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

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

Plaintiffs and Appellees,

v.

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

Defendants and Appellants.

BRIEF OF *AMICI CURIAE* OF PLANNED PARENTHOOD ADVOCATES OF MONTANA AND MONTANA PUBLIC INTEREST RESEARCH GROUP

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

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INTRODUCTION

This Court should determine and define the "power" of the People's constitutionally granted lawmaking powers and set the standard of measuring the constitutionality of laws impacting that power based on whether a law "facilitates" or "impairs" that power. This Court should sustain the Judgment entered by the District Court finding that four laws unconstitutionally violated the People's power of lawmaking.

STATEMENT OF INTEREST

Amici Montana Public Interest Research Group (MontPIRG) and Planned Parenthood Advocates of Montana (PPAMT) are non-profit corporations representing college students and Montanans seeking to preserve personal choice in reproductive decisions, respectively. The citizen members of MontPIRG and PPAMT have sponsored ballot issue language, carried ballot issue petitions seeking signatures from Montana electors and advocated for or against passage of certain initiatives or referendum on the ballot in Montana elections. These citizen Amici have an interest in protecting the People's power of initiative and referendum set out in Montana's Constitution. Therefore, the Amici support the position of Appellee in this matter.

ARGUMENT

I. There Is an Article III Peoples' Power of Initiative and Referendum

All parties in this matter agree on one thing: this Court should determine and define the People's "power" of initiative and referendum existing under Montana

Constitution Article III, Sections 4 and 5 and reserved from the non-facilitating reach of Legislative power at Article V, Section 1.

The Appellees (collectively "Ellingson") in this Matter are a group of 10 individuals, identified by its lead Plaintiff, Mae Nan Ellingson. In District Court briefing Ellingson sought an explicit judicial recognition of a People's power of initiative and referendum as set out in the Montana Constitution Article III, sections 4 and 5 and reserved from the reach of Legislative power at Article V, section 1. (Doc Nos. 19, 28, 33, 47). In her argument, Ellingson consistently used the word "power" in connection the People's Article III lawmaking, even though the word "power" had no prior, consistent application in Montana case law concerning ballot issues. The District Court agreed and found for a People's "power" in its summary judgment orders, explicitly using the word "power". (Doc. Nos. 30, 51.) Ellingson's appeal brief is expected to argue that the Supreme Court should sustain the District Court's finding of a People's power of initiative and referendum.

The State Defendants largely ignored "power" in Article III at the District Court and instead used the word "right" in connection with citizen's initiatives. (Doc. 22.) They argued that alternative authority, such as election law, allowed the Legislature to adopt restrictions on the People's Article III lawmaking. *Id.*, p. 13. Now, reversing course, the State explicitly acknowledges that there exists a "People's lawmaking power" and that "the People and the Legislature both have the power to make law.' *State Br.*, p. 1. In essence, the State has conceded the Article III Peoples' power issue. Appellant

Amici likewise filed an appeal brief stating "[t]he power of initiative and referendum belong to the People," thus conceding the Article II People's power issue. *Appellant Amici Br.*, p. 4.

PPAMT and MontPIRG agree; under Article III, a Peoples' power of initiative and referendum exists. The Constitution of Montana explicitly uses the words "people", "power" and "initiative" in a single sentence: "The people reserve to themselves the powers of initiative and referendum." Mont. Const. Art. V, § 1. The distinction between "power" and "right," in regard to reserved initiative power, was recently highlighted by Montana's former Solicitor General, Anthony Johnstone, who squarely endorsed the use of the word "power" when defining constitutional provisions such as Montana's Article III Peoples' Power of lawmaking. *See* Anthony Johnstone, *The Separation of Legislative Powers in the Initiative Process*, 101 Neb. L. Rev. 125 (2022).

II. It is Necessary to Define the Peoples' "Power" of Initiative and Referendum.

It is necessary and urgent that this Court tell the parties, Amici, district courts and the public just what the Constitution means when it sets out the Article III Peoples' lawmaking power of Initiative and Referendum. The Appellant Amici point out that past decisions by this Court dealing with ballot issues have on occasion (and always without definition) alternatively used the word "power" or the word "right" to describe what now all parties agree should be defined as a People's power. *Appellant Amici Br.*, p. 4. For example, former Chief Justice McGrath, in the recent case of *Cottonwood v.*

Knudsen, 2022 MT 49, 408 Mont. 587, 505 P3d 837, identified an action by the Attorney General as an infringement on the Article III, § 4 "right" to enact laws by initiative. *Id.*, ¶¶ 31-32. As in prior cases there was no definition of the word "right" as used in the context of a ballot issue, nor was the word "right" contrasted to and distinguished from the word "power" as applied to Article III lawmaking by the People.

To that end, this Court should provide guidance to the Legislature on the issue of how the People's Article III lawmaking power affects, relates to and is affected by the Legislature's Article V, section 1 lawmaking power. Legislative guidance is necessary because Montana's legislature, like many others, has directly interfered with the People's power of lawmaking. *See, e.g.*, Johnstone, 101 Neb. L. Rev. at 127-128. During Montana's 2021 and 2023 session, the Legislature passed an unprecedented number of laws setting restrictions on the Article III Peoples' Power of lawmaking. These laws were adopted by the Legislature without any demonstrated consideration of, or deference to, the Peoples' Article III lawmaking powers, even though that Peoples' power is reserved under Article V, section 1, the very constitutional provision that provides lawmaking authority to the Legislature. Rather, they sought to "restrict the use of the initiative process by changing the rules to make the process less accessible and limit the initiative measures that can be enacted." John Dinan, *Changing the Rules for Direct Democracy in the Twenty-First Century in Response to Animal Welfare, Taxation, Marijuana, Minimum Wage, and Medicaid Initiatives*, 101 Neb. L. Rev. 40, 41 (2022).

The restrictions on the Article III lawmaking power began when the 2021 Legislature eliminated a prior statutory restriction at § 13-27-312(7)(2019), MCA, which prohibited the Attorney General from considering the substantive legality of a ballot measure during the AG's legal sufficiency review of a proposed ballot measure. The Attorney General understood the removal of the prohibition to mean that he could conduct a substantive legal review. *Cottonwood*, ¶¶ 31-32 (C.J. McGrath, concurring). The court rejected this notion and likely violated the separation of powers between the Legislative and Judicial branches. *Id.*, ¶ 22, ¶¶ 31-32 (C.J. McGrath concurring).

There is a power-based explanation for a legislative action restricting the Peoples' lawmaking power such as that taken by the 2021 Montana Legislature. Simply, "the initiative power by design functions as a legislative rival to the legislature," so the legislature seeks to consolidate its own power at the expense of the people's power. *Johnstone*, 101 Neb. L. Rev. at 126. Indeed, "[t]he initiative process . . . checks and balances the legislature through its allocation of legislative power to the people themselves." *Id.* And across the country, "increasingly polarized state legislatures," like Montana's have acted "to restrict the use of the initiative process." *Id.*, at 127.

Within that general framework of a peoples' lawmaking power designed as a check and balance to legislative power, two such restrictions were passed by the 2021 Montana Legislature. First, the Montana AG's "pre-circulation rejection" of initiative language on constitutional grounds. This triggered a separation of powers issue between the executive and judicial branches. *Johnstone*, Neb. L. Rev. at153; *Cottonwood*, ¶¶ 31-32

(C.J. McGrath concurring). In *Cottonwood*, while the concurrence "emphasize[d] the judicial power, it also reinforce[d] the independent initiative power with its hesitation to invoke a statutory 'legal sufficiency' standard that does not apply to the legislature itself. *Johnstone*, 101 Neb. L. Rev. at 154.

Second, the 2021 laws implemented a "harm to business interest" ballot issue restriction that required placement on appropriate ballot issue petitions of a specific warning written by the 2021 Legislature. *Id.* P. 154. That wording of the warning reads as follows:

> WARNING
>
> The Attorney General of Montana has determined the proposed ballot issue will likely cause significant material harm to one or more business interests in Montana.[1]

Id., 154-55; § 13-27-204(2)(b), MCA (2021). This language could run afoul of Montana's constitution: "[i]f this additional warning about harm to business interests imposes an additional subject matter regulation on the initiative power not expressed in the state constitution or imposed by the legislature on itself, it may impair the reserved power of the initiative." *Johnstone*, 101 Neb. L. Rev. at 154-55.

Continuing this trend of power consolidation, the 2023 Legislature, considered and passed Senate Bill ("SB93"). Senate Bill 93 absorbed, reorganized and renumbered

[1] This is the exact language required by §13-27-238(2)(b), MCA.

the initiative restrictions passed by the 2021 Legislature. This meant that the 2023 legislature again passed law requiring the Attorney General to review proposed initiative language for substantive legality.[2] The harm to business warning, including a review and opinion on regulatory taking, was renumbered and kept intact. And a third law requiring pre-petition review/vote by a Legislative Committee was renumbered and kept intact. *See* §§ 13-27-228, -238(1)(d), MCA.

In addition to the incorporated 2021 restrictions SB93 added new restrictions by: 1) Prohibiting the refiling of a ballot issue previously rejected by electors, § 13-27-221, MCA; 2) Requiring a $3,700 fee in order to filing proposed initiative language § 13-27-215, MCA; 3) Providing pre-petition authority to the Budget Director to hold the ballot issue language for the purpose of deciding to add fiscal note language, §§ 13-27-216(5), -227(1), MCA; and, 4) Providing authority to the Secretary of State (SOS) to assess a petition gatherer filing fee, § 13-27-112(1)(a), MCA. In sum, SB93 added two new pre-petition review agencies (the budget office and a legislative committee). These new reviews by government added at least 14 days of pre-petition review time for legislative committee work, §13-27-228(3)(b), MCA and at least 10 days of time for the Budget Office review, §§ 13-27-216(5), (7), MCA.

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[2] Section 13-27-226(2) directs that the AG "shall… prepare an opinion as to the proposal's legal sufficiency." Section 13-27-110(7) defines "legal sufficiency" as meaning "that a petition complies with statutory and constitutional requirements governing submission of the proposed issue to the qualified electors and the *substantive legality* of the proposed issue if approved by voters." (Emphasis added.)

The Appellant Amici purport to accept a relationship of "equal power" under the Constitution as between the Legislature and the People. *Appellant Amici Br.*, p. 13. Yet, they, and the State, argue in favor of the restrictions retained or imposed by SB93. In contrast, those who use the initiative power to propose laws to fellow electors, such as Appellee Amici, regard the above laws passed by the 2021 and 2023 Legislatures as wrong, unfair and harmful to the People's power of lawmaking. These new laws add time and cost to the Peoples' Article III law drafting process. These new laws do not respect equal lawmaking power in the People and Legislature. These new laws transform agency involvement in ballot issues from helpful review to a fiat form of gatekeeping. These new laws diminish an independent and separate constitutional power of the People to something beholden to legislative power and agency fiat.

Further, the restrictive laws passed by the 2023 Legislature, including the restatement of suspect laws passed by the 2021 Legislature, were enacted in the face of warnings by former Chief Justice McGrath, scholarly cautions by Johnstone and specific warnings of unconstitutionality made by ballot issue advocates during legislative hearings on SB93. (Doc. 60, p. 8.) The "equal power" words used by the Appellant Amici, thus, lack sincerity as the Montana Legislature has shown itself willing to pass laws restricting the initiative process without regard for the Peoples' power of lawmaking.

Because the Legislature has shown its lack of care for the People's Article III power, this case presents as an urgent and important issue to the preserve that power

and protect the Constitutional right of initiative. Appellee Amici, therefore, respectfully request this Court to recognize and define the structure and scope of lawmaking power that exists as between the People, the Legislature and agencies of government.

III. The Court Should Adopt the Flexible Standards of "Facilitate" or "Impair" to Measure the Effect of Laws Passed by the Legislature

To date, this Court has not defined the bounds of what constitutes an unconstitutional infringement on the People's lawmaking power. It should do so here, so that Montanans and district courts can measure whether a legislatively enacted law unconstitutionally interferes with the People's lawmaking power. The Court should follow the lead of the District Court involved and the analysis by Johnstone, *Johnstone*: 101 Neb. L. Rev. at 150-54, and adopt the standards of "facilitate" and "impair" as the means to measure constitutionality or unconstitutionality.

The State and Appellant Amici discuss at length standards from other states and argue at length against an "equal footing" test they claim was erroneously determined and applied by the District Court. These arguments do not detract from adoption of "facilitate" and "impair" standards, as these are flexible standards that accommodate, as any such standard will need to do, the particular facts of any proposed legislative law that restricts the People's Power of lawmaking.

The People of Montana are not first-time visitors to Montana's ballot issue process nor are they first-time observers of the involvement of the legislature and agencies in that ballot issue process. Leaving aside pre-1972 Constitution years,

beginning in 1977 state statutes required that ballot issue petition language include a salutation and a warning to electors that they can sign the petition only one time. *See* Rev. Codes of Mont. 1947, 37-118; § 13-27-204, MCA (1978), The "Yes", "No" and "purpose" statements on a ballot issue petition were prepared by the AG after enough signatures were submitted to place the issue on the ballot. *See* §§ 13-27-301 et seq, MCA (1978). By 2015 state statutes also required Legislative Services review of proposed ballot issue, § 13-27-202, MCA (2015), as well as inclusion on the ballot issue petition of certain "purpose/implication" statements, "approved" by the AG, §§ 13-27-202, -312, MCA (2015).

This 48-year history of appropriate Legislative and agency interaction with the People's power of lawmaking shows that "facilitate" and "impair" are proper standards to assess new, challenged Legislative laws as certain longstanding laws passed by past legislatures demonstrate how the facilitate vs. impairment standards will work and further show that there is no basis to claim existence of a separate "equal footing" test.

There has long been a Montana law requiring Legislative Services review of draft initiative language. Section 13-27-225, MCA. A ballot issue proponent begins the lawmaking process by filing proposed ballot issue language with the SOS. Section 13-27-216(1)(a), MCA. Setting aside the filing fee issue, the SOS is required to send the submitted text of the proposed ballot issue and the proposed ballot statement to the legislative services division for review. *Id.* Legislative Services then must review "the text and ballot statements for clarity, consistency, and conformity with the most recent

edition of the bill drafting manual," within 14 days. Section 13-27-216(2), MCA. After review, the legislative services staffer makes written recommendations to the ballot issue proponent who responds in writing "accepting, rejecting or modifying each of the recommended revisions." Section 13-27-225(2)(a)(b), MCA. This is a legitimate type of facilitation by state agencies:

> Initiatives must at least comply with the form and content requirements of legislation, including single subject rules and title requirements. Pre-submission review of petitions for form and content facilitates the initiative power by providing drafting assistance and early notice of any constitutional obstacles or textual obscurities that could preclude the initiative or make it less effective if approved as law.

Johnstone, 101 Neb. L. Rev. at 151.

This form-and-language review of the text of proposed initiatives by Montana Legislative Services is also comparable to the drafting and language review support provided by Legislative Services to comparable Article V law-making (bills introduced) by Montana legislators.[3] Finally, the review leaves the ballot issue proponent in control of the ultimate ballot issue language because they can respond to Legislative Services comments by "accepting, rejecting or modifying" the submitted ballot language. Section 13-27-225(2)(b), MCA.

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[3] *See,* Montana Legislative Services Division, *A Guide to the Montana Legislature*, p. 15, https://archive.legmt.gov/content/About-the-Legislature/Resources/2013%20guide%20to%20montana%20legislature.pdf (Jan. 2013) ("Drafting and Introducing Bills. Once a legislator has an idea for a bill, he or she asks the legislative staff to draft it. The bill drafter makes sure the bill is written in the proper legal form. The drafter also works with the legislator to make sure the bill will accomplish what the legislator intends.")

The above analysis shows the People's lawmaking power is not impaired but made better and facilitated by this review. *See*, *Johnstone*, 101 Neb. L. R. at 150 ("Legislative review of proposals assists proponents, at least inexperienced proponents, in drafting an initiative that will bring about their intended policy effects.") Accordingly, no one, including any ballot proponent, has claimed impairment by Legislative Services review of proposed ballot issue language. The comparison to legislative law-making is made as part of the examination to determine facilitation, rather than a test of facilitation by itself. The District Court's Order recognizes this legitimate type of agency action stating that while the: "legislature has a role in facilitating the ballot issue process through statute, it may not create statutes which hinder the people's ability to participate." (Doc 30, p. 8).

A second example of facilitation is the statutory warning to electors that they can sign the ballot petition only one time. Section 13-27-204, MCA (1978). That law, too, has not been challenged by *Ellingson* and anyone else in 48 years, despite the fact that the laws places language written by the Legislature on the face of the petition ballot petition. Again, a facilitation examination should determine that the warning assists in proper signature gathering without arguing for or against the substance of the ballot

issue such that it would influence the collection of signatures. There is therefore a benefit to People's lawmaking power without detriment and this is facilitation.[4]

These examples reflect appropriate deference (and therefore facilitation) provided the People's lawmaking power. These examples did not cause ballot issue proponents to file a lawsuit because they believed the law impaired the People's power of lawmaking. In contrast, the *Ellingson* claims assert that in passing SB93 the 2021 and 2023 Montana Legislatures tossed aside 48 years of deference and culture and passed laws impairing the People's power of lawmaking.

IV. The District Courts Judgment Should be Sustained

Under this facilitation standard, the People's power is to be "liberally construed to the end that this right may be facilitated and not hampered by either technical statutory provisions or technical construction thereof, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right." *Sudduth v. Chapman*, 558 P.2d 806, 808-09 (Wash. 1977). That is exactly what the District Court did, and this Court should, therefore, affirm the District Court's determination that four certain laws set out by SB93 were facially unconstitutional because under any set of facts the laws did not facilitate but impaired the People's power of lawmaking.

[4] In this example comparison to legislative bills would not be part of the examination because there is no comparable warning applicable to legislative bills as legislative bills are introduced without a requirement of elector signatures.

A. SB93 Unconstitutionally Prohibits Filing a Particular Initiative

The District Court Judgment held that § 13-27-221, MCA, unconstitutionally impaired the Peoples' power of lawmaking when it prohibited the refiling of a ballot issue previously rejected by electors. The District Court cited to the Peoples' Article III, § 4 constitutional power to "enact laws on all matters" and determined that this language included filing a ballot proposal for law based on language that was a refiling of the language a previously rejected initiative. (Doc. 51.)

The analysis of the District Court is correct. The People have constitutional lawmaking power to "enact laws on all matters" and there is no Legislative constitutional authority set out or implied elsewhere in the Constitution that allows the Legislature to pass § 13-27-221, MCA restricting a certain part of the People's lawmaking power.

The State and Appellant Amici do not disagree that the People's constitutional power of lawmaking includes the refiling of the language of a previously rejected initiative. *State Br.*, pp. 15-2; *Appellant Amici Br.*, pp. 15-20. Instead, the briefs argue at length that § 13-27-221, MCA, facilitates the People's power of lawmaking by lessening the degree to which Montana citizen initiatives clog the ballot demanding too much attention from voters leading to ballot fatigue. But it is not enough to make conclusory statements, there must be some evidence supporting such claims. *Browning v. Fla. Hometown Democracy, Inc.*, 29 So. 3d 1053, 1071 (Fla. 2010) ("As a general matter, we agree that preserving ballot integrity and preventing fraud in the initiative-circulation

process may constitute significant state interests. Nevertheless, the Legislature may not simply incant these aims to shield its actions from judicial inquiry.")

This argument is strangely deficient. It is not just the People who put issues on the ballot in Montana. The Montana Legislature also places issues on the ballot for a vote by electors and each legislative ballot issue takes up space on the ballot and in the Voter Information Pamphlet comparable to that of a citizen ballot issue.

Further, the number of issues the legislature has placed on the ballot are roughly comparable in number to those placed by People's initiative and, in fact, outnumbered citizen initiatives 5 to 2 during the two sessions when SB93 language evolved and passed into law.[5] Section 13-27-221, MCA, passed by the Legislature, is deficient because it only restricts the People's Article III lawmaking powers. It is remarkably unjust that the Appellant Amici and the State argue that "clogging" and "voter fatigue" justify a selective restriction of only the Peoples' Article III lawmaking power by ballot issue. The District Court completely rejected a basis for this facilitation argument when it determined that "[t]here is no evidence ballot issues have cluttered the ballot and created confusion in past elections". (Doc. 30, pp. 10-11.) This Court should reject

[5] In the two elections [2020, 2022] preceding the legislative sessions during which SB93 language evolved the Legislature placed five issues (3 constitutional and 2 statutory) on the ballot while the People placed two (1 constitutional and 1 statutory initiative). *See* "Elections", "Ballot Issues", "Past Ballot Issues" Montana Secretary of State Website. Available at: shttps://sosmt.gov/elections/]. All past legislative and citizen ballot issues can be reviewed at this website.

facilitation on both lack of evidence and on the law's stark failure to treat the People's lawmaking equally with Legislative lawmaking.

Lastly, the People of Montana wrote, placed on the ballot and voted in favor of Initiative 125 (I-125) at the November 1996 election. I-125 created law that lessened funds flowing for or against ballot issue measures as it prohibited money from a corporate checkbook from being spent in an initiative campaign. That law was challenged by a group of Plaintiffs led by the Montana Chamber of Commerce, the lead party filing an Appellant Amici brief in this Matter. In the Matter of *Montana Chamber of Commerce v Argenbright*, 28 F. Supp. 2d 593 (D. Mont. Nov. 20, 1998), the US District Court of Montana conducted a one-week bench trial and struck I-125 as unconstitutional because interfered with the speech rights of corporations. Having resisted the Peoples' efforts to limit money in ballot issue campaigns, Appellant Amici now offer their solution – lessen money spent by limiting the scope of the ballot issues that the People can offer. Any removal of this option from the Peoples' power of lawmaking is inappropriate. Politics is an ever-changing world, and this particular power of lawmaking could become vital in tomorrow's politics.

B. SB93 Unconstitutionally Directs A Legislative Committee to Consider and Vote on a People's Ballot Issue

This Court should sustain the District Court's Judgment determining that SB93 unconstitutionally inserts Legislative power into the separate Peoples' power of lawmaking. The District Court found that a certain section of SB93, §§ 13-27-228, -

238(1), MCA, unconstitutionally impaired the People's power of lawmaking by "unlawfully insert[ing] themselves [the Legislature] into the people's independent lawmaking process." (Doc 51, p. 15.) The District Court determined that Article V, section 1 reserves the powers of initiative and referendum "to the people – not the legislative branch of government." *Id.* The District Court found the law "unconstitutional on its face." *Id.*

Legislative interference with the People's power of lawmaking is clear. Section 13-27-216, MCA, specifies that the AG submits notice and information to the SOS that Legislative Services, the budget director, the AG have completed their reviews of ballot issue language, prepared ballot statements, prepared any necessary fiscal note and completed a legal sufficiency review. Sections 13-27-216(2), -216(5), -216(7), MCA. For decades the SOS was then required to prepare the sample ballot petition for use by the ballot issue proponent. *See, e.g.*, § 13-27-202, MCA (2019). SB93 changed this by requiring the SOS to hold the completed review work and instead transmit the completed ballot issue text and ballot statements for review and vote by an interim legislative committee. Sections 13-27-216(8)(b), -228, MCA.

That interim committee review does not potentially improve ballot issue language, does not assist in preparing ballot statements, and does not otherwise facilitate the People's power of lawmaking. Instead, the Legislative Committee uses legislative power and procedure to take at least 14 days from the ballot proponent. Section 13-27-3(b), MCA. That time is used to hold a hearing, take a vote on the merits of the

proposed ballot issue language and insert that vote tally onto the face of the ballot issue petition. *Id.* There is nothing that facilitates or respects the People's Article III lawmaking power and Article V, section 1 clearly prohibits the legislature from taking this act. *See, e.g.*, *Wolverine Golf Club v. Sec'y of State,* 180 N.W.2d 820, 831 (Mich App. 1970).

At best it gives the Legislature the opportunity to try and influence the signature gathering process under the guise of educating the public. This is not a reason to impair the people's power of initiative. *See, e.g.*, *Wolverine Golf Club*, 180 N.W.2d at 831 (Mich App. 1970).

C. SB93 Unconstitutionally Imposes a $3,700 filing fee.

This Court should sustain the District Court's Judgment determining that SB93 unconstitutionally imposes a $3,700 filing fee that "restricts access based on a person's ability or willingness to pay." (Doc 30, p. 11.)

The first step any ballot issue proponent takes under its Article III lawmaking power is to submit proposed ballot issue language, including proposed ballot statements, to the SOS. Section 13-27-216(1), MCA. The job of SOS has been ministerial as for decades it simply memorialized the exercise of Article III lawmaking power and forwarded the ballot statements to Legislative Services for its review. SB93 changed this as that Article III ballot issue filing must now include "the [$3,700] filing fee." Sections 13-27-216(1)(a), -215, MCA. The SOS enforces this fee and has acted to reject initiative filing that did not include the required fee. (Doc. 18, ¶¶ 7-9.)

The people's power of lawmaking is hardly a power if it can be shut down at the very beginning for failure to pay a fee. *Bullock v. Carter*, 405 U.S. 134, 143, 92 S. Ct. 849, 856 (1972) (excessive candidate filing fee is of "a patently exclusionary character."); *cf. Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668, 86 S. Ct. 1079, 1082 (1966) ("The principle that denies the State the right to dilute a citizen's vote on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a fee to vote or who fail to pay."). Further, there is nothing facilitating about this $3,700 fee as the Peoples' power of lawmaking exists by grant from the Constitution and that grant of power is made to the People without any requirement of fees or costs. Thus, the District Court correctly found that the filing fee "is an impairment on the exercise of the [Peoples'] powers of initiative and referendum under Article III, sections 4 and 5." (Doc 30, p. 11.)

D. SB93 Unconstitutionally Directs the AG to Make a pre-petition Determination of substantive legality of a ballot issue.

This Court should sustain the District Court's Judgment determination that SB93 unconstitutionally grants substantive review authority of proposed ballot language because "[t]he legislature has no authority over constitutional review questions and therefore cannot grant such authority to a third party, including the Attorney General." (Doc. 30, p. 7.)

A proposed law progressing through review under the Peoples' power of lawmaking should not be subject to constitutional determination during that review. It

makes no sense. If the People have a separate power of lawmaking how can that power be terminated by an agency action during law drafting process?

CONCLUSION

Amici respectfully urge this Court to define an Article III lawmaking power and to sustain the District Court's Judgment entered in this Matter.

Dated this 25th day of June, 2025.

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/s/ Robert Farris-Olsen
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Garamond text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2008 for Mac is 4,874, not averaging more than 280 words per page, excluding caption, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service.

DATED this 25th day of June 2025.

MORRISON SHERWOOD WILSON DEOLA PLLP

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CERTIFICATE OF SERVICE

I, Robert M. Farris-Olsen, hereby certify that I have served true and accurate copies of the foregoing Brief - Amicus to the following on 06-25-2025:

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Service Method: eService

Electronically signed by Amy Kirscher on behalf of Robert M. Farris-Olsen
Dated: 06-25-2025