doc. 51 at 15, but the voters regularly share their input with legislative committees on proposed legislation. There is no harm in legislative committees doing the same for the People.

Finally, Ellingson challenges S.B. 93's waivable \$3,700 filing fee. *See* S.B. 93 § 4(6), codified at § 13-27-215, MCA. Ellingson lacks standing to challenge S.B. 93's waivable filing fee because she did not apply for a financial hardship waiver. *See Madsen v. Boise State Univ.*, 976 F.2d 1219, 1220–21 (9th Cir. 1992) (per curiam); *Niman v. Christian*, No. CV 23-79-M-DWM, 2025 WL 35133, at *7 (D. Mont. Jan. 6, 2025) (Molloy, J.). Even if Ellingson had standing, she did not come

close to proving the filing fee is unconstitutional in every application. Ellingson and the district court overlooked that S.B. 93 provides for a financial hardship waiver. It is not unconstitutional to require those with the ability to pay—such as political action committees who raised millions of dollars in support of initiatives in 2024—to pay and offset the State’s costs in reviewing and processing ballot petitions. And *every* request for a waiver under this provision has been granted. Rather than speculating, as the district court did, that a waivable fee will always be unconstitutional, the appropriate context for a challenge to the filing fee is an as-applied challenge, brought by a proponent whose hardship waiver request is denied.

ARGUMENT

I. This Court should reject an “equal footing test” and clarify that a ballot regulation is constitutional if it is reasonably tailored to facilitate the People’s lawmaking power and does not unduly burden the People’s lawmaking power.

To review S.B. 93’s constitutionality, the district court employed two overlapping, and sometimes conflicting, tests. At times, the district court asked “whether the [challenged regulation] exists to facilitate the people’s exercise of [lawmaking] power or to impair it.” (Doc. 30 at 8) (“the ‘facilitate vs. impair’ test”). Other times, the district court held that ballot issue regulations must “exist on equal footing with the legislature’s legislative power” and struck ballot issue regulations that lacked a perfect analogue in the Legislature’s process. (*Id.* at 9) (“the equal footing test”). The Court should reject the equal footing test and clarify that ballot

issue regulations need not have a perfect analogue in the Legislature's process. The appropriate test should look to whether the regulation at issue facilitates the People's initiative and referendum power or impedes that power.

This Court has never required a perfect analogue between a legislative rule and a ballot issue regulation. The reason is simple. The legislative session and the initiative process are very different settings for lawmaking that require distinct regulatory approaches. As this Court explained in 1936:

It is instructive to note the difference in the conditions under which a measure is submitted to the electorate of this state. The members of the legislature meet for the purpose of considering legislation, and for a period of sixty days that, with a few exceptions, is their sole business. The members of that body have the advantage of conference, that is, of conferring together and each gaining from the other such information as each may possess concerning a given measure. That alone is of inestimable value; but is not practicable where a measure is submitted to the electorate. The voter to whom a measure is submitted has a business or occupation other than that of the consideration of legislation. The measure is submitted to the banker, the merchant, the farmer, the lawyer, the laborer, the housewife. In other words, the voter is of necessity 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. 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, 103 Mont. at 168, 62 P.3d at 351–52 (emphasis added). An equal footing test is inconsistent with this court's common-sense recognition in *Sawyer*

Stores that enacting law through initiative and in a legislative session are radically different processes that require different safeguards.

An equal footing test would invalidate many longstanding ballot regulations. For example, the Secretary of State's authority to review petitions for compliance with statutory procedures dates to 1977. *See* Ch. 342, L. 1977. The Attorney General has had a role in reviewing ballot petitions since 1977. *See* Sec. 1, 13, Ch. 342, L. 1977. Since 1999, the Legislature has tasked the Attorney General with legal sufficiency review. §§ 13-27-202(3), -312, MCA. This Court has repeatedly affirmed "the permissible bounds of [non-substantive] legal sufficiency review of initiative and referenda by the Attorney General." *Monforton*, ¶ 7 (collecting cases). These provisions have long been part of Montana's tradition, but they have no analogue in the Legislative process. This Court should reject the district court's equal footing test. Adopting an equal footing test would upend many well-settled regulations of the initiative and referendum process and would gut the Montana Legislature's ability to advance the State's "**compelling** interest in imposing reasonable procedural requirements tailored to ensure the integrity, reliability, and fairness of its election processes[.]" *Larson v. State*, 2019 MT 28, ¶ 40, 394 Mont. 167, 434 P.3d 241 (emphasis added)..

This Court should look to other states' case law for guidance in formulating the proper standard for reviewing statutes that regulate the initiative and referendum

process. For example, Utah’s courts recognize that “while residents of Utah may not be statutorily deprived of the right to initiative, the legislature does possess the power to define the boundaries surrounding its practice, which may have the effect of rendering the ballot-initiative process more difficult.” *Cook v. Bell*, 2014 UT 6, ¶ 12, 344 P.3d 634 (2014).²

Utah thus employs a balancing test for determining “whether the [challenged] enactment unduly burdens the right to initiative.” *Safe to Learn*, ¶ 35. First, the court assesses “whether the enactment is reasonable.” *Id.* It then determines whether there is a “legitimate legislative purpose.” *Id.* Finally, the enactment must “reasonably tend[] to further the legislative purpose.” *Id.* When conducting this analysis, “courts should weigh the extent to which the right of initiative is burdened against the importance of the legislative purpose.” *Id.* Legitimate purposes “include deterring fraud, ensuring the efficiency of the process, and ensuring a modicum of numerical support for an initiative.” *Cook*, ¶ 25, (cleaned up). This standard does not require the State to prove that the challenged law is “the least restrictive manner of furthering its purpose,” but rather requires the court to balance “the burden imposed by the

² While Utah’s Constitution contains an express enabling clause authorizing the enactment of legislation to facilitate the initiative process, *see* Utah Const. art. VI, § 1(2)(a)(i), Montana’s Legislature has *implicit* power to regulate the initiative and referendum process. *See* Anthony Johnstone, *The Separation of Legislative Powers in the Initiative Process*, 101 Neb. L. Rev. 125, 236 (2022).

measure and the importance of the underlying legislative purpose[.]” *Safe to Learn*, ¶ 37.

The decision of the Colorado Supreme Court in *Loonan v. Woodley* provides a similar, workable framework that this Court could adopt. Colorado recognizes “three types of regulatory situations” and employs a different test for each. *Id.*, 882 P.2d at 1386–87. First, if a statute “has addressed the same subject matter as [the express text in] the constitutional provision,” Colorado courts have “struck down any statutory provision which tends to narrow the constitutional right” to initiative. *Id.* at 1386. For example, Colorado’s constitution allows *qualified* electors to sign ballot petitions, so a law limiting petition signing and circulation to *registered* electors was unconstitutional. *Id.* (citing *Colorado Project--Common Cause v. Anderson*, 178 Colo. 1, 495 P.2d 220, 221 (1972)). Second, if a statute “regulates situations not addressed in the constitutional text,” Colorado courts ask if the statute “enhances rather than restricts” the right of initiative. *Id.* (citing *In re Interrogatories Propounded by Senate Concerning House Bill 1078*, 189 Colo. 1, 8, 536 P.2d 308 (1975)). In the third “situation,” the legislature “enacts laws governing the form and procedures for exercising the initiative power where those forms and procedures are not prescribed in the constitution.” *Id.* at 1387. In this zone, legislation “designed to prevent fraud, mistake, or other abuses in the initiative process is ... firmly rooted in the constitutional soil.” *Id.* at 1387 (citation and quotation marks omitted). If the law

does not “actually limit[] or hinder[] the ability of the people to initiate legislation,” Colorado courts “accord some deference to the judgment of the legislative body in fashioning procedures calculated to prevent mistake, fraud and other abuses and thus assure that the true will of the people will be manifested in the initiative and referendum.” *Id.* (cleaned up).

This Court should reject the district court’s equal footing test—which, if applied uniformly, would invalidate nearly all regulations applicable to the initiative process—and instead adopt a test that will allow this Court and lower courts to weigh the circumstances of an initiative regulation. As other state courts have recognized, legislation that facilitates the People’s initiative power may have the ancillary effect of making it more difficult for proponents to get an initiative on the ballot. *See, e.g., Cook*, ¶ 12. But such minimal burden furthers the People’s initiative power. Because the initiative power belongs to the People, the core question is whether a regulation facilitates the *People’s* power to make law, even if the regulation might make it more difficult for a proponent under certain circumstances. At bottom, the appropriate test should look to the specific purposes of the challenged law and ask if the law will, on balance, facilitate the People’s lawmaking power or impede it.

II. S.B. 93’s resubmission clause facilitates the People’s lawmaking power.

Montana Code Annotated § 13-27-221 provides that a “statewide initiative filed under the provisions of this chapter may not be filed if it is substantially the

same as a measure defeated by the voters in an election within the preceding 4 years.” (“resubmission clause”). The district court concluded that the resubmission clause violated Article III, section 4 of the Montana Constitution for two reasons. First, there “is no similar restriction on the legislature’s ability to reintroduce proposed bills from one session to the next.” (Doc. 51 at 5.) Second, “the legal and political landscape” can change in four years, so imposing a waiting period on resubmitting rejected initiatives was, in the district court’s view, an “arbitrary hurdle.” (*Id.*).

The district court’s first consideration relied on an “equal footing” rationale that this Court should reject. *See* § I, *supra*. As to the district court’s second rationale, S.B. 93’s resubmission clause is constitutional because it facilitates, rather than impedes, the People’s lawmaking power.

The power to make law through the initiative and referendum process belongs not to any single proponent but to the “People” of Montana. *See* Mont. Const. art. III, §§ 4, 5. As this Court explained in *Sawyer Stores*, “[t]he fact is that many initiative measures are sponsored by those who have a direct personal interest in that particular legislation, and each is permitted to vote thereon. The direct opposition to such a measure usually arises from those whom the measure affects detrimentally, in their business or otherwise, and they are permitted to vote thereon. These two groups usually comprise but a small minority of the electorate of the state.” *Sawyer*

Stores, 103 Mont. at 168, 62 P.2d at 352. Commonsense ballot regulations advance the important “end that the result [of the initiative process] shall represent the will of a majority of the voters.” *Id.* 103 Mont. at 169, 62 P.2d at 352. Indeed, one of the Framers’ core concerns was “to prevent frivolous legislative efforts by a small minority” while allowing “serious, popular measures to be initiated by the people.” Montana Constitutional Convention Transcripts, Vol. II General Government Committee Report, p. 820. In other words, a minority of proponents should not be able to hold hostage the People’s collective interests and attention through perennial ballot initiatives the People continually reject.

S.B. 93’s resubmission clause advances the Legislature’s compelling interest in ensuring that the result of the initiative process truly “represent[s] the will of a majority of the voters.” *Id.*, 103 Mont. at 169, 62 P.2d at 352. By prohibiting the constant forcing of rejected measures, § 13-27-221 protects voters’ ability to focus on, research, debate, and persuade their neighbors about new initiatives. Preventing abuse of the ballot initiative process through annual measures enhances the process for all involved. *See Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2617 (2020) (Roberts, C.J., concurring) (states have “important regulatory interests in combating fraud and ensuring that ballots are not cluttered with initiatives that have not demonstrated sufficient grassroots support.”).

S.B. 93’s resubmission clause facilitates the People’s power, even if it might restrict (temporarily) one ballot issue proponent’s ability to resubmit a rejected initiative. Proponents—and opponents—of a proposed initiative must compete with other initiatives to get their message out to the voters of Montana.³ They must compete for advertising in traditional and social media. And the greater the number of initiatives, the higher the price of advertisements will be. They must compete for mental space. They must compete for signature gathering. In a close election, a slight edge could make all the difference. Preventing a recently rejected measure from being resubmitted for four years gives proponents of new measures a better chance to advocate for their ideas and prevents rejected measures from monopolizing the marketplace of ideas.

Clogging the ballot with rejected measures could also lead to voter fatigue, a scientifically recognized phenomenon in which “[f]acing more decisions before a given contest significantly increases the tendency to abstain or rely on decision shortcuts, such as voting for the status quo or the first-listed candidate.” *See* Augenblick, et al., “Ballot Position, Choice Fatigue, and Voter Behaviour,” 83 *Rev. Econ. Stud.* 406 (Apr. 2016), *available at* <https://tinyurl.com/2p8xby9v>; Simon

³ *See* Alex Sakariassen, Montana Free Press, “Twin constitutional initiatives aim to make Montana elections more competitive” (Oct. 4, 2024) (noting that Montanans for Election Reform, who advanced the rejected CI-126 and CI-127 initiatives, raised a total of \$7.4 million backing those measures, including \$4.7 million from a “Texas-based social welfare nonprofit”), *available at* <https://tinyurl.com/3hkn9mcp>.

Hedlin, *Do Long Ballots Offer Too Much Democracy?*, The Atlantic, (Nov. 3, 2015), available at <https://tinyurl.com/j46bwawt>; See Martin P. Wattenberg, Ian Mcallister & Anthony Salvanto, *How Voting Is Like Taking an SAT Test: An Analysis of American Voter Rolloff*, 28 Am. Pol. Q. 234 (2000), available at <https://tinyurl.com/3rjwswk7>; see also *State ex rel. Franchini v. Oliver*, 516 P.3d 156, 160 (N.M. 2022) (citing New Mexico secretary of state’s statement that “ballot crowding, voter fatigue, and high costs of elections are the major concerns of every election administrator”); *Nairne v. Ardoin*, 715 F. Supp. 3d 808 (M.D. La. 2024) (finding that a state holding seven elections in 2023 and as many as twelve in a single year “breeds voter fatigue and confusion, which is amplified in poor and under educated communities”); *Mich. State A. Philip Randolph Inst. v. Johnson*, 326 F. Supp. 3d 532, 562 (E.D. Mich. 2018) (crediting expert testimony that “voter fatigue sets in when voters must address numerous contests and proposals, and that this fatigue causes ballot roll-off”), *vacated on mootness grounds*, 2019 WL 4145547 (6th Cir. Jan. 14, 2019).

Montana is not alone in imposing a temporary restriction on resubmitting rejected measures. Eight other states impose similar requirements to prevent the constant forcing of rejected questions and leave space for the people to thoroughly

debate, consider, and decide whether to enact new ideas.⁴ As the Massachusetts Supreme Judicial Court has explained, these measures prevent “the constant forcing of questions which have been rejected.” *Bogertman v. Attorney General*, 474 Mass. 607, 620, 53 N.E.3d 627, 637 (2016) (cleaned up).

Like the similar provisions in these eight other states, S.B. 93’s resubmission clause temporarily restricts the resubmission of initiatives the People have recently considered and rejected at the polls. In doing so, it protects voters’ ability to focus on, research, debate, and persuade their neighbors about new initiatives. This will

⁴ **Massachusetts.** Mass. Const. art. 48, pt. 2, § 3 (requiring the attorney general to certify that an initiative is not “either affirmatively or negatively, substantially the same as any measure which has been qualified for submission or submitted to the people at either of the two preceding biennial state elections”); **Mississippi.** Miss. Const. art. 15, § 273(11); Miss. Code Ann. § 23-17-43; **Nebraska.** Neb. Const. art. III, § 2; *see also State ex rel. Lemon v. Gale*, 272 Neb. 295, 721 N.W.2d 347 (2006); **New Jersey.** N.J. Const. art. IX, ¶ 7 (providing that if a proposed constitutional amendment is not approved by voters, “neither such proposed amendment nor one to effect the same or substantially the same change in the Constitution shall be submitted to the people before the third general election”); **North Dakota.** N.D. Cent. Code Ann. § 16.1-01-11 (more than two elections on the “same general matter” cannot be held within 12 months); **Oklahoma.** Okla. Const. art. V, § 6 (“Any measure rejected by the people, through the powers of the initiative and referendum, cannot be again proposed by the initiative within three years thereafter by less than twenty-five per centum of the legal voters.”), 34 Okla. St. Ann. § 21; **Utah.** Utah Code Ann. § 20A-7-202(5)(v) (providing that the lieutenant governor “shall reject” an initiative petition if it “is identical or substantially similar to a law proposed by an initiative for which signatures were submitted to the county clerks and lieutenant governor for certification within” the preceding two years); **Wyoming.** Wyo. Const. art. 3, § 52(d) (“An initiative petition may be filed at any time except that one may not be filed for a measure substantially the same as that defeated by an initiative election within the preceding (5) years.”); Wyo. Stat. Ann. § 22-24-301.

benefit not only proponents and opponents of new measures. It will also protect the voter who is already “devoting a very large part of his time and energy to the conduct of [her] business” and has a limited amount of time and attention to consider whether to sign a ballot petition and, ultimately, make the proposal law. *Sawyer Stores*, 103 Mont. at 168, 62 P.2d at 351–52. All of this enhances the People’s power to make law.

Finally, S.B. 93’s resubmission clause does not forever ban rejected initiatives. It is a short waiting period that allows new ideas to be considered. But after 4 years, the proponents of a rejected measure can reintroduce it. Moreover, this Court can instruct courts to construe S.B. 93’s description of “substantially the same” measures narrowly to avoid any constitutional problems. *Cf. Williams v. Bd. of Cnty. Com’rs of Missoula Cnty.*, 2013 MT 242, ¶ 64, 371 Mont. 356, 308 P.3d 88. And because this is a facial challenge, proponents could bring as-applied challenges in context of a specific case. But Plaintiffs here have not met their “heavy burden” to prove S.B. 93’s resubmission clause facially unconstitutional. *Hensley v. Mont. State Fund*, 2020 MT 317, ¶ 17, 402 Mont. 277, 477 P.3d 1065.

III. Placing the results of an advisory legislative committee vote on the ballot petition is within the Legislature’s power to regulate the form of ballot petitions and facilitates the People’s initiative power.

Ellingson also challenges Mont. Code Ann. § 13-27-228, which requires the relevant interim legislative committee to hold a public hearing at which it votes

whether to recommend placement of the proposed initiative on the ballot. The Secretary of State must then place non-argumentative language on the ballot petition summarizing the result of these votes. *See* §§ 13-27-238(1)(d), 13-27-241(d), MCA.

The language is neutral and detached:

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.

§ 13-27-238(1)(d), MCA.

The results of this advisory vote “may not be reflected in the statewide initiative’s statement of purpose and implication, the statewide initiative’s petition title, or the ballot title if the statewide petition is placed on the ballot.” § 13-27-228(4), MCA.

Despite upholding the placement of a financial harm statement on the ballot petition, the district court held this anodyne requirement unconstitutional. The district court reasoned that the Legislature’s vote would “serve[] no purpose other than to provide an unsolicited opinion on the substance of the proposal” and was “not a legitimate reason to add as many as fourteen days to the short calendar in which initiative proponents seek certification for their proposals.” Doc. 51 at 15–16.

First, the placement of an advisory recommendation on a ballot petition is within Legislature’s power to regulate the form of ballot petitions. *See* Mont. Const.

art. IV, § 3; *Cottonwood I*, ¶¶ 4–5 (describing Legislature’s longstanding regulation of the initiative and referendum processes). Section 13-27-228 is also consistent with historical practice. Members of the Legislature can present substantive written arguments in voter information pamphlets for a measure that has qualified for placement on the ballot. *See* § 13-27-402(2), (3), MCA. And they have done so with a flourish—often stridently opposing an initiative or supporting it. *See, e.g.*, Mont. 2024 Voter Info. Pamphlet, p. 11, Arguments Against CI-126.⁵ If legislators can make overt arguments for and against an initiative that has qualified for placement on the ballot, a committee of the Legislature can place the non-argumentative results of a committee vote on ballot petitions.

Second, this measure encourages more public participation—the interim committee hearing is livestreamed and broadcasted on public television and the public has a right to testify before a committee. Doc. 39, Ex. B, ¶ 20. For example, a hearing on I-193 allowed tribal members to express concerns that the measure would likely have caused significant legal issues in Indian Country. Doc. 39, Ex. B, ¶ 21; recording available at <https://tinyurl.com/435txewh>. A strong analogue to the legislative process also supports this regulation. Members of the public regularly appear before legislative committees to testify for and against bills during the legislative session. In that posture, one front of lawmaking power—the People—

⁵ Available at <https://sosmt.gov/elections/vip/> (last visited Apr. 3, 2025).

advises another—the Legislature—who will ultimately decide whether the considered bill becomes law. The same thing exists in section 13-27-228: a committee of the Legislature gives its recommendation to the People, who will ultimately decide whether a ballot issue becomes law. Just as the Legislature benefits from the People’s input, the People may benefit from the Legislature’s input.

The district court’s concerns about delay also do not justify holding this commonsense measure facially unconstitutional. After S.B. 93, proponents still have nearly a year to submit petitions to circulate their petitions and gather signatures. *See* §§ 13-27-104, -228, -243, MCA. And any concerns over delay can be addressed by submitting ballot issues promptly. *Meyer v. Knudsen*, ¶ 18. Ellingson presented no evidence below that the 14 days for the legislative committee hearing burdened her, or anyone else’s, ability to promote a ballot issue. Doc. 39, Ex. A at ¶¶ 23–24.

Finally, there is a latent paternalism in the district court’s analysis. *Cf. Mont. Consumer Fin. Ass’n v. State ex rel. Bullock*, 2010 MT 185, ¶ 24, 375 Mont. 237, 238 P.3d 765 (Morris, J., specially concurring) (criticizing a dissenting opinion for suggesting that “minor revisions to the Attorney General’s ballot statement could lead to certain voters unwittingly signing a petition in support of an initiative they otherwise would not support”). The district court correctly recognized that a fiscal note or “harm to business” warning would not unduly coerce voters into changing their decision whether to sign a ballot petition. (Doc. 51 at 9–10, 11–12). Similarly,

the interim legislative committee’s advisory vote is an additional source of information that voters can consider or reject as they wish. “Interested voters have the opportunity to read the entire petition,”—and, indeed, are advised to do so, Mont. Code Ann. § 13-27-241(c)—“before deciding whether to sign the petition.” *Mont. Consumer Finance*, ¶ 25 (Morris, J., specially concurring). Each voter considering an issue can “draw[] on both official and unofficial sources of information and education” and “will exercise his or her political judgment.” *Harper v. Greely*, 234 Mont. 259, 269, 763 P.2d 650, 657 (1988).

The district court felt this provision unnecessary, but just because this measure is unnecessary for the People to exercise their initiative power does not mean that it does not facilitate that power. Like other ballot regulations, Mont. Code Ann. § 13-27-228 “provide[s] fair notice of the content of the” ballot issue and aids voters in casting “an intelligent and informed ballot.” *Citizens Right to Recall v. State ex rel. McGrath*, 2006 MT 192, ¶ 16, 333 Mont. 153, 142 P.3d 764 (citation and quotation marks omitted).

Finally, the district court’s summary analysis relieved Ellingson of her heavy burden to prove this measure’s facial unconstitutionality. It is difficult to imagine how a non-argumentative vote from an interim legislative could unduly interfere with the People’s initiative power. But should that circumstance arise, a proponent could bring that challenge in the context of a specific fact pattern. But in the context

of a facial challenge, the district court's policy disagreement is too abstract and tenuous to show that § 13-27-228 is unconstitutional in every application. This Court should reverse.

IV. Ellingson lacks standing to challenge S.B. 93's waivable filing fee and failed to prove that the fee is unconstitutional in every application.

The district court also erred when it held S.B. 93's filing fee facially unconstitutional. That provision requires a proponent to remit "a nonrefundable filing fee of \$ 3,700 per submitted proposal at the time of submittal to the secretary of state." Mont. Code Ann. § 13-27-215(1). The filing fee may be waived if a proponent shows "a financial inability to pay without substantial hardship." § 13-27-215(3). When this litigation started, the only two proponents who requested a "substantial hardship" waiver had those requests granted. (Doc. 22, Ex. A, ¶ 17.) The ten plaintiffs here refused to seek a financial hardship waiver because they wanted to tee up a facial constitutional challenge to the filing fee. Doc. 19 at 13–14; (Doc. 18) Motl Decl., ¶ 9.

The district court concluded that S.B. 93's waivable filing fee is facially unconstitutional. This conclusion was wrong because Ellingson lacked standing to challenge the waivable filing fee when she refused to apply for a waiver. And even if Ellingson had standing, Ellingson did not show that the waivable fee is unconstitutional in every application.

A. Ellingson lacks standing to challenge S.B. 93’s fee provision because she refused to apply for a waiver.

“[A] plaintiff lacks standing to challenge a rule or policy to which he has not submitted himself by actually applying for the desired benefit.” *Madsen*, 976 F.2d at 1220–21 (collecting cases); *see also Smelt v. Orange Cnty.*, 447 F.3d 673, 683–86 (9th Cir. 2006) (applying this principle to a facial equal protection claim); *Friery v. Los Angeles Unified Sch. Dist.*, 448 F.3d 1146, 1149 (9th Cir. 2006).

Madsen proves the point. The plaintiff there brought a § 1983 action against Boise State University for failing to offer free handicap parking permits on campus. 976 F.2d at 1220. But Madsen did not apply for a permit, nor did he seek a fee waiver. *Id.* Instead, he immediately filed a complaint with the U.S. Department of Education, Office of Civil Rights, which wound up in federal court. *Id.* Citing “a long line of cases” holding that a plaintiff lacks standing if they do not apply “for the desired benefit,” the Ninth Circuit concluded Madsen lacked standing to bring his claim. *Id.* at 1221–22 (collecting cases); *see also Do No Harm v. Gianforte*, No. 6:24-cv-00024-BMM-KLD, 2025 WL 399753, at *2 (D. Mont. Feb. 5, 2025) (Morris, J.) (applying *Madsen*); *Niman*, 2025 WL 35133, at *7 (Molloy, J.) (applying *Madsen* and concluding that law school student who did not appeal his classification as a

nonresident lacked standing to challenge the policy under which he was classified).⁶

Like the plaintiff in *Madsen*, Plaintiffs claim that the filing fee here is constitutional in the abstract, but they never sought a waiver. *See Madsen*, 976 F.2d at 1220. They were never denied ballot access when an alternative means of ballot access—seeking a waiver—was available. Because this alternative path exists, a court can only speculate about whether plaintiffs would have been harmed by the filing fee. *See Mitchell v. Glacier Cnty.*, 2017 MT 258, ¶ 10, 389 Mont. 122, 406 P.3d 427 (citation omitted) (constitutional standing requires the plaintiff to show a “concrete” injury that is “not conjectural or hypothetical); *accord Madsen*, 976 F.2d at 1222 (“requiring a formal application ... limits those who can claim injury from a policy that may not have harmed them at all[.]”). Plaintiffs admit they chose not to request a waiver precisely because they wanted to set up their facial constitutional challenge to the fee provision. Doc. 19 at 13–14; (Doc. 18) Motl Decl., ¶ 9. And while they insist that they would have been denied a waiver had they sought one, Doc. 19 at 13–14; (Doc. 18) Motl Decl., ¶ 9, that argument lacks factual support. *See Madsen*, 976 F.2d at 1220–21; *see also Niman*, 2025 WL 35133, at *7; *Friery*, 448

⁶ This Court recently reaffirmed that the “cases at law and equity” language in Article VII, section 4 of the Montana Constitution imposes the same justiciability limits on state courts as Article III of the United States Constitution does on federal courts. *See Gottlob v. Desrosier*, 2025 MT 56, ¶ 13, 2025 WL 900129, —P.3d—. Therefore, federal standing precedents remain persuasive authority for assessing the standing of plaintiffs under the Montana Constitution.

F.3d at 1150 (“[T]hese [assumed] facts represent the quintessence of conjecture and speculation—realms where [a court’s] jurisdiction to entertain suit may cease.”). They lack standing to challenge S.B. 93’s fee provision.

B. Ellingson did not show that S.B. 93’s waivable filing fee is facially unconstitutional.

The district court also erred by ignoring the high burden for facial unconstitutionality, requiring Ellingson to prove that “no set of circumstances exists under which” S.B. 93’s waivable filing fee would be constitutional. *MCIA*, ¶ 14. The undisputed record here shows that every proponent who has requested a waiver has received one. Doc. 22, Ex. A, ¶ 17. Plaintiffs’ claim that they would not have qualified for a waiver is mere speculation and comes nowhere close to proving that S.B. 93’s waivable filing fee is unconstitutional in every application. *Cottonwood II*, ¶ 7; *MCIA*, ¶ 14.

As the State argued below, the \$3,700 filing fee was determined to offset the time and costs for each office per submitted ballot issue. This was not an arbitrary amount to gatekeep access but rather a reasonable estimation of the cost of placing an initiative on the ballot. And as such, the costs are distributed accordingly across the various government actors contributing to measure review. The purpose of the filing fee then is to require those with the ability to pay to offset the significant costs of reviewing and preparing their ballot petitions. (Doc. 22 at 14–15.)

The fee also discourages frivolous or unserious proposals. An important aspect of efficient governmental administration, the State must remain vigilant in protecting its political process from frivolous or fraudulent ballot measures. This fee is but one of many mechanisms to ensure the expenditure of government time and resources is not in vain. For example, of 34 ballot issue submissions, only 2 made it onto the ballot. Most failed to proceed either because of failure of the submitter to respond or procedural deficiencies. And some were voluntarily withdrawn by the submitters. The filing fee, coupled with other measure review mechanisms, ensure the integrity of the State’s political processes.

There are many conceivable circumstances in which it would be constitutional to ask a proponent to pay a \$3,700 filing fee to defray some of these significant costs. If Charles Koch, Jeff Bezos, or Elon Musk wishes to finance a petition for placement on the Montana ballot, they should pay. The same would be true for petitions sponsored by large and well-funded organizations such as the NRA or Planned Parenthood.⁷ It is permissible to ask those with the ability to pay to absorb some of the taxpayer-funded costs of preparing a ballot petition.

⁷ Alex Sakariassen, “Twin constitutional initiatives aim to make Montana elections more competitive,” (Oct. 4, 2024), <https://tinyurl.com/3hkn9mcp>; (noting that an organization supporting CI-126 and CI-127 “raised a total of \$7.4 million on its campaign,” most of which came from out-of-state organizations).

Because in many scenarios it would be constitutionally permissible to charge a fee, Plaintiffs failed to prove this statute unconstitutional in all its applications. *See Disability Rts. Mont. v. State*, 2009 MT 100, ¶¶ 22–23, 350 Mont. 101, 207 P.3d 1092 (rejecting a facial challenge to § 41-3-205(7) “in light of the myriad of future factual scenarios to which it must be applied” and because a section of the statute “provides a rational means to obtain an order to disseminate future reports”); *see also Robinson v. State Comp. Mut. Ins. Fund*, 2018 MT 259, ¶¶ 18–25, 393 Mont. 178, 430 P.3d 69.

In effect, S.B. 93’s waiver provision requires those who can pay to defray the costs to the State of reviewing and preparing ballot petitions. Any party who applies for a waiver and is denied it can seek immediate injunctive relief. This Court can—and should—make clear that the statutory waiver provision should be liberally construed by courts to protect the People’s initiative power.

The district court worried that the statutory waiver does not define “what constitutes a ‘substantial hardship.’” Doc. 30 at 11. But this concern is misplaced and does not justify holding the provision facially unconstitutional. First, “substantial” is not vague—it means “considerable in quantity,” and “not imaginary or illusory.” Merriam-Webster Online Dictionary, “Substantial” (definitions 1 and

3).⁸ The \$3,700 filing fee may constitute a “substantial hardship” for many Montanans, as the median household income in the State is \$69,922. *See* United States Census Bureau, QuickFacts: Montana.⁹ Second, Plaintiffs did not bring a vagueness challenge to this statute. *See generally* Doc. 1. And third, any concerns about ambiguity would be easily resolved by obeying this Court’s instruction to “construe statutes in a manner that avoids an unconstitutional interpretation.” *Mont. Indep. Living Project v. State, DOT*, 2019 MT 298, ¶ 14, 398 Mont. 204, 454 P.3d 1216. Courts should also construe the fee waiver provision liberally to facilitate the People’s initiative power. *See State ex rel. Mont. Citizens for Pres. of Citizens’ Rts. v. Waltermire*, 224 Mont. 273, 276, 729 P.2d 1283, 1285 (1986). If there is a question whether a person’s claimed inability to pay is “substantial,” the tie should always go to the citizen seeking the waiver. And this Court can say so here.

In short, Ellingson has failed to meet her heavy burden to show that the waivable filing fee is unconstitutional in every single application. *See Hensley*, ¶ 17. Especially when every waiver application so far has been granted and she—and all 10 plaintiffs here—refused to even apply for a waiver. The district court erred in relieving Ellingson of that burden. A challenge to S.B. 93’s filing fee can be brought

⁸ Available at <https://www.merriam-webster.com/dictionary/substantial> (last visited Apr. 2, 2025).

⁹ Available at <https://www.census.gov/quickfacts/fact/table/MT/PST045223> (last visited Apr. 2, 2025).

by a party harmed by the denial of a waiver in the context of a specific case. But the record refutes the district court's and Ellingson's belief that S.B. 93's waivable filing fee is unconstitutional in "all its applications." *Cottonwood II*, ¶ 7.

CONCLUSION

This Court should reverse.

Respectfully submitted this 25th day of April 2025.

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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 8,076 words, excluding cover page, tables of contents and authorities, certificates of service and compliance, signatures, and any appendices.

/s/ Michael D. Russell
Michael D. Russell

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 25-0172

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,

Defendant and Appellant.

APPENDICES

Order – Plaintiffs’ Motion for Partial Summary Judgment (Doc. 30)	App’x A
Order – Plaintiffs’ Second Motion for Partial Summary Judgment (Doc. 51)	App’x B

CERTIFICATE OF SERVICE

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