

DA 25-0142

IN THE SUPREME COURT OF THE STATE OF MONTANA

2026 MT 233

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

Plaintiffs, Appellees,
and Cross-Appellants,

v.

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

Defendants, Appellants,
and Cross-Appellees.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. ADV-2023-388
Honorable Mike Menahan, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Austin Knudsen, Montana Attorney General, Brent Mead (argued),
Deputy Solicitor General, Michael D. Russell, Michael Noonan,
Assistant Attorneys General, Helena, Montana

For Appellees:

John Meyer (argued), Cottonwood Environmental Law Center,
Bozeman, Montana

For Amici Curiae Montana Chamber of Commerce, Montana Farm Bureau Federation, Montana Wood Products Association, Montana Bankers Association, and Montana Association of Realtors:

Dale Schowengerdt (argued), Landmark Law PLLC, Helena, Montana

For Amici Curiae Planned Parenthood Advocates of Montana and Montana Public Interest Research Group:

Robert Farris-Olsen (argued), Morrison, Sherwood, Wilson & Deola, PLLP, Helena, Montana

Argued: April 10, 2026
Submitted: April 14, 2026
Decided: October 6, 2026

Filed:



Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Mae Nan Ellingson, Jerome Leondorf, Arlyne Reichert, Hal Harper, Bob Brown, Evan Barrett, C.B. Pearson, Carole Mackin, Mark Mackin, and Jonathan Motl (collectively, “Ellingson” or “the Ellingson Plaintiffs”) sued the State of Montana, Governor Greg Gianforte, Attorney General Austin Knudsen, and Secretary of State Christi Jacobsen (collectively, “State”) in the First Judicial District Court to invalidate new laws governing the statewide initiative process. Ellingson alleged that several provisions of Senate Bill 93, 2023 Mont. Laws ch. 647 (“SB 93”), unconstitutionally diminished the people’s reserved power of direct democracy by imposing qualifications and procedural steps not contemplated by the Montana Constitution. In two rulings on separate motions, the District Court granted the Ellingson Plaintiffs summary judgment on four of their claims and denied relief on seven others. The parties stipulated to dismiss without prejudice all claims not resolved in Ellingson’s favor. Following entry of judgment, the District Court denied Ellingson’s motion for attorney fees.

¶2 The State appeals three of the District Court’s summary judgment rulings. The Ellingson Plaintiffs cross-appeal the denial of their request for fees. Restated, we consider the following issues on appeal:

1. *What standard governs a Montana court’s review of a constitutional challenge to laws regulating the initiative and referendum process?*
2. *Does § 13-27-221, MCA, prohibiting resubmission of a statewide ballot measure for four years after defeat of a substantially similar measure, violate the Montana Constitution?*

3. *Does § 13-27-228, MCA, authorizing legislative interim committees to vote on proposed ballot measures and place the result of the vote on the face of the petition, violate the Montana Constitution?*
4. *Does § 13-27-215, MCA, imposing a \$3,700 filing fee on all proposed ballot measures, violate the Montana Constitution even though it authorizes the Secretary of State to waive the fee for hardship?*
5. *Did the District Court abuse its discretion when it denied Ellingson's motion for attorney fees under the private attorney general doctrine?*

We affirm on all issues.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 The 2023 Montana Legislature's Senate Bill 93, passed and signed into law, generally revised the laws governing statewide ballot issues and established a host of new procedural requirements. 2023 Mont. Laws ch. 647. Among others that Ellingson challenged in this case were these four provisions, which the District Court declared invalid: (1) a requirement that initiative proponents pay the Secretary of State a \$3,700 filing fee unless they qualify for a hardship waiver (§ 13-27-215, MCA); (2) provisions authorizing the Attorney General to review the substantive legality of a proposed initiative or referendum (§§ 13-27-110, -226, MCA)¹; (3) a prohibition on refiling initiatives that are “substantially the same” as measures defeated by voters within the past four years (§ 13-27-221, MCA); and (4) provisions permitting an interim legislative committee to

¹ The District Court upheld the Attorney General's authority to review the form of a ballot issue petition for legal sufficiency, authority the Attorney General has had since 1977 and this Court has affirmed. *See Meyer v. Knudsen*, 2022 MT 109, ¶ 9, 409 Mont. 19, 510 P.3d 1246. This was one of the claims that Ellingson dismissed after the court denied her motion for summary judgment, and it is not at issue on appeal.

vote on proposed initiatives and directing the Secretary of State to place the results of that vote on the face of the ballot (§§ 13-27-228, -238(1)(d), MCA).

¶4 The Ellingson Plaintiffs were the citizen sponsors of three ballot initiatives for the 2024 election cycle. Motl prepared draft language for each of the initiatives and submitted them to the Secretary of State’s Office. That office directed Motl to pay the \$3,700 filing fee or, alternatively, to obtain a waiver by demonstrating financial hardship. Motl responded that the proponents were ineligible for a waiver but would nevertheless withhold payment. The Secretary of State’s Office rejected the proposed initiatives.

¶5 In May 2023, the Ellingson Plaintiffs filed this suit for declaratory and injunctive relief. Ellingson claimed that eleven of SB 93’s provisions were facially unconstitutional because they “impair[ed] the initiative and referendum power of the people by imposing requirements and obstacles that are not found within the Montana Constitution.” Ellingson prayed for judgment declaring the challenged provisions unconstitutional, an order enjoining the State from enforcing SB 93, and an award of attorney fees.

¶6 In October 2023, Ellingson moved for partial summary judgment with respect to the filing fee and the Attorney General’s authority to conduct substantive legal review of initiatives. The District Court granted Ellingson’s motion, concluding that both provisions were facially unconstitutional.² In March 2024, Ellingson filed a second summary

² The District Court concluded that the Attorney General does not have the authority to make determinations on the substantive legality of issues proposed by initiative, citing *Hoffman v. State*, 2014 MT 90, ¶ 9, 374 Mont. 405, 328 P.3d 604 (“As an executive officer of the State of Montana, the Attorney General does not have the authority to make a declaration regarding the constitutionality of [a proposed ballot issue]. ‘Constitutional questions are properly decided by a judicial body, not an administrative official, under the constitutional principle of separation of

judgment motion on their nine remaining claims. The District Court granted Ellingson’s motion with respect to the four-year refiling prohibition and the legislative committee vote. The court ruled against Ellingson on their remaining claims, holding that they had not met their burden to prove the statutes facially unconstitutional. The parties stipulated to dismiss all claims not resolved in Ellingson’s favor in September 2024, and the court entered judgment for Ellingson on their four successful claims shortly thereafter.

¶7 Ellingson moved to recover their costs and for an award of attorney fees under the private attorney general doctrine. The State opposed an award of fees. The District Court ruled that the Ellingson Plaintiffs failed to prove that their burden in bringing the litigation was of sufficient magnitude to warrant a fee award and denied their motion.

STANDARDS OF REVIEW

¶8 This Court exercises plenary review of constitutional questions. *Cottonwood Env’t Law Cntr. v. State*, 2024 MT 313, ¶ 7, 419 Mont. 457, 560 P.3d 1227 [hereinafter *Cottonwood II*] (citation omitted). The constitutionality of a statute is a question of law. *Cottonwood II*, ¶ 7. “The Framers’ intent controls our interpretation of a constitutional provision.” *Mont. Dem. Party v. Jacobsen*, 2024 MT 66, ¶ 18, 416 Mont. 44, 545 P.3d 1074 [hereinafter *MDP*] (citation omitted). We generally look to the plain meaning of the Constitution’s language to determine the Framers’ intent. *Nelson v. City of Billings*,

powers.” (citations omitted)); *See also Cottonwood Env’t Law Cntr. v. Knudsen*, 2022 MT 49, ¶¶ 28-36, 408 Mont. 57, 505 P.3d 837 [hereinafter *Cottonwood I*] (McGrath, C.J., with Sandefur, J., concurring). The State does not challenge the District Court’s conclusions on this issue. We therefore affirm the District Court’s order voiding § 13-27-110(7), MCA, to the extent that it defines “legal sufficiency” to include a determination of “the substantive legality of the proposed issue if approved by the voters.”

2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058 (citations omitted). But even in the context of clear and unambiguous language, a court considers “the historical and surrounding circumstances under which the framers drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve.” *Nelson*, ¶ 14 (citations omitted). The Constitution further informs a court’s interpretation. *State ex rel. Livingstone v. Murray*, 137 Mont. 557, 564-65, 354 P.2d 552, 555-56 (1960), *cited in MDP II*, ¶ 18.

¶9 We review summary judgment rulings de novo. *Mont. Cannabis Indus. Ass’n v. State*, 2016 MT 44, ¶ 11, 382 Mont. 256, 368 P.3d 1131 [hereinafter *MCIA*]. Summary judgment is appropriate when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. M. R. Civ. P. 56(c)(3). When no genuine dispute of material fact exists, the Court reviews for correctness a district court’s conclusion that the movant is entitled to judgment as a matter of law. *MCIA*, ¶ 11.

¶10 Whether legal authority exists to support an award of attorney fees is a legal conclusion that this Court reviews de novo. *Forward Mont. v. State*, 2024 MT 75, ¶ 12, 416 Mont. 175, 546 P.3d 778. If authority exists, we review for abuse of discretion a district court’s order awarding or denying fees. *Forward Mont.*, ¶ 12. A court abuses its discretion if “it acts arbitrarily, without employment of conscientious judgment, or in excess of the bounds of reason resulting in substantial injustice.” *Bitterroot River Protective Ass’n v. Bitterroot Conservation Dist.*, 2011 MT 51, ¶ 11, 359 Mont. 393, 251 P.3d 131 (citations omitted).

DISCUSSION

¶11 *1. What standard governs a Montana court’s review of a constitutional challenge to laws regulating the initiative and referendum process?*

¶12 The parties first ask us to consider whether the District Court properly interpreted and construed Article V, Section 1, and Article III, Sections 4 and 5, of the Montana Constitution. Article V establishes the Legislative Branch of state government. It opens with the following language in Section 1:

Power and Structure. The legislative power is vested in a legislature consisting of a senate and a house of representatives. The people reserve to themselves the powers of initiative and referendum.

Article III, entitled “General Government,” includes two separate sections giving life to those reserved powers. Section 4 provides:

Initiative. (1) The people may enact laws by initiative on all matters except appropriations of money and local or special laws.

(2) Initiative petitions must contain the full text of the proposed measure, shall be signed by at least five percent of the qualified electors in each of at least one-third of the legislative representative districts and the total number of signers must be at least five percent of the total qualified electors of the state. Petitions shall be filed with the secretary of state at least three months prior to the election at which the measure will be voted upon.

(3) The sufficiency of the initiative petition shall not be questioned after the election is held.

Section 5 governs the referendum process and provides in similar fashion that “[t]he people may approve or reject by referendum any act of the legislature except an appropriation of money.” It prescribes how a referendum may qualify for the ballot and when, upon the requisite number of signatures, an act referred for the ballot may be suspended pending the election. Mont. Const. art. III, § 5.

¶13 Ellingson’s first contention—with which the State does not substantively disagree—is that the people’s ability to pass or reject laws by initiative and referendum is a power the people reserved to themselves, not a right the Constitution bestowed. The parties also generally agree that the test for constitutionality of a legislative regulation of that power ultimately entails determining whether a regulation facilitates or impairs the initiative process.

¶14 The District Court likewise conducted its analysis by reviewing whether each of the challenged laws facilitated or impaired the initiative process. To determine impairment, the court considered (1) whether the Legislature subjected itself to the same regulation; (2) whether the regulation unreasonably inserted legislative power into the initiative process; or (3) whether the regulation created arbitrary obstacles to discourage participation.

¶15 The parties offer divergent views on what “facilitate or impair” means. The State contends that a regulation is not unconstitutional merely because the Legislature did not subject itself to the same. On appeal, the parties refer to this as the “equal footing test.” The State argues that “this Court has never required a perfect analogue” to exist between regulations governing representative and direct democracy. The State reasons that such a test is unworkable because the distinct processes of the people’s initiative and the legislative process require equally distinct regulations. Supporting Amici—Montana Chamber of Commerce, Montana Farm Bureau Federation, Montana Wood Products Association, Montana Bankers Association, and Montana Association of Realtors (collectively, “Business Amici”)—endorse the State’s argument. They add that if the

power of initiative is indeed a power, then the test should not assess a regulation’s constitutionality by its effect on a particular proposal but instead on “the impact of a law on the People’s collective lawmaking power.”

¶16 Ellingson counters that “equal footing” does not require an exact analogue in the legislative process. Instead, a court must determine whether the regulation “imposes [a] substantially greater burde[n] on the people’s legislative power than the [L]egislature imposes on its own” See Anthony Johnstone, *The Separation of Legislative Powers in the Initiative Process*, 101 Neb. L. Rev. 125, 151 (2022). Supporting Amici—Planned Parenthood Advocates of Montana and Montana Public Interest Research Group (collectively, “Ellingson Amici”)—agree. They surveyed statutes historically regulating the initiative process and suggest that those unchallenged regulations are constitutional because they provide appropriate deference to the people throughout the initiative process.

¶17 The initiative and referendum have a long history in Montana. Upon invitation from the United States and as part of achieving statehood, the people of Montana drafted and ratified their first constitution in 1889. See Act of February 22, 1889 (Enabling Act), 25 Stat. 676 (1889); see also James J. Lopach et al., *We the People of Montana: The Workings of Popular Government*, 4-6 (Mountain Press Publ’g Co. 1983). In the 1889 Constitution, the people “delegated to their representatives, the legislative body, the exclusive authority to make laws for the government of the state, subject only to such restrictions as were found in the Constitution and the exercise of the executive veto.” *State ex rel. Goodman v. Stewart*, 57 Mont. 144, 151, 187 P. 641, 643 (1920); see also Montana Constitutional Convention Commission, Commission Report Number 6: Legislative

Council Report on the Montana Constitution, 1 (1971) [hereinafter Conv. Comm’n Report No. 6]; Larry M. Elison & Fritz Snyder, *The Montana State Constitution*, 117-18 (Oxford Univ. Press 2011).

¶18 Within the first decade of the constitution’s adoption, however, a movement began to “recall that exclusive authority,” *Stewart*, 57 Mont. at 151, 187 P. at 643, by vesting the people with direct legislative power. “At the turn of the century, concern over corporate control of state legislatures prompted the Progressive Party to crusade for constitutional authorization of initiatives and referenda.” Elison & Snyder, at 101 (discussing the era of “inordinate influence” over the Legislature by Montana mining companies); Ellis Waldron & Paul B. Wilson, *Atlas of Montana Elections, 1889-1976*, 35-36 (1978); *see also Patrick v. State*, 2011 MT 169, ¶¶ 18-23, 361 Mont. 204, 257 P.3d 365 (recounting similar attempts at influence over the Montana judiciary during the same time). “After ten years of vigorous crusading,” Elison & Snyder, at 101, the people approved an amendment to the Montana Constitution in the November 1906 general election to secure the initiative and referendum. *See Stewart*, 57 Mont. at 148, 187 P. at 642; 1905 Mont. Laws ch. 61. The 1906 constitutional amendment reserved to the people “the power to propose laws, and to enact or reject the same at the polls,” excepting local and special laws, laws relating to appropriations of money, and constitutional amendments. *See Mont. Const. art. V, § 1* (1889, amended). The 1905 enabling legislation expressly required the Legislature to “enact legislation suitable for carrying [the power of direct democracy] into effect” once the voters approved the constitutional amendment. 1905 Mont. Laws ch. 61, § 2;

see also 1907 Mont. Laws ch. 62; *Sawyer Stores v. Mitchell*, 103 Mont. 148, 154, 62 P.2d 342, 345-46 (1936).

¶19 The delegates to the 1971 Montana Constitutional Convention were reminded of this history that—serving as both an immediate check on and a means to bypass an unresponsive Legislature—the powers of initiative and referendum were adopted as “[d]evice[s] . . . that would bring state government back under the control of the people” from that of “political machines or corporations.” Montana Constitutional Convention, Commission Report Number 12: The Legislature, p. 22 (1971) [hereinafter Conv. Comm’n Rep. No. 12]; Montana Constitutional Convention, Commission Report Number 11: Suffrage and Elections, p. 87 (1971) [hereinafter Conv. Comm’n Rep. No. 11]. The 1972 Montana Constitution was drafted and adopted with this tradition in place, making clear in its plain language that it reserved to the people the power to legislate directly and concurrently with the grant of authority to the representative legislative body.

¶20 Cementing that the Constitution’s force “obtains life [only] by the direct power of the people,” *State ex rel. Mont. Citizens for Preservation of Citizens’ Rights v. Waltermire*, 227 Mont. 85, 96, 738 P.2d 1255, 1262 (1987) [hereinafter *Mont. Citizens*], Article II, Sections 1 and 2, of the 1972 Montana Constitution provide:

Popular Sovereignty. All political power is vested in and derived from the people. All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole.

Self-government. The people have the exclusive right of governing themselves as a free, sovereign, and independent state. They may alter or abolish the constitution and form of government whenever they deem it necessary.

As the *Stewart* Court described more than 100 years ago, “In this country the power once vested in the king vests in the people” *Stewart*, 57 Mont. at 166, 187 P. at 648.

Through the people’s declaration, the Constitution thus functions as

not only the direct and basic expression of the sovereign will, [but] also the absolute rule of action and decision for all departments and offices of government with respect to all matters covered by it The state constitution is the mandate of a sovereign people to its servants and representatives.

General Agric. Corp. v. Moore, 166 Mont. 510, 515-16, 534 P.2d 859, 862-63 (1975) (citations omitted). Because the inherent power and authority reside with the people, “[n]o other authority can be put above them,” and “from the people, as a source, alone flows the delegated power of the [L]egislature” to represent the people’s will. *Mont. Citizens*, 227 Mont. at 96-97, 738 P.2d at 1262 (citations omitted) (discussing constitutional requirement for publication of constitutional amendment proposed by initiative). By the express terms of the new Constitution, legislative power is, in part, “vested in a legislature,” but the people expressly “reserved to themselves the powers of initiative and referendum.” Mont. Const. art. V, § 1.

¶21 Article III, Section 4, of the Montana Constitution prescribes the specific conditions and circumstances under which the power of initiative may be exercised, excluding only “appropriations of money and local or special laws” from that authority. It provides the particulars by which such measures will qualify for the ballot, including signatures from “at least five percent of the qualified electors in each of at least one-third of the legislative representative districts,” with a “total number of signers . . . at least five percent of the total qualified electors of the state.” Similar prescriptions are included in Article III, Section 5,

for the power of referendum. Unlike the 1906 constitutional amendment, the 1972 Montana Constitution does not expressly authorize the Legislature to enact regulations to carry forward the initiative and referendum process. *Compare* Mont. Const. art. V, § 1, art. III, § 4, *with* 1905 Mont. Laws ch. 61 § 2.

¶22 Constitutional law scholar and now Ninth Circuit United States Court of Appeals Judge Anthony Johnstone has described the unique relationship between the Legislature’s and the people’s lawmaking powers:

The initiative [power] . . . stands apart from other separated or shared powers in state constitutions because its lawmaking function operates independently but in the same manner as its legislative rival, while also depending on that rival for enabling legislation.

Johnstone, at 149. So long as legislative regulations do not contravene express constitutional provisions, we do not read the Constitution’s silence on enabling legislation “to disable the legislature from enacting statutes to facilitate the initiative process, which would disable the initiative process itself.” Johnstone, at 136-37. “As with other relationships between and within branches, the initiative power requires the legislature to provide the support necessary for a functioning initiative process, while respecting the constitutional independence of that process from legislative control.” Johnstone, at 150.

¶23 “Statutes are presumed to be constitutional, a presumption that may be overcome only after careful consideration of the purpose and effect of the statute.” *State v. Smith*, 2021 MT 148, ¶ 56, 404 Mont. 245, 488 P.3d 531 (internal quotation marks and brackets omitted; citation omitted). “The party challenging the constitutionality of a statute has the burden of proving beyond a reasonable doubt that it is unconstitutional.” *Smith*, ¶ 56

(citation omitted). This principle applies fully to statutes governing initiative and referendum. Our Opinion in *Stewart*, however, recognized a qualification in this context. We observed that under “the strict rules of constitutional and statutory construction, . . . [e]very intendment should be taken in favor of the propriety of legislative action, and in case of doubt the doubt will be resolved in favor of the propriety of legislative action” *Stewart*, 57 Mont. at 164-65, 187 P. at 648 (internal quotations and citation omitted). But we continued:

We are not here called upon, however, to determine merely the constitutionality of a legislative Act, or to decide as to whether a legislative body clearly exceeded its authority; but we are to determine a legal controversy between two law-making bodies of the state--on the one hand the people, who are supreme, the creator of the legislature, in whom, originally, all power is vested; and, on the other hand, the legislature, the creature of the people.

In the context of the peoples’ co-equal legislative power, therefore, we explained that doubts “should be resolved in favor of the reserved power of the people[.]” *Stewart*, 57 Mont. at 165, 187 P. at 648.³

¶24 As we observed in *General Agric. Corp.*, 166 Mont. at 515, 534 P.2d at 862, “[t]he supremacy of constitutional mandates is too well established to require citation.” Thus, as legislative power is divided equally between the representative legislative body and the

³ The Court’s discussion involved its examination of the Legislature’s declaration of an “emergency” that would take away the right of referendum under the 1889 Constitution. Article V, Section 26, reserved to the people the power of referendum except, as applicable, “as to laws necessary for the immediate preservation of the public peace, health or safety.” Thus, the Court was called upon “to decide whether an admittedly valid and proper Act of the legislature comes within the class of Acts which may, by proper proceedings provided for in the Constitution, be referred to the people, or whether it falls within the exception to the reserved right.” *Stewart*, 57 Mont. at 163, 187 P. at 647.

people, the Legislature may not interfere when the Constitution prescribes the conditions for exercise of the people's process. Laws that add restrictions, narrow the subject matter amenable to initiative power, or prescribe qualifications or requirements already fixed in Article III, Section 4, of the Montana Constitution, are precluded by the principle that the Legislature may not act contrary to express constitutional provision. "The state constitution is the mandate of a sovereign people to its servants and representatives. No one of them has a right to ignore or disregard its mandates, and the legislature, the executive officers, and the judiciary cannot lawfully act beyond its limitations." *General Agric. Corp.*, 166 Mont. at 516, 534 P.2d at 862-63. *See also Powder River Cnty. v. State*, 2002 MT 259, ¶ 40, 312 Mont. 198, 60 P.3d 357 ("The legislature, . . . by the enactment of statute, possesses all powers of law-making in this state except only in so far as those powers are curtailed in the Constitution.").⁴ *See also* 16 C.J.S. Constitutional Law § 148 (explaining that when a state constitution "defines the circumstances under which a right may be exercised, the specification is an implied prohibition against legislative interference to add to the condition").

¶25 As the State and Business Amici note, though the people's power to make law is equal in degree to the Legislature's, it is different in kind. As we discussed in *Sawyer Stores*, the Legislature shares lawmaking power with the people but has the advantage of a dedicated period to confer and deliberate on proposed policy measures, where voters do

⁴ The parties focus their attention on Article III, Section 4, of the Montana Constitution, because the dispute hinges on the power of statutory initiative. But the principles we discuss here apply equally to the power of referendum as reserved in Article III, Section 5, of the Montana Constitution.

not. *Sawyer Stores*, 103 Mont. at 167-69, 623 P.2d at 351-52. Due to the different deliberative conditions under which representative power and direct legislative power operate, the Legislature appropriately may consider these differences when regulating the initiative and referendum process.

¶26 Subject to express constitutional limitations, because of the Legislature’s required role to implement the initiative and referendum process to make it orderly and workable, it plainly has authority to enact procedures to carry that process into effect—for filing, drafting review, signature gathering, verification, and election administration. *See Sawyer Stores*, 103 Mont. at 154, 168-69, 62 P.2d at 345-46. As such, whether the Legislature acts within its constitutional authority when it regulates the initiative process depends on whether such regulations “facilitate the initiative power” or “impair the initiative power.” *Johnstone*, at 149. A precise analogue need not be found between regulations governing the Legislature’s and the people’s lawmaking processes if the regulation does not substantially burden or interfere with the exercise of the people’s independent power. Legislative practice may provide useful evidence of whether a requirement serves a genuine facilitative function, but it is not a separate test.

¶27 At bottom, their shared lawmaking authority requires that the people and the Legislature retain “equal, coordinate, and independent” power to legislate. *Cf. Powder River Cnty.*, ¶ 112 (discussing separation of powers among the three branches). If the Legislature substantially interferes with or burdens the people’s exercise of initiative power or inserts its own policy choices into the people’s initiated proposals, it unconstitutionally impairs the people’s independent power. *Stewart*, 57 Mont. at 171-73, 187 P. at 651;

see also Johnstone, at 157. The Legislature’s proper regulation of the initiative and referendum process is limited to implementing and facilitating the process. The Constitution also sets forth the Legislature’s express duty to “guard against abuses of the electoral process.” Mont. Const. art. IV, § 3. *Cf.* 1905 Mont. Laws ch. 61, § 2 (directing Legislature to “enact *Legislation suitable for carrying this amendment into effect*” (emphasis added)); *see also* *Chouteau Cnty. v. Grossman*, 172 Mont. 373, 378, 563 P.2d 1125, 1128 (1977) (liberally construing statutes that “*aid*” in the exercise of initiative and referendum power); *accord* *Ford v. Mitchell*, 103 Mont. 99, 108, 61 P.2d 815, 819 (1936).

¶28 Regulations governing procedure and form are necessary to carry the initiative process into effect and do not impair the power so long as they do not impose substantial burdens or undermine the foundational principles of popular sovereignty and self-government. The Legislature’s implied powers historically have included prescribing mechanisms to ensure “notice to the voter of the nature and purpose of the initiative measure” so that “the result shall represent the will of a majority of voters.” *Sawyer Stores*, 103 Mont. at 168-69, 62 P.2d at 352; *Ford*, 103 Mont. at 109, 61 P.2d at 819 (“The act was passed as a safeguard to the rights of the voters to whom the petition was offered for signature. The requirement was intended to secure the voters, whose interests were to be affected, an opportunity to know what they were signing, and to know that they were not signing something different from those whose signatures appeared on the petition.”); *see* §§ 106-114, RCM (1907).⁵

⁵ Judge Johnstone notes common examples of facilitating regulations found in other states, as well as ours. These examples include: (1) “[l]egislative review of proposals assist[ing] proponents, at

¶29 The Constitution and its history demonstrate that the path for the people’s lawmaking power was intended to have as few obstacles as possible before reaching the ballot and eventually becoming law; the path should be direct. *See* Mont. Const. art. VI, § 10(1) (excluding initiative and referendum measures from governor’s veto power); *State ex rel. Mont. Sch. Bd. Ass’n v. Waltermire*, 224 Mont. 296, 299, 729 P.2d 1297, 1299 (1986) (holding Court’s interference with initiative power prior to election appropriate only for “extraordinary cause,” and discretionary review “should not be exercised unless it is absolutely essential”); *McDonald v. Jacobsen*, 2022 MT 160, ¶ 14, 409 Mont. 405, 515 P.3d 777 (explaining that Court’s pre-election review of initiative and referendum is “rare” and exercised only when the proposed law is “obvious[ly] defec[tive]” or “unquestionably and palpably unconstitutional on its face” (citations omitted)); Montana Constitutional Convention, Verbatim Transcripts, March 18, 1972, Vol. VII, pp. 2696-97 (removing requirements for strict technical language in statutory initiative proposals); *see also* Montana Constitutional Convention, Verbatim Transcripts, February 17, 1972, Vol. III, pp. 456, 461-62 (removing legislative commission from constitutional initiative process). This is not to say, however, that every inconvenience is facially unconstitutional. Regulations originating from the Legislature’s implied powers that function to carry the

least inexperienced proponents, in drafting an initiative that will bring about their intended policy effects”; (2) “[o]fficial petition forms allow[ing] voters to know what they are signing, assur[ing] proponents their petitions will be accepted, and facilitat[ing] county and state officials’ efficient verification of signatures on the petitions”; (3) “[t]ime, place, and manner regulations of petitioners guard[ing] against fraud, duress, and aggressive tactics that distort the petitioning process and give the initiative process a bad name”; (4) “[b]allot statements and other voter information efforts [that] help proponents explain their purposes and may inform voters of the arguments against the initiative”; (5) “[c]lear procedures, and enforceable penalties for violating them, [that] are essential to the exercise of direct democracy.” Johnstone, at 150.

initiative process into effect, *cf. Sawyer Stores*, 103 Mont. at 160, 168-69, 62 P.2d at 348, 351-52; *Ford*, 103 Mont. at 109, 61 P.2d at 819; *Chouteau Cnty.*, 172 Mont. at 378, 563 P.2d at 1128, or fall under the Legislative duty to “insure [sic] the purity of elections and guard against abuses of the electoral process,” Mont. Const. art. IV, § 3, may impose some burden—and are permissible if they do not impair the initiative or referendum process.

¶30 In short, because “it is fundamental law that the people may themselves propose legislation,” *Stewart*, 57 Mont. 171-72, 187 P. at 651, the people did not reserve for themselves the lawmaking power “to place in the hands of the [L]egislature a weapon to defeat and destroy that power” or to “nullify” that which allows them peacefully to accomplish the fundamental goals of popular sovereignty and self-government. *Stewart*, 57 Mont. at 171-72, 187 P. at 651; *Harper v. Greely*, 234 Mont. 259, 267-68, 763 P.2d 650, 655 (1988).

¶31 As “arbiters between two equally powerful bodies of the same branch of the government,” it is a court’s duty to determine the constitutionality of regulations governing the initiative and referendum process. *Stewart*, 57 Mont. 167, 187 P. at 651; *MDP*, ¶ 30. We have broadly construed the initiative power to “maintain the maximum power in the people.” *State ex rel. Harper v. Waltermire*, 213 Mont. 425, 429, 691 P.2d 826, 829 (1984); *Chouteau Cnty.*, 172 Mont. at 378, 563 P.2d at 1128; *Ford*, 103 Mont. at 108, 61 P.2d at 819. In other words, doubts about whether a regulation facilitates or impairs the initiative process “shall be resolved in favor of the people, in whom the power originally vested and

who have reserved” to themselves the power to make law independent of and equal to the Legislature. *Stewart*, 57 Mont. at 165, 187 P. at 649.

¶32 In summary, we hold that the Legislature may not impose requirements for ballot measures that exceed express conditions set forth in the Montana Constitution. We will examine a challenged statute to determine whether it reasonably helps administer the initiative process, supplies neutral information needed to carry it into effect, or protects against abuses in the process without materially burdening the people’s independent lawmaking power or conditioning access to that power on a substantive requirement the Constitution does not impose. The Legislature’s imposition of a regulation on the initiative process that it does not require for its own processes will be taken into account in determining whether the regulation is reasonably necessary to facilitate the process. A regulation will be invalid if it substantially burdens the exercise of the people’s coextensive lawmaking power. Finally, doubts about the regulation’s constitutionality must be resolved in favor of the people’s reserved power. We turn to the challenged statutes to apply these principles.

¶33 2. *Does § 13-27-221, MCA, prohibiting resubmission of a statewide ballot measure for four years after defeat of a substantially similar measure, violate the Montana Constitution?*

¶34 Section 13-27-221, MCA, prohibits a statewide initiative from being “filed if it is substantially the same as a measure defeated by the voters in an election within the preceding 4 years.” The District Court found the law facially unconstitutional under Article V, Section 1, and Article III, Section 4, of the Montana Constitution. The court concluded that § 13-27-221, MCA, arbitrarily limited proposed initiatives in contravention

of the plain language of the Constitution. The District Court added that no such regulation exists for the Legislature and concluded that the regulation did not pass constitutional muster.

¶35 Article III, Section 4(1), of the Montana Constitution provides the people the authority to “enact laws by initiative on all matters except appropriations of money and local or special laws.” The text of this provision is clear: proposed laws on “*all* matters,” with two precisely defined exceptions, are fair game.

¶36 The State concedes the same but contends that the four-year resubmission limitation is merely a procedural protection and a small inconvenience that falls within the Legislature’s regulatory tradition. The State and Business Amici suggest that the Legislature is acting within its express duty to protect the initiative process from abuse. Mont. Const. art. IV, § 3. They posit that a small and loud minority’s attempts to pass frivolous laws causes voter fatigue, and the resubmission clause thereby protects the integrity of the initiative process. They contend that the resubmission clause opens the marketplace of ideas to a more diverse array of perspectives and ensures that initiatives truly represent the will of the majority.

¶37 Quoting the 1972 Montana Constitutional Convention debates, the State notes that preventing “frivolous legislative efforts by a small minority” while allowing “serious, popular measures” to reach the ballot was a major concern for the delegates. Conv. Tr., Vol. VII, pp. 2695-96. The State overlooks, however, that the delegates satisfied this concern by including stringent signature requirements in the Constitution’s text. Conv. Tr., Vol. VII, pp. 2695-96; *see, e.g.*, Conv. Tr., Vol. III, pp. 455-56 (suggesting that

signature requirements for calling a constitutional convention were “high enough to prevent frivolous attempts at constitutional change and yet low enough to [e]nsure citizens constitutional control”); Conv. Tr., Vol. III, pp. 505-09 (debating signature requirements for initiatives for constitutional amendments); *see also State ex rel. Graham v. Bd. of Examiners*, 125 Mont. 419, 427, 239 P.2d 283, 289 (1952) (explaining that the signature requirements’ purpose is to deter “trivial matters” from being presented on the ballot[,] and for a proponent to meet that requirement demands “sufficient interest so that a substantial number of people of the state desire the legislation proposed, and the public interest [is not] a local one but must be such that . . . [several] counties desire such legislation.”)

¶38 There is no shortcut in these signature requirements for resubmitting an initiative petition approved in a previous election cycle. Proponents of a proposed measure—even if once put before the voters and defeated—must satisfy the signature requirements to qualify each measure for the ballot. Once they do, they have met the Constitution’s requirements for submitting the measure to the voters. Aside from those explicit limitations, the people’s power is plenary insofar as the United States or Montana Constitutions provide no restriction. *State ex rel. Bonner v. Dixon*, 59 Mont. 58, 76, 195 P. 841, 844 (1921). The resubmission provision does not facilitate the people’s lawmaking power—it places an obstacle in the process.

¶39 We are unpersuaded that § 13-27-221, MCA, is merely procedural. A proposed measure cannot be resubmitted if it is “*substantially* the same as a measure defeated by the voters in an election within the preceding 4 years.” Section 13-27-221, MCA (emphasis

added). The measure's text and substance provide the basis for determining whether a measure may be resubmitted. The four-year resubmission limitation is thus an abridgement of the Montana Constitution's reservation of initiative power on "all matters except appropriations of money and local or special laws." Mont. Const. art. III, § 4(1). Whatever the State's legitimate interests in avoiding ballot congestion and added administrative expense, the four-year resubmission clause substantially burdens the initiative process by limiting measures that can qualify for the ballot based on their substantive content. As the District Court observed, no such limitation appears in the Constitution or exists for the Legislature, thereby elevating its lawmaking power above the initiative's independent legislative autonomy.

¶40 The State and Business Amici maintain that the regulation nonetheless safeguards the initiative process by guarding against voter fatigue. They presented no evidence of Montana "voter fatigue" from repeat ballot submissions or, for that matter, of any measures being resubmitted on the Montana ballot after failure. Their suggestion that the resubmission clause protects the initiative process from abuse and voter fatigue thus finds no support in the record. Likewise, the State's argument that a loud minority dominates the initiative process also finds no record basis. The Legislature cannot purport to act under its duty to guard against abuses in the electoral process when there is no factual support for that theory. *See Stewart*, 57 Mont. at 166, 173-74, 187 P. at 648, 651-52 (holding Legislature's declaration of an emergency exception to the people's referendum power under the 1889 Montana Constitution was insufficient and required factual support).

¶41 Resolving doubts in favor of the people, the unsupported threat of voter fatigue is insufficient to sustain this burden on the initiative process. *Stewart*, 57 Mont. at 167, 187 P. at 649. We affirm the District Court’s ruling that § 13-27-221, MCA, impairs the initiative process and is facially unconstitutional.

¶42 3. *Does § 13-27-228, MCA, authorizing legislative interim committees to vote on proposed ballot measures and place the result of the vote on the face of the petition, violate the Montana Constitution?*

¶43 Under § 13-27-228, MCA, once the Attorney General finds a proposed statewide initiative⁶ to be legally sufficient, the Secretary of State is directed to give a legislative interim or administrative committee (“committee”) the text of the proposed measure. Section 13-27-228(1), MCA. Within fourteen days of receiving the full text of the proposed statewide initiative, the committee must hold a public meeting, vote “to either support or not support the placement of the proposed statewide initiative text on the ballot,” and submit their vote to the Secretary of State (“committee vote” or “vote”). Section 13-27-228(2)-(3), MCA. The outcome of the 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 initiative is placed on the ballot.” Section 13-27-228(4), MCA. The result of the committee vote is, however, placed on the face of the petition, providing:

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

⁶ Statewide initiative means a “constitutional initiative, a constitutional convention initiative, or a statutory initiative.” Section 13-27-110(11), MCA.

of the vote was [x] in favor of placing the measure on the ballot and [x] against placing the measure on the ballot.

Sections 13-27-238(1)(d), -241(1)(d), -242(1)(d), MCA.

¶44 The District Court determined that by requiring the committee's vote to be placed on the face of the petition, the Legislature "unlawfully inserted [itself] into the people's independent lawmaking process." The District Court added that the vote "serves no purpose other than to provide an unsolicited opinion on the substance of the proposal."

¶45 The State argues that additional information on the face of the petitions falls within its express duty to secure elections from fraud and injustice, Mont. Const. art. IV, § 3, and its implied powers to generally facilitate the initiative process. *Cf. Sawyer Stores*, 103 Mont. at 160, 168-69, 62 P.2d at 348, 351-52; *Ford*, 103 Mont. at 109, 61 P.2d at 819; *Chouteau Cnty.*, 172 Mont. at 378, 563 at P.2d 1128. The State contends that inclusion of the committee vote is non-argumentative and that even if it were, voter information pamphlets contain strident arguments that the Appellees do not challenge here. The State adds that voters are advised to read the entirety of a petition, §§ 13-27-238 through -242, MCA, and can "dra[w] on both official and unofficial sources of information and education [in the exercise of] his or her political judgment." *Harper*, 234 Mont. at 269, 763 P.2d at 657. The State characterizes the committee vote as merely more information to facilitate the initiative process.

¶46 Ellingson responds that, though the State may regulate a petition's form, additions to a petition beyond the constitutional requirement historically have been limited to neutral statements. Ellingson Amici add that the committee vote inserts Legislative power into the

initiative process in a way that does not ultimately assist the people or facilitate the people's independent lawmaking power.

¶47 The people rely on two formal documents to make law: the petition and the ballot. Without them, the people cannot engage in direct legislation. Before an issue may be placed on the ballot, the people must circulate a petition, § 13-27-103, MCA, in approved form, § 13-27-233, MCA, and gather the required number of signatures, Mont. Const. art. III, §§ 4-5. The people's process of deliberation begins when the petition is approved for circulation. Circulating a petition serves at least two essential purposes in direct democracy: to disseminate information about the proposed measure and to gain support for that measure. This effort demands the expenditure of the people's time, money, and labor without financial support from the government.

¶48 The Constitution's only requirement for what must be included in a petition is the "full text of the proposed measure" Mont. Const. art. III, § 4(2). The Legislature is presumed to be precluded from supplementing this requirement. Johnstone, at 149. To overcome this presumption, the text must facilitate the initiative process, *Sawyer Stores*, 103 Mont. at 160, 168-69, 62 P.2d at 348, 351-52, or protect the initiative process from fraud and injustice, Mont. Const. art. IV, § 3, without impairing that process.

¶49 Since first enacted in 1907, regulations have required that petitions contain text supplementing the full text of the proposed measure, at first addressing only the penalties for unlawfully signing a petition. Section 107, RCM (1907). Since then, regulations requiring additional text have mandated that it be non-argumentative. For example, the 1977 revised regulations provided the attorney general with the authority to issue a

statement of purpose. Section 37-127, RCM (1977). Since at least 1981, that statement has appeared on the face of both the petition and the ballot. Section 13-27-312, MCA (1981 Mont. Laws 1981, ch. 488, § 7); *see also* Secretary of State, *Voter Information Pamphlet for General Election on November 2, 1982* (1982). At that time, regulations required that the attorney general’s statement give “a true and impartial statement of the purposes of the issue in plain, easily understood language and in a manner that [was] *not an argument or likely to create prejudice for or against the issue.*” Section 37-127, RCM (1977) (emphasis added); *see also* § 13-27-312, MCA (1981). The current version of the statute maintains the requirement that the statement of purpose meet the standard of neutrality. Section 13-27-212(1), MCA.

¶50 The State asserts that the committee vote is merely a presentation of the fact that the committee approved or disapproved of the measure’s placement on the ballot. But it fails to explain how the legislative body’s approval or disapproval has any place in the concurrent, independent lawmaking power reserved to the people. The vote interjects the weight of the Legislature’s opinion on the measure rather than serving to carry the process into effect. The law, meanwhile, requires the proponent’s statement of purpose to be an “impartial explanation.” Section 13-27-212(1), MCA.

¶51 The committee vote also stalls the commencement of signature gathering by fourteen days. The State suggests that the petitioners should simply start earlier to accommodate for this borrowed time. But in making this argument, the State minimizes that the initiative process is constrained to a timeline. To place an initiative on the November 3, 2026 ballot, the total time between when a sponsor is allowed to submit

for review a proposed measure to when signature gathering must cease is, at most, just over a year and a month. Sections 13-27-104, -216, -233, -301, 13-1-104(1), 1-1-301 through -307, MCA.⁷ Review includes several other steps—some of which may take up to a month—that must be accomplished before a petition may receive final approval for circulation. *See* §§ 13-27-216, -218, -219, MCA.

¶52 Not all regulations that interrupt a petition’s timeline to accommodate governmental review are facially unconstitutional. Ellingson Amici draw two material distinctions between the committee vote and the legislative services division’s separate and less problematic review. Section 13-27-225, MCA. The legislative services division reviews a proposed measure’s “text and ballot statement for clarity, consistency, and conformity” with the bill drafting manual as well as other laws and factors “that the staff considers when drafting proposed legislation.” Section 13-27-225(1), MCA. The legislative services division then provides recommendations that the proponent may accept, reject, or modify. Section 13-27-225(2), MCA.

¶53 The legislative services division’s review facilitates the initiative process because it helps ensure consistency in the drafting of laws and “assists proponents, at least inexperienced proponents, in drafting an initiative that will bring about their intended policy effects.” Johnstone, at 150. It also does not impair because it defers to the people the final determination of the proposed measure’s text, thereby ultimately empowering independent lawmaking. The legislative services division’s review is the type of regulation

⁷ *See also* Montana Secretary of State, *2025-2026 Ballot Issue Calendar*, <https://perma.cc/JW7F-R8TG>.

that facilitates the people's discrete deliberative process recognized in *Sawyer Stores*, 103 Mont. at 160, 168-69, 62 P.2d at 348, 351-52. By contrast, the committee vote neither provides clarity nor aids the proponent in drafting law. The appearance of the committee vote on the face of the ballot also is mandatory, stripping the people of deference or discretion over their own proposals.

¶54 The State finally argues that the committee vote provides an organized forum that encourages public participation on a proposed measure. It adds that the committee vote is indistinguishable from the voter information pamphlet. The State ignores material distinctions between the voter information pamphlet and the petition. The voter information pamphlet is prepared after a measure has qualified for the ballot to help voters cast an informed vote. *See* Title 13, chapter 27, part 4, MCA. The procedures for preparing the voter information pamphlet are entirely separate from and do not disrupt the limited timeline for reviewing and circulating petitions. And the government does not rely on the time, labor, and money of the people to disseminate the arguments contained in the pamphlet. Section 13-27-410, MCA. The voter information pamphlet is an official government publication, designed to both educate and influence a voter, providing arguments for and against adoption of proposals that will appear on their ballots. The current provision for proponents' and opponents' arguments to be included in the voter information pamphlet—often written by legislators, at least in part—provides the vehicle for voters to receive information and education about the measure outside the petition process and is an adequate forum for public participation.

¶55 As a final observation, the 1972 delegates discussed whether to include the Legislature in procedures for initiating constitutional conventions, recognizing that it could cause delay, so that the Legislature could “provide for a preparatory commission to assemble information on constitutional questions to assist the voters” on the initiative. Montana Constitutional Convention, General Government and Constitutional Amendment Committee Proposal on Constitutional Revisions, February 12, 1972, pp. 2-3 (1972) [hereinafter *Conv. Comm. Proposal, Constitutional Revision*]. Though some delegates found value in the Legislature’s involvement, the delegates ultimately decided to remove the Legislature from the initiative process, concluding that “power of the people [must remain] independent of the Legislative Assembly” *Conv. Tr.*, Vol. III, pp. 456-62. *Compare* *Conv. Comm. Proposal, Constitutional Revision*, pp. 2-3, *with* *Mont. Const. art. XIV, § 2* (1972).

¶56 Because the people’s power of initiative is independent of the law-making power of the Legislature, the latter’s voice has no place on the face of the petition. The Legislature is not precluded from providing the voter with more information than what is available on the petition, but it must do so independent of the petition’s form and process. It may not place its thumb on the scale by conditioning the circulation of petitions on the inclusion of its own body’s recommendation on the proposed measure. The committee vote impairs the initiative power because it interferes with the people’s independent ability to make law, substantially burdens the people’s timeline for balloting an issue, and does so without final deference to the people. We affirm the District Court’s ruling that § 13-27-228, MCA, is facially unconstitutional.

¶57 4. *Does § 13-27-215, MCA, imposing a \$3,700 filing fee on all proposed ballot measures, violate the Montana Constitution even though it authorizes the Secretary of State to waive the fee for hardship?*

¶58 Section 13-27-215(1), MCA, requires a proponent of any statutory initiative, statutory referendum, constitutional initiative, or constitutional convention initiative to include a “nonrefundable filing fee of \$3,700 per submitted proposal at the time of submittal to the secretary of state.” The fees are distributed between the Secretary of State, Legislative Services Division, and Department of Justice to “defray the costs of review by those officers.” Section 13-27-215(2), MCA. A proponent may request a waiver “by demonstrating a financial inability to pay without substantial hardship” and may be subject to penalty if it is discovered the proponent had the “ability to pay.” Section 13-27-215(3), MCA.⁸

¶59 The District Court found that the filing fee impaired the initiative process because a similar rule did not apply to the Legislature, which instead uses its taxing power to fund its lawmaking process. The court considered the availability of a discretionary waiver upon the proponent’s showing of “a financial inability to pay without substantial hardship” and concluded that it did not remedy the filing fee’s constitutional infirmities. It found the

⁸ Before the District Court, the State challenged the Ellingson Plaintiffs’ standing to contest the filing fee because they did not apply for the waiver. But during oral argument, the State acknowledged that our recent decision in *Noland v. State*, 2025 MT 294, 425 Mont. 328, 581 P.3d 47, resolves this question.

waiver both vague and an arbitrary hurdle in the initiative process. The District Court determined that the \$3,700 filing fee was facially unconstitutional.⁹

¶60 The Montana Constitution does not mention filing fees or fees generally as a condition to participate in the initiative process. Mont. Const. art. III, § 4. As noted previously, the Convention delegates crafted the signature requirements to prevent frivolous or unserious attempts at making law. Conv. Tr., Vol. VII, pp. 2695-96; *see also* Conv. Tr., Vol. III, pp. 455-56; Conv. Tr., Vol. III, pp. 505-09; *State ex rel. Graham*, 125 Mont. at 427, 239 P.2d at 289. Applying the principles discussed earlier in this Opinion, because the Constitution establishes specific conditions to qualify a measure for the ballot, the Legislature is precluded from supplementing those requirements with additional qualifications except as reasonably necessary to facilitate the process.

¶61 The State contends that the filing fee serves to protect the initiative process from frivolous attempts at lawmaking that do not represent the majority's will. Notwithstanding the State's unsubstantiated proposition that financial burden dissuades a loud minority from dominating the initiative process, such a justification for imposing the challenged filing fee does not find support in the Constitution. The State therefore must demonstrate that the fee is reasonably necessary to facilitate or protect the initiative process or to prevent demonstrable abuses in the process. *Cf. Sawyer Stores*, 103 Mont. at 160, 168-69, 62 P.2d at 348, 352; *Ford*, 103 Mont. at 109, 61 P.2d at 819.

⁹ The District Court upheld SB 93's \$100 filing fee for registration of paid signature gatherers. Section 13-27-112(1)(a), MCA. Unlike the \$3,700 filing fee, the court observed, this fee "appears to be a standard administrative fee." Ellingson voluntarily dismissed this claim and does not challenge the court's ruling on appeal.

¶62 The State suggests that the fee facilitates the initiative process because it is necessary to defray the costs of reviewing and processing initiative applications. But in its attempt to cabin Ellingson’s facial challenge to an as-applied challenge, the State notes that since the fee was imposed, all proponents have qualified for a waiver of the costly fee. Waiving all fees does not comport with the State’s assertion that the fees are necessary to defray the costs of the officers’ review and process of initiatives. The State’s allegations that the challenged fee is necessary has no basis in the record. A fee of \$3,700 to submit a petition, even if waiver is possible, together with the threat of penalty, is not justified by the State’s showing and may deter the exercise of the people’s independent lawmaking power.

¶63 The State acknowledges that the signature requirements—compelling proponents to obtain a significant number of signatures from at least one-third of the 100 legislative representative House districts—deters unserious proposals. By the State’s own argument, the \$3,700 fee is intended to *keep people from filing petitions* rather than to administer or facilitate the initiative process. Finally, the fact that the Legislature does not impose any fees—much less the same fees—upon itself for submitting bill drafts to the body for consideration and vote represents a double standard and an impairment of the initiative process. Johnstone, at 159-60. We affirm the District Court’s determination that § 13-27-215, MCA, is facially unconstitutional.

¶64 5. *Did the District Court abuse its discretion when it denied Ellingson’s motion for attorney fees under the private attorney general doctrine?*

¶65 Montana follows the American Rule that, absent statutory or contractual authority, prevailing parties must pay their own attorney fees. *Forward Mont.*, ¶ 14. Although we recognize limited exceptions, we construe such exceptions narrowly so that they do not “swallow the rule.” *W. Tradition P’ship v. Att’y Gen. of Mont.*, 2012 MT 271, ¶ 9, 367 Mont. 112, 291 P.3d 545 (citations omitted).

¶66 The private attorney general doctrine is one equitable exception to the American Rule. *W. Tradition P’ship*, ¶ 13. An award of fees is proper under the doctrine “when the government, for some reason, fails to properly enforce interests which are significant to its citizens and private citizens must take up litigation to vindicate those interests.” *Burns v. Cnty. of Musselshell*, 2019 MT 291, ¶ 13, 398 Mont. 140, 454 P.3d 685 (internal quotations omitted; citations omitted). The fee-seeking party must show the following three factors to prove that they are entitled to a fee award: “(1) the strength or societal importance of the policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, [and] (3) the number of people standing to benefit from the decision.” *Montanans for the Responsible Use of the Sch. Tr. v. State ex rel. Bd. of Land Comm’rs*, 1999 MT 263, ¶¶ 66-67, 296 Mont. 402, 989 P.2d 800 [hereinafter *Montrust*]. We also consider whether awarding fees would be equitable under the circumstances. *Forward Mont.*, ¶ 30; *W. Tradition P’ship*, ¶ 18. Although equity is not an independent requirement of the doctrine, it may function as a guidepost for determining whether an award is proper and consistent with the doctrine’s purpose.

Forward Mont., ¶ 30; *W. Tradition P’ship*, ¶ 18. Like other exceptions, we invoke this exception sparingly. *W. Tradition P’ship*, ¶ 13.

¶67 The District Court remarked that Ellingson could “likely satisfy the first and third *Montrust* factors” because those statutes it found unconstitutional interfered with citizens’ initiative and referendum powers, and “[p]rotecting Montanans’ constitutional rights is of the utmost societal importance and stands to benefit all.” The court concluded, however, that the Ellingson Plaintiffs failed to prove the second *Montrust* factor and denied their claim on that basis. The court found that the magnitude of Ellingson’s burden did not support a fee award considering the following circumstances: (1) the parties did not engage in discovery, (2) the court resolved Ellingson’s successful claims on summary judgment, and (3) the parties stipulated to dismiss Ellingson’s remaining claims, thereby avoiding further litigation. The court also considered that Ellingson increased their own burden by presenting their arguments in two summary judgment motions instead of one and that only a portion of Ellingson’s burden was attributable to their four successful claims. The court explained that Ellingson could not recover fees for the seven other claims they agreed to dismiss, which “necessarily reduce[d] the burden on [Ellingson] attributable to vindicating their constitutional rights.”

¶68 Ellingson argues that the second *Montrust* factor supports a fee award because their claims required private enforcement and involved time-intensive briefing on issues of first impression. Ellingson also claims that equity favors awarding fees under the doctrine. In the alternative, Ellingson asks us to remand with instruction that the District Court apply a “presumption in favor of attorney fees,” citing *Montana Environmental Information*

Center v. Office of the Governor for State, 2025 MT 112, 422 Mont. 136, 569 P.3d 555 [hereinafter *MEIC*] in support. The State counters that Ellingson cannot prove any of the three *Montrust* factors and that *MEIC*'s holding does not apply to this case.

¶69 We first address Ellingson's alternative argument that they are entitled to a presumption in favor of attorney fees. In *MEIC*, plaintiffs prevailed on the merits of their right-to-know claim against the Governor's Office and sought fees under §§ 2-3-221, MCA, and 2-6-1009, MCA. *MEIC*, ¶¶ 5-6 (internal quotations omitted; citations omitted). These statutes authorize attorney fee awards to parties who prevail on their right-to-know claims against the government. Sections 2-3-221, 2-6-1009, MCA. We reversed the trial court's denial of fees and held that when a party prevails on a constitutional right-to-know claim against the government and requests fees under these statutory provisions, courts may apply a presumption toward awarding fees. *MEIC*, ¶ 10.

¶70 *MEIC* held that "a presumption towards awarding fees when a plaintiff vindicates their constitutional right to know follows naturally in the context of the right[.]" which "comes with a constitutional presumption that every document within the possession of public officials is subject to inspection." *MEIC*, ¶ 15. The decision is limited to cases in which plaintiffs have proven a violation of their constitutional right-to-know and seek fees under the applicable statutory exceptions; it did not alter our test for awarding fees under the private attorney general doctrine. *MEIC*, ¶¶ 6, 25-26; *see also Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶ 23, 351 Mont. 464, 215 P.3d 649 ("The American Rule is a foundation of our jurisprudence, and we must narrowly construe the exceptions lest they swallow the rule."). Our holding in *MEIC* is irrelevant to Ellingson's fee request. Our analysis is

limited to the private attorney general doctrine framework, which solely requires application of the *Montrust* factors and consideration of equitable factors.

Equity

¶71 We first address Ellingson’s argument that equity favors awarding fees under the private attorney general doctrine. Although equity is not an independent requirement of the private attorney general doctrine, we consider it when determining whether the predicate for an award of fees—that “the government, for some reason, fail[ed] to properly enforce interests which are significant to its citizens”—is met. *W. Tradition P’ship*, ¶¶ 13, 20. We have considered, for example, whether the Attorney General defended the challenged law frivolously or in bad faith, *W. Tradition P’ship*, ¶ 18, whether the Legislature passed the law in bad faith, *Forward Mont.*, ¶ 30, or whether the State breached its fiduciary duties in enacting the statutes at issue, *Montrust*, ¶¶ 51, 58. We have cautioned that fee awards against the State are improper in “garden variety” declaratory judgment actions challenging the constitutionality of statutes, *W. Tradition P’ship*, ¶ 17, including when “the only potential liability of the State for fees would lie for the actions of the Legislature in enacting an unconstitutional bill[,]” *W. Tradition P’ship*, ¶ 19 (quoting *Finke v. State ex rel. McGrath*, 2003 MT 48, ¶ 34, 314 Mont. 314, 65 P.3d 576).

¶72 For example, the plaintiffs in *Western Tradition Partnership* sought a declaratory ruling that § 13-35-227, MCA (2003)—a statute prohibiting corporations from making contributions to political candidates—violated their free speech rights. *W. Tradition P’ship*, ¶¶ 2-3. Although we initially ruled in the State’s favor on the merits of the challenge, the United States Supreme Court reversed our decision. *W. Tradition P’ship*,

¶¶ 5-6; *see also* *W. Tradition P'ship v. Att'y Gen. of Mont.*, 2011 MT 328, 363 Mont. 221, 271 P.3d 1, *rev'd sub nom. Am. Tradition P'ship v. Bullock*, 567 U.S. 516, 132 S. Ct. 2490 (2012). Plaintiffs sought fees under the private attorney general doctrine, and the district court denied their request. *W. Tradition P'ship*, ¶ 20.

¶73 We affirmed. *W. Tradition P'ship*, ¶ 20. We considered that the Attorney General maintains discretion to defend cases in which the State has an interest, including litigation challenging the constitutionality of statutes. *W. Tradition P'ship*, ¶ 17 (citing Mont. Const. art. VI, § 4(4); § 2-15-501(1), MCA). To avoid separation of powers concerns, courts must practice restraint in awarding fees when the office of Attorney General exercises its discretion to defend statutes in good faith. *W. Tradition P'ship*, ¶¶ 17-18. In that case, we considered the following facts to determine that the Attorney General defended § 13-35-227(1), MCA (2003), in good faith: the State's defense was "grounded in constitutional principles and in an effort to enforce interests the executive deemed equally significant to its citizens"; a majority of the Court was initially convinced by the State's arguments; the statute at issue was deeply rooted in Montana's history; and the plaintiffs' challenge was brought "in a time of shifting legal landscapes, the contours of which" were yet undefined. *W. Tradition P'ship*, ¶ 20. We therefore ruled that a fee award was inappropriate because "the predicate for an award of fees under the private attorney general doctrine—'when the government, for some reason, fails to properly enforce interests which are significant to its citizens'—ha[d] not been established." *W. Tradition P'ship*, ¶ 20.

¶74 In contrast, we determined in *Forward Montana* that equitable considerations supported an award of fees under the private attorney general doctrine. *Forward Mont.*, ¶¶ 11, 44. There, plaintiffs challenged the constitutionality of Senate Bill 319 (SB 319)—a bill passed during the 2021 Legislative Session that purported to regulate joint political fundraising committees. *Forward Mont.*, ¶ 3. Plaintiffs prevailed on their claims that two of the bill’s sections violated the single subject rule (Mont. Const. art. V, § 11(3)) and the rule on amendments (Mont. Const. art. V, § 11(1)). *Forward Mont.*, ¶ 5. The district court rejected plaintiffs’ claim for fees, however, reasoning that although plaintiffs satisfied the three *Montrust* factors, their litigation presented a “garden-variety” constitutional challenge. *Forward Mont.*, ¶¶ 5, 10-11.

¶75 We reversed, concluding that the court abused its discretion when it found that equitable considerations did not support a fee award. *Forward Mont.*, ¶ 44. Evidence showed that two days before the Legislature adjourned, a free conference committee added four new sections to SB 391 during a closed meeting in contravention of the Legislature’s constitutional limitations. *Forward Mont.*, ¶ 4. Because the Legislature is required to abide by the Constitution and is undoubtedly aware of its own duties and limitations, its deliberate violation of these duties created a strong showing of bad faith. *Forward Mont.*, ¶¶ 26, 34. Further, the Attorney General offered no substantive or constitutional interests in defense of the Legislature’s actions and did not appeal the court’s ruling that SB 319 was unconstitutional. *Forward Mont.*, ¶¶ 10, 18. We distinguished *Western Tradition Partnership*, where both sides litigated to vindicate constitutional interests, from the case at hand where only the plaintiffs vindicated constitutional interests. *Forward Mont.*, ¶ 18.

We concluded that an award of fees was proper not “because of the Attorney General’s defense of the law” but “because of the process through which these unconstitutional sections of this Bill came to be: an obviously unlawful Bill adopted through willful disregard of constitutional obligations.” *Forward Mont.*, ¶ 20.

¶76 Like *Western Tradition Partnership*, Ellingson’s litigation concerned issues of first impression; as the parties’ arguments in this case reveal, the contours of the people’s constitutional initiative power had yet to be fully defined. The Attorney General exercised his executive discretion to defend Ellingson’s constitutional challenge to SB 93 and, unlike *Forward Montana*, offered several public interests in defense of SB 93’s challenged provisions: ensuring that voters can consider new initiative measures, preventing voter fatigue, encouraging public participation, and discouraging frivolous or unserious proposals. Though the State did not prevail on all of its positions, it raised legitimate arguments supported by persuasive authority and grounded in the Legislature’s constitutional authority to enact legislation that protects the electoral process. *See* Mont. Const. art. IV, § 3. Further, the entirety of SB 93 was not “obviously unlawful.” *Forward Mont.*, ¶ 20. The State mounted meritorious defenses to seven of Ellingson’s eleven claims on summary judgment. After the District Court denied Ellingson relief, they agreed to dismiss those seven claims, thereby waiving their ability to appeal the court’s ruling.

¶77 Ellingson, however, likens this case to *Forward Montana*, arguing that the Legislature passed SB 93 in bad faith because this Court had put the Legislature on notice that the Attorney General lacks authority to review the substantive legality of initiatives.

Ellingson is correct that on this point, we have advised that only courts have the power to review the constitutionality of ballot initiatives; therefore, the Legislature cannot confer this power upon the Attorney General. *See Hoffman*, ¶ 9; *Cottonwood I*, ¶¶ 28-36 (McGrath, C.J., with Sandefur, J., concurring). In *Forward Montana*, however, we found that the Legislature acted in bad faith because it adopted SB 319 through unlawful procedure and in *willful disregard* of its constitutional limitations. *Forward Mont.*, ¶ 20. Ellingson presents no evidence that the Legislature’s process in enacting SB 93 was similarly unlawful or that it *willfully* disregarded the limitations on its authority. And this provision was only one of many included in the general revision bill and just one of the eleven provisions Ellingson challenged. Again, a prevailing party is not entitled to fees simply because the Legislature enacts a law later determined to be unconstitutional. *W. Tradition P’ship*, ¶ 19.

¶78 The Attorney General made well-supported arguments and defended SB 93 to further public interests that the executive deemed significant. The State defeated Ellingson’s motion for summary judgment on seven of their eleven challenges to SB 93, and Ellingson voluntarily dismissed their unsuccessful claims. The facts of this case do not support a finding of bad faith. They instead show that the Legislature passed a bill containing four unconstitutional provisions that the Attorney General, in his discretion, chose to defend. Ellingson has not proven that this litigation presented more than a “garden-variety” constitutional challenge or that the State failed to enforce interests significant to its citizens. *W. Tradition P’ship*, ¶ 17. Considering these factors, we conclude that the District Court did not abuse its discretion when it declined to find that

equity supported an award of fees under the private attorney general doctrine. Although the absence of equitable factors is not fatal to Ellingson’s claim, it cautions us to exercise restraint in awarding fees under the doctrine. *W. Tradition P’ship*, ¶ 17.

***Montrust* Factors**

¶79 We first consider the strength of public policy the Ellingson Plaintiffs vindicated by their litigation. *Montrust*, ¶ 66. When analyzing this factor, courts must refrain from assessing “the relative strengths or weaknesses of public policies furthered by their decisions and of determining at the same time which public policy should be encouraged by an award of fees, and which not—a role closely approaching that of the legislative function.” *Montrust*, ¶ 66 (quoting *Serrano v. Priest*, 569 P.2d 1303, 1314 (Cal. 1977)). To avoid interfering with the separation of powers, fee awards are available only when the litigation vindicates constitutional interests. *Am. Cancer Soc’y v. State*, 2004 MT 376, ¶ 21, 325 Mont. 70, 103 P.3d 1085.

¶80 The people’s power of initiative derives from the Montana Constitution. Mont. Const. art. III, § 4; Mont. Const. art. V, § 1. As discussed in detail above, this “unique and important” reserved power demonstrates the degree of control the people wished to maintain over changes to the law. *State ex rel. Mont. Sch. Bd.*, 224 Mont. at 299, 729 P.2d at 1299; *see also Mont. Consumer Fin. Ass’n v. State*, 2010 MT 185, ¶ 21, 357 Mont. 237, 238 P.3d 765 (Morris, J., concurring). Ellingson claimed that eleven of SB 93’s provisions were facially unconstitutional because they impaired the people’s constitutional power of initiative. The District Court agreed with Ellingson on four of their challenges and struck the relevant provisions. We affirm the court’s ruling on those claims.

Ellingson’s litigation protected the people’s constitutional initiative power from encroachment by the other branches of government. Those claims therefore satisfied the first *Montrust* factor’s requirement that the litigation vindicate constitutional interests. *See Am. Cancer Soc’y*, ¶ 21.

¶81 We next analyze whether the District Court abused its discretion when it found that Ellingson failed to satisfy the second *Montrust* factor. This factor requires us to consider the necessity for private enforcement and the magnitude of plaintiff’s burden in bringing the litigation. *Montrust*, ¶ 66. We also consider whether invoking the private attorney general doctrine will incentivize parties “to bring public interest related litigation that might otherwise be too costly to bring.” *Forward Mont.*, ¶ 36 (citing *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 91, 338 Mont. 259, 165 P.3d 1079). Fee awards are inappropriate where parties are motivated by their own pecuniary interests, such as when litigation would have resulted in a monetary judgment. *Sunburst*, ¶ 91.

¶82 Ellingson claims the District Court erred in finding that they failed to prove the second *Montrust* factor because (1) no public entity could have challenged SB 93, rendering private enforcement necessary, and (2) the court overlooked the necessity of Ellingson’s litigation approach and the time involved in preparing their motions and supporting documents. The State responds that the court correctly ruled on this factor because resolution of Ellingson’s claims was straightforward and Ellingson may recover fees only for their four successful claims.

¶83 Ellingson is correct that private enforcement likely was necessary in this case because the only government entity involved in the litigation was defending SB 93.

See Forward Mont., ¶ 41 (concluding that private enforcement was necessary because “the only governmental entity involved in this case was defending the statute”). The necessity of private enforcement, however, is not dispositive. Ellingson also must prove that the burden of bringing their litigation is of sufficient magnitude to warrant a fee award.

¶84 In their first summary judgment motion, Ellingson challenged SB 93’s provisions imposing a filing fee and authorizing the Attorney General to review the substantive legality of initiatives. They prevailed on both claims. Ellingson moved for summary judgment on their seven remaining claims in a separate motion the following month. The District Court granted their motion with respect to the four-year prohibition on refile and the interim committee vote. The court denied summary judgment on their seven remaining claims because Ellingson failed to meet their burden of proving that the other challenged provisions were facially unconstitutional. Approximately one month after the court entered its second summary judgment order, the parties stipulated to dismiss all claims not resolved in Ellingson’s favor. The District Court resolved Ellingson’s claims by considering only the parties’ summary judgment briefs and accompanying exhibits and declarations. The parties did not participate in discovery, attend hearings, or request any relief other than summary judgment.

¶85 There is no bright-line rule that establishes when a party’s burden is of sufficient magnitude to warrant a fee award. We have determined, however, that this factor weighed in favor of awarding fees where the litigation spanned multiple years and involved three appeals, *Bitterroot River Protective Ass’n*, ¶¶ 5-9, 27-32; where the fee-seeking party bore the entire burden of halting an illegal vote recount, which involved time-sensitive motions,

briefs, and hearings, *Burns*, ¶¶ 4-8, 22; and where the State conceded that the fee-seeking party bore a significant burden in bringing the litigation, *Forward Mont.*, ¶ 38; *Montrust*, ¶ 67. No similar circumstances exist here. Although this litigation involved issues of first impression, the parties resolved it via two summary motions on questions of law, followed by stipulated dismissal of Plaintiffs' unsuccessful claims. Ellingson's burden is further mitigated because they may recover fees only for time spent litigating their four successful claims, thereby reducing the magnitude of their potential fee award and resulting burden.

¶86 The District Court considered the above circumstances and concluded that Ellingson failed to establish that "the burden of private enforcement related to their four successful claims would merit an award of attorney fees under the narrow confines of the private attorney general doctrine." This was a discretionary determination made by the judge who presided over the case and was familiar with the record and the parties' efforts. Affording deference to the court's consideration that the parties efficiently resolved Ellingson's claims, the District Court did not act arbitrarily, fail to employ conscientious judgment, or exceed the bounds of reason in finding that Ellingson failed to meet the second *Montrust* factor.

¶87 Ellingson's failure to prove the second *Montrust* factor, in combination with the absence of equitable concerns, defeats their claim for fees under the private attorney general doctrine. We therefore need not address the third and final *Montrust* factor. We reiterate that the private attorney general doctrine, like other exceptions to the American Rule, is to be construed and applied narrowly; it is not a fee-shifting rule that entitles plaintiffs prevailing in constitutional litigation to an award as a matter of right. As with all

rulings deciding a party's motion to award fees, we afford discretion to the district courts that have handled the litigation. Where, as here, the appellant has not established an abuse of that discretion, we will not disturb the trial court's determination. We affirm the District Court's order denying Ellingson's motion for attorney fees.

CONCLUSION

¶88 Article V, Section 1, and Article III, Sections 4 and 5, of the Montana Constitution govern the people's and the Legislature's equal power to legislate. Though the Legislature may act under its duty to facilitate the initiative process and protect it from fraud and injustice, it may not impair the people's independent power to make law. We conclude that §§ 13-27-110(7)¹⁰, -221, -228, and -215, MCA, impair the people's initiative power, are facially unconstitutional, and are declared void. The District Court did not abuse its discretion, however, when it found on the record of this case that Ellingson was not entitled to attorney fees under the private attorney general doctrine. We affirm its judgment in all respects.

/S/ BETH BAKER

We Concur:

/S/ CORY J. SWANSON
/S/ JAMES JEREMIAH SHEA
/S/ JIM RICE

¹⁰ To the extent that it includes "substantive legality" in the definition of "legal sufficiency."

Chief Justice Cory J. Swanson, concurring.

¶89 I join the Court’s Opinion in full. I write separately to address my growing concerns about the evolution of private attorney general doctrine (Doctrine) attorney fee awards under our jurisprudence, and suggest it is time to reassess its application.

¶90 Awarding attorney fees against the government entails, by its very nature, some level of infringement on the separation of powers. Under the Doctrine, we allow courts to award fees “when the government, for some reason, fails to properly *enforce* interests which are significant to its citizens.” *In re Dearborn Drainage Area*, 240 Mont. 39, 43, 782 P.2d 898, 900 (1989) (emphasis added). That is inherently a judicial second-guessing of the conduct of another branch of government, likely the executive. The classic case where an attorney fee award is merited under the Doctrine is when a governmental entity failed to follow and enforce the law, and an aggrieved party required court action to enforce his constitutional and statutory rights (which the government should have already been working to uphold). *Burns*, ¶¶ 7-9.

¶91 When it comes to suing to overturn legislation, that is a different matter. We correctly observed in *Finke*, ¶ 34, that we should not entertain attorney fees “for the actions of the Legislature in enacting an unconstitutional bill” The Court later held that statement was dicta, and the citation to § 2-9-111, MCA, was in error. *Forward Montana*, ¶¶ 21-22. But the constitutional principle behind that statement bears examination. We should not award attorney fees in lawsuits challenging the constitutionality of a statute, lest we become the promoter and rewarder of litigation geared toward our policy preferences instead of the policy-making branches’ preferences.

¶92 Since first recognizing the Doctrine, we have repeatedly cautioned against intrusion into the business of the other branches of government. In *Montrust*, when we first awarded fees under the Doctrine, we quoted a cautionary note from the California Supreme Court: “courts could be ‘thrust into the role of making assessments of the relative strength or weakness of public policies furthered by their decisions and of determining at the same time which public policy should be encouraged by an award of fees, and which not—a role closely approaching that of the legislative function.’” *Montrust*, ¶ 66 (quoting *Serrano v. Priest*, 569 P.2d 1303, 1314 (Cal., 1977)). Following that guidance, we subsequently limited fee recovery under the Doctrine to cases vindicating a constitutional interest, not merely a statutory interest. *Am. Cancer Soc’y*, ¶ 21.¹

¶93 The inherent risk of awarding attorney fees according to the Doctrine—whose three prongs are rather subjective—comes into sharp relief when comparing our analysis and holdings in *Western Tradition Partnership with Forward Montana*. In *Western Tradition Partnership*, we affirmed the denial of attorney fees, despite those plaintiffs carrying an extraordinary litigation load to challenge a campaign finance law ultimately declared unconstitutional by the United States Supreme Court. This was based on our review of the Doctrine’s factors and “the District Court’s express determination that the State’s defense was meticulously researched, well presented, and made in good faith” *W. Tradition P’ship*, ¶ 21. In *Forward Montana*, ¶ 38, we reversed the District Court’s denial of attorney

¹ But see *Indiana Bd. of Tax Comm’rs v. Town of St. John*, 751 N.E.2d 657, 662 (Ind. 2001), criticizing even this narrowing approach on the basis that statutory law “more accurately reflects current social priorities” in many areas because it is more easily amended and updated than constitutional law.

fees under the Doctrine on the grounds the “Appellants bore a large burden,” despite the fact that the case was resolved on summary judgment motions almost immediately after filing, and the Attorney General declined to appeal the District Court’s ruling. We also based our holding on a finding of *legislative* bad faith in passing a particular statute. “We therefore find it a helpful guidepost to look to the bad faith of the Legislature in enacting unconstitutional laws when deciding whether attorney fees are proper under the Doctrine.” *Forward Montana*, ¶ 18.

¶94 The contrast between these two cases could not be more glaring. In the first, the plaintiffs engaged in a multi-year litigation battle which included extensive discovery, loss at our Court, successful appeal to the United States Supreme Court, then another round of state court litigation over attorney fees. The second was truly a “garden variety” constitutional lawsuit. As Justice Rice aptly summarized, “With all due respect to the fine lawyering on behalf of the Plaintiffs here in *Forward Montana*, this case was a cakewalk compared to *Western Tradition Partnership*, and the Court’s reliance on the heavy burden here provides no shelter from the precedent of *Western Tradition Partnership*’s denial of fees in a much more difficult case.” *Forward Montana*, ¶ 52 (Rice, J., dissenting). This disparate treatment points to two inherent problems in applying such a subjective fee doctrine to the Legislature’s law-making authority under the Constitution.

¶95 The first problem is that we seven judicial officers have granted to ourselves the equitable authority to impose attorney fees as an additional sanction against the Legislature if we deem its acts—signed by the Governor into law—“obviously” unconstitutional or passed in “bad faith.” Such skewing of the separation of powers is inherent when the first

Montrust factor asks the courts to gauge the “strength or societal importance of the policy vindicated by the legislation,” words that typically require us to examine the Legislature’s communicated public policy via statutory enactment. But when judges are asked to award attorney fees to litigants who challenge the Legislature’s enactments, then courts become the policy-makers. As the Indiana Supreme Court noted, “[S]ocietal importance is in the eye of the beholder.” *Town of St. John*, 751 N.E.2d at 662. Attorney fees awarded to Plaintiffs that the courts approve as vindicating socially important interests *against the elected policy-makers* become a “sword to punish the Legislature,” and an “intru[sion] into the internal operation of another branch of government,” beyond what the Constitution allows. *Forward Montana*, ¶ 56 (Rice, J., dissenting).

¶96 This constitutional intrusion is only exacerbated when we apply the Doctrine inconsistently. It gives the impression and creates the effect of judicial policy-shaping through litigation sanctions and rewards. As the New Mexico Supreme Court observed in rejecting the Doctrine:

Unbridled judicial authority to “pick and choose” which plaintiffs and causes of action merit an award of attorney fees under the private attorney general doctrine would not promote equal access to the courts for the resolution of good faith disputes inasmuch as it lacks sufficient guidelines to prevent courts from treating similarly situated parties differently and could easily result in decisions that favor a particular class of private litigants while unduly discouraging the government from mounting a good faith defense.

New Mexico Right to Choose/NARAL v. Johnson, 986 P.2d 450, 459, ¶ 31 (N.M. 1999).

¶97 This leads us to the second problem with our application of this Doctrine, specifically when entertaining constitutional challenges to statutes. It discourages the Attorney General from defending statutes that are controversial or *possibly*

unconstitutional. And if the office of Attorney General “exercises its discretion” to defend a statute, Opinion, ¶ 73, then the court may award fees under the second *Montrust* factor because of the burden such defense placed on the plaintiffs. *See* Opinion ¶ 67, Concurrence and Dissent, ¶¶ 107-109. One can’t help but detect a subliminal message from our recent cases on this subject:

Legislators, we decide whether your policies are passed in bad faith, so be careful what laws you pass. Attorney General, be careful what laws you decide to defend. And if you exercise your discretion to defend a controversial or questionable statute, we prefer you don’t really fight that hard and admit defeat early.

¶98 That is impermissible judicial interference in the legislative and executive functions of the government. If courts get so heavy-handed with discouraging the State’s rigorous and merited defense of statutes, we may well find ourselves in the position of awarding attorney fees to parties who intervene to *defend* the constitutionality of a statute on the grounds that private enforcement was necessary, because the Attorney General chose not to defend. *Montrust*, ¶ 66 (second factor analyzing the “necessity for private enforcement”). This is a different variation of the dilemma posed in *Barrett v. State*, 2024 MT 26, 416 Mont. 226, 547 P.3d 630, where private litigants sued to defend the Board of Regents’ constitutional authority against a statute, when the Regents chose not to challenge a statute, *Barrett*, ¶ 61 (Gustafson, J., dissenting in part), but similar to *Bitterroot River Protective Ass’n v. Bitterroot Conservation Dist.*, 2011 MT 51, ¶ 27, 359 Mont. 393, 251 P.3d 131, when private intervenors defended the stream access law when the Department of Fish, Wildlife & Parks declined to continue litigating.

¶99 Bad faith is not a formal *Montrust* factor. But as explained above, it has become more prominent in our treatment of these equitable factors.² And in truth, we should consider bad faith in litigation, not only because that is a legitimate arena for judges to sanction parties, but because the Legislature has already approved bad faith as a factor in awarding attorney fees against the government:

[I]n any civil action brought by or against the state, a political subdivision, or an agency of the state or a political subdivision, the opposing party, whether plaintiff or defendant, is entitled to [costs] and reasonable attorney fees as determined by the court if:

(a) the opposing party prevails against the state, political subdivision, or agency; and

(b) the court finds that the claim or defense of the state, political subdivision, or agency that brought or defended the action was frivolous or pursued in bad faith.

Section 25-10-711(1), MCA.³

¶100 The statute expressly allowing attorney fees against a governmental entity is premised upon bad faith or a frivolous claim or defense, factors which are inherently within the province of judges to determine. This is the rule we should be following when considering fee awards against unsuccessful governmental litigants, whether they are plaintiffs or defendants (the private attorney general doctrine—so far—generally awards fees to plaintiffs against the government). Following the clear guidance in this statute

² See also Chief Justice McGrath’s concurrence in *Barrett v. State*, “Nor was the Attorney General’s defense of the law in bad faith.” *Barrett*, ¶ 76 (McGrath, C.J., concurring).

³ The 2025 Legislature added an amendment directly responsive to *Forward Montana*. “The conduct of the legislative branch in passing legislation may not be considered in a bad faith analysis.” Section 25-10-711(2), MCA (effective May 5, 2025). No party has yet tested whether the Legislature can statutorily limit the Doctrine we recognized as equitable. Nor has any party raised the obvious next issue: whether the Legislature can wholly revise or abolish the Doctrine.

keeps courts in their lane and out of the policy arena. As one appellate court noted in rejecting the Doctrine:

We conclude . . . that the policy judgments underlying the doctrine are those that should be made by the legislative branch of government, not the judicial branch. . . . Unlike the wrongful act doctrine, the private attorney general doctrine has nothing to do with the administration of court proceedings.

League of Women Voters of Fla. v. Detzner, 188 So. 3d 68, 74 (Fla. 1st. Dist. Ct. App. 2016).

¶101 The danger inherent in such a practice is why the United States Supreme Court has steadfastly held “the Judiciary itself would not create a general rule, independent of any statute, allowing awards of attorneys’ fees in federal courts.” *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 249, 95 S. Ct. 1612, 1618 (1975), *overruled on other grounds in Lackey v. Stinnie*, 604 U.S. 192, 205, 145 S. Ct. 659, 669-70 (2025).

¶102 I concur in the Court’s holding affirming the denial of attorney fees under the Doctrine. I do not write to suggest our adoption of the Doctrine is manifestly wrong. The parties have not raised those arguments. But I offer these thoughts to warn against the injury to separation of powers brought by awarding attorney fees to sanction the Legislature for passing legislation and the Attorney General for providing a rigorous and merited defense of laws which enjoy a presumption of constitutionality. Since the Legislature has already passed a statute allowing the award of attorney fees against the government when the opposing party prevails and the government’s defense or claim was in bad faith, awarding fees on that basis does not offend the separation of powers. *Alyeska Pipeline Serv. Co.*, 421 U.S. at 249, 95 S. Ct. at 1618. Doing so places judges in the position of

awarding fees based on what they are uniquely able to assess—the administration of court proceedings—and not what the policy branches are uniquely able to assess.

/S/ CORY J. SWANSON

Justice Katherine M. Bidegaray, concurring and dissenting.

¶103 I join the majority’s analysis and disposition of the constitutional issues. I respectfully dissent from its affirmance of the attorney-fee order because the District Court applied the second *Montrust* factor under an incorrect legal framework. I would reverse that order and remand for reconsideration under the framework our precedent requires.

The Governing Framework

¶104 Montana follows the American Rule, under which each party generally bears its own attorney fees. *Forward Montana v. State*, 2024 MT 75, ¶ 14, 416 Mont. 175, 546 P.3d 778. The private attorney general doctrine is a narrow equitable exception used when government fails to protect interests significant to its citizens and private parties must litigate to vindicate those interests. *Montanans for the Responsible Use of the Sch. Tr. v. State ex rel. Bd. of Land Comm’rs*, 1999 MT 263, ¶¶ 64-67, 296 Mont. 402, 989 P.2d 800 (*Montrust*).

¶105 Under *Montrust*, the court considers “(1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, [and] (3) the number of people standing to benefit from the decision.” *Montrust*, ¶ 66. The court also considers whether an award

would be unjust under the circumstances. *W. Tradition P'ship, Inc. v. Att'y Gen. of Mont.*, 2012 MT 271, ¶ 14, 367 Mont. 112, 291 P.3d. 545; *Barrett v. State*, 2024 MT 86, ¶ 3, 416 Mont. 226, 547 P.3d 630 (produced no majority opinion on attorney fees).

¶106 The doctrine provides an incentive for parties to bring public-interest litigation that otherwise might be too costly to bring. *Forward Montana*, ¶ 24. It does not establish an automatic prevailing-party rule or punish the State for defending a statute. The claimant must satisfy the *Montrust* factors, and the court must consider equity. If fees are proper, the claimant still must establish a reasonable amount. These inquiries may overlap, but a reduction in the potential award does not itself measure the burden reasonably required to obtain the qualifying relief.

The Burden of Private Enforcement

¶107 The majority holds that the successful claims vindicated constitutional interests and satisfied the first *Montrust* factor. Opinion, ¶ 80. It also acknowledges that private enforcement likely was necessary because the governmental defendants were defending SB 93. Opinion, ¶ 83. The District Court recognized that protecting Montanans' initiative and referendum powers stands to benefit all but treated the magnitude component of the second factor as dispositive. The disputed question is whether the burden reasonably attributable to the successful constitutional litigation was of sufficient magnitude.

¶108 The District Court considered the absence of discovery, the use of two summary-judgment motions, the stipulated dismissal of seven claims, and Plaintiffs' partial success. Those circumstances may inform its assessment. But the court also stated that fees incurred "in relation to the claims ultimately dismissed" were not recoverable and that

this “necessarily reduces” the burden attributable to vindicating constitutional rights. That reasoning does not distinguish work devoted exclusively to unrelated unsuccessful claims from work that also contributed to the successful claims. The Court repeats the same premise in treating a smaller potential award as a smaller litigation burden. For example, the successful committee-vote claim and the unsuccessful harm-to-business claim both challenged mandatory governmental statements on the petition. This overlap does not establish that particular work served both claims; it identifies a question the categorical exclusion did not answer.

¶109 The absence of discovery or trial may show that this case imposed less burden than others, but it does not, by itself, establish an insufficient burden. Summary judgment may require substantial research, record development, and briefing. *Forward Montana* involved preliminary-injunction proceedings and a summary-judgment ruling without additional discovery. *Forward Montana*, ¶¶ 6-9. The State’s concession concerning the magnitude of the burden distinguishes that case and does not establish the sufficiency of the Plaintiffs’ showing here. *Forward Montana*, ¶ 38. Likewise, the court could discount unnecessary or duplicative work from separate briefing cycles. The question remains what work the successful litigation reasonably required, not what additional work different procedures might have required.

Partial Success and Related Work

¶110 The possibility of excluding some work from a fee award does not answer whether the burden reasonably attributable to the successful claims was substantial. In *Bitterroot River Protective Ass’n v. Bitterroot Conservation Dist.*, 2011 MT 51, ¶¶ 37-39, 359 Mont.

393, 251 P.3d 131, we upheld the decision to award fees under the private attorney general doctrine and then addressed challenges to the amount awarded. After determining that the litigation qualified under the private attorney general doctrine, the District Court reduced the requested amount for work on a dismissed public-trust claim and an unsuccessful due process claim. *Bitterroot River Protective Ass’n*, ¶ 39. That decision does not make partial success irrelevant to qualification; it shows that qualification and apportionment are distinct inquiries.

¶111 Our fee-calculation precedent distinguishes unrelated, unsuccessful claims from claims sharing a common core of facts or related legal theories. *See Laudert v. Richland County Sheriff’s Dep’t*, 2001 MT 287, ¶¶ 18-20, 307 Mont. 403, 38 P.3d 790. A court may reduce an award for distinctly unsuccessful or unrelated claims, but when claims share a common core of facts or related legal theories, it must consider the overall significance of the relief obtained in relation to the hours reasonably expended. *Laudert*, ¶¶ 18-20. A mechanical ratio of successful to unsuccessful claims does not substitute for assessing the services rendered and results secured. *Osterman v. Sears, Roebuck & Co.*, 2003 MT 327, ¶¶ 39-41, 318 Mont. 342, 80 P.3d 435.

¶112 *Laudert*, ¶¶ 18-20, and *Osterman*, ¶¶ 39-41, concern fee calculation rather than *Montrust* qualification; they do not require a full fee calculation before a court decides qualification. They matter here because the District Court used the assumed noncompensability of work on dismissed claims to reduce the qualifying burden. Partial success may inform that assessment, but work does not become irrelevant merely because it also concerned an unsuccessful claim. The Plaintiffs remained responsible for

establishing the burden reasonably attributable to their successful claims, including any common work. Challenging provisions of the same bill does not make every hour compensable. The court should assess their showing without categorically excluding work that contributed to successful relief merely because it also related to a dismissed claim.

Equity

¶113 I agree that the present record does not establish legislative or executive bad faith, and I would not rest an award on that ground. But bad faith is “only an equitable guidepost rather than a requirement.” *Forward Montana*, ¶ 30. Other equitable circumstances remain relevant. *W. Tradition P’ship*, ¶¶ 14, 18-20. The District Court recited that framework but denied fees on the second *Montrust* factor without making the equitable determination the Court now attributes to it. I would leave that determination to the District Court if the Plaintiffs establish the remaining *Montrust* requirements.

Disposition

¶114 The ultimate decision under the private attorney general doctrine remains discretionary, reviewed for abuse of discretion. *Bitterroot River Protective Ass’n*, ¶¶ 9-10. A district court nevertheless abuses its discretion when it rests its fee decision on an inaccurate view of the law or applies the wrong legal framework. *Osterman*, ¶ 36. I would not reverse merely because I assessed the litigation’s difficulty differently. I would reverse because the court treated work related to dismissed claims as categorically noncompensable without determining whether any of that work contributed to the successful claims and used that premise to reduce the qualifying burden. Deference to the court’s familiarity with the litigation cannot cure that error.

¶115 I would reverse the attorney-fee order and remand for the District Court to reconsider the magnitude component of the second *Montrust* factor based on the work reasonably attributable to the successful claims, including any related work. I would neither direct an award nor presume that the Plaintiffs have met their burden. If the court concludes that they satisfied the second factor, it should address the third *Montrust* factor and, if fees are proper, calculate a reasonable amount accounting for unrelated unsuccessful, unnecessary, duplicative, or excessive work and the degree of success.

/S/ KATHERINE M. BIDEGARAY

Justices Ingrid Gustafson and Laurie McKinnon join in the concurring and dissenting Opinion of Justice Katherine M. Bidegaray.

/S/ INGRID GUSTAFSON
/S/ LAURIE McKINNON