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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’  
SECOND MOTION FOR  
PARTIAL SUMMARY  
JUDGMENT**

Before the Court is Plaintiffs’ second 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 (collectively Plaintiffs).

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

### 5 **STATEMENT OF FACTS**

6 Article V, Section 1 of the Montana Constitution reserves “the  
7 powers of initiative and referendum” to the people of the state. Article III further  
8 defines these powers. “The people may enact laws by initiative on all matters  
9 except appropriations of money and local or special laws.” Mont. Const., Art. III  
10 § 4. “The people may approve or reject by referendum any act of the legislature  
11 except an appropriation of money.” Mont. Const., Art. III § 5. The Court’s use  
12 of the terms “initiative” or “referendum” should be read interchangeably to the  
13 extent the processes for certifying initiatives, whether constitutional or statutory,  
14 and referendums are the same.

15 On February 5, 2024, the Court granted partial summary judgment  
16 in favor of Plaintiffs finding two sections of Senate Bill 93 (SB 93)  
17 unconstitutional. Specifically, the Court’s prior summary judgment order  
18 addressed the legislation’s imposition of a filing fee and grant of authority to the  
19 attorney general to perform substantive legal review of ballot initiatives.  
20 Plaintiffs now move for summary judgment on the remaining challenged sections  
21 of SB 93 and the codifying statutes.

### 22 **PRINCIPLES OF LAW**

23 Summary judgment is warranted when no genuine issues of  
24 material fact exist, and the moving party is entitled to judgment as a matter of  
25 law. Mont. R. Civ. P. 56(c)(3). It is appropriate when “the pleadings, the

1 discovery and disclosure materials on file, and any affidavits show that there is  
2 no genuine issue as to any material fact and that the movant is entitled to  
3 judgment as a matter of law.” Mont. R. Civ. P. 56(c)(3). The party moving for  
4 summary judgment must establish the absence of any genuine issue of material  
5 fact and the party is entitled to judgment as a matter of law. *Tin Cup County*  
6 *Water &/or Sewer Dist. V. Garden City Plumbing*, 2008 MT 434, ¶ 22,  
7 347 Mont. 468, 200 P.3d 60.

8           Once the moving party has met its burden, the party opposing  
9 summary judgment must present affidavits or other testimony containing material  
10 facts which raise a genuine issue as to one or more elements of its case. *Id.*, ¶ 54  
11 (citing *Klock v. Town of Cascade*, 284 Mont. 167, 174, 943 P.2d 1262, 1266  
12 (1997)). To avoid summary judgment, the opposing party’s evidence “must be  
13 substantial, ‘not mere denial, speculation, or conclusory statements.’” *Hadford v.*  
14 *Credit Bureau, Inc.*, 1998 MT 179, ¶ 14, 962 P.2d 1198, 1201 (quoting *Klock* at  
15 174).

## 16 ANALYSIS

17           As the moving party, Plaintiffs bear the initial burden to establish a  
18 lack of genuine issues of material fact and demonstrate they are entitled to  
19 judgment as a matter of law. The parties in this matter agree the issues presented  
20 here are questions of law. A plaintiff alleging a statute is facially  
21 unconstitutional “may succeed only if the challenger can establish that ‘no set of  
22 circumstances exists under which the [challenged legislation] would be valid.’”  
23 *Montana Cannabis Industry Ass'n v. State*, 2016 MT 44, ¶ 73, 382 Mont. 256,  
24 368 P.3d 1131 (quoting *U.S. v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100,  
25 95 L.Ed.2d 697 (1987)). A plaintiff bringing such a challenge bears the burden

1 of proving, beyond a reasonable doubt, the statute is unconstitutional. See *City of*  
2 *Great Falls v. Morris*, 2006 MT 93, ¶ 12, 332 Mont. 85, 134 P.3d 692.

3 **I. Whether SB 93, as codified at Montana Code Annotated § 13-27-221,**  
4 **unconstitutionally prohibits refiling a ballot issue.**

5 Plaintiffs first challenge the constitutionality of Montana Code  
6 Annotated § 13-27-221, which provides, “[a] statewide initiative filed under the  
7 provisions of this chapter may not be filed if it is substantially the same as a  
8 measure defeated by the voters in an election within the preceding 4 years.”  
9 According to Plaintiffs, the statute is unconstitutional on its face because it  
10 conflicts with, and infringes upon, the people’s use of their expressly reserved  
11 constitutional power of initiative. Plaintiffs argue the impairment of the power  
12 retained by Montana citizens under their constitution is harmful. The world of  
13 politics is a changing world in which circumstances leading to the defeat of a  
14 ballot issue may change significantly between elections and voters may approve a  
15 previously unsuccessful ballot initiative. Plaintiffs further observe there is no  
16 similar restriction on the legislature to prohibit lawmakers from resubmitting bill  
17 proposals during successive legislative sessions.

18 Defendants first argue Plaintiffs lack standing to challenge the  
19 statute. Specifically, Plaintiffs have not demonstrated the statute has prevented  
20 them from filing a proposed ballot initiative. However, as the Court found in its  
21 prior order on summary judgment, Plaintiffs are active participants in the ballot  
22 initiative process. The harm Plaintiffs allege through this litigation is  
23 interference with their constitutionally protected powers to participate in the  
24 ballot initiative process. This harm exists regardless how far Plaintiffs advance  
25 through the process on any given proposal before reaching the first barrier.

1 Plaintiffs therefore have standing to challenge the provisions of SB 93 to the  
2 extent they create unconstitutional barriers to “the powers of initiative and  
3 referendum” guaranteed under Article V, Section 1 of the Montana Constitution.

4 Next, Defendants argue the Court should reject Plaintiffs’  
5 challenge on the merits because the restriction on resubmitting rejected initiatives  
6 protects the integrity and reliability of the initiative process. According to the  
7 State, the restriction ensures the people of Montana are not inundated at every  
8 election with measures they have already rejected; reduces voter confusion by  
9 preventing clogging the ballot with issues the people have already considered and  
10 rejected; and ensures state resources devoted to placing initiatives on the ballot  
11 are not consumed by proposals previously rejected by voters.

12 Article III, Section 4 of the Montana Constitution reads: “The  
13 people may enact laws by initiative *on all matters* except appropriations of  
14 money and local or special laws” (emphasis added). Disallowing a proposed  
15 ballot initiative on the basis voters rejected a similar initiative proposal within the  
16 preceding four years creates an arbitrary hurdle to participation in the ballot  
17 initiative process. Voters may reject a particular ballot initiative in a particular  
18 election for numerous reasons. Nonetheless, the legal and political landscape  
19 which informs voters’ decisions is not static. There is no similar restriction on  
20 the legislature’s ability to reintroduce proposed bills from one session to the next.  
21 Indeed, such a restriction would place an unconstitutional limitation on  
22 legislative power vested in the legislature under Article V, Section 1 of the  
23 Montana Constitution.

24 Montana Code Annotated § 13-27-221 prevents ballot initiative  
25 proponents and voters from having the same opportunity as the legislature to

1 adopt policies or amend the constitution as facts and circumstances change.  
2 Thus, Montana Code Annotated § 13-27-221’s restriction on refiling proposed  
3 initiative language is unconstitutional because it prohibits submission of  
4 proposed ballot initiatives in violation of Article III, Section 4 of the Montana  
5 Constitution.

6 **II. Whether SB 93 unconstitutionally infringes upon the powers of**  
7 **initiative and referendum by conferring unlawful authority to the secretary**  
8 **of state to reject a ballot issue.**

9 When an initiative proponent submits a proposed initiative to the  
10 secretary of state, the secretary of state sends the proposed language to the  
11 legislative services division for review. Mont. Code Ann. § 13-27-216(1). Upon  
12 receipt of the proposed language, the legislative services division “reviews the  
13 text and ballot statements for clarity, consistency, and conformity with the most  
14 recent edition of the bill drafting manual furnished by the legislative services  
15 division, the requirements of this part, and any other factors that the staff  
16 considers when drafting proposed legislation. Mont. Code Ann. § 13-27-225(1).  
17 The legislative services division then communicates any recommended revisions  
18 of the proposed text to the initiative proponent in writing. Mont. Code Ann.  
19 § 13-27-225(2).

20 Following the legislative services division review, the initiative  
21 proponent must submit the final text of the proposed initiative and ballot  
22 statement to the secretary of state. Mont. Code Ann. § 13-27-216(3). However,  
23 if the initiative proponent submits final text containing “material not submitted to  
24 the legislative services division that is a substantive change not recommended by

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1 the legislative services division,” Montana Code Annotated §§ 13-27-216(4) and  
2 218(4) direct the secretary of state to reject the initiative. Plaintiffs challenge the  
3 statute on the basis it unconstitutionally authorizes the secretary of state to reject  
4 proposed initiatives.

5 Applying the same argument, Plaintiffs challenge the  
6 constitutionality of Montana Code Annotated §§ 13-27-216(7) and 218(7), which  
7 direct the secretary of state to reject a proposed initiative if the attorney general  
8 determines it is not legally sufficient. Plaintiffs argue the challenged statutory  
9 authority is unconstitutional because any act of the legislature which designates  
10 *the power to reject* to an agency is an impairment of the people’s power to write  
11 and pass laws through initiative. Plaintiffs further argue the challenged statutory  
12 authority allows the secretary of state to hold, consider, and ultimately assert  
13 power it does not have to reject ballot issue language.

14 In response, Defendants maintain the grants of authority Plaintiffs  
15 identify are only directives for the secretary of state to perform ministerial duties.  
16 Contrary to Plaintiffs’ assertions, the statutory language does not provide the  
17 secretary of state any independent authority to determine whether to reject or  
18 accept a ballot initiative. Rather, the statutes direct the secretary of state to reject  
19 the proposed initiatives only if the initiative proponent submits final text  
20 substantially different from that reviewed by the legislative services division or if  
21 the attorney general finds the proposed initiative is not legally sufficient.

22 Defendants argue Montana Code Annotated §§ 13-27-216(4) and  
23 218(4) are constitutional because they ensure all proposed language has been  
24 subject to review by the legislative services division. Plaintiffs do not challenge  
25 the legislative services division review during the initiative process. Both the

1 legislature and citizens must submit their proposed initiatives to the legislative  
2 services division to ensure code clarity, uniformity, and to identify potential  
3 textual defects.

4 Plaintiffs have not met their burden to establish the statutes  
5 directing the secretary of state to reject proposed ballot initiatives under the  
6 specific circumstances identified are unconstitutional. The statutes do not grant  
7 the secretary of state discretionary authority. Requiring initiative proponents to  
8 submit final text which is substantively consistent with the text submitted for  
9 review by the legislative services division ensures all proposed laws have  
10 undergone the same review process. If a proponent could submit substantively  
11 different language after the legislative services division review, it would defeat  
12 the purpose of the review.

13 Turning to the second set of statutes, requiring the secretary of  
14 state to reject ballot proposals the attorney general finds legally insufficient  
15 facilitates the attorney general review process. The statutes merely direct the  
16 secretary of state to give effect to the attorney general’s findings. The statutes do  
17 not grant the secretary of state discretionary authority to reject the proposed  
18 initiatives. Thus, the issue of rejection under Montana Code Annotated  
19 §§ 13-27-216(7) and 218(7) is more properly considered in relation to Plaintiffs’  
20 challenge to the attorney general’s legal sufficiency review.

21 **III. Whether it is unconstitutional for the attorney general to impose a**  
22 **“harm to business statement” on a ballot issue petition.**

23 Plaintiffs next argue SB 93 unconstitutionally impairs the people’s  
24 power of initiative by providing the attorney general unilateral authority to

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1 impose a “harm to business” statement on a ballot issue petition. Mont. Code  
2 Ann. §§ 13-27-238(f)(2)(a)-(b) and 241(f)(2)(a)-(b). Per Montana Code  
3 Annotated § 13-27-232(2), “[i]f the attorney general determines the proposed  
4 ballot issue will likely cause significant material harm to one or more business  
5 interests in Montana” the front page of the ballot petition must contain the  
6 following warning:

7           WARNING: The Attorney General of Montana has determined the  
8           proposed ballot issue will likely cause significant material harm to  
9           one or more business interests in Montana.

10 Plaintiffs argue the harm to business statement improperly addresses the  
11 substance of the proposed initiative.

12           Defendants, on the other hand, argue Article IV, Section 3 of the  
13 Montana Constitution gives the legislature, not the ballot initiative proponents,  
14 the authority to regulate the form of ballot petitions. Defendants argue the harm  
15 to business warning provides prospective petition signers with more information  
16 regarding the nature of the ballot measure including the measure’s effect on  
17 business and livelihoods. Further, Defendants argue the harm to business  
18 statement does not create an impediment to the right to initiative and referendum  
19 because it does not prevent the petition from moving forward and does not  
20 impede a voter from signing the petition.

21           Plaintiffs have not met their burden to establish the attorney  
22 general’s harm to business statement is unconstitutional. On its face, the harm to  
23 business statement does not interfere with a ballot proponent’s ability to advocate  
24 for their proposal or collect signatures in support. While Plaintiffs question the  
25 decision to focus on whether a proposed initiative may harm business interests

1 rather than constitutionally protected interests like harm to a clean and healthful  
2 environment, these arguments are a matter of policy rather than constitutionality.  
3 Similarly, whether it is fair or beneficial to allow the attorney general to require  
4 harm to business statements on ballot petitions is a matter of policy because it  
5 does not impede an initiative proponent's ability to meaningfully participate in  
6 the process. If an individual ballot proponent wishes to challenge the imposition  
7 of a harm to business statement on a specific ballot petition, the issue may be  
8 examined in context. However, based on the information currently before the  
9 Court, Plaintiffs have not established the harm to business statement requirement  
10 is unconstitutional in all applications.

11 **IV. Whether it is unconstitutional to authorize the budget director to**  
12 **determine a proposed initiative requires a fiscal note and for the attorney**  
13 **general to prepare and insert a 50-word statement of fiscal impact on the**  
14 **face of a ballot issue petition.**

15 Montana Code Annotated §§13-27-216(5) and 13-27-227(1)  
16 authorize the budget director to decide whether a fiscal note is necessary before  
17 ballot issue petition language can be finalized. Plaintiffs argue these statutes  
18 unconstitutionally impair the people's power of initiative because the Montana  
19 Constitution does not convey authority to the budget director to decide a fiscal  
20 note is needed or whether fiscal statement language should be inserted on the  
21 ballot petition. Plaintiffs further argue the need for a fiscal note is a substantive  
22 issue rather than a procedural issue related to submitting ballot initiatives.  
23 Therefore, Plaintiffs argue consideration of the fiscal note issue should be  
24 reserved for after a proposed ballot initiative is certified to appear on the ballot  
25 and there is a means for substantive argument in the voter information pamphlet.

1 Finally, Plaintiffs challenge the statutes on the basis the review of the budget  
2 director is a new agency review—resulting in the addition of ten days or more for  
3 the agency review of a proposed ballot initiative.

4 Relatedly, Plaintiffs challenge Montana Code Annotated  
5 § 13-27-226(4), which authorizes the attorney general to prepare and insert a  
6 fiscal statement on the face of a ballot issue petition and on the ballot. Plaintiffs  
7 argue Montana’s Constitution does not vest power in the attorney general to  
8 insert a statement of fiscal impact on a petition. Moreover, fiscal impact  
9 statements are not necessary to facilitate the proper functioning of the initiative  
10 process. Plaintiffs maintain the ballot initiative process functioned properly for  
11 decades before the legislature required fiscal impact statements. Finally,  
12 Plaintiffs argue if a fiscal note is needed it can be written independently and  
13 released to the public prior to the vote on any ballot issue submitted to voters for  
14 approval.

15 Defendants argue the legislature constitutionally facilitates the  
16 ballot issue process when it provides voters information explaining the effect of a  
17 measure on public finances. According to Defendants, fiscal notes and  
18 statements of fiscal impact provide a neutral analysis of ballot issues on state  
19 finances. Montana Code Annotated § 5-4-205(2) prohibits the budget director  
20 from expressing any opinion for or against the underlying policy in a fiscal note.  
21 Because statute requires the fiscal note be policy neutral, Defendants argue it  
22 does not present a substantive argument for or against any ballot initiative.  
23 Rather, it is intended to provide more information for voters. Further,  
24 Defendants contend the fiscal note process for proposed ballot initiatives has  
25 been in effect and functioning for decades.

1                   Plaintiffs have not met their burden to establish the relevant  
2 statutes authorizing the budget director to decide whether a fiscal note is  
3 necessary are unconstitutional on their face. The Court disagrees with Plaintiffs’  
4 characterization of a fiscal note as a substantive issue. By statute, the fiscal note  
5 and statement must be position neutral. A fiscal note provides information but  
6 does not advocate for or against any particular outcome. The fiscal statement  
7 summarizes the fiscal note. Additionally, the inclusion of a fiscal note and  
8 statement does not interfere with a proponent’s ability to advocate for a proposal.

9                   Finally, preparation of fiscal notes prior to voting on a bill is  
10 standard procedure in the legislative lawmaking process. Regardless of the  
11 context, e.g., legislators considering a bill draft or citizens considering a proposed  
12 initiative, fiscal notes facilitate the lawmaking process by providing important,  
13 content neutral information to potential voters. The statutes authorizing the  
14 budget director to prepare fiscal notes and the attorney general to prepare neutral  
15 fiscal statements are not unconstitutional.

16       **V.       Whether it is unconstitutional for the attorney general to reject**  
17 **ballot issue language on the basis of legal sufficiency.**

18                   Next, Plaintiffs challenge Montana Code Annotated  
19 §§ 13-27-216(5) and 13-27-227(1), which authorize the attorney general to reject  
20 ballot issue language on the basis of legal sufficiency. Plaintiffs argue the  
21 statutes unconstitutionally impair the people’s power of initiative by vesting in  
22 the attorney general unilateral authority to reject ballot issue language by reason  
23 the proposed language is not legally sufficient. Again, Plaintiffs argue the  
24 Montana Constitution does not grant authority to the attorney general to reject  
25 proposed ballot initiative on these grounds.

1 Montana’s attorney general has been tasked with reviewing  
2 proposed ballot issue language for legal sufficiency since 1977. The Montana  
3 Supreme Court has affirmed this authority repeatedly. Citing a prior version of  
4 the attorney general review statute, the Montana Supreme Court stated, “[o]n  
5 review for legal sufficiency, the Attorney General may determine whether the  
6 petition for a ballot issue complies with the statutory and constitutional  
7 requirements ‘governing submission of the proposed issue to the electors.’”  
8 *Meyer v. Knudsen*, 2022 MT 109, ¶ 9, 409 Mont. 19, ¶ 9, 510 P.3d 1246,  
9 ¶ 9 (quoting Mont. Code Ann. § 13-27-312(8) (2021)).

10 To the extent the attorney general’s review authority is limited to  
11 determining whether a proposed ballot initiative meets the requirements for  
12 submission of the issue, the review facilitates the initiative process. For instance,  
13 the Montana Supreme Court most recently found, “[i]t is within the Attorney  
14 General's authority to determine whether a proposed ballot issue complies with  
15 the separate-vote provision of Article XIV, Section 11, of the Montana  
16 Constitution.” *Montanans Securing Reprod. Rights v. Knudsen*, 2024 MT 54,  
17 ¶ 6, 415 Mont. 416, ¶ 6, 545 P.3d 45, ¶ 6. Montana’s Constitution establishes the  
18 separate-vote requirement for ballot issues. If a proposed ballot issue does not  
19 satisfy this requirement, it does not comply with the constitutional requirements  
20 governing submission of the proposed issue to the electors.

21 Unlike substantive review of the proposed ballot issue, review for  
22 legal sufficiency is meant to ensure proposed ballot issues conform to the  
23 requirements of the constitutionally established process. Therefore, such review  
24 facilitates the ballot initiative process. To the extent Plaintiffs argue the review  
25 statute is capable of being misapplied for improper purposes, the issue is not with

1 the constitutionality of the statute. Should a ballot issue proponent wish to  
2 challenge a specific legal sufficiency determination, Montana Code Annotated  
3 § 13-27-605 allows the proponent to bring an original action in the Montana  
4 Supreme Court to challenge the determination. While the attorney general does  
5 not have the authority to make any determinations regarding “the substantive  
6 legality of the proposed issue if approved by the voters,” it is not unconstitutional  
7 for the attorney general to review a petition for compliance “with statutory and  
8 constitutional requirements governing submission of the proposed issue to the  
9 qualified electors.” Mont. Code Ann. § 13-27-110(7).

10 **VI. Whether SB 93 unconstitutionally authorizes a legislative committee**  
11 **to vote on the merits of a proposed initiative and place the results of the vote**  
12 **on the ballot petition.**

13 Plaintiffs next challenge Montana Code Annotated § 13-27-228,  
14 which authorizes interim legislative committees to consider and vote on proposed  
15 initiatives; and Montana Code Annotated § 13-27-238(1)(d), which directs the  
16 secretary of state to place language summarizing the results of the vote on the  
17 face of the ballot petition. Plaintiffs argue the plain language of the Montana  
18 Constitution reserves the power of law-making by initiative solely to the people  
19 of the state. In adopting the constitution, the people reserved to themselves the  
20 powers of initiative and referendum—to authorize Montana citizens to vote on  
21 ballot issues without interference from the legislature. Plaintiffs argue the  
22 challenged statutes interfere with that authority by allowing legislative  
23 committees to participate in and influence the initiative process. Moreover,

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1 Plaintiffs claim the statutes unconstitutionally impair the people’s power of  
2 initiative by requiring fourteen days to arrange for and vote on the merit of a  
3 proposed ballot issue.

4           According to Defendants, the legislative committee review  
5 facilitates the initiative process by informing the public so they may better  
6 exercise their political rights. Thus, requiring a legislative statement whether the  
7 committee supports the proposal achieves that aim. The legislative committee  
8 does not have authority to reject proposed initiative or ballot statement text.  
9 Defendants argue the legislative committee review allows the public to express  
10 their opinions through testimony and public comment, and for sponsors to appear  
11 and explain their proposals.

12           Notwithstanding Defendants’ policy analysis, Article V, Section 1  
13 of the Montana Constitution reserves “the powers of initiative and referendum”  
14 to the people—not the legislative branch of government. The statutory scheme  
15 adopted by legislature, which authorizes legislative committees to participate in  
16 the initiative process and vote on proposed initiatives and requiring ballot  
17 petitions to include a state of legislative support or opposition, is unconstitutional  
18 on its face. The initiative and referendum process established in the Montana  
19 Constitution is intentionally separate from the legislature’s lawmaking authority.  
20 By requiring ballot proponents to include the legislature’s position on the face of  
21 their petitions, legislators have unlawfully inserted themselves into the people’s  
22 independent lawmaking process.

23           The legislative committee vote is distinguishable from the agency  
24 review process at issue here because it serves no purpose other than to provide an  
25 unsolicited opinion on the substance of the proposal. This is not a legitimate

1 reason to add as many as fourteen days to the short calendar in which initiative  
2 proponents seek certification for their proposals. The Court is unconvinced by  
3 the Defendant’s argument the legislative committee vote helps the public “better  
4 exercise their political rights.” The initiative process specifically eschews the  
5 idea the people need the legislature’s participation or approval to exercise their  
6 political rights. If the legislature wishes to express an opinion on proposed  
7 initiatives, it may do so through the voter information pamphlet after the  
8 initiative proponents have collected the necessary signatures to certify an  
9 initiative for the ballot.

10 **VII. Whether SB 93’s agency review requirements unconstitutionally**  
11 **infringe upon the electors’ power of initiative and referendum.**

12 Next, Plaintiffs argue SB 93 unconstitutionally infringes upon the  
13 peoples’ power of initiative and referendum by requiring the secretary of state,  
14 attorney general, budget director, and legislature to engage in lengthy reviews of  
15 proposed initiative language. In the five-month period following the end of a  
16 legislative session, initiative proponents must submit proposed initiatives, move  
17 through agency review, secure a petition, and collect sufficient signatures.  
18 Plaintiffs argue Montana statutes allowing agency review, rejection, and writing  
19 of ballot issue language take significant time. As a result, Plaintiffs believe the  
20 agency review processes unconstitutionally interfere with initiative proponents’  
21 ability to collect the requisite number of signatures within the constitutionally  
22 provided timeframe.

23 Conversely, Defendants argue the election calendar has remained  
24 essentially unchanged for decades and SB 93 provides a more expedited  
25 consideration of statutory referendum than previously established. Summarizing



1 the various statutorily provided review periods for each step of the review  
2 process, Defendants state the previous process, established in 2019, allowed  
3 forty-four days for agency review whereas SB 93 reduced the time to thirty-seven  
4 days.

5 While the Court appreciates the difficulties ballot issue proponents  
6 face regarding the short timeline for qualifying an initiative, agency review of  
7 proposed ballot issues is not inherently unconstitutional. As established in the  
8 Court's prior order granting partial summary judgment, the Montana Constitution  
9 expressly reserves the powers of initiative and referendum to the people. The  
10 legislature, however, may create statutes facilitating the exercise of those powers.  
11 Plaintiffs appear to have interpreted the Court's prior ruling in a much broader  
12 fashion than intended. Specifically, Plaintiffs argue several statutes are  
13 unconstitutional because they are not necessary to facilitate participation in the  
14 process. However, a statute may facilitate the process without being strictly  
15 necessary to the process. For instance, a fiscal note is not necessary to the  
16 process, but it does facilitate the process by providing potential ballot petition  
17 signers with relevant, position neutral data. Statutes providing for agency review  
18 which facilitate the process are not unconstitutional. Therefore, each statute  
19 authorizing agency review must be considered individually to determine its  
20 constitutionality.

21 **VIII. Whether it is unconstitutional for the State to charge ballot**  
22 **proponents a filing fee to engage signature gatherers.**

23 Finally, Plaintiffs challenge Montana Code Annotated  
24 § 13-27-112(1)(a), which provides:

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1           A person who employs a paid signature gatherer shall register with  
2           the secretary of state prior to collecting signatures. Except as  
3           provided in subsection (1)(b), the registration in this subsection (1)  
4           must be accompanied by a filing fee of not more than \$100 or an  
          amount set by the secretary of state.

5           Montana Code Annotated § 13-27-112(1)(a). Plaintiffs’ argue the statute  
6           impairs the people’s power of initiative by requiring ballot proponents to  
7           pay an unconstitutional fee to employ signature gatherers. Plaintiffs  
8           analogize the filing fee for registering paid signature gatherers with the fee  
9           for filing ballot initiatives, which the Court struck down in its prior order  
10          on summary judgment.

11                  Defendants argue the filing fee statute does not impair Plaintiffs’  
12          rights because the secretary of state’s current rules set the fee at \$0. Defendants  
13          argue registration requirements are not inherently unconstitutional. Nonetheless,  
14          Plaintiffs have not challenged the registration requirements per se but challenge  
15          the constitutionality of filing fee requirements for ballot initiative signature  
16          gatherers. While Defendants argue the fee as currently established, cannot impair  
17          Plaintiffs’ rights, the fee statute is open ended and authorizes any “amount set by  
18          the secretary of state.” Accordingly, the issue then is not whether the fee is  
19          excessive but whether charging a filing fee for registering paid signature  
20          gatherers is unconstitutional on its face.

21                  Plaintiffs have not met their burden to establish the paid signature  
22          gatherer registration filing fee is facially unconstitutional. Unlike the fee this  
23          Court found unconstitutional in its prior order on summary judgment, the filing  
24          fee for registering paid signature gatherers does not appear on its face to be an  
25          arbitrary hurdle to participation in the initiative process. Whereas the \$3,700 fee

1 for submitting an initiative proposal required initiative proponents to pay for the  
2 right to participate in the process, the filing fee at issue here appears to be a  
3 standard administrative fee.

4 Notably, the fee only applies if an initiative proponent chooses to  
5 engage paid signature gatherers. Because the use of paid signature gatherers  
6 creates opportunity to incentivize the process, the registration requirement serves  
7 a legitimate purpose in monitoring the activity. A reasonable filing fee intended  
8 to facilitate the administration of the registration process is not facially  
9 unconstitutional. A reasonable filing fee in this context will not prevent initiative  
10 proponents from participating in the process because they have the option to  
11 engage volunteer signature gatherers, thus avoiding the registration requirement  
12 entirely, or seek a fee waiver by demonstrating financial hardship. Provided the  
13 filing fee remains reasonably related to the cost of administering the registration  
14 system, the registration fee is not unconstitutional.

15 **ORDER**

16 **IT IS HEREBY ORDERED** Plaintiffs’ second motion for partial  
17 summary judgment is **GRANTED** in accordance with this Order. Montana Code  
18 Annotated §§ 13-27-228 and 13-27-238(1)(d) are unconstitutional in that they  
19 violate Article V, Section 1 of the Montana State Constitution. Montana Code  
20 Annotated § 13-27-221 is unconstitutional in that it violates Article III, Section 4  
21 of the Montana State Constitution.

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1                                   **IT IS FURTHER ORDERED** Plaintiffs’ second motion for  
2 partial summary judgment is **DENIED** as to the remaining statutes.

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5                                   /s/ Mike Menahan  
6                                   MIKE MENAHAN  
7                                   District Court Judge

8  
9 cc:       John Meyer, via email  
10           Michael Noonan, via email  
11           Emily Jones, via email  
12           Austin Knudsen, via email  
13           Alwyn T. Lansing, via email

14 MM/sm/ Order – Pl. Second Motion Partial Summ Judgment  
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