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**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY**

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

Plaintiffs,

v.

STATE OF MONTANA; GREG  
GIANFORTE, governor of the State of  
Montana; AUSTIN KNUDSEN,  
Montana Attorney General; CHRISTI  
JACOBSEN; Secretary of Montana,

Defendants.

Cause No. ADV-2023-388

**ORDER – PLAINTIFFS’  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

Before the Court is Plaintiffs’ motion for partial summary  
judgment. John Meyer represents Plaintiffs Mae Nan Ellingson, Jerome  
Loendorf, Arlyne Reichert, Hal Harper, Bob Brown, Evan Barrett, C.B. Pearson,  
Carole Mackin, Mark Mackin, and Jonathan Motl. Montana Attorney General

1 Austin M. Knudsen, Michael Noonan, Brent Mead, and Emily Jones represent  
2 Defendants State of Montana, Greg Gianforte, Governor of the State of Montana,  
3 Austin Knudsen, Montana Attorney General, and Christi Jacobsen, Montana  
4 Secretary of State.

### 5 STATEMENT OF FACTS

6 Article V, Section 1 of the Montana State Constitution reserves  
7 “the powers of initiative and referendum” to the people of the state. Article III  
8 further defines these powers. “The people may enact laws by initiative on all  
9 matters except appropriations of money and local or special laws.” Mont. Const.,  
10 art. III, § 4. “The people may approve or reject by referendum any act of the  
11 legislature except an appropriation of money.” Mont. Const., art. III, § 5. For  
12 efficiency purposes, the Court will refer to initiatives and referendums  
13 collectively as “ballot issues” for the remainder of the order.

14 Governor Gianforte signed Senate Bill 93 (SB 93) into law on  
15 May 19, 2023. Among other provisions, SB 93 created two ballot issue  
16 procedural requirements at issue in the present matter. First, SB 93 grants the  
17 Montana Attorney General authority to determine the substantive legality of  
18 proposed ballot issues before they may appear on the ballot. Second, SB 93  
19 imposes a \$3,700 filing fee on all proposed ballot issues filed with the Secretary  
20 of State. Plaintiffs are Montana citizens attempting to participate in Montana’s  
21 ballot issue process. Plaintiffs attempted to file draft ballot initiative language  
22 with the Secretary of State’s office. The Secretary of State refused to accept the  
23 draft language because Plaintiffs did not pay the \$3,700 filing fee.

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1 Plaintiffs filed their complaint on May 26, 2023. Defendants filed  
2 their answer on October 10, 2023. In their motion for partial summary judgment,  
3 Plaintiffs challenge two provisions of SB 93. First, Plaintiffs ask the Court to  
4 find SB 93’s provisions granting the Montana Attorney General authority to  
5 conduct substantive legal review of proposed ballot issues unconstitutional.  
6 Second, Plaintiffs ask the Court to find SB 93’s provision requiring ballot issue  
7 proponents pay a filing fee to file proposed ballot issues with the Secretary of  
8 State’s office unconstitutional. The parties appear to agree the issues before the  
9 Court are issues of law and therefore appropriate for summary judgment.

### 10 PRINCIPLES OF LAW

11 Summary judgment is warranted when no genuine issues of  
12 material fact exist, and the moving party is entitled to judgment as a matter of  
13 law. Mont. R. Civ. P. 56(c)(3). It is appropriate when “the pleadings, the  
14 discovery and disclosure materials on file, and any affidavits show that there is  
15 no genuine issue as to any material fact and that the movant is entitled to  
16 judgment as a matter of law.” Mont. R. Civ. P. 56(c)(3). The party moving for  
17 summary judgment must establish the absence of any genuine issue of material  
18 fact and the party is entitled to judgment as a matter of law. *Tin Cup County*  
19 *Water &/or Sewer Dist. V. Garden City Plumbing*, 2008 MT 434, ¶ 22,  
20 347 Mont. 468, 200 P.3d 60.

21 Once the moving party has met its burden, the party opposing  
22 summary judgment must present affidavits or other testimony containing material  
23 facts which raise a genuine issue as to one or more elements of its case. *Id.*, ¶ 54  
24 (citing *Klock v. Town of Cascade*, 284 Mont. 167, 174, 943 P.2d 1262, 1266  
25 (1997)). To avoid summary judgment, the opposing party’s evidence “must be

1 substantial, ‘not mere denial, speculation, or conclusory statements.’” *Hadford v.*  
2 *Credit Bureau, Inc.*, 1998 MT 179, ¶ 14, 962 P.2d 1198, 1201 (quoting *Klock* at  
3 174).

4 A plaintiff alleging a statute is facially unconstitutional “may  
5 succeed only if the challenger can establish that ‘no set of circumstances exists  
6 under which the [challenged legislation] would be valid.’” *Montana Cannabis*  
7 *Industry Ass'n v. State*, 2016 MT 44, ¶ 73, 382 Mont. 256, 368 P.3d 1131  
8 (quoting *U.S. v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100,  
9 95 L.Ed.2d 697 (1987)). A plaintiff bringing such a challenge bears the burden  
10 of proving, beyond a reasonable doubt, that the statute is unconstitutional. *See*  
11 *City of Great Falls v. Morris*, 2006 MT 93, ¶ 12, 332 Mont. 85, 134 P.3d 692.

12 In reviewing a constitutional challenge to a statute, courts must  
13 “avoid an unconstitutional interpretation if possible.” *State v. Nye*,  
14 283 Mont. 505, 510, 943 P.2d 96 (1997); *Brown v. Gianforte*, 2021 MT 149,  
15 ¶ 32, 404 Mont. 269, 488 P.3d 548. However, “[n]either statutory nor  
16 constitutional construction should lead to absurd results, if reasonable  
17 construction will avoid it.” *Nelson v. City of Billings*, 2018 MT 36 ¶ 16,  
18 390 Mont. 290, 412 P.3d 1058.

## 19 ANALYSIS

### 20 **Standing**

21 As a preliminary matter, Defendants argue Plaintiffs lack standing  
22 to challenge the Attorney General’s authority to conduct substantive legal review  
23 of proposed ballot issue language on the basis Plaintiffs have not alleged an  
24 injury caused by the Attorney General. “Standing is a threshold jurisdictional

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1 requirement.” *Mitchell v. Glacier Cty.*, 2017 MT 258, ¶ 9, 389 Mont. 122, ¶ 9,  
2 406 P.3d 427, ¶ 9. “Standing resolves the issue of whether the litigant is a proper  
3 party to seek adjudication of a particular issue, not whether the issue is  
4 justiciable.” *Chipman v. Nw. Healthcare Corp.*, 2012 MT 242, ¶ 25,  
5 366 Mont. 450, ¶ 25, 288 P.3d 193, ¶ 25 (citing *Mont. Trout Unlimited v.*  
6 *Beaverhead Water Co.*, 2011 MT 151, ¶ 27, 361 Mont. 77, 255 P.3d 179; *Helena*  
7 *Parents Comm'n v. Lewis & Clark County Comm'rs*, 277 Mont. 367, 371,  
8 922 P.2d 1140, 1142 (1996)).

9 Plaintiffs submitted three draft ballot initiatives to the Secretary of  
10 State’s office for inclusion on the 2024 ballot. The Secretary of State’s office  
11 rejected all three on the basis Plaintiffs did not include the \$3,700 filing fee.  
12 Plaintiffs allege SB 93 infringes upon their rights guaranteed under Montana’s  
13 Constitution by requiring them to pay a \$3,700 fee for each of the three ballot  
14 initiatives. Plaintiffs have standing to bring this claim because the challenged fee  
15 prevented them from participating in the constitutionally established ballot issue  
16 process.

17 Plaintiffs further allege SB 93 is facially unconstitutional because  
18 it requires the Attorney General to complete a substantive legal review of the  
19 ballot issues. Defendants argue Plaintiffs lack standing to bring this challenge  
20 because their ballot initiatives never made it to the Attorney General legal review  
21 stage. Because the Attorney General did not perform a substantive legal review  
22 of Plaintiffs’ proposed initiative language, Defendants argue it is impossible for  
23 them to demonstrate harm. Notwithstanding, Plaintiffs argue that requiring the

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1 Attorney General to perform substantive legal review of proposed language is  
2 facially unconstitutional regardless of how it affects any individual proposed  
3 initiative.

4 Plaintiffs are actively attempting to participate in the ballot  
5 initiative process. Plaintiffs' ballot initiatives did not reach the challenged  
6 Attorney General substantive review stage on account of an intervening allegedly  
7 unconstitutional provision. If Plaintiffs prevail on their claim regarding the  
8 constitutionality of the filing fee, the fact their initiatives did not reach the review  
9 stage would be the result of the imposition of an unconstitutional requirement.  
10 The harm Plaintiffs allege is interference with their constitutionally protected  
11 powers to participate in the ballot issue processes. This harm exists regardless of  
12 the extent Plaintiffs advanced through the process before reaching the first  
13 barrier. Plaintiffs therefore have standing to challenge the provisions of SB 93 to  
14 the extent they create unconstitutional barriers to that process.

#### 15 **Attorney General Substantive Legal Review**

16 Plaintiffs challenge SB 93's provisions which grant the Attorney  
17 General authority to perform substantive legal review of proposed ballot issues  
18 prior to their being placed on the ballot. Plaintiffs argue these provisions are  
19 facially unconstitutional because the Attorney General review is unconstitutional  
20 under any set of facts. The Court agrees. Montana has substantial case law  
21 prohibiting the Attorney General from engaging in substantive review of  
22 proposed ballot issues. See, e.g., *Monforton v. Knudsen*, 2023 MT 179, ¶ 6,  
23 413 Mont. 367, ¶ 6, 539 P.3d 1078, ¶ 6 ("A long line of our cases have  
24 emphasized the limitation upon the Attorney General's authority to address the

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1 substantive legality of ballot initiatives and referenda, both under then-current  
2 governing statutes, and in the context of generally applicable common law and  
3 constitutional principles”).

4 Defendants argue the extensive case law largely predates the  
5 legislature’s 2021 grant of power under HB 651 and is therefore outdated.  
6 However, statutory changes do not affect the validity of the Supreme Court’s  
7 prior determinations. Rather, the Montana Supreme Court has consistently held  
8 the Attorney General may not perform substantive legal review of ballot issues.

9 As an executive officer of the State of Montana, the Attorney  
10 General does not have the authority to make a declaration regarding  
11 the constitutionality of [a proposed ballot issue]. “Constitutional  
12 questions are properly decided by a judicial body, not an  
13 administrative official, under the constitutional principle of  
14 separation of powers.”

14 *Hoffman v. State*, 2014 MT 90, ¶ 9, 374 Mont. 405, ¶ 9, 328 P.3d 604, ¶ 9  
15 (quoting *Mitchell v. Town of W. Yellowstone*, 235 Mont. 104, 109, 765 P.2d 745,  
16 748 (1988)).

16 The legislature has no authority over constitutional review questions and  
17 therefore cannot grant such authority to a third party, including the Attorney  
18 General.

19 Thus, regardless of the change in statutory language, Montana’s  
20 case law continues to support the conclusion substantive legal review by the  
21 Attorney General as part of the ballot issue process is unconstitutional.

22 Constitutional provisions governing separation of power issues may not be  
23 legislated. The Attorney General may only review proposed ballot issues for  
24 legal sufficiency. Legal sufficiency asks only whether the ballot statements  
25 comply with statutory requirements. “We have made clear in several recent

1 opinions that the Attorney General's legal sufficiency review does not authorize  
2 him to withhold a proposed ballot measure from the ballot for an alleged  
3 substantive constitutional infirmity.” *Hoffman v. State*, 2014 MT 90, ¶ 8,  
4 374 Mont. 405, ¶ 8, 328 P.3d 604, ¶ 8. To the extent SB 93 provides the  
5 Attorney General authority to engage in substantive legal review of proposed  
6 ballot issues, those sections of the statute are void.

### 7 **Filing Fee**

8 Plaintiffs challenge SB 93’s imposition of a \$3,700 mandatory fee  
9 for initiating the ballot issue process. Under the new statute, a ballot issue  
10 proponent must pay the filing fee to submit proposed draft language to the  
11 Secretary of State. Plaintiffs argue the legislative branch lacks authority under  
12 the constitution to impose a filing fee onto the ballot issue process. The ballot  
13 issue procedures exist to facilitate the power of the citizens of this state to enact  
14 laws by initiative and to approve or reject by referendum any act of the  
15 legislature. Article III, Sections 4 and 5 guarantee these powers. While  
16 Defendants correctly observe the legislature has a role in facilitating the ballot  
17 issue processes through statute, it may not create statutes which hinder the  
18 people’s ability to participate. Thus, the question is whether the filing fee exists  
19 to facilitate the people’s exercise of power or to impair it. Defendants’  
20 arguments generally fall into two categories: concern over use of state resources  
21 and concern over keeping the ballot manageable.

22 Defendants argue the filing fee is permissible to defray the costs of  
23 state resources expended in time reviewing and processing proposed ballot  
24 issues. Plaintiffs, on the other hand, argue it is unconstitutional to charge fees to  
25 citizens engaged in law-making when legislators are not charged for the same



1 services. Under Article V, Section I, the people’s powers of initiative and  
2 referendum exist on equal footing with the legislature’s legislative power. Yet  
3 the legislature has created a system whereby their own law-making processes are  
4 funded by levying taxes while citizens must fund their own participation.  
5 Requiring legislators to pay for their bill proposals would clearly interfere with  
6 the legislature’s ability to engage in the law-making process. Plaintiffs argue the  
7 same standard should apply to citizens.

8           According to Defendants, the fee is necessary “to safeguard the  
9 integrity of the initiative process” and “[d]iscourag[e] frivolous or unserious  
10 proposals.” However, this argument ultimately returns to the issue whether  
11 proposals are serious enough to warrant expending state resources in reviewing  
12 and processing them. Defendants maintain that only fifteen percent of submitted  
13 ballot issues made it through the review process to appear on the ballot in 2022.  
14 Defendants appear to view the other eighty-five percent as essentially a waste of  
15 resources. However, Defendants have not provided any metric against which the  
16 Court may compare these percentages. For instance, according to the Montana  
17 state legislature’s published “2023 Session Statistics Board,” the 2023 legislature  
18 successfully passed 17.3 percent of the bills for which legislators submitted draft  
19 requests. Legislators submitted 4,643 draft requests to the Legislative Services  
20 Division. Ultimately, only 804 of those bills made it through the entire process  
21 to become law. Yet, Defendants point to the thirty-four citizen submitted ballot  
22 issues from 2022 as evidence a filing fee is necessary to prevent expending state  
23 resources, including the time of the Legislative Services Division, on “unserious”  
24 proposals.

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1           Having a system which allows for meaningful participation by the  
2 people means certain inefficiencies are inevitable. There is no evidence the  
3 unsuccessful ballot issue proposals from 2022 failed because the proponents were  
4 not serious about their issues or the process. Rather, there are many existing,  
5 legitimate hurdles to getting a proposed initiative or referendum on the ballot,  
6 including signature gathering requirements and legal sufficiency review.  
7 Signature gathering requirements ensure there is at least a moderate amount of  
8 support for a proposed ballot issue—which contradicts Defendants’ concern the  
9 ballot will be overrun with meritless proposals. Legal sufficiency review ensures  
10 every successful ballot issues comport with existing constitutional requirements.  
11 These legitimate hurdles differ from the imposition of a filing fee because they  
12 relate to the content of a proposed ballot issue rather than simply serving as a  
13 barrier. If ballot issue proponents are unable to gather enough support for their  
14 proposals in the signature gathering phase, the failure of the proposal properly  
15 reflects the will of the people. Conversely, if the fee requirements dissuade ballot  
16 issue proponents from submitting their proposals, the failure may be attributable  
17 to the government’s actions.

18           Defendants’ claim the filing fee at issue here is analogous to filing  
19 fees candidates must file to run for office, i.e., that filing fees prevent a ballot  
20 from becoming cluttered, is unpersuasive. As demonstrated by Defendants’ own  
21 example, allowing citizens to file ballot issues without a filing fee resulted in  
22 only two initiatives appearing on the 2022 general election ballot. In short, the  
23 State has not demonstrated a legitimate interest in imposing a filing fee to prevent  
24 a problem which does not exist. There is no evidence ballot issues have cluttered  
25 the ballot and created confusion in past elections and there is no legitimate reason



1 cc: John Meyer, via email  
2 Michael Noonan, via email  
3 Emily Jones, via email  
4 Austin Knudsen, via email  
5 Alwyn T. Lansing, via email

6 MM/sm/ Order – Pl. Motion Partial Summ Judgment  
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