CHICAGO-KENT JOURNAL OF
ENVIRONMENTAL
AND ENERGY LAW

VOLUME 14 • ISSUE 1 • FALL 2024

CHICAGO-KENT JOURNAL OF ENVIRONMENTAL AND ENERGY LAW
IIT Chicago-Kent College of Law
565 West Adams Street
Chicago, IL 60661-3691

JEEL@kentlaw.iit.edu

The *Chicago-Kent Journal of Environmental and Energy Law* is edited and produced by the students of IIT Chicago-Kent College of Law. The views expressed in articles printed herein are not necessarily those of the *Journal*, the editorial board, the Illinois Institute of Technology, or the Chicago-Kent College of Law.

Manuscripts are accepted on a rolling basis and can be submitted electronically to jeel@kentlaw.iit.edu in Microsoft Word format and through Scholastica. A resume or curriculum vitae and abstract should accompany the manuscript. Guidelines can be found at:

https://studentorgs.kentlaw.iit.edu/ckjeel/submission-info/

Please cite the *Journal* as
13 CHI.-KENT J. ENV'T ENERGY L. ___ (2024)

Citations conform generally to *The Bluebook: A Uniform System of Citation* (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020).

Previous archives of the *Journal* can be found on the Chicago-Kent Scholarly Commons, LexisNexis, Westlaw, HeinOnline, or on our Open Access Home Site:

https://studentorgs.kentlaw.iit.edu/ckjeel/journal/

ISSN: 2769-6707

This Journal is available exclusively in electronic format. Please consider the environment before printing.

Chicago-Kent Journal of Environmental and Energy Law

Volume 14 Fall 2024 Issue 1

Chicago-Kent Journal of
Environmental and Energy Law

Volume 14 Fall 2024 Issue 1

TABLE OF CONTENTS

WE NEED YOUTH: CLIMATE CHANGE, PSYCHOLOGICAL HARM, AND LEGAL STANDING IN *HELD V. MONTANA*

Lauren Carita*

INTRODUCTION

Human-induced climate change is on track to irreversibly devastate ecological systems throughout this century.[1] This crisis is driven by increases in greenhouse gas emissions since the Industrial Revolution, and as a result, the global climate is buckling under the stress of overconsumption and unsustainable land use.[2] These pressures have led to rapid changes in ocean temperatures, decreased food security, more frequent extreme weather events, and heightened ecosystem vulnerability.[3] These effects are significantly more life-threatening to vulnerable populations like Indigenous peoples, low-income households, and children.[4] To address this escalating crisis, nations must prioritize robust solutions, chief among them being significant and sustained reductions in greenhouse gas emissions.[5]

As the climate crisis tightens its grip, young people increasingly feel forgotten and ignored.[6] Fifty-eight years have passed since the President's Science Advisory Committee first alerted the U.S. government to the scientific warnings about climate change.[7] Yet, for almost six decades, all

---

* J.D. Candidate and M.A. Climate and Environmental Policy Candidate 2025, Vermont Law and Graduate School; B.S. Environmental Conservation and Sustainability 2022, University of New Hampshire. My deepest gratitude to Nate Bellinger and Christophe Courchesne for their invaluable feedback and guidance. Thanks also to the editors and staff of VJEL and CKJEEL for their meticulous and thoughtful review.

[1] Hoesung Lee et al., *Climate Change 2023: Synthesis Report*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [IPCC], at 18 (2023), https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_FullVolume.pdf. [https://perma.cc/3JAZ-YDA2].

[2] *Id.* at 4, ¶ A.1.

[3] *Id.* at 5, 6.

[4] *Id.* at 50.

[5] *See Id.* at 12, ¶ B.1

[6] Roger Harrabin, *Climate change: Young people very worried- survey*, BBC (Sept. 14, 2021), https://www.bbc.com/news/world-58549373. [https://perma.cc/2ZCL-KX4C].

[7] Env't Pollution Panel of the President's Sci. Advisory Comm., *Restoring the Quality of Our Env't*, (Nov. 5, 1965) https://nsarchive.gwu.edu/sites/default/files/documents/Document%202_0.pdf. [https://perma.cc/GJ3A-9RYV]. (reporting on warnings of pollution impacts, linking the measurable effects of fossil fuel production to the increase in carbon dioxide in the atmosphere and to the measurable changes in the Earth's climate by the year 2000).

three branches of government have consistently failed to recognize the urgency of climate change.[8] In response, state governments and legal organizations are taking it up with the courts.[9]

The summer of 2023 marked an inflection point for many adults and a breaking point for concerned young Americans.[10] Near-apocalyptic conditions persisted throughout the summer. Daily temperatures rose to a level that prompted hospital visits for heat-related illnesses and serious injuries from scorching sidewalks.[11] Against this backdrop, the question of young people's ability to influence climate policy comes into sharp focus. Without the right to vote, young people's capacity to impact climate policy is severely limited.

The lack of representation for young people's interests is deteriorating the mental wellness of American youth and is exacerbated by government support for a fossil fuel energy system.[12] The results of a large-scale survey of climate anxiety in young people and its relationship to perceived government response reflect this concern.[13] More than a third of respondents expressed that their feelings about climate change negatively impacted their *daily* lives.[14] About 76% described the future as "frightening."[15] A similar study from 2021 found that the reported daily distress and feelings of betrayal strongly correlate with a wholly inadequate governmental response.[16] The refusal of governments to meaningfully

---

[8] *See* Zoya Teirstein, *Scientists identify the missing ingredient for climate action: Political will*, GRIST (April 8, 2022), https://grist.org/politics/scientists-identify-the-missing-ingredient-for-climate-action-political-will/.[https://perma.cc/MRF2-9PBR] (emphasizing that the political branches' hesitation and refusal in employing significant climate action will detrimentally impact the economy and social stability).

[9] Elena DeBre, *Youth suing states over climate change will have their day in court, and public opinion is on their side*, YALE PROGRAM ON CLIMATE CHANGE COMMC'N. BLOG (Apr. 20, 2022), https://climatecommunication.yale.edu/news-events/youth-climate-lawsuits-in-montana-oregon-and-virginia- demonstrate-ypccc-findings/. [https://perma.cc/NW5J-BULA].

[10] Julie Bosman, *Why Summers May Never Be the Same*, N.Y. TIMES (Oct. 5, 2023), https://www.nytimes.com/2023/10/05/us/summer-climate-change.html.

[11] Jen Christensen, *It's so hot in Arizona, doctors are treating a spike of patients who were burned by falling on the ground*, CNN (July 24, 2023), https://www.cnn.com/2023/07/24/health/arizona-heat-burns-er/index.html. [https://perma.cc/Q45K-8GFV].

[12] Caroline Hickman et al., *Climate anxiety in children and young people and their beliefs about government responses to climate change: a global survey*, 8 THE LANCET PLANETARY HEALTH e879, e885 (2024).

[13] *Id*.

[14] *Id*.

[15] *Id*.

[16] Caroline Hickman et al., *Climate anxiety in children and young people and their beliefs about government responses to climate change: a global survey*, 5 THE LANCET PLANETARY

answer to climate change not only jeopardizes young people's security but is creating a mental health crisis.[17]

August of 2023 brought success for American youth suing a state for the right to live in a safe climate with the landmark case *Held v. State of Montana*.[18] The youth in this case were represented by Our Children's Trust (OCT), a non-profit law firm representing youth in rights-based climate litigation, makes it their mission to bring lawsuits challenging government laws and conduct promoting fossil fuels.[19] In *Held*, OCT sued the state of Montana over an amendment to the Montana Environmental Policy Act (MEPA).[20] The state legislature barred identification and consideration of all climate change-related issues in environmental impact assessments.[21] Pursuant to the MEPA limitation, the approval of numerous large fossil fuel-related permits could advance without considering or disclosing greenhouse gas emissions or climate change impacts.[22] In *Held*, the youth plaintiffs described experiencing debilitating mental, physical, spiritual, cultural, and psychological injuries caused by climate change.[23] They detailed psychological injuries due to the government's betrayal of their interests in supporting fossil fuels.[24] OCT argued that these injuries directly result from the Montana legislature's efforts to limit considering climate change in environmental impact reviews and the ensuing fossil fuel permitting decisions.[25] The First Judicial District Court of Montana found a "fairly traceable" causal connection between the legislature's actions and the plaintiff's injuries, but it refused to grant standing for the plaintiff's psychological injuries related to institutional betrayal as cognizable on their own.[26]

This paper argues that the Montana district court should have recognized the youth plaintiff's mental health injuries as cognizable on their own in relation to the state's inaction and counterproductive measures regarding climate change. Part I provides background on legal standing for psychological harm and explores the concept of climate emotions. Part II

HEALTH e863, e865 (2021).
[17] *Id*. at e871.
[18] Findings of Fact, Conclusions of Law, and Order at 1, Held v. State of Mont, (Mont. 1st Dist. Ct. filed Aug. 14, 2023) (No. CDV-2020-307).
[19] Our Children's Trust, *Our Children's Trust*, https://www.ourchildrenstrust.org. [https://perma.cc/8CUH-EHED].
[20] Held, *supra* note 18 at 32.
[21] *Id*. at 100.
[22] *Id*. at 15.
[23] *Id.* at 32.
[24] *Id*. at 54-57.
[25] *Id.* at 2.
[26] Held, *supra* note 18 at 86, 87.

analyzes and employs relevant Montana case law, advocating for a modernized approach to standing that recognizes the unique vulnerabilities of youth. Part III draws on other OCT rights-based climate cases to compare *Held* to standing precedent in other states. Throughout, this paper emphasizes the importance of recognizing psychological standing to advance intergenerational climate justice. Ultimately, this paper envisions a system where state courts recognize mental health injuries for youth plaintiffs as causally linked to state action and inaction on climate change and treats them as cognizable on their own for standing.

PART I: LEGAL AND FACTUAL BACKGROUND

A. Legal Background: Standing Under Federal and State Law

1. Federal Standing Basics

Article III of the Constitution states that federal courts have jurisdiction over "cases" and "controversies" arising under federal law.[27] The Supreme Court interpreted Article III to limit its power to review cases where an individual shows they have sustained or is immediately in danger of sustaining some direct injury.[28] This concept became known as the legal standing requirement. Later, the Court added three new requirements, formulating the modern Article III standing test of "injury in fact."[29] First, plaintiffs must have suffered injuries that are "concrete," "particularized," "actual," and "imminent."[30] This means plaintiffs can only bring claims related to an immediate injury that cannot be "hypothetical" or "conjectural."[31] Assessing concreteness depends on "whether the asserted . . . harm has a 'close relationship' to harm traditionally recognized in American courts."[32] Second, there must also exist a "fairly traceable" causal connection between the injury and the defendant's conduct.[33] No causal connection exists if the conduct results from an independent third party not before the court, nor can courts grant standing for weak or speculative chains of causation.[34] Third, it must be likely that a favorable decision will redress the injury.[35] Redressability can take the form of injunctive, declaratory, or

---

[27] U.S. CONST. art. III, § 2, cl. 1.
[28] Commw. of Mass. v. Mellon, 262 U.S. 447, 488 (1923) (Thompson, J., concurring).
[29] Lujan v. Def. of Wildlife, 504 U.S. 555, 560 (1992).
[30] *Id.* at 560-61.
[31] City of L.A. v. Lyons, 461 U.S. 95, 102 (1983).
[32] TransUnion LLC v. Ramirez, 594 U.S. 413, 417 (2021) (citing Spokeo, Inc. v. Robins, 578 U.S. 330, 340–41(2016)).
[33] Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 41–2 (1976).
[34] *Id*. at 62 (Brennan, J., concurring).
[35] Simon, *supra* note 33, at 38.

nominal relief.[36]

Injunctive relief "is a remedy which restrains a party from doing certain acts or requires a party to act in a certain way" and will generally be granted if irreparable harm will result without the relief.[37] The Supreme Court has held that a plaintiff seeking injunctive relief must prove that future injury is "*certainly* impending."[38] Alternatively, declaratory relief or judgment gives the court "immediate means to resolve the uncertainty" of the party's rights.[39] What type of remedy offered is at the discretion of the deciding court. The court will grant standing if the plaintiff can show each of the three elements—injury in fact, causation, and redressability.[40]

2. Standing in Montana

The Montana district court applied the federal injury in fact standing test in *Held*, with some interesting distinctions.[41] Montana's case law details additional state-specific standing requirements.[42] In *Sanders*, the Montana Supreme Court decided that "alleged injuries must be distinguishable from the public generally, but need not be exclusive" to the plaintiff.[43] The court expanded the sufficiency of complained injuries in *Heffernan*, holding environmental harms like light pollution and impacted wildlife habitat established a specific personal and legal interest.[44] In *Chipman*, the Montana Supreme Court rejected an employer's argument that denying employees retirement benefits "hinge[d] on hypothetical contingencies and unknown future events" and thus lacked standing.[45] The court granted standing in *Chipman*, holding that threatened injury can constitute a cognizable interest.[46] In another case, the court recognized that the realistic fear of criminal prosecution and related psychological harms was sufficient for

---

[36] Simon, *supra* note at 33, at 38 v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 38 (1976); Uzuegbunam v. Preczewski, 592 U.S. 279, 282-83 (2021) (holding that nominal damages can satisfy the redressability requirement for Article III standing)

[37] *Injunctive Relief*, LEGAL INFO. INST., CORNELL L. SCH., https://www.law.cornell.edu/wex/injunctive_relief [https://perma.cc/W4WP-8QG6].

[38] Clapper v. Amnesty Int'l U.S., 568 U.S. 398, 410–11 (2013).

[39] *Declaratory Judgment*, LEGAL INFO. INST., CORNELL L. SCH., https://www.law.cornell.edu/wex/declaratory_judgment [https://perma.cc/P5P4-7XHC].

[40] *Standing Requirement: Overview*, LEGAL INFO. INST., CORNELL LAW SCH., https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1/standing-requirement-overiw [https://perma.cc/K2G6-5HXS].

[41] Held, *supra* note 18, at 86–90.

[42] Sanders v. Yellowstone Cnty., 2011 MT 91, 267 Mont. 116, 119-20 (1996); Heffernan v. Missoula City Couns., 2011 MT 91, 360 Mont. 207, 225 (2011).

[43] Sanders, 267 Mont. 116 at 119-20.

[44] Heffernan, 360 Mont. at 225.

[45] Chipman v. Northwest Healthcare Corp., 2012 MT 242, 366 Mont. 450, 458, 461–62 (2012).

[46] *Id*. at 461 (citing Gryczan v. State, 283 Mont. 433, 446 (1997)).

injury in fact claims.[47] While the Supreme Court has not recognized such claims, they are cognizable under Montana law.

The Montana Supreme Court has also distinguished the causation element of standing through various cases.[48] In *Larson*, the court held that a general interest in the legality of a governmental action is insufficient for standing without a "direct causal connection between the illegality and the harm personally suffered."[49] Montana does not have a foreseeability requirement for causation except where the chain of causation is severed by an independent intervening cause, leaving the test with a simple "but for" or "substantial factor" analysis.[50] *Young* outlines the traditional "but-for" and "substantial factor" causation in fact tests.[51] But-for causation analyses depend on whether the injury would have occurred if not for the defendant's alleged conduct.[52] Substantial factor causation applies in cases involving evidence and an assertion that multiple causes combined to produce the result at issue.[53] These cases allow Montana courts to analyze causation for standing purposes more broadly than required in federal courts.

Redressability, as a requirement for standing, was confirmed in *In re Vainio* when the court ruled that an injury must be one that can be remedied by a favorable outcome in the legal action.[54] Injury in fact standing in Montana thus reflects the basic federal principles while broadening and restricting certain elements.

Montana's legislative branch can also enact statutes creating legal rights, where "the invasion of which creates standing, even though no injury would exist without [it]."[55] The legislative branch may grant standing to the "fullest extent of Article III" by expressly modifying prudential rules.[56] The Montana Supreme Court confirmed in *Heffernan* that discretionary limits on exercising judicial power cannot be defined by "hard and fast rules."[57] The court in *Heffernan* granted standing to a plaintiff with a legal property right, which also applies to legislatively granted civil rights.[58] Through the creation of state-specific civil rights, the court can effectively create standing where federal interpretations are silent.

---

[47] *Id.*
[48] Larson v. State, 2019 MT 28, 394 Mont. 167, 199–200 (2019); Young v. Flathead Cnty., 232 Mont. 274, 281–82 (1998).
[49] *Id.*
[50] Busta v. Columbus Hosp. Corp., 276 Mont. 342, 370 (1996).
[51] Young v. Flathead Cnty., 232 Mont. at 281–82.
[52] *Id.*
[53] *Id.*
[54] In re Vainio, 284 Mont. 229, 235 (1997).
[55] Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973).
[56] Heffernan, 360 Mont. at 221.
[57] *Id.*
[58] *Id.*

3. Psychological Harm and Standing

Psychological harm is the "impairment of a [person's] mental health, as documented by a licensed psychologist, psychotherapist, or psychiatrist."[59] The Supreme Court has not directly analyzed the "cognizability of psychological harm as injury in fact, choosing to focus only on the typical tangible harms such as physical and monetary."[60] Plaintiffs must have a "personal stake" in the controversy's outcome,[61] and they cannot simply claim a generalized grievance.[62] Further, the psychological impacts of observing conduct one disagrees with have been deemed insufficient for injury in fact analyses.[63] However, the Court has recently held that intangible injuries can be concrete.[64] According to the Court, "[a] 'concrete injury' must be 'de facto;' that is, it must actually exist."[65] Although "concrete" is not synonymous with "tangible," the Court agrees that intangible injuries like reputational harm can also be concrete, given sufficient causation and redressability.[66] The Court wrangles in this breadth by clarifying that plaintiffs cannot allege a bare procedural violation without the concrete personal harm component.[67] Additionally, a plaintiff's threatened harm must be "certainly impending" and "perceptible," further embracing the solidity of concreteness.[68] Nonetheless, no Supreme Court precedent explicitly addresses whether psychological harm alone meets the standard of "concrete" for the injury in fact test. Montana, however, fills this gap with the *Gryczan* decision.[69]

---

[59] *Psychological Harm Definition*, L. INSIDER, https://www.lawinsider.com/dictionary/psychological-harm. [https://perma.cc/4JTB-PCM4].
[60] Rachel Bayefsky, Psychological Harm and Constitutional Standing, 81 BROOK. L. REV. 1555, 1557 (2016); Ramirez, *supra* note 31, at 414.
[61] Baker v. Carr, 369 U.S. 186, 204 (1962).
[62] Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 620 (2007) (Scalia, J., concurring).
[63] Valley Forge Christian Coll. v. Am. United for Separation of Church and State, Inc., 454 U.S. 464, 485 (1982).
[64] Spokeo, Inc. v. Robins, 578 U.S. 330, 340 (2016).
[65] *Id.*
[66] *Id.*
[67] *Id.* at 341.
[68] *See* U.S. v. SCRAP, 412 U.S. 669, 689 (1973) (holding that the plaintiff's recreational and aesthetic harm could constitute a concrete injury for standing purposes, but not if the allegations end up as a "sham" or fail to raise a genuine issue of fact).
[69] Gryczan v. State, 283 Mont. 433, 446 (1997).

B. Factual Background: Climate Emotions

1. Anxiety

Climate and eco-anxiety are now popular terms to describe the worry individuals feel as climate instability gains attention worldwide.[70] The Handbook of Climate Psychology defines climate anxiety as the "heightened emotional, mental, or somatic distress in response to dangerous changes in the climate system."[71] Comprehending the immensity and scale of the problem can be debilitating.[72] The implication of climate breakdown and "psychological threat of civilizational collapse is already imperiling millions."[73] This existential undoing is already apparent, especially in countries like Tuvalu, Micronesia, and the Marshall Islands.[74] 3.6 billion people live in areas highly susceptible to climate change, and this number is expected to grow significantly between now and the end of the century.[75]

Anxiety about the state of the world can manifest as intrusive thoughts or feelings of distress about current or impending climatic disasters.[76] The underlying fear or uncertainty drives symptoms like irritability, panic attacks, sleeplessness, and depression.[77] These symptoms can lead to clinical

---

[70] Caroline Hickman et al. *supra* note 15, at E863.
[71] *Handbook of Climate Psychology*, CLIMATE PSYCH. ALL. (2020), https://www.climatepsychologyalliance.org/images/files/handbookofclimatepsychology.pdf. [https://perma.cc/4A73-6EMK].
[72] CHARLIE HERTZOG YOUNG, SPINNING OUT: CLIMATE CHANGE, MENTAL HEALTH, AND FIGHTING FOR A BETTER FUTURE 11 (FOOTNOTE PRESS 2023).
[73] *Id.* at 25.
[74] Lewis Jackson, *Climate change put Tuvalu in the spotlight*, REUTERS (Nov. 10, 2023), https://www.reuters.com/business/environment/climate-change-put-tuvalu-spotlight-2023-11-10/ (Tuvalu, a Pacific Island state, is incredibly low-lying. During high tides, seawater covers about 40% of the land in Tuvalu, and by 2050, half of the land area of the capital will flood with seawater daily); Mark Edward Keim, *Sea Level Rise Disaster in Micronesia: Sentinel Event for Climate Change?*, 4 DISASTER MED. AND PUB. HEALTH PREPAREDNESS 81, 81–87 (Mar. 2010) (Another group of small islands, Micronesia, is experiencing the same acute sea-level rise, heavily impacting the nation's crop productivity and freshwater resources. Sustainable interventions are rapidly necessary to ensure the survival of the nation); Jake Bittle, *Inside the Marshall Islands' life-or-death plan to survive climate change*, GRIST (Dec. 5, 2023), https://grist.org/extreme-weather/marshall-islands-national-adaptation-plan- sea-level-rise-cop28/ [https://perma.cc/P3PG-GY99] (The Marshall Islands, another group of Pacific Islands, face the same rapid sea-level rise that is increasingly endangering community subsistence and reliance on their land).
[75] *Climate change*, WORLD HEALTH ORG. (Oct. 12, 2023), https://www.who.int/news-room/fact- sheets/detail/climate-change-and-health [https://perma.cc/VQ6H-97N2].
[76] *Yale Experts Explain Climate Anxiety*, YALE SUSTAINABILITY (Mar. 13, 2023), https://sustainability.yale.edu/explainers/yale-experts-explain-climate-anxiety. [https://perma.cc/8XVM-3JRV].
[77] Joseph Dodds, *The psychology of climate anxiety*, 45 BJPSYCH BULL. 222, 222 (2021).

disorders, substance misuse, intimate partner violence, and even suicide.[78] When faced with these possibilities, defense mechanisms take over.[79] Defense mechanisms can manifest as minimizing the threat, intellectualizing the issues as to distance from emotion, becoming pessimistic and hopeless, and seeking distraction.[80]

"Although more than three-quarters of Americans experience worries about climate change effects, climate-related concerns are especially acute for young people."[81] Children and adolescents are still developing their psychological capacity to process large-scale ramifications, and they lack influence over the systems responding to the climate crisis.[82] The unique situation of growing up in this environment leaves young people vulnerable to the mental and emotional effects of climate change.[83] Youth, specifically in the 2020s, become susceptible to climate anxiety through consistent exposure to "whiplash weather," deadly climatic events, and the persistent disquiet of compounding global crises.[84] Many young people understand that they will live to see the worst environmental destruction this century—and it's upending their sanity.[85]

2. Grief and Betrayal

Much like climate anxiety, grief and anticipatory grief can have devastating implications for sufferers.[86] People experience climate grief when they notice or anticipate the loss of "'species, ecosystems, and meaningful landscapes due to acute or chronic environmental change.'"[87] Like normal grief, the loss of a person or animal can trigger climate grief; however unlike normal grief, climate change is relentless and ongoing.[88] There is rarely a moment to fully grieve the loss of climate stability when a

---

[78] *Id.*
[79] *Id.* at 224.
[80] *Id.*
[81] Janis Whitlock, *Climate change anxiety in young people*, NATURE MENTAL HEALTH 297, 297 (2023).
[82] *Id.*
[83] *Id.*
[84] CHARLIE HERTZOG YOUNG, SPINNING OUT: CLIMATE CHANGE, MENTAL HEALTH, AND FIGHTING FOR A BETTER FUTURE 12 (2023); Jennifer A. Francis, *What in the world is weather whiplash?*, BULL. OF THE ATOMIC SCI. (Feb. 9, 2024), https://thebulletin.org/2024/02/what-in-the-world-is-weather-whiplash/. [https://perma.cc/243Z-JP3M].
[85] *Id.*
[86] Summer Allen, *Is climate grief something new?*, AM. PSYCHOLOGICAL ASS'N (Feb. 19, 2020), https://www.apa.org/members/content/climate-grief. [https://perma.cc/QTS6-2KWY].
[87] *Id.*
[88] *Id.*

new extreme weather pattern occurs every day—a constant reminder of a new normal.[89] Climate grief can manifest as anticipatory or "transitional," which describes the process of grieving losses before they materialize.[90] The sense of doom is prevalent, along with anxious feelings of knowing disasters will occur but not knowing when, where, or to whom.[91] This can be exacerbated by feelings of "institutional betrayal," or the type of psychological trauma manifested when institutions perpetuate or turn away from harm done to individuals who depend on them.[92] A form of "systemic gaslighting," institutional betrayal denies the harm done to the individual and can lead to feelings of disappointment, doubt, and shame.[93] Climate grief, anticipatory climate grief, and institutional betrayal are difficult emotions to process and can be a very lonely experience.[94]

3. Solastalgia: A Mix of Emotions

Solastalgia is a concept developed by Australian philosopher Glenn Albrecht in 2007 to provide further meaning to environmentally induced distress.[95] Solastalgia describes the "distress that is produced by environmental change, exacerbated by a sense of powerlessness or lack of control over the process."[96] Albrecht summarizes solastalgia as a "lived experience of the desolation of a much-loved landscape," but these feelings can eventually become the "catalyst" for action on the world's behalf.[97] Further literature summarizes solastalgia as a "place-based lived experience" that deteriorates proportionally to the growing intensity of global climate change.[98] Those displaced by climate disasters may experience this loss and longing related to their severed connection to cultural or spiritual land.[99] If

---

[89] *Id.*
[90] Panu Pihkala, *Climate grief: How we mourn a changing planet*, BBC (Apr. 2, 2020), https://www.bbc.com/future/article/20200402-climate-grief-mourning-loss-due-to-climate-change. [https://perma.cc/MZ24-F2WD].
[91] *What is Climate Grief?*, Climate Emergency Manchester, https://climateemergencymanchester.net/student-climate- handbook/part-1-climate-grief-and-our-mental-health/what-is-climate-grief. [https://perma.cc/QC5E-DBUG].
[92] Melanie Ho, *What is "institutional betrayal"?*, MEDIUM (Oct. 21, 2021), https://medium.com/@melanie-ho/what-is-institutional-betrayal-84d81c5c5523. [https://perma.cc/U6ZB-9W3S].
[93] *Id.*
[94] *What is Climate Grief?, supra* note 91, at 04.
[95] Glenn Albrecht et al., *Solastalgia: the distress caused by environmental change*, 15 AUSTL. PSYCHIATRY, Supp, 95–98 (2007).
[96] *Id*.
[97] PAUL BOGARD ET AL, SOLASTALGIA: AN ANTHOLOGY OF EMOTION IN A DISAPPEARING WORLD xv (2023).
[98] Lindsay P. Galway et. al., *Mapping the Solastalgia Literature: A Scoping Review Study*, 16 INT'L J. ENV'T. RSCH. AND PUB. HEALTH 1, 2 (2019).
[99] Edward P. Richards, *The Societal Impacts of Climate Anomalies During the Past 50,000*

the climate changes at the current predicted rate, solastalgia will contribute to a "quickening spiral of mental illness" among a crowded population.[100] Paul Bogard, author and environmentalist, believes that "to feel solastalgia is to feel pain, sorrow, and grief, but it is also to recognize that the source of the pain is the love for the places of which we are part," such as the Earth.[101] He believes that within that love "lies the energy to defend the world we have known" and to collectively "create the future we want for our children and grandchildren . . . ."[102]

C. Factual Background: Intergenerational Justice and Equity

Intergenerational justice theory argues "that the rights of past, present, and future generations to live on a healthy planet are equal."[103] While future generations cannot influence present actions, the choices people make today will profoundly shape their lives.[104] Intergenerational justice assumes that future people will hold rights, that those rights will be determined by their interests, and that the current populace's actions and policies will affect those interests.[105] This theory speaks to the obligations and entitlements that past and future people can potentially generate.[106] In the context of climate change, "intergenerational justice calls for immediate action to protect future generations from experiencing the worst effects of climate disasters."[107] Ensuring intergenerational justice demands attention not only to future generations but also to "youth and children already living whose existence is detrimentally impacted by the changing climate."[108]

Years and their Implications for Solastalgia and Adaptation to Future Climate Change, 18 HOUS. J. OF HEALTH L. AND POL'Y 131, 148 (2018).

[100] R. Louv., *The Nature Principle: Reconnecting with Life in a Virtual Age* (2011).

[101] PAUL BOGARD ET AL., SOLASTALGIA: AN ANTHOLOGY OF EMOTION IN A DISAPPEARING WORLK xxi (2023).

[102] *Id.*

[103] Erika Strazzante, *Intergenerational justice, or how to be a good ancestor*, GENERATION CLIMATE EUR. (July 29, 2022), https://gceurope.org/intergenerational-justice-or-how-to-be-a-good-ancestor/. [https://perma.cc/B43W-EP5J].

[104] *Id.*

[105] Lukas Meyer, *Intergenerational Justice*, STAN. ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., 2003) (rev. 2021), https://plato.stanford.edu/archives/sum2021/entries/justice-intergenerational/. [perma.cc/KUM6-WXSF].

[106] Andres Santos Campos, *Intergenerational Justice Today*, 13 PHIL. COMPASS e12477, (abstract) (2018), https://compass.onlinelibrary.wiley.com/doi/epdf/10.1111/phc3.12477.

[107] *Reflections on The Call for Inputs: Enhancing climate change legislation, support for climate change litigation and advancement of the principle of intergeneration justice*, THE GLOB. NETWORK FOR HUM. RTS. AND THE ENV'T (July 7, 2023), https://www.ohchr.org/sites/default/files/documents/issues/climatechange/cfi-enhancing-climate- change-legislation/CFI-SR-Climate-GA-2023-NGO-global-network.pdf. [https://perma.cc/X99X-CETW].

[108] *Id.*

Intergenerational *equity* meanwhile refers to "the fairness in access and use of planetary resources across time."[109] It accounts for both (1) "the relationship between each generation and all other generations" and (2) "the relationship between humanity and nature."[110] Equity does not require absolute balance but aims to achieve a fair balance of present and future needs.[111] For intergenerational progress with climate action and resource allocation, both justice and equity must exist.[112] To meet the goals of intergenerational equity, the forgotten generation of today's youth must have a seat at the table to ensure their interests are represented.

PART II: MONTANA STANDING CASE LAW AUTHORIZING YOUTH PSYCHOLOGICAL INJURIES AS COGNIZABLE

A. Montana Precedent Supports Recognizing Psychological Injuries as Cognizable for Injury in Fact Standing Purposes

Generally, the Montana Supreme Court applies a standard view of federal injury in fact standing; however, the state's case law confirms it can and should be flexible in the face of modern climate change-related mental health issues. This section applies Montana Supreme Court decisions to *Held* to prove that recognizing psychological injuries as cognizable for injury in fact standing is appropriate under state precedent. A review of the case law on injury in fact standing, plus the limited opinion on psychological injury outlines the Montana Supreme Court's potential view of the claims made in *Held*. Applying this case law to the *Held* facts establishes that the plaintiffs had specific cognizable psychological injury claims and had the requisite causation and redressability to support those claims.

The Montana Supreme Court has acknowledged that psychological harms are concrete on their own for standing purposes.[113] The *Gryczan* decision, although three decades old, illustrates the Montana Supreme Court's willingness to progressively expand standing beyond federal limits when necessary for state constitutional claims.[114] This decision leaves crucial space for judicial discretion and adaptation to modern issues by using controlled yet considerate language and tone.[115]

---

[109] Lydia Slobodian, *Defending the Future: Intergenerational Equity in Climate Litigation*, 32 GEO. ENV'T. L. REV. 569, 571 (2020).
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] Gryczan, *supra* note 69 at 446.
[114] *Id.*
[115] *See* Gryczan, *supra* note 69 at 446 (employing a matter-of-fact tone in granting standing to respondent's claims, stating, "to deny Respondents standing would effectively immunize the statute from constitutional review"); *see also* Sanders, 267 Mont. at 119 (holding that

Applying Montana's standing precedent to *Held* establishes a clear path to finding cognizability in the claims for injury in fact purposes, traceable causation, and adequate redressability. While the psychological injuries expressed in *Held* are specific to its youth plaintiffs, these psychological injuries are impacting young people throughout the state and country. Dr. Cathy Whitlock, a distinguished professor of Earth Sciences at Montana State University, testified in the *Held* trial as an expert witness that climate change is and will harm Montana's children.[116] The youth plaintiffs suffered psychological injury from climate change and governmental ignorance in ways that, while not exclusive to them, can be clearly distinguished from the broader public experience.

The psychological injuries the plaintiffs allege adhere to the *Sanders* precedent that injuries must not be shared among the public but need not be exclusive to the plaintiff.[117] At trial, psychiatrist Dr. Lise van Susteren explained how some of the plaintiffs felt betrayed watching their government deliberately ignore climate change, some even expressing a reluctance to have children as a result.[118]

Additionally, pediatrician Dr. Lori Byron testified to this unique vulnerability children experience in the face of the climate crisis.[119] Because they are still developing, they are at higher risk for both physical harm in a natural disaster and psychological injury in swallowing the current reality.[120] In *Held*, the youth plaintiffs testified to feelings of immense grief, depression, anxiety, and loss of important Indigenous cultural activities due to the changing climate in Montana.[121] Moreover, they alleged past, present, and future psychological injuries resulting from the lack of protection from the state government.[122] Arguing that their constitutional right to a clean and

---

the plaintiff's allegation was "clearly personal to himself" when asserting a property-related injury).

[116] Tr. of Proc. at 237–242, Held v. State of Mont., No. CDV-2020-307, Mont. 1st Dist. Ct. (Aug. 14, 2023).

[117] Sanders, 267 Mont. at 119; *see generally* Whitlock, *supra* note 81, at 297-98.

[118] Tr. of Proc., *supra* note 115, at 13.

[119] *Id.* at 16-7.

[120] *Id.*

[121] *Id*. at 14, 207, 446, 449, 492, 561, 580, 603, 771. Plaintiffs Lilian and Ruby are part of the Crow Nation wear traditional leather outfits which can become increasingly warm and uncomfortable to wear with increasing temperatures. *Id.* at 492. They attend the Crow Fair yearly. *Id.* at 492. This important event is also becoming more dangerous due to extreme weather. *Id.* at 492. Plaintiff Sariel is part of the Confederated Salish Kootenai Tribe, which for thousands of years has lived off the land on the Flathead Reservation in Montana through subsistence hunting and gathering for food and medicine. *Id.* at 580. As flooding and droughts flip-flop yearly, it is growing more difficult to sustain this way of life. *Id.* at 603.

[122] *Id.* at 86.

healthful environment was violated by the state's continued subsidizing of fossil fuels, the plaintiffs used their psychological injuries as proof that they had—and continue to have—a personal stake in the controversy.[123] The district court granted standing for the plaintiff's injuries related to climate change, but it refrained from accepting the plaintiffs reasoning that their psychological injury stemming from institutional betrayal was sufficient on its own to show injury.[124]

This ruling was correct to find injury in fact standing for the plaintiff's mental injuries, but it should have gone further.[125] The court should have recognized mental injuries as cognizable on their own as related to the state's inaction and counterproductive measures on climate change.[126] The youth plaintiffs' anxiety and grief related to climate change are concrete and particularized past, present, and threatened injuries.[127] Employing the *Heffernan* standard, environmental injuries like the *Held* plaintiffs' loss of cultural land and threatened loss of personal and legal interests constitute cognizable injuries for standing purposes.[128] While some argue these concerns are "hypothetical and hinge on unknown future events", *Chipman* illustrates that threatened impacts can remain cognizable even with some uncertainty.[129] Furthermore, the youth plaintiffs did not simply have a general interest in the legality of a government action like in *Larson*; they had causally related psychological responses to Montana statutes like in *Gryczan*.[130] This precedent should have been more than enough for the district court to grant standing for the plaintiffs' mental injuries as related to the state's institutional betrayal of their generation and violation of their constitutional rights.

B. Montana Precedent Supports Recognizing Psychological Injuries as Cognizable When Traceable to Harm

Regarding Article III standing, Montana law employs a chain of causation

---

[123] *See* Mont. CONST. art. IX, § 1 (codifying the protection of a clean and healthful environment in Montana for present and future generations).
[124] Held, *supra* note 18 at 87-88.
[125] *Id.*
[126] *See Id.* at 86 (rejecting plaintiffs' mental health injuries as not cognizable on their own in the context of direct relation to the state's violation of plaintiff's constitutional right to a clean and healthful environment).
[127] Tr. of Proc. at 237–39, *supra* note 115. The plaintiffs have clearly experienced past extreme weather driven by climate change, which can arguably be linked to the state's blatant disregard for fossil fuel phase-out. The plaintiffs continue to experience these impacts, and projections indicate that conditions will worsen in the future
[128] *See* Heffernan, 360 Mont. at 237.
[129] Chipman, 366 Mont. at 461-62; Gryczan, *supra* note 69, at 446.
[130] Larson, *supra* note 48, at 200; Gryczan, *supra* note 69, at 445-46.

test.[131] The Montana Supreme Court described this test as "recogniz[ing] that the injury and the post-injury trauma . . . may take a path anticipated by no one, but nonetheless [is] traceable to the injury itself," which is then traceable to the source of the harm.[132] The Ninth Circuit has stated victims of psychological injury at the hands of unconstitutional government conduct have non-speculative causation when the cause is the resolution itself.[133]

The court in *Held* rejected the youth plaintiff's mental injuries related to the institutional betrayal demonstrated by the mere existence of the MEPA limitation.[134] In the second standing element, the court found that Montana's greenhouse gas emissions caused, contributed to, and "reduce[d] the opportunity to alleviate the Plaintiff's injuries."[135] If the court had followed the *Larson* and *Young* precedents, it would have held that the affirmative state actions to promote the fossil fuel industry would have been enough on their own to cause the plaintiff's psychological injuries related to institutional betrayal.

Additionally, there is a very explicit causal chain made evident by the plaintiff's ages. All sixteen plaintiffs were under twenty when the case was filed in 2020.[136] Montana's emissions contributions have directly impacted the youth plaintiffs, now ages five to twenty-two. The compounding climate impacts due to increasing greenhouse gas emissions both cause and contribute to psychological injury the youth plaintiffs face.[137] Each ton of emissions added to the atmosphere worsens the climate crisis and, in turn, worsens the plaintiff's psychological damage.[138] Climate science can now thoroughly quantify and document Montana's contributions to greenhouse gas emissions, illuminating the causal and proportional ratio of the increase of greenhouse gas emissions to the acute climate crisis, and psychological injuries.

Montana emits disproportionately high amounts of greenhouse gases for its population—more than 42 other states.[139] An extensive mining

---

[131] Campbell v. Young Motor Co., 211 Mont. 68, 72 (1984).
[132] *Id.*
[133] Larson, *supra* note 48, at 200; Young, *supra* note 51, at 281–82.
[134] Held, *supra* note 18, at 87-88.
[135] *Id.* at 88.
[136] Clark Mindock, *Montana judge hands historic win to young plaintiffs in climate change case*, REUTERS (Aug. 15, 2023), https://www.reuters.com/business/environment/montana-judge-hands-historic-win-young-plaintiffs-climate- change-case-2023-08-14/. [https://perma.cc/5XKY-79G6].
[137] *See* Tr. of Proc., *supra* note 115, at 237.
[138] *See Id*. at 12.
[139] *Id*. at 938–39; *Montana State Profile and Energy Interests*, U.S. ENERGY INFO. ADMIN. (Apr. 20, 2023), https://www.eia.gov/state/?sid=MT (explaining that Montana has the nation's largest recoverable coal reserves (30% of the U.S. total), and accounts for 5% of the total U.S. coal production. Coal-fired power plants produce the largest share of the

economy reliant on coal production has led the cumulative fossil fuel emissions in Montana since 1960 to a total of 3.7 billion metric tons.[140]

In *Held*, OCT called Anne Hedges, who "serves as the co-director and director of policy and legislative affairs" for the Montana Environmental Information Center ("MEIC"), to testify as an expert witness regarding the state's ignorance of this limitation's danger.[141] At trial, Ms. Hedges described a 1968 conference held by the state for presenters to detail up-and-coming climate findings.[142] Presentations exhibited dire warnings and potential disaster if the world rejected regulating carbon emissions before the year 2000.[143] MEPA and the Montana environmental constitutional protections were created soon after these findings were presented, and both were adopted almost unanimously.[144] Ms. Hedges further testified to Montana's increasing awareness of climate change, citing the Intergovernmental Panel on Climate Change reports that the MEIC brought to the state government's attention in the 1990s.[145]

From the 1960s to present day, the Montana government has known about the link between emissions and climate change and created legislation and constitutional protections to promote a cleaner environment.[146] Still, Montana subsidized fossil fuel projects with disregard for their destructive and existential impacts.[147] Montana legislature's disregard of scientific warnings and prioritization of economic growth is clearly linked to the growing climate crisis and *Held's* youth plaintiffs' psychological injuries.

In prioritizing the state's investments in the fossil fuel industry, Montana's legislature was intentionally blind in its failure to consider adverse public health outcomes.[148] Montana's constitution enshrines this unique right to a "clean and healthful environment" and requires the legislature to

---

state's electricity. The state's extensive mining system contributes to fossil-fuel dependency, where coal acts as the main driver of the state's economy) [https://perma.cc/4H63-QHHZ].

[140] Tr. of Proc., *supra* note 115, at 941; Clark Mindock *supra* note 135; *U.S. Emissions*, Ctr. for Climate and Energy Sols. https://www.c2es.org/content/u-s-emissions/ (using EPA data to show that the U.S. emitted nearly 6 billion metric tons of greenhouse gases in 2020).

[141] Tr. of Proc., *supra* note 115, at 781, 784, 796-97.

[142] *Id.* at 797

[143] *Id.* at 797-98

[144] *Id.* at 798

[145] *Id.* at 803.

[146] *Id.* at 797.

[147] *Montana Lawmakers Double Down on Fossil Fuels in 2023 Legislative Session*, MIT CLIMATE PORTAL (July 7, 2023), https://climate.mit.edu/posts/montana-lawmakers-double-down-fossil-fuels-2023-legislative-session. [https://perma.cc/46TR-QCGM].

[148] *Montana: State Profile and Energy Estimates*, U.S. ENERGY INFO. ADMIN. (Apr. 20, 2023), https://www.eia.gov/state/?sid=MT [https://perma.cc/Y4AT-95DL].

"provide for the administration and enforcement of this duty."[149] Montana's legislature not only violated the *Held* plaintiff's state constitutional rights, but has contributed to profound psychological injury in the youth. This strongly suggests the plaintiffs proved the causation required for the district court to grant standing for their mental injuries as related to the state's dangerous decision to ignore climate impacts.

C. *Montana Precedent Supports Recognizing Psychological Injuries as Cognizable When Redressability Can Be Proven*

Montana reviews redressability and relief similar to the Supreme Court. However, the Ninth Circuit recognized redress for psychological injuries in the *Catholic League* case.[150] The court stated that in a constitutional law context, seeking declaratory judgment that a resolution or statute is unconstitutional is legally redressable.[151] In terms of affirmative injunctive relief, or the court ordering the state to act, the Ninth Circuit has said that "emotional injuries, psychological distress, and risk of suicide" likely constitutes "irreparable harm and therefore required injunctive relief."[152]

Additionally, the Montana Supreme Court held in *Meech* that a "speedy remedy" must be afforded for every injury of "person, property, or character."[153] In climate change litigation, speedy remedies are critical; delays can be the difference between mitigating the climate crisis and the need for forced adaptation to yet another disaster flowing from failed greenhouse gas emission reductions. The district court in *Held* correctly decided the youth plaintiffs had proven redressability at trial, holding the state of Montana can alleviate injuries by rejecting projects that would lead to the unreasonable degradation of the environment.[154] The court also states that it is possible to prevent future degradation and injuries to the plaintiffs if they are allowed to consider greenhouse gas emissions and climate change during the environmental impact assessment review.[155] The Montana district court did not go so far as to grant affirmative injunctive relief, which would have ultimately remedied the plaintiff's psychological injuries related to both

---

[149] *See* Mont. CONST. art. IX, § 1 (codifying the protection of a clean and healthful environment in Montana for present and future generations).
[150] Catholic League for Religious & Civ. Rts. v. City & Cnty. of S.F., 624 F.3d 1043, 1052 (2010).
[151] *Id.*
[152] Porretti v. Dzurenda, 11 F.4th 1037,1050 (9th Cir. 2021).
[153] Meech v. Hillhaven West, Inc., 238 Mont. 21, 36 (1989) (quoting Pfost v. State, 219 Mont. 206, 219 (1985)).
[154] Held, *supra* note 18, at 88-89.
[155] *Id.* at 89-90.

climate change and the MEPA limitation.[156] They did, however, grant negative injunctive relief, which prohibits the state from following the now-unconstitutional MEPA limitation.[157]

A clear path to redressability when dealing with fact patterns similar to those of *Held* is uncovered when applying *Catholic League* and *Meech*. In *Held*, the plaintiffs testified to their psychological injuries, and expert witnesses reinforced that these injuries caused by both climate change and the MEPA limitation were concrete and particularized. Under the *Catholic League* standard, the plaintiffs have eligibility for declaratory relief.[158] The district court in *Held* granted declaratory relief by holding the MEPA limitation unconstitutional.[159]

Ultimately, the court forcing Montana to restrain its harmful emissions would best redress Montana's legislature and the fossil fuel industry's violations of the state constitution. Although the court found redressability, the court's cautiousness in rejecting affirmative injunctive relief is understandable, given the political and economic environment in the state. The court should have pushed further into this area of unprecedented jurisprudence as the stability and well-being of their state's youth depended on it.

In conclusion, Montana's case law illustrates how the state can be flexible and progressive in the face of mental and psychological injuries. Montana Supreme Court decisions support recognizing psychological injuries as concrete and causally related to the state's actions.[160] The youth plaintiff's injuries would be adequately redressed if the court had explicitly recognized the state's disregard of climate science through the MEPA limitation as a direct cause of their psychological harm.

PART III: COMPARING HELD V. MONTANA TO OTHER OUR CHILDREN'S TRUST CASES

A. Standing in Hawai'i: Navahine F. v. Hawai'i Dept. of Transportation

In January 2022, fourteen young people sued the Hawai'i Department of Transportation, alleging the system's establishment, operation, and maintenance violated their and future generation's state constitutional right

---

[156] *Id.* at 102.
[157] *Id.*
[158] *See* Johnson v. Supersave Markets, 211 Mont. 467, 472 (1984).
[159] Held, *supra* note 18, at 102.
[160] Sanders, 267 Mont. at 119; Heffernan, 360 Mont. at 237; Chipman, 366 Mont. at 461-62; Gryczan, *supra* note 69.

to a clean and healthful environment.[161] The *Navahine* case reflects another climate lawsuit brought on behalf of youth to compel governments to divest from and reject fossil fuels. Although this case does not hinge on psychological injuries, *Navahine* peeks into a future where courts rule passionately in favor of finding standing for the consequences caused by climate change.

In denying a motion to dismiss filed by the state, the Hawai'i trial court granted the plaintiffs' interest in preserving their environment as concrete and cognizable.[162] The court rejected the federal standing test and expressed that the injuries were so concrete as to clearly establish standing.[163] The judge explained that "plaintiffs allege nothing less than that they stand to inherit a world with severe climate change and the resulting damage to our natural resources."[164] Starkly rejecting the state's argument, the court concluded that the "destruction of the environment is a concrete interest."[165] This undeniably powerful language imparts an unambiguous perspective: the youth of America deserve their day in court to challenge the government's decades of inaction in mitigating the climate crisis.

By holding that the "destruction of the environment is a concrete interest," the *Navahine* court opens the door for other courts to consider psychological injuries due to climate change.[166] The *Held* case could have significantly benefited from the Hawai'i court's strong language by considering the plaintiff's psychological injuries related to state action and inaction as cognizable on their own due to the severity and necessity of the circumstances.[167]

B. Standing in Utah: Natalie R. v. State of Utah

In *Natalie R. v. State of Utah*, youth plaintiffs once again took a stand against a state for its historic and ongoing promotion of fossil fuel use, which is contributing to the climate crisis in violation of the plaintiffs' constitutional rights.[168] Here, Utah does not have a "green amendment" like the one in Montana, so the plaintiffs' alleged violations related to their state constitutional rights to life, health, and safety.[169] The plaintiffs in *Natalie*

---

[161] Navahine F. v. Hawaii Dep't. of Transportation, No. 1CCV-22-0000631 1, 3 (Haw. 1st Cir. filed June 1, 2022).
[162] Ruling on Mot. to Dismiss at 10, Navahine F. v. Haw. Dep't. of Transp., No. 1CCV-22-0000631, Haw. 1st Cir. Apr. 6, 2023.
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] Held, *supra* note 18, at 26.
[168] Natalie R. v. State of Utah, No. 220901658 1, 2 (Utah 3d Dist. Ct. filed Mar. 15, 2022).
[169] *Id.*

asserted that "they are uniquely vulnerable to and face disproportionate harm to their psychological health and safety as a result" of Utah's fossil fuel economy.[170] The plaintiffs in *Natalie* asked the court to declare unconstitutional "policy explanations" in two statutes related to the burning of fossil fuels.[171]

Unlike in *Held*, the court concluded that Utah's state constitution does not allow redress for the youth plaintiffs in this case, and rather, it was the legislature's job to fix the issue.[172] The court outlined that the plaintiff's claims are precluded by the political question doctrine, which "'establishes separation of powers between the legislative, judicial, and executive branches,'" and that the argument the plaintiffs propose is "contrary to our constitutional system."[173] In addition to the inability for the "[p]laintiffs' request equitable relief. . . [to] redress their alleged harms" and preclusion due to the political question doctrine, the court asserted that it would be improper to extend substantive due process.[174] The court declined to offer substantive due process review in this case because it "should not extend the doctrine to areas it has not been previously applied, like global climate change and fossil fuel policy."[175]

Throughout the decision to dismiss the case, the court cited similar attempts by youth plaintiffs suing in state courts to remedy or compel actions related to climate change.[176] But, in the court's view, the cited cases had brought non-justiciable claims analogous to those brought by the plaintiffs in *Natalie*.[177] Although claiming the plaintiffs have a "valid concern," the court made little effort to act, justifying its position upon the argument that the remedies sought could be possible only through a global solution.[178] Thus, instead of creating a precedent to handle material issues relating to the state's promotion of fossil fuel policy and its impact on global climate change, the court dismissed the case altogether.[179]

C. Standing in Massachusetts: Kain v. Mass. Dept. of Env. Protection

In 2014, four youth plaintiffs sued the Massachusetts Department of

---

[170] Mem. Decision & Order at 1, Natalie R. v. State of Utah, No. 220901658, Utah 3d Dist. Ct. (Nov. 9, 2022).
[171] *Id.* at 7.
[172] *Id.* at 4-7.
[173] *Id.* at 2, 6-7.
[174] Natalie R. v. State of Utah, No. 220901658 1, 2 (Utah 3d Dist. Ct. filed Mar. 15, 2022).
[175] Mem. Decision & Order, *supra* at 2, 6-7.
[176] *Id.* at 3-6.
[177] *Id.*
[178] *Id.* at 2, 8.
[179] *Natalie R. v. State of Utah,* OUR CHILDREN'S TRUST, https://www.ourchildrenstrust.org/utah (case is now on appeal and pending before the Utah Supreme Court). [https://perma.cc/P83S-973U]

Environmental Protection (MassDEP), with the help of OCT, for "fail[ing] to perform statutorily mandated duties under a particular subsection of the state Global Warming Solutions Act."[180] These duties included the requisite "promulga[tion] of regulations establishing a desired level of declining annual aggregate emissions limits for sources . . . that emit greenhouse gases."[181] MassDEP missed the statutory deadline to promulgate such regulations, which were supposed to be "instituted by January 1, 2012, [and] take effect on January 1, 2013."[182] The plaintiffs brought suit to compel the state to create and enforce emission limits.[183] The plaintiffs in *Kain* do not assert any physical or psychological claims—only that the MassDEP failed to effectively and meaningfully participate in the state's climate change regulation.[184] This case was appealed to the Massachusetts Supreme Judicial Court, which ultimately ordered MassDEP to impose limits on annual aggregate greenhouse gas emissions and take additional steps to comply with the Global Warming Solutions Act.[185]

Like *Kain*, the *Held* plaintiffs challenged the state's manipulation of climate legislation and argued that certain impacts were blatantly ignored.[186] The court in *Kain* refrained from discussing standing because its issue was one of statutory interpretation.[187] The *Held* case could have benefited from this direct standing analysis, but the youth plaintiffs had distinctive injuries buttressed by key research. The *Held* ruling was distinguished through more complexity than the *Kain* argument offers.

CONCLUSION

Youth all over America suffer some of the worst impacts of climate change with little assistance from the branches of government. Experiencing climate anxiety, grief, solastalgia, stress, and trauma, young people are enduring humanitarian and intergenerational injustice. In a movement to pressure the courts, young people joined forces with OCT attorneys to represent their interests in pressing for action against the climate crisis. *Held v. State of Montana* made history as the first U.S. climate lawsuit to reach a trial and succeed on behalf of youth. In granting the sixteen youth plaintiffs'

---

[180] Mem. of Decision & Order on the Pl.'s Mot. for J. on the Pleadings, at 1, Kain v. Mass. Dep't. of Env't. Prot., No. 14- 02551 474 Mass. 278 (Mar. 24, 2015). (citing G.L. c. 21N, § 3(d)).
[181] *Id.* at 2.
[182] *Id.*
[183] *Id.* at 3.
[184] *Id.*
[185] Kain v. Mass. Dep't. of Env't., 474 Mass. 278, 300 (2016).
[186] Held, *supra* note 18 at 1.
[187] Mem. Of Decision, *supra* note 184, at 4.

cognizable injury in fact standing for their psychological injuries related to climate change, the Montana district court solidified a historic ruling. While this decision is a significant win in the climate movement, young people need more profound and meaningful accountability from their governments. The courts ought to hear their unprecedented stories, appreciate their psychological injuries by recognizing the cognizability of the injuries on their own as they relate to institutional betrayal, and offer relief accordingly. Without judicial recognition of youth psychological injuries related to their state government's ignorance and institutional betrayal of their generation's constitutional rights, the *Held* plaintiffs remain vulnerable. This vulnerability may persist, but the next wave of Our Children's Trust youth climate cases is already on its way to the courts, ready and willing to shift the paradigm for current and future generations.

BALLOT BOX BIOLOGY: STATE INITIATIVES THAT IMPACT SCIENTIFIC WILDLIFE MANAGEMENT AND THE PATHWAY TO ENACT SUPERMAJORITY RESTRICTIONS ON THEM

Colin J. Schmitt*

INTRODUCTION

"Ballot box biology" refers to the use of state-level ballot initiatives to make wildlife management decisions.[1] These ballot initiatives, a form of direct democracy, allow the public to propose and enact laws or statutory changes via popular vote.[2] Currently, twenty-four states allow for the ballot initiative process, and twenty-one of those states allow for a statutory initiative process.[3] The statutory process is most commonly used to impact wildlife management decisions. The use of the initiative process has become

* Colin J. Schmitt is a former New York State Assemblyman and former Co-Chair of the NY Legislative Sportsmen's Caucus. He is currently a joint JD/MEM student at the Elisabeth Haub School of Law at Pace University and Yale School of the Environment. *Author Acknowledgements*: I thank my wife Nikki, our newborn daughter Felicity and our law dog Quincy for giving me the time to write this note. Much appreciation to Professor Carol Barry and Professor Josh Galperin for insight, input and support at various times during the writing process along with the staff of several organizations who helped advance the research process. A huge thank you to the staff and editors of the Chicago-Kent Journal of Environmental & Energy Law for their edits and insights to make this paper the best it could be.

[1] *See* Remington Contributor, *Ballot Box Biology,* REMINGTON AMMUNITION – BIG GREEN BLOG (Feb. 13, 2024) https://www.remington.com/big-green-blog/ballot-box-biology.html [https://perma.cc/4EXP-HJSZ]; Andrew Carpenter, *Cougar Hunting ban proposal is 'not straightforward,'* THE TIMES-INDEPENDENT (May 14, 2024) https://www.moabtimes.com/articles/cougar-hunting-ban-proposal-is-not-straightforward/ [https://perma.cc/BNH6-JVAG] (Academic research and sourcing on the specific term 'ballot box biology' is currently limited. Drawing on my experience serving as a New York State Legislator and Co-Chair of the NY Legislative Sportsmen's Caucus and using industry and advocacy group sourcing to highlight the accepted term for the use of initiatives targeting scientific wildlife management within the hunting community that strongly opposes ballot box biology.).

[2] *I&R Fact Sheet* – Number 1- What is Initiative and Referendum– Initiative and Referendum Inst. USC Gould School of Law, https://static1.squarespace.com/static/64fb2a824bc4a564c732b324/t/6547f7d62344e76b3d89a8a5/1699215320142/Handout+-+What+is+IR+%281%29.pdf. [https://perma.cc/S4UV-C7KP] (last visited June 26, 2024, 11:47 AM)

[3] *Direct Democracy in Your State,* Initiative and Referendum Inst. USC Gould School of Law, https://www.initiativeandreferenduminstitute.org/dd-in-your-state [https://perma.cc/A9VJ-LXAY] (last visited June 23, 2024, 10:39 AM).

particularly prevalent in the western United States, leading to a concentration of ballot box biology disputes in that region of the country.[4] As a result, hunters, referred to as consumptive users throughout this note,[5] and wildlife management professionals in the American West increasingly seek ways to preserve scientific wildlife management practices when faced with the initiative driven process.

Wildlife management in the United States is based on the North American Model of Wildlife Conservation (NAMWC).[6] NAMWC has seven tenets, including "scientific management of wildlife: the best science available will be used as a base for informed decision-making in wildlife management."[7] Since its inception that model has had renowned success, with no big game species going extinct and in many cases species reaching record population numbers.[8] The model is funded by fees from hunting and fishing licenses and excise taxes, known as 'Pittman-Roberston' on related equipment purchased by consumptive users.[9] NAMWC therefore depends on consumptive users to support its funding and operational mechanisms. Ballot box biology initiatives directing wildlife management decisions empowers nonconsumptive-users (and therefore non-funders), who typically have a limited knowledge and experience in these matters, to enact wildlife management decisions that are typically not scientifically based.[10] States

---

[4] RICHARD J. ELLIS, DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA 35 (2002) ("States that have come to rely most heavily on the initiative process, [are] particularly Oregon, California, Colorado, Washington and Arizona.").

[5] Martin Nie, *State Wildlife Policy and Management: The Scope and Bias of Political Conflict*, 64 Pub. Admin. Rev. 221, 229 (2004) (The term consumptive users will be used throughout the paper and always refers to hunters.).

[6] Brent Lawrence, *North American Model of Wildlife Conservation: Wildlife for Everyone*, U.S. FISH AND WILDLIFE SERVICE (June 24, 2024, 09:32 PM), https://www.fws.gov/story/2022-04/north-american-model-wildlife-conservation-wildlife-everyone. [https://perma.cc/N5AX-GH9A].

[7] *Id. (The seven tenets of NAMWC are: (1) Wildlife as Public Trust Resource; (2) Eliminations of Markets for Wildlife; (3) Allocation of Wildlife by Law; (4) Wildlife Can Only be killed for a Legitimate Purpose; (5) Wildlife Are Considered an International Resources; (6) Science Is the Proper Tool for Discharge of Wildlife Policy and (7) Democracy of Hunting).*

[8] ROBERT E. WRIGHT, THE HISTORY AND EVOLUTION OF THE NORTH AMERICAN WILDLIFE CONSERVATION MODEL 5 (2022) (The author of this book refers to NAMWC by a modified naming convention in both the title and contents of the book. This modified naming convention is not used in this paper nor other academic sources.).

[9] Lawrence, *supra* note 6 ("Today, through self-imposed excise taxes on hunting, shooting, archery and angling equipment, and a tax on boating fuels, hunters, recreational shooters and anglers have generated approximately $25.5 billion for wildlife and habitat conservation since 1937." The funding "comprises, on average, 75% of a state fish and wildlife agency's annual budget." For the year 2022 "a record $1.5 billion was distributed to states through the program.").

[10] Wright, *supra* note 8, at 79-80.

have a vested interest in protecting the NAMWC and the work of state-employed scientists and experts who carry out science-based wildlife management ("S-BWM") efforts within their borders. Without additional safeguards, the initiative process undercuts a state's entire system of scientific wildlife management and the rights and access of consumptive users.

In order to protect science-based wildlife management from the negative impacts of action at the ballot box, Utah voters in 1998 approved Proposition 5.[11] This proposition was a constitutional amendment to require a supermajority vote to adopt any initiative related to wildlife management.[12] Supporters of the proposition said its enactment would ensure "Utah's wildlife policies and practices . . . have more protection from outside intervention."[13] Since Utah voters passed Proposition 5, S-BWM has been protected in the state with no wildlife initiative qualifying to appear on the ballot for a vote.[14]

This note argues that the best available solution to protect S-BWM in states with simple majority ballot initiatives is replicating Utah's supermajority requirement. Starting with Part I, this note will discuss the history, success, and importance of NAMWC and S-BWM. Part I will also argue hunters should have an elevated status in the management of wildlife. It will also provide a brief history of state initiatives.

Then, the note will examine two significant examples of ballot box biology: California's Proposition 4 from 1998, which asked voters to ban trapping in the state, and Colorado's Proposition 114 from 2020, which asked voters to mandate wolf reintroduction. The note will discuss the original arguments for and against these propositions and campaign spending records, to shed light on how both propositions passed despite opposition from the state's respective wildlife management agencies.

Part II of this note will look at attempts at restricting the use of initiatives for wildlife management issues. It will look at Utah's success in imposing a supermajority requirement and two failed attempts in Arizona to implement a supermajority requirement and a subject matter restriction. Part III will discuss supermajorities and First Amendment claims by examining

---

[11] UTAH OFFICE OF THE LT. GOV., UTAH VOTER INFORMATION PAMPHLET – GENERAL ELECTION NOVEMBER 3, 1998 at 34 (1998).

[12] *Id.* ("Official Ballot Title: Shall the Utah Constitution be amended to require a two-thirds vote in order to adopt by initiative a state law allowing, limiting, or prohibiting the taking of wildlife or the season for or method of talking wildlife?").

[13] Zack Van Eyck and Lucinda Dillon, *Utah voters approve Prop. 5 by 60-40 margin*, DESERT NEWS (November 4, 1998) https://www.deseret.com/1998/11/4/19410489/utah-voters-approve-prop-5-by-60-40-margin/ [https://perma.cc/T8WR-CB8V]

[14] See NATIONAL CONFERENCE OF STATE LEGISLATURES, Statewide Ballot Measures Database, https://www.ncsl.org/elections-and-campaigns/statewide-ballot-measures-database (last visited May 30, 2024).

the Tenth Circuit's ruling upholding the Utah supermajority requirement in *Initiative and Referendum Institute v. Walker*.[15] Next, the note will discuss supermajorities and equal protection claims by reviewing the U.S. Supreme Court ruling in *Gordon v. Lance*.[16] Part IV offers guidance that other states can follow to implement supermajority requirements to protect science-based wildlife management.

I. BACKGROUND

A. North American Model of Wildlife Conservation (NAMWC)

The North American Model of Wildlife Conservation is a unique form of wildlife management practiced in the United States and Canada.[17] The model emerged in the early 1900's and was developed as part of the larger effort to conserve wildlife on the North American continent.[18] NAMWC was advocated for by sportsmen, particular Boone and Crockett Club members.[19] The early efforts that led to the NAMWC were fueled by sportsmen's concerns regarding the reduction in wildlife population and habitat.[20] Since NAMWC was implemented, its success has been significant, and it is "generally credited with saving many wild game species from extinction."[21] Since its inception over a century ago "no big game species has gone extinct and several have attained, or approached, record populations, in so far as they can be estimated."[22] NAMWC is comprised of seven tenets that work together to create the modern-day wildlife management structure.[23]

All tenets of the model are critical for its success, which despite having no independent legal authority is the foundation for how the federal and state governments manage wildlife, [24] but this note will only explore the

---

[15] Initiative and Referendum Inst. v. Walker, 450 F.3d 1082 (10th Cir. 2006).
[16] Gordon v. Lance, 403 U.S. 1 (1971).
[17] *See* Valerius Geist, Shane P. Mahoney, John F. Organ, *Why Hunting Has Defined the North American Model of Wildlife Conservation*, TRANSACTIONS OF THE 66TH NORTH AMERICAN WILDLIFE AND NATURAL RESOURCES CONFERENCE 175, 175 (Wildlife Mgmt. Inst. 2001).
[18] *North American Model of Wildlife Conservation (NAMWC)*, COLO. PARKS & WILDLIFE, https://cpw.state.co.us/conservation/north-american-model-of-wildlife-conservation [https://perma.cc/752G-YZA8] (June 24, 2024, 9:31 PM).
[19] Geist et al., *supra* note 17, at 180.
[20] Lawrence, *supra* note 6, at 2.
[21] Wright, *supra* note 8, at 5.
[22] *Id.*
[23] Geist et al., *supra* note 17, at 176-79.
[24] M. Nie, C. Barns, J. Haber, J. Jolu, K. Pitt & S. Zellmer, *Fish and Wildlife Management on Federal Lands: Debunking State Supremacy*, 47 ENVTL. L. 14, (2017) ; see, e.g., NAMWC, *supra* note 18; Lawrence, *supra* note 6.

sixth and seventh tenets because they are most directly impacted by ballot box biology. The sixth tenet states "science is the proper tool for discharge of wildlife policy."[25] The sixth tenet represents a core of what was advocated for by the Boone and Crockett Club and sportsmen supporters of wildlife conservation.[26] The effort to have science at the forefront of wildlife management created the wildlife profession in North America.[27] Each state has an agency or commission that employs wildlife professionals that oversee and implement the NAMWC and regulate hunting and fishing.[28] These state wildlife managers use a range of data and scientific approaches to monitor animal populations and habitats to make wide ranging management decisions.[29] An example of a scientific approach that differentiates NAMWC from other management models is that hunting is considered a tool for conservation instead of a threat to animal survival.[30] This approach ensures science is what regulates hunting instead of other political or special interests.[31] Protecting wildlife decisions from political or special interests ensures that wildlife managers are able to rely on their data and expertise versus any other non-wildlife management influences which would not be science based.

The seventh tenet is "[d]emocracy of [h]unting."[32] This tenet was meant to reject the European hunting model that provided only the ruling elite with the ability to hunt and control land access. The seventh tenet ensures in North America that "all citizens in good standing can participate."[33] Recently, some have misconstrued the "democracy" tenet to support a form of majority rule for wildlife management.[34] It is a false understanding of NAMWC to say the seventh tenet supports majority rule and could be used as a justification for ballot box biology. The seventh tenet is based on Aldo Leopold's "democracy of sport" which worked to ensure "the participation of the common man in hunting."[35] This approach was needed to protect against "wildlife becoming a pawn in class conflict,"[36] as had happened historically

---

[25] *See* Geist et al., *supra* note 17, at 178.
[26] *Id.*
[27] *Id.*
[28] Ethan A. Shirley, *Can the North American Model Work in the Global South*, in WILDLIFE L. CALL 1 (Ass' of Fish & Wildlife Agencies 2017-2018).
[29] Wright, *supra* note 8, at 10.
[30] Shirley, *supra* note 28.
[31] *Id.*
[32] Geist et al., *supra* note 17, at 179.
[33] *Id.*
[34] Wright, *supra* note 8, at 80.
[35] Geist et al., *supra* note 17, at 179.
[36] *Id.* at 181.

in Britain.[37] The seventh tenet goes to the core of what this note will explore; it will address concerns over ballot box biology pitting well-funded, nonconsumptive-users supporting wildlife initiatives against consumptive users supporting scientific approaches in popular vote initiative elections.

The NAMWC funding mechanism of "user-pay, user-benefit model"[38] plays a significant role in the success of the NAMWC. With this, structure wildlife managers are able to focus on long-term goals which benefits not only consumptive users and the species they hunt and fish but nature and all who enjoy it as a whole.[39] The NAMWC funding model has been declared "the most successful wildlife management model in the world."[40] Large portions of each state's wildlife management funds come from revenue generated through this model.[41] The main driver of funding is license fees, along with excise taxes collected on hunting and fishing related products.[42] As the U.S. Fish & Wildlife Service has declared, "the relationship between hunters, anglers and wildlife conservation is truly special and incredibly intertwined."[43]

This intertwined relationship of being heavily dependent on consumptive users plays prominently into concerns over attempts at making wildlife management decisions at the ballot box.[44] The relationship succeeds by generally "not allowing non-payers (who are often nonconsumptive-users with limited understanding of the issues involved) to dictate policy, even if they constitute a majority of voters."[45] A common concern regarding wildlife management initiatives across different jurisdictions is that restrictions and management decisions imposed by voters will result in less opportunities for consumptive users. Moreover, this situation could also result in a decrease in

---

[37] *Id.* ("Pawn in class conflict as was the case during the Tudor and Stuart Periods in Britain.") (internal citations omitted).
[38] Wright, *supra* note 10, at 80.
[39] Lawrence, *supra* note 6, at 4.
[40] NAMWC, *supra* note 18.
[41] *Id.* at 2. (noting that seventy-percent of the state of Colorado's wildlife management funds come from revenue generated by hunting and fishing activities using this funding mechanism).
[42] Lawrence, *supra* note 6, at 4-5.
[43] *Id.* at 5.
[44] *See* Martin Nie, *State Wildlife Policy and Management: The Scope and Bias of Political Conflict*, 64 Pub. Admin. Rev. 221, 223 (2004) ("The most direct challenge to this paradigm has come from disgruntled interest groups that believe their values and perspectives do not receive serious consideration in the dominant wildlife commission decision-making framework. Many of these groups strike at what they see as the root of the problem: the wildlife policy-making process. The Humane Society of the United States, clearly prioritizing this issue, summarizes: 'the 94 percent of Americans who do not hunt are effectively excluded from wildlife management decisions and policy development.").
[45] Wright, *supra* note 8, at 80.

fees generated, which are essential to ensure the continued success of the S-BWM system currently in place under the NAMWC.[46]

1. Elevated Status of Hunters

The elevated status of hunters as consumptive users, and the exclusion of nonconsumptive users and non-hunters,[47] by NAMWC is appropriate. While this elevated status has caused frustration among nonconsumptive users and non-hunters leading to additional attempts at ballot box biology it is important to understand the reason behind this status that can provide helpful context. [48] First, hunters fund wildlife and conservation management efforts with the "user pay, user-benefit model."[49] Secondly, the elevated status is also warranted due to hunters' prominence in developing, along with filling vital roles in the modern system of wildlife management and conservation.[50] Finally, hunter field activity is key to tracking management goals and providing wildlife biologists with data and information they need to properly conduct science-based management.[51] These factors are the practical reasons why state wildlife agencies traditionally align their actions and efforts with those in the hunting community.[52]

Arguments have been made that the elevated status of hunters can be reduced with a change in the funding mechanism and changes to the composition of the modern wildlife management system.[53] What cannot be changed, and the strongest argument for hunters elevated status, is the American hunting legacy. The elevated status of hunters is enshrined by the historical legacy of hunters both in the formation of this country and in the continent's history. Since the beginning of American history society has

---

[46] Tony Davis, *Prop. 109's details send both sides into tizzy*, ARIZONA DAILY STAR, September 30, 2010 ("Proposition 109 as critical to preserve what is known as the North American Model of Wildlife Management.").
[47] *See* Wright, *supra* note 8.
[48] *See* Nie, *supra* note 44 at 223.
[49] *See* Wright, *supra* note 8, at 80.
[50] Nie, *supra* note 44, at 222.
[51] ORGAN, J.F., V. GEIST, S.P. MAHONEY, S. WILLIAMS, P.R. KRAUSMAN, G.R. BATCHELLER, T.A. DECKER, R. CARMICHAEL, P. NANJAPPA, R. REGAN, R.A. MEDELLIN, R. CANTU, R.E. MCCABE, S. CRAVEN, G.M. VECELLIO, AND D.J. DECKER, The North American Model of Wildlife Conservation, The Wildlife Soc'y Tech. Rev. 12-04 at 22 (2012) ("State agencies have been collecting information on wildlife from hunters at check stations since the 1930s, a practice called "surrogate biology" as it used people to obtain information about harvests and traits of harvested animals.").
[52] Nie, *supra* note 44, at 223.
[53] *See* Cynthia A. Jacobson and Daniel J. Decker, *Ensuring the future of State Wildlife Management: Understanding Challenges for Institutional Change*, 34 WILDLIFE SOC'Y BUL. 531 (2006).

relied on the harvesting of wild game both for individual subsistence and as a bedrock of the larger economy and community life. The historical precedent for wildlife and hunting laws dates back to Roman and Greek legal traditions and runs through history to the founding of the nation.[54] The tradition of hunting itself on the North American continent stretches back even further, over 13,000 years ago.[55] These historical factors buttress the practical modern-day funding and operational aspects of the elevated status of hunters.

B. State Initiatives

The birth of initiatives at the state level can be traced back to the populist movement in the late 19th century.[56] Early supporters were on the left of the American political spectrum.[57] These supporters sought to bring the Swiss direct democracy model to the United States in order to help working class voters "destroy the American plutocracy."[58] These early attempts were unsuccessful, but they laid the groundwork for a mainstreaming of the efforts and language used to build support for initiative at the state level.[59] The prominent national talking point became that the "referendum"[60] should be applied only to those subjects where the existing state laws are so bad that practically everyone favors a change."[61] It was argued that on a "majority of issues the voters should and would stay out of the legislature's way."[62] As state legislatures took up debate on whether to adopt the initiative process, supporters declared it would serve as "another safeguard of politics, one

---

[54] *See* Geer v. Conn., 161 U.S. 519, 522-24 (1896) (Justice White majority opinion historical review).
[55] *See* Terry L. Jones, *Archaeological Perspectives on Prehistoric Conservation in Western North America*, 70 Int'l J. Envtl. Stud. 350 (2013).
[56] *See Ellis*, *supra* note 4, at 26 (discussing background of populist party movement to bring the initiative to the states); THOMAS GOEBEL, A Government by the People: Directing Democracy in American, 1890-1940, 12-13 (2002).
[57] *Id.*
[58] *See Ellis*, *supra* note 4, at 28; STEVEN L. PIOTT, Giving Voters a Voice: The Origins of Initiative and Referendum in America, 1 (2003).
[59] *See Ellis*, *supra* note 4, at 30 (noting the language changed for incendiary populist slogans to more mainstream comments "to justify direct legislation as a safeguard of last resort, remedying the abuses and corrupt excesses that prevented the legislature from operating optimally.").
[60] While this note is focused on the initiative, from time-to-time words such as initiative and referendum, which have different meanings, will be used or quoted. For the scope of this note these terms and others are meant to relate to the overall process of direct democracy.
[61] Ellis, *supra* note 4, at 32 (quoting George Shibley, founder of the Non-partisan Federation for Securing Majority Rule).
[62] *Id.*

which citizens would only need to deploy infrequently to keep politicians in check."[63]

The minimalist arguments used to get states to adopt direct legislation authority did not last. The infrequent use promised in arguments leading to the initiative's adoption made way for a system being frequently used and abused. Often, initiative overuse targeted not just the political class and powerful interests but a wide range of vulnerable citizens.[64] Despite a common desire from those supportive of initiatives for a new process that would shake up the traditional power structure, "[t]he initiative process does not offer a respite from interest group politics, but rather a new venue in which most of the same old interest groups contest for power."[65] These ballot battles can play out across a diverse range of issue areas and the ideological spectrum on a state-by-state basis. From 1990 to 2000, there was three times the rate of initiatives appearing on the ballot as compared to the 1940's-1960's.[66] Regarding initiatives related to wildlife management from 1990 to 2019, at least 103 measures[67] have appeared on the ballot. These data points reflect the extensive use of the initiative beyond what the initial arguments in favor of the process promised. In regards to wildlife management, the use of ballot initiatives has become a common practice.[68]

Currently twenty-four states allow for initiative, and twenty-one of those states allow for a statutory initiative process.[69] Each state has individualized rules for how an initiative makes it onto the ballot, from petition signature requirements, to subject matter restrictions, and campaign finance rules.[70] Following the process that a state prescribes for an initiative to qualify for the ballot, "[d]epending on effectiveness of supporting or opposing campaigns or general acceptance of the content of the language found in the initiative, laws are made or changed based on majority opinion

---

[63] *Id.* at 33.
[64] *Id.* at 35 (analogy discussing vulnerable minorities being impacted by the "gunslingers" who control political power.).
[65] *Id.* at 109.
[66] Ellis, *supra* note 4, at 35.
[67] Email from Brent Miller, Vice President – Policy, Congressional Sportsmen's Foundation, (July 1, 2024 9:08 AM) (on file with author excel of Congressional Sportsmen's Foundation Ballot Initiatives History Database 1990-2019).
[68] Lucas O'Brien, *State Ballot Initiatives and Federal Preemption: How Colorado Voters Have Changed Cooperative Federalism in Wildlife Management*, 62 NAT. RESOURCES J. 49, 71 (2022).
[69] Direct Democracy in Your State, *supra* note 3.
[70] *See* Quinn Yeargain, *Administrative Capacity in Direct Democracy*, 57 U.C. DAVIS L.R.1347, 1351 (2023).

of the voting public."[71] The initiative process often limits those with opposing views on a proposed ballot initiative from having any input outside of publicly campaigning against the measure.[72]

The legal and political requirements around the modern-day initiative process have created an "initiative industrial complex,"[73] with high priced campaigns and professional operations aimed at supporting or opposing measures. This has empowered interest groups with organizational and funding capabilities to succeed in the initiative process.[74] Funding plays a major part in the success or defeat of initiatives with "78% of ballot campaigns . . . won by the side that spent the most money."[75] While voters may be given a voice when casting a ballot for an initiative, it upends the traditional democratic approach which encourages debate and compromise.[76] This modern-day initiative process has a significant impact on wildlife management and how consumptive users and state wildlife management experts are able to respond to ballot box biology initiatives.[77]

C. Ballot Box Biology

Ballot box biology[78] has seen a precipitous rise in use, fueling efforts to circumvent the usual legislative or agency process to enact a desired reform related to wildlife management.[79] Changes in wildlife law and management

---

[71] Donald G. Whittaker, Steven Torres, *Introduction: Ballot Initiatives and Natural Resource Management: Some Opinions on Processes, Impacts, and Experience*, 3 HUM. DIMENSIONS OF WILDLIFE 1, 1 (1998).

[72] *See* Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 SANTA CLARA L. REV. 1037, 1052-53 (2001) [hereinafter K. Miller].

[73] Elizabeth F. Maher, *When a Majority Does Not Rule: How Supermajority Requirements on Voter Initiatives Distort Elections and Deny Equal Protections*, 15 GEO. MASON L. REV. 1081, 1085 (2008) (quoting TODD DONOVAN ET AL., DANGEROUS DEMOCRACY?: THE BATTLE OVER BALLOT INITIATIVES IN AMERICA 101, 101 (Larry J. Sabato et al. eds., 2001)).

[74] *See* RICH BRAUNSTEIN, INITIATIVE AND REFERENDUM VOTING GOVERNING THROUGH DIRECT DEMOCRACY IN THE UNITED STATES 5 (2004).

[75] *Id.* (Campaign funding disparities and how this impacted outcomes on specific initiatives will be examined later, but a separate work would be required to fully explore the impact of money on a popular vote election.).

[76] *See* K. Miller, *supra* note 72, at 1051 ("The initiative process substitutes the legislature's elaborate system of checks and balances with much more direct lawmaking. Bypassing checks and balances can in fact help produce major policy breakthroughs in an expedited way, but these benefits come at a cost.").

[77] *See* Scot J. Williamson, *Origins, History, and Current Use of Ballot Initiatives in Wildlife Management*, 3 HUM. DIMENSIONS OF WILDLIFE 51, 51 (1998).

[78] *See* Remington Contributor *supra* note 1, at 1.

[79] *See* Stephen L. Eliason, *Structural Foundations, Triggering Events, and Ballot Initiatives: The Case of Proposition 5*, 29 WILDLIFE SOC'Y BULL. 207, 207 (2001).

made at the ballot box versus through the traditional process "can have far-reaching consequences that individuals fail to see."[80] Concerns over initiatives dealing with wildlife management include the controversial nature of the topics, poor understanding of the issue by the general public and a lack of biological or scientific justification.[81] A major factor behind this increase has been the "growth of wildlife organizations with nonconsumptive orientations."[82] When nonconsumptive users influence in the process increases, it threatens to derail the success of NAMWC, which as previously discussed, relies on consumptive users for funding and to maintain support for a science-based approach to wildlife management.

The consumptive user is a numerical minority within voting populations.[83] As such, the well-funded special interest groups "may unfairly limit consumptive user groups regulated by state wildlife management agencies."[84] Those who strongly oppose wildlife management initiatives point to the fact that the general public is not as equipped as "trained wildlife biologists and experts to make these decisions."[85] Moreover, urban residents, who are often far removed from the location and direct impact of these decisions, tend to have a larger share of voting power and can out vote consumptive users and rural residents.[86] The urban resident's disproportionate voting power can lead to the outcome of a wildlife management initiative election being divorced from a science-based decision process and the "user-pay, user-benefit model,"[87] upending the NAMWC completely.[88] Leading opponents of ballot box biology decry these initiatives as "entrusting uninformed voters with habitat decisions better left to the 'knowledgeable wise men (or women) of science.'"[89] Successful initiatives can limit the tools available to state wildlife management agencies,[90] leaving little recourse for consumptive users and scientists and impacting wildlife in ways beyond the scope of what is written on the paper ballot.[91]

---

[80] *Id.* at 208.
[81] *Id.*
[82] Jacobson & Decker, *supra* note 53, at 531.
[83] Williamson, *supra* note 77, at 58.
[84] *Id.*
[85] Nie, *supra* note 44, at 227.
[86] *See Id.*
[87] *See* Wright, *supra* note 8, at 80.
[88] *See* Leeann Sullivan, *For Species reintroduction it's all politics*, 19 FRONT. ECOL. EVN'T 206, 206 (2021).
[89] *Id.*
[90] *See* Williamson, *supra* note 77, at 58.
[91] Nie, *supra* note 44, at 227 (quoting prominent wolf biologist David Mech (1996) "it is ironic that this simple majority rule type of wildlife management is basically that same approach that extirpated carnivores many years ago. Although there were no actual referendums at the time, there were bureaucrats acting contrary to scientific opinion but

1. California Proposition 4 – 1998

In 1998, California Proposition 4 was on the ballot to "place[] new restrictions on the use of traps and poisons to capture and kill specified mammals for various purposes."[92] This proposition "virtually eliminate[d] animal trapping in California."[93] The initiative passed with the vote yes coalition spending a combined $1,517,340 on their successful efforts, while the vote no coalition spent $550,755.[94] Proposition 4 passed, despite the opposition of the California Department of Fish and Game who publicly "generally oppose[d] the proposition, saying it favor[ed] emotionalism over sound wildlife management principles."[95] The state agency charged with scientific wildlife management objected to the proposition because of anticipated impacts to endangered species recovery programs, predator control and public health applications.[96] The state agency also defended the humane applications of the traps the proposition sought to outlaw, which the state had used to capture and monitor protected species like the golden eagle.[97] Despite the state agency's concerns about the proposition, its supporters prevailed.

While California Fish and Game argued against attempts to limit their management authority, the vote yes coalition pushed back, and with a well-funded campaign.[98] The vote yes coalition called for the protection of both wildlife and family pets, declaring that the traps were "cruel and indiscriminate" and would cause "injury and prolonged suffering until death."[99] As a newspaper report from the time indicated, the battle facing

---

bending to the public will . . . the lesson to be learned is that public sentiment is fickle. If major carnivore management decisions are determined by public mood rather than by the knowledge of professionals, we could end up with California full of carnivores and North Dakota with none.").

[92] CALI. SEC'Y OF STATE, VOTE98 – ANALYSIS OF PROPOSITION 4 (1998).

[93] Glen Martin, *Proposition 4 Divides Environmental Groups/Conservationists Argue over traps*, SAN FRANCISCO CHRONICLE (October 23, 1998) https://www.sfgate.com/politics/article/Proposition-4-Divides-Environmental-Groups-2983455.php.

[94] CALI. SEC'Y OF STATE, PROPOSITION 4 SPENDING REPORTS (1998) (The margin for the election was Yes 57.44% to No 42.56%). (The successful vote yes coalition of outside interest groups headed by the Humane Society of the United States outspent the vote no coalition by a margin of over 2.75 to 1).

[95] Martin, *supra* note 93. (The department has since been renamed the California Department of Fish and Wildlife).

[96] *Id.*

[97] *Id.*

[98] *See supra* note 94.

[99] CALI. SEC'Y OF STATE, VOTE98 – ARGUMENT IN FAVOR OF PROPOSITION 4 (1998).

scientific management was daunting despite the proven value of trapping to the environment and animal populations including endangered species: "images of coyotes or bobcats caught in these devices are arresting, and they will no doubt influence many voters."[100] Given the emotion driven public relation impact these arguments had compared to science or data based arguments available to the state agency and consumptive users, there was an inability to successfully defend scientific wildlife management tools.[101]

2. Colorado Proposition 114 – 2020

In 2020, Colorado Proposition 114 was on the ballot to mandate the "reintroduction of gray wolves on designated lands."[102] This proposition sought to "force the state to capture and release wolves in Western Colorado by 2024."[103] The initiative passed by a slim margin, 50.9% to 49.1%.[104] The Vote Yes coalition spent a combined $2,403,099.01[105] on their successful effort, while the Vote No coalition spent $1,064,478.04.[106] The proposition passed despite the long-held opposition to forced gray wolf reintroduction by

---

[100] Martin, *supra* note 93.

[101] Christopher Burnett, *Ballot Initiatives and Wildlife Management Policy Change in Two Western States*, 31 J. Enviro. Sys. 222, 223 (2004) ("Advocates of trapping bans have spent millions on ballot issues, usually effectively overwhelming federal and state wildlife agencies which argue that the use of the ballot box makes a mockery of the professional decision-making superiority of wildlife managers.").

[102] COLO. GEN. ASSEMB., 2020 COLO. BALLOT ANALYSIS: PROPOSITION 114 REINTRODUCTION AND MANAGEMENT OF GRAY WOLVES, FINAL TEXT OF MEASURE (May 24, 2019). https://leg.colorado.gov/sites/default/files/initiative%2520referendum_prop%20114%20final%20lc%20packet.pdf [https://perma.cc/Y8D5-BY3S].

[103] Sam Brasch, Why Colorado's Wolf Initiative is Causing Howls of 'Ballot Box Biology,' CPR News (Feb. 6, 2020), https://www.cpr.org/2020/02/06/why-colorados-wold-initiative-is-causing-howls-of-ballot-box-biology/ [https://perma.cc/K33F-GMSB]

[104] COLO. SEC'Y OF STATE, 2020 GENERAL ELECTION RESULTS – PROPOSITION 114 (STATUTORY) – PASSED (November 5, 2020) https://www.sos.state.co.us/pubs/elections/Results/Abstract/2020/general/amendProp.html [https://perma.cc/QE6F-9NQF] (The proposition passed 50.9% (1,590,299) to 49.1% (1,533,313)).

[105] COLO. SEC'Y OF STATE, CAMPAIGN FINANCE DISCLOSURE DATABASE REPORT OF CONTRIBUTION AND EXPENDITURES FOR ROCKY MOUNTAIN WOLF ACTION FUND (YES), COLORADO SIERRA CLUB – ELECT THE WOLF (YES) (April 15, 2024) (This final number includes lifetime summary of monetary and non-monetary contributions combined. The spending disparity between the successful yes side and no side was over 2.25 to 1.).

[106] COLO. SEC'Y OF STATE, CAMPAIGN FINANCE DISCLOSURE DATABASE REPORT OF CONTRIBUTION AND EXPENDITURES FOR STOP THE WOLF (NO) AND COLORADANS PROTECTING WILDLIFE (NO) (April 15, 2024) (This final number includes lifetime summary of monetary and non-monetary contributions combined.).

Colorado Parks and Wildlife.[107] This note does not seek to take a stance on the merits for or against reintroduction of wolves as an issue in the global sense, but highlights the concerns of making such a paramount decision through the ballot box and against the NAMWC and scientific input of the state's wildlife management experts who had "repeatedly opposed reintroduction, [but] the state [was] open to wolves migrating to Colorado on their own."[108] The initiative was seen as a threat to S-BWM and the NAMWC,[109] which Colorado Parks and Wildlife practices,[110] effectively replacing wildlife experts with ballots casts on election day. Despite the long-held opposition to forced wolf (re)introduction by Colorado Parks and Wildlife and significant collaborative efforts with a diverse set of interested parties to tackle wolf management issues,[111] the proposition passed. On December 18, 2023, Colorado started the release of the first five wolves into the western range.[112]

Notwithstanding the state's years of work on gray wolf management,[113] the Vote Yes coalition was able to secure a victory. The opposition to wolf reintroduction has argued wolves will cause conflict with humans, livestock and pets in Colorado.[114] Cattle ranchers voiced the loudest concern.[115] While supporters of Proposition 114 outlined that reintroducing

---

[107] COLO. PARKS AND WILDLIFE COMM'N, RESOL, – 16-01 REGARDING INTRODUCTION/REINTRODUCTION OF WOLVES (January 13, 2016) ("Now therefore be it resolved, that the Colorado Parks and Wildlife Commission affirms its support of the Wolf Working Group's recommendations adopted by the Wildlife Commission in May 2005, and hereby opposes any introduction of Mexican or intentional reintroduction of any gray wolves in the State of Colorado.") (A similar resolution was adopted twice previously in January 1982 and September 1989.).

[108] Brasch, *supra* note 103 (Colorado Parks and Wildlife did confirm wolves were present in Colorado, including a wolf pack prior to this initiative vote.).

[109] *Id.*

[110] *See* NAMWC, *supra* note 18.

[111] COLO. WOLF MGMT. WORKING GRP, FINDINGS AND RECOMMENDATIONS FOR MANAGING WOLVES THAT MIGRATE INTO COLORADO, at 3 (August, 2023), https://cpw.state.co.us/sites/default/files/2024-08/2023-Final-CO-Wolf-Plan.pdf [https://perma.cc/7RM8-LBCW].

[112] Travis Duncan, *Colorado Parks and Wildlife successfully release gray wolves on Colorado's Western Slope*, COLO. PARKS AND WILDLIFE (December 18, 2023) https://cpw.state.co.us/aboutus/Pages/News-Release-Details.aspx?NewsID=4003. https://cpw.state.co.us/news/12192023/colorado-parks-and-wildlife-successfully-release-gray-wolves-colorado-western-slope [https://perma.cc/YB9U-ZAF6].

[113] *See* COLO. WOLF MGM. WORKING GRP, *supra* note 111, at 7; COLO. PARKS AND WILDLIFE COMM'N, RESOL, *supra* note 107.

[114] Jason Blevins, *Proposition 114 Explained: What's At Sate With the Effort to Reintroduce Gray Wolves in Colorado,* THE COLORADO SUN (September 24, 2020), https://coloradosun.com/2020/09/24/proposition-114-explained-wolf-reintroduction/ [https://perma.cc//4LQA-A2V6].

[115] *Id.*

wolves in Colorado would connect wolf populations to the north and south of the state[116] restoring a balance to the habitat with a critical species reintroduction.[117] In the end, the scientists and the Vote No opposition lost to the better funded Vote Yes arguments. Additionally, much of the proposition's support came from urban voters, who are furthest removed from the impacts of this monumental wildlife management decision.[118] Proposition 114 was the first time in history that voters reintroduced an endangered species via the ballot box.[119]

II. Attempts at Restrictions

Ballot box initiatives concerning wildlife management continue to exist even though states have attempted to restrict initiatives related to wildlife management. [120] Most of these attempts have been unsuccessful, with

---

[116] Brasch, *supra* note 103. ("Wolf packs currently roam the Northern Rockies from Washington to Wyoming. A separate population of Mexican gray wolves lives in Arizona and New Mexico.'").

[117] Blevins, *supra* note 114 ("Wolf supporters point to the Northern Rockies as evidence that wolves restore balance to ecologies and help manage big game populations that can sometimes adversely impact the habitats of other species." *and* "Wolf advocates see Colorado as the critical final step in a 40-year effort to return wolves to the lower 48.").

[118] CSU MarComm Staff, *CSU Studies: What Influenced Coloradoans on close vote to reintroduce wolves*, WARNER COLLEGE OF NATURAL RESOURCES, (April 5, 2022) https://watnercnr.source.colorstate.edu/csu-studies-what-influenced-coloradoans-on-close-vote-to-reintroduce-wolves/ [https://perma.cc/V9XR-YQQV]. ("Proposition 114 had a strong positive relationship with voter support for President Joe Biden. Additionally, the study found that younger and more urban voters had greater support for the initiative, whereas areas with more elk hunters had less support. In addition, precincts closest to locations where wolves had been recently detected, and also more broadly in the Western Slope region – where the state's wolf reintroduction process will be targeted – tended to have less support for reintroduction relative to the rest of the state.").

[119] Blevins, *supra* note 114 ("Colorado's Proposition 114 marks the first time that voters, not the federal government, would direct state wildlife managers to script a recovery plan for wolves." *See* also Brasch, *supra* note 103 ("According to the coalition backing the plan, it'd also be the first time that voters – in any state – would decide whether to reintroduce an endangered species.").

[120] Several attempts have been made to restrict initiatives related to wildlife management. This list does not include any attempts to limit initiatives generally (that list would be longer) beyond specifically wildlife management: 1) State of Alaska, November 7, 2000 (ballot measure No. 8 – act relating to management of game (subject matter restriction on wildlife management initiatives that was unsuccessful at the ballot box)); 2) Michigan Fish and Wildlife Initiated Law Bill PA 281 of 2014 (September 9, 2014) (law that declared state fish and wildlife sole agency along with the legislature that could promulgate wildlife management in state, effectively barring ballot initiatives on the subject ruled unconstitutional in Keep Mich. Wolves Protected v. State of Mich. Dept. Nat. Res., No. 328604, 2016 WL 6905923 (Mich. Ct. App. Nov. 22, 2016); 3) Arizona Proposition 102 (November 7, 2000) (proposition that sought a supermajority requirement for wildlife

a notable exception, the State of Utah with Proposition 5 in 1998, which created a supermajority requirement.[121] The attempts have traditionally taken the form of constitutional amendments, but others like Michigan have tried a legislative remedy.[122] These attempts at restrictions have been mainly presented as a method to prevent from interference with management decisions by interest groups via the ballot box.[123]

Consumptive users have been encouraged to take a proactive approach and not wait to be on the defensive when the next wildlife management ballot initiative comes about.[124] Supporting new restrictions on initiatives is not without precedent with states taking a wide variety of actions to limit the statutory power of voters at the ballot box including new requirements on petition gathering, subject matter restrictions on initiatives and campaign-finance rules.[125] There have been historical constitutional limits on the legislative powers of state legislatures, such as supermajority requirements to enact certain legislation, so it has been argued that it would make sense for voters also to be limited.[126] States have also placed limits on initiatives related to appropriations, and those that impact the judicial system or public safety.[127]

Raising the threshold for passage of an initiative is not without precedent, nor are supermajority requirements generally in American history.[128] Arizona has a constitutional requirement that for an initiative or

---

management initiatives and was defeated at the polls); 4) Arizona Proposition 109 (November 2, 2010) (proposition that sought to place a subject matter restriction on wildlife management initiatives and was defeated at the polls); 5) Utah Proposition 5 (November 3, 1998) (successful proposition that sought to place a 66.7% supermajority requirement on the passage of wildlife management initiatives).

[121] UTAH OFFICE OF THE LT. GOV., *supra* note 11 (the official "resolution establishing wildlife initiative numbers.").

[122] *See supra* note 120.

[123] Ariz. Sec. of State, Ballot Propositions & Judicial Performance Review November 7, 2000 GENERAL ELECTION 31, 33 (November 7, 2000) (comments from Joe Carter, Arizona Game and Fish Commissioner). https://apps.azsos.gov/election/2000/Info/pubpamphlet/english/prop102.pdf [https://perma.cc/3VSE-WTDH].

[124] Eliason, *supra* note 79, at 209-10.

[125] Yeargin, *supra* note 70, at 1351.

[126] *Id.* at 1420.

[127] *Id.* at 1420-21.

[128] Ellis, *supra* note 4, at 122-23 ("Supermajorities are sprinkled throughout the constitution; two-thirds vote is required for the House or Senate to expel a member; two-thirds of the Senate must vote to convict the president in order to remove him from office, and presidential vetoes may be overridden only with a 2/3rd vote in both houses of congress. Even where the constitution is silent, American political institutions have often adopted supermajority rules to govern their proceedings. Up until 1936 the Democrat party required presidential and vice-presidential candidates to receive the votes of 2/3rds of the

referendum to approve a tax a 60% supermajority threshold is required.[129] Colorado also recently amended its Constitution to require any new constitutional amendment to receive at least a 55% supermajority vote.[130] Still, that limit does not apply to repeals of existing constitutional provisions.[131] Other forms of supermajority restrictions include requiring a majority of the total number of people who turn out to vote in the general election to support the initiative.[132] Although, these restrictions have various histories they all put guard rails on the initiative process.

A. Utah Proposition 5 - 1998

Utah voters approved Proposition 5 in 1998 - a "resolution establishing wildlife initiative numbers."[133] This proposition "amend[ed] the state constitution to require a two-thirds majority vote for the passage of any citizen initiative dealing with wildlife issues."[134] The proposition approval required all wildlife-management-related measures to garner 66.7% of the vote to succeed.[135] The funding disparity of the initiative campaign was significant, with the pro-supermajority camp spending $600,000 - more than 10 times the opposition.[136] The proposition was supported by a large bipartisan majority of the state legislature,[137] as well as the Director of Wildlife Resources who supported maintaining the NAMWC process.[138] The

---

convention delegates. 3/5ths of the Senate must vote for cloture in order to terminate a filibuster. Each of these departures from majority rule reflects the nation's historical commitment to safeguarding minority rights and interests as well as promoting democratic deliberation and good public policy.").

[129] ARIZ. CONST. art. IV, pt. 1, sec. 1N, subsec. 5.

[130] COLO. CONST. art. V, §1, pt. IV, subsec. B.

[131] *Id.*

[132] Ellis, *supra* note 4, at 128 ("A majority in favor of an initiative must also be a majority of the total number of people who turn out to vote in the general election. This means that if 10 percent of the voters in Wyoming do not vote on a given initiative, the supermajority required for that initiative to pass will be about 55%. If drop off climbs to 20%, an initiative would require around 60% of the vote to pass.") (the law was challenged and the Tenth Circuit upheld it saying "If Wyoming wants to make it harder rather than easier to make laws by the initiated process, such is its prerogative.").

[133] UTAH OFFICE OF THE LT. GOV., *supra* note 11, at 34.

[134] Van Eyck & Dillon., *supra* note 13.

[135] Utah Const. art. VI, § 1, subsec. 2(a)(ii) ("Notwithstanding subsection (2)(a)(i)(A), legislation initiated to allow, limit, or prohibit the taking of wildlife or the season for or method of taking wildlife shall be adopted upon approval of two-thirds of those voting.").

[136] Van Eyck and Dillon., *supra* note 13 ("Utahns for Wildlife Heritage and Conservation spent much of that money on a television advertising campaign.").

[137] UTAH OFFICE OF THE LT. GOV., *supra* note 11, at 34 (House: Yeas, 52; Nays, 19; Absent, 4. Senate: Yes, 25; Nays, 3; Absent, 1).

[138] *Id.* at 35.

propositions success was a win for the NAMWC and the Utah state wildlife agency as compared to other initiatives previously discussed.[139] The agency took a public position on a proposition that proactively protected NAMWC and won at the ballot box.[140] The vote yes coalition succeeded by promoting S-BWM advocating for residents to "vote for [P]roposition 5 so your wildlife is managed using science and facts, not emotion and political campaigns run by extremist groups.[141] The vote yes coalition urged support for the initiative by highlighting how ballot box biology was negatively used in other states and if no action was taken Utah would be next.[142]

This proactive approach to protecting science-based wildlife management succeeded despite push-back from the vote no coalition. While the opposition campaign were gravely outspent by over 10-1,[143] the Vote No coalition argued that the "proposition would violate our tradition of majority rule . . . a vote for this proposition would limit your voice in the democratic process."[144] Vote No avoided any reference to wildlife management issues and kept its focus squarely on a democratic argument. This is another departure from previous examples of initiative propositions that leaned heavily into messaging related to the wildlife. Strategy wise this could be viewed as a decision based on the political affiliation make-up of the state or a decision to oppose the substantive efforts to change the constitution vs. wildlife that could be impacted by those changes.

The success of Proposition 5 represents both the last, and most successful constitutional amendment to limit the wildlife management initiative process preventing any wildlife initiatives from making that ballot, let alone passing, since its adoption.[145] While it has yet to be replicated, Proposition 5 is the best model S-BWM that supporters can follow to limit ballot-box biology.[146]

B. Arizona Failures – Proposition 102 and Proposition 109

---

[139] *See* Cali. Sec'y of State, *supra* note 92; Colo. General Assembly, *supra* note 102.
[140] *Id.*
[141] UTAH OFFICE OF THE LT. GOV., *supra* note 11 at 35.
[142] *Id.* ("Look at their history of taking away wildlife management practices from wildlife experts: 1990 California, 1990 Arizona, 1992 Colorado, 1992 Arizona, 1993 Oregon, 1996 California, 1996 Colorado, 1996 Oregon, 1996 Washington, and 1996 Idaho. Now, they are threatening Utah!").
[143] Van Eyck & Dillion *supra* note 13.
[144] Utah Office of the Lt. Gov., *supra* note 11, at 36.
[145] *See* note 16.
[146] Van Eyck & Dillon, *supra* note 13 (immediately after Proposition 5's passage, the effort was assumed to move to other states.)

Two unsuccessful attempts to enact restrictions on wildlife management initiatives occurred in Arizona, Proposition 102 in 2000, related to a two-thirds supermajority, [147] and Proposition 109 in 2010 related to subject matter restriction.[148] These efforts were legislative referrals,[149] supported by Arizona Game and Fish Commissioners.[150] Both initiatives were resoundingly defeated by voters at the polls.[151] Campaign finance records show that the Vote No coalition, which opposed wildlife subject matter restrictions, outspent the Vote Yes coalition, which sought to advocate for subject matter restrictions on wildlife management related matters for Proposition 109.[152] Arguments for both propositions centered on protecting the right to hunt and fish from special interests; arguing against allowing wildlife management decisions to be made at the ballot box and instead

---

[147] ARIZ.SEC. OF STATE, BALLOT PROPOSITIONS & JUDICIAL PERFORMANCE REVIEW – NOVEMBER 7, 2000 GENERAL ELECTION 31, 32 (November 7, 2000) ("Proposition 102 would also amend the Arizona Constitution to require that any initiative measure relating to the taking of wildlife does not go into effect unless it is approved by at least two-thirds of the voters who vote on the measure. Currently, the Arizona Constitution requires a simple majority vote for initiative measures. The two-thirds requirement would also apply to measures authorizing or restricting (1) the methods of taking wildlife (2) the seasons when wildlife may be taken. The two-thirds requirement would not apply to legislative enactments or to measures that the legislature refers to voters."). https://apps.azsos.gov/election/2000/Info/pubpamphlet/english/prop102.pdf. [https://perma.cc/3VSE-WTDH].

[148] ARIZ. SEC. OF STATE, BALLOT PROPOSITIONS & JUDICIAL PERFORMANCE REVIEW PUBLICITY PAMPHLET – GENERAL ELECTION November 2, 2010 43 [November 2, 2010] ("Proposition 109 would amend the Arizona Constitution to provide that: 1. Wildlife is held in trust for the citizens of this state, whom have a right to lawfully hunt, fish and harvest the wildlife. 2. The legislature has the exclusive authority to enact laws to regulate hunting, fishing and harvesting of wildlife. The legislature may grant rule making authority to a game and fish commission. No law or rule shall unreasonably restrict hunting, fishing or harvesting of wildlife or the use of traditional means and methods for those activities. Any law or rule shall have the purpose of wildlife conservation and management and preserving the future of hunting and fishing. 3. Lawful public hunting and fishing are the preferred means of managing and controlling wildlife. By its terms, nothing in Proposition 109 shall be construed to modify any law relating to trespass or property rights.").

[149] *See* Ariz. Sec. of State Proposition 102; Ariz. Sec. of State Proposition 109.

[150] *See Id.*;Davis, *supra* note 46. ("The Game and Fish Commission has endorsed Proposition 109.").

[151] ARIZ. SEC. OF STATE, STATE OF ARIZ. OFFICIAL CANVASS 2000 GENERAL ELECTION – NOVEMBER 7, 2000 15 (November 27, 2000) (Prop 102 No: 62.49%; Yes: 37.51%) *and* ARIZ. SEC. OF STATE, STATE OF ARIZ. OFFICIAL CANVASS 2010 GENERAL ELECTION – November 2, 2010 14 (November 29, 2010) (Prop 190 No: 56.48%; Yes: 43.52%) https://apps.azsos.gov/election/2000/General/Canvass2000GE.pdf. [https://perma.cc/4AGL-VPPV].

[152] ARIZ. SEC. OF STATE, BALLOT MEASURES SPENDING REPORT – HUNTING AND FISHING (PROP 109) (last visited June 29, 2024) (Amount against $438,963.16; amount for $333,097.05).

leaving all decisions to state wildlife managers using science and data.[153] Despite advocating for wildlife managers who use science and data in management decisions under NAMWC to be protected from ballot box biology decisions, both propositions were defeated.

The Vote No coalitions for both propositions opposed each proposition with different arguments. To defeat Proposition 102, the Vote No coalition avoided the wildlife argument, instead arguing for protecting democratic principles, which did not work in Utah,[154] but worked in Arizona.[155] To defeat Proposition 109, the Vote No coalition successfully leaned into the "protect wildlife" arguments.[156] However, these defeated attempts would have protected S-BWM. Coincidently, despite voting against a supermajority for wildlife management issues, Arizona voters later approved[157] a supermajority requirement for tax related initiatives.[158] These defeats represent additional failures for a state wildlife agency to achieve its desired outcome at the ballot box but from an offensive rather than defensive position.[159]

III. Analysis

A. Supermajorities and First Amendment Claims

Utah Proposition 5, which enacted a supermajority requirement on wildlife management initiatives, faced a federal legal challenge after its approval by voters on First Amendment claims.[160] The case, *Initiative and Referendum Institute v. Walker*,[161] was decided by the Tenth Circuit, and plaintiffs appealed to the United States Supreme Court, which denied certiorari.[162] The plaintiffs challenged the supermajority requirement on First

---

[153] Proposition 109, *supra* note 148, at 44.
[154] *See* Utah Office of the Lt. Gov, supra note 11, at 36.
[155] Proposition 102, *supra* note 147, at 37.
[156] Proposition 109, *supra* note 148, at 48-9.
[157] ARIZ. CONST. art. IV, pt. 1, sec. 1N, subsec. 5.
[158] Why did Arizona voters support a supermajority for taxes but not wildlife management? The citizens clearly do not have an engrained opposition to supermajority rules in order to protect majority rule and democratic principles. It would require a deeper dive into spending, messaging, and turnout to try and find the divergence. From a campaign strategy point of view, an effort to reattempt an initiative for supermajority for wildlife management issues should be considered by NAMWC supporters in Arizona.
[159] There are various laws and rules regulating how active a state wildlife agency can be in relation to initiative campaigns. From a strategic point of view agencies that can be active in commenting on initiatives, and/or outside partners need to rethink how to approach campaigns on these matters.
[160] Initiative and Referendum Inst. v. Walker, 450 F.3d 1082 (10th Cir. 2006).
[161] *Id.*
[162] Initiative and Referendum Inst. v. Herbert, 549 U.S. 1245 (2007).

Amendment grounds by arguing that the increased voter threshold "imposes a 'chilling effect' on the exercise of their First Amendment rights, and does so in a manner that is both impermissibly content-discriminatory and overbroad."[163] The plaintiffs sought to have the court apply strict scrutiny, arguing that the supermajority burdened "core political speech."[164] The Court of Appeals, en banc, rejected this argument and found the provision did not implicate freedom of speech under the First Amendment, upholding the supermajority requirement.[165] The Court of Appeals was correct in this finding, since the supermajority restriction is not a burden on political speech. Any person can still freely exercise their political speech, the supermajority requirement simple provides parameters for which the initiative process must operate.

The majority focused on this distinction between regulation of speech and regulation of process. Regulations of speech and regulations of process warrant different levels of scrutiny with "laws that regulate or restrict the communicative conduct of persons . . . warrant strict scrutiny, and laws that determine the process by which legislation is enacted, which do not."[166] The requirement that a supermajority be attained for a wildlife management initiative to pass does not prevent a person or organization from advocating for their stated position, nor does it exclude attempts to gain ballot access for their point of view. Although it increases the difficulty of success, the court found the argument of increased difficulty to be an insufficient First Amendment argument.[167] This line of reasoning follows courts upholding state restrictions at other stages of the initiative process including geographic distribution requirements for petitions (the beginning stage), subject-matter restrictions (the petition filing stage) and campaign finance rules (advocacy/campaign stage).[168] The court went through a lengthy review of supermajority requirements in state constitutions;[169] highlighting that the

---

[163] *Initiative and Referendum Inst*., 450 F.3d at 1085.
[164] *Id.* at 1099.
[165] *Id.* at 1082.
[166] *Id.* at 1099-1100.
[167] *Id.* ("[R]elying on Dobrovolny v. Moore, 126 F.3d 1111,1113 (8th Cir. 1997), which held that 'the difficulty of the [initiative] process alone is insufficient to implicate the First Amendment, as long as the communication of ideas associated with the circulation of petitions is not affected.'").
[168] *See* Yeargain, *supra* note 70.
[169] *Initiative and Referendum Inst*., 450 F.3d at 1100-1 ("Constitutions and rules of procedure routinely make legislation, and thus advocacy, on certain subjects more difficult by requiring a supermajority vote to enact bills on certain subjects. Those who propose, for example, to impeach an official, override a veto, expel a member of the legislature, or ratify a treaty might have to convince two-thirds of the members of one or both houses to vote accordingly. State constitutions attach supermajority requirements to a bewildering array of specific categories of legislation, including appropriations bills, tax levies, bonding bills,

supermajority tool is one widely used to regulate 'process' and held that "the First Amendment ensures that all points of view may be heard; it does not ensure that all points of view are equally likely to prevail."[170]

The court's majority also spoke to the plaintiffs' argument that if strict scrutiny did not apply, intermediate scrutiny should apply because the supermajority restricted expressive conduct.[171] The court wrote a healthy review distinguishing the plaintiffs' claims from the First Circuit decision in *Wirzburger*,[172] which dealt with Massachusetts' constitutional limits on ballot initiatives of specific subjects,[173] and applied the *O'Brien*[174] intermediate scrutiny standard. [175] The Tenth Circuit correctly found that *O'Brien* "does not apply to structural principles of government making some outcomes difficult or impossible to achieve."[176] Future attempts at enacting supermajority requirements should rely on this distinction when crafting legislation, ballot language, and supporting documents to avoid being trapped by any perceived Federal Court circuit split. While drafting future supermajority restrictions, parties need to explicitly state as the Tenth Circuit did, that "the supermajority requirement at issue here is a regulation of the legislative process, not a regulation of speech or expression."[177]

It is important to review points made in the dissent by Judge Lucero in order to avoid potential constitutional challenges to future supermajority efforts. Judge Lucero stated that a present-day majority was able to enact a permeant lock on its opinion in perpetuity even if the general public changed

---

debts, land use regulations, the salaries and discipline of state officials, district formation and redistricting, and judicial administration. California imposes a supermajority requirement for approval of gaming compacts. Cal. Gov't Code § 12012.25(b)(2). Hawaii imposes a supermajority requirement to permit the construction of nuclear power plants and the disposal of radioactive material. Haw. Const. art. XI, § 8. Minnesota employs a supermajority requirement to control the enactment of any general banking law.' Minn. Const. art. IV, § 26. Oregon uses the device to make it more difficult to institute reductions in certain criminal sentences. Or. Const. art. IV, § 33. South Carolina requires a supermajority to display unauthorized flags at the state capitol building. S.C.Code Ann. § 10–1–160.").

[170] *Id.*

[171] *Id.*

[172] Wirzburger v. Galvin, 412 F.3d 271 (1st Cir. 2005).

[173] *Id.* (Massachusetts prohibited initiatives for "public financial support for private primary or secondary schools" and those "related to religion, religious practices or religious institution.").

[174] United States v. O'Brien, 391 U.S. 367 (1968).

[175] *Initiative and Referendum Inst*., 450 F.3d at 1102 ("The intermediate scrutiny standard of *O'Brien* applies to laws that restrict 'expressive conduct' such as flag burning, nude dancing, or sitting at a segregated lunch counter.").

[176] *Id.*

[177] *Id.* at 1103.

its view over time.[178] The judge's opinion is inaccurate on at least two fronts. First, as the majority illustrated, the supermajority does not prevent any attempt at an initiative; it only increases the threshold needed for success - similar to restrictions related to gaining ballot access or spending campaign money. Second, neither the Proposition 5 language,[179] nor the Utah State Constitution,[180] prevents a repeal of this amendment in the future. The Utah State Constitution provides for the state legislature to amend or repeal portions of the constitution via the amendment and revision process,[181] or via a convention.[182] The revision process and convention requires only a simple majority vote of the state's electors to succeed.[183] Supermajority requirements such as in Utah or any other possible future supermajority does not take away a citizen's enshrined rights to advocate for constitutional changes, including to the supermajority amendment.

Initiative and Referendum Inst. presents a clear pathway for successfully defeating any First Amendment challenges to supermajority requirements for wildlife management initiatives. States looking to develop supermajority requirements on the initiative process that embrace the well-reasoned Tenth Circuit decision, avoid any circuit split issue with the *Wirzburger* decision that delt with state restrictions on ballot initiatives of specific subjects, and are prepared to respond to the deficiencies in the Lucero dissent, will have strong legal footing.

B. Supermajorities and Equal Protection Claims

Supermajority requirements for initiatives have also faced challenges of equal protection claims in federal court. The opponents of Proposition 5 in Utah initially announced that they would sue for violations of the Fourteenth Amendment[184] before abandoning that attempt to challenge on First Amendment grounds as outlined in the above section. The seminal U.S. Supreme Court case regarding supermajorities and equal protection is *Gordon v. Lance*.[185]

In *Gordon* the Court's decision protects supermajority requirements from equal protection claims. A majority of the Court stated that a three-fifths supermajority "does not violate the Equal Protection Clause or any other

---

[178] *Id*. at 1110.
[179] UTAH OFFICE OF THE LT. GOV., *supra* note 11, at 37.
[180] Utah Const. art. VI, § 1, subsec. 2(a)(ii).
[181] Utah Const. art. XXIII, § 1.
[182] Utah Const. art. XXIII, § 2.
[183] Utah Const. art. XXIII, § 3.
[184] Van Eyck & Dillon, *supra* note 13.
[185] Gordon v. Lance, 403 U.S. 1 (1971).

provision of the Constitution."[186] The Court's majority decision found the supermajority requirement did not single out a "discrete and insular minority for special treatment."[187] *Gordon* further stated that the supermajority requirement did not deny access, but made certain government actions more difficult.[188] The majority opinion highlighted that neither the Constitution, history, nor any Supreme Court cases mandate that a majority prevail on every issue every time:

> Certainly any departure from strict majority rule gives disproportionate power to the minority. But there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue. On the contrary, while we have recognized that state officials are normally chosen by a vote of the majority of the electorate, we have found no constitutional barrier to the selection of a Governor by a state legislature, after no candidate received a majority of the popular vote.[189]

The Court also included a list of topics where more than a simple majority is needed for government action such as in the federal government for impeachment and treaty ratification and in state government for taxation and debt matters.[190] In the ruling the Court declared that what additional issues are important enough to warrant more than majority support is "properly left to the determination by the States and the people than to the courts operating under the broad mandate of the Fourteenth Amendment."[191] This finding by the Court fully secures the ability for any state to impose supermajority requirements on any subject. This ruling protects Utah's wildlife management supermajority and any other supermajority requirement such as Colorado's constitutional amendment supermajority,[192] and Arizona's tax increase supermajority.[193] The *Gordon* decision provides the undeniable foundation

---

[186] *Id.* at 8.
[187] *Id.* at 5.
[188] *Id.* at 5-6.
[189] *Id.* at 6.
[190] *Id.* ("The Federal Constitution itself provides that a simple majority vote is insufficient on some issues; the provisions on impeachment and ratification of treaties are but two examples. Moreover, the Bill of Rights removes an entire area of legislation from the concept of majoritarian supremacy. The constitutions of many states prohibit or severely limit the power of the legislature to levy new taxes or to create or increase bonded indebtedness, thereby insulating entire areas from majority control.")
[191] *Id.* at 6.
[192] COLO. CONST. art. V, pt. IV, subsec. B.
[193] ARIZ. CONST. art. IV, pt. 1, sec. 1N, subsec. 5.

for states to impose supermajority restrictions on wildlife management initiatives.

Based on this decision, there are few limits to what a state can do with supermajority requirements. Even so, when developing a new supermajority requirement, a state would be wise to consider a footnote related to the Court's final holding. The footnote states in part, "we intimate no view on the constitutionality of a provision requiring unanimity or giving a veto power to a very small group."[194] The Court does not provide any other details.[195] Still, it appears to leave open the possibility of limiting the *Gordon* decision in the future if a case presents an unreasonable supermajority requirement. It would be a safe estimation that the closer a restriction gets to unanimity, the more likely it will be found unconstitutional.

A progeny of *Gordon* from the Southern District of Mississippi, *Armstrong v. Allain,*[196] did test the extent of the Court's ruling. In *Gordon*, the Court found it could "discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing. Consequently, no sector of the population may be said to be 'fenced out' from the franchise because of the way they will vote."[197] In *Armstrong*, black Mississippi voters argued that after desegregation, "voting on school bond issues in this state has been racially polarized, with blacks voting cohesively in favor of bond issues and whites voting as a bloc against them."[198] Under the plaintiffs argument, the supermajority requirement impacted an identifiable group, given that a 60% supermajority was needed to approve the bond issues.[199] However, the Court found, based on *Gordon*, simply segmenting a specific population due to a supermajority requirement is not enough to show there is a constitutional issue. "[P]laintiffs must show that a discriminatory purpose was a motivating factor in the enactment and maintenance of the requirement."[200] The ruling in *Armstrong*, stated that the enactment was "not antiblack but anti-tax,"[201] and therefore the supermajority was not actionable beyond what the Supreme Court found in *Gordon*.[202] Since no specific identifiable class is for or against hunting, a wildlife management supermajority would not create a viable legal challenge to *Gordon* under the *Armstrong* argument. Even if an identifiable class in the future did politically align against science-based wildlife management, a state

---

[194] *Gordon*, 403 U.S. at 8.
[195] *Id.*
[196] *Armstrong v. Allain*, 893 F. Supp. 1320 (S.D. Miss. 1994).
[197] *Gordon*, 403 U.S. at 5.
[198] *Armstrong*, 893 F. Supp. at 1328.
[199] *Id.* at 1332-33.
[200] *Id.* at 1334.
[201] *Id.* at 1335.
[202] *Id.* at 1336.

enactment of a supermajority requirement would not have been targeted towards that group, and therefore a challenge would not be successful.

A law journal article has previously made an argument that *Gordon*, a case regarding bonds and indebtedness, and its progeny, are distinguishable from matters related to wildlife management or other subjects.[203] Given that "bonds and tax increases impose requirements on citizens,"[204] and future generations will bear the burden of these decisions, the "supermajority requirement can be useful as a means to ensure those who commit to the indebtedness 'submerge their preferences into a broader constituency.'"[205] While the argument uses this point to say that wildlife management decisions do not burden future generations, that is not a correct assessment and should not be considered by courts moving forward. The wildlife management initiatives "may have little or no biological justification, and may have long-term impacts that reach beyond the immediate letter of the law they are designed to change."[206] The ramifications could last well beyond one generation if an animal population is not properly managed. In contrast, while public debt has future course correction options such as refinancing, consolidation, early pay-off, and forgiveness, etc., and decisions impacting nature do not. Therefore, the courts should not consider this argument distinguishing *Gordon* and related cases.

IV. Conclusion

The North American Model of Wildlife Conservation has been the most successful conservation model in world history. Its reliance on S-BWM and embrace of consumptive users to support the model has led to the historic restoration of impacted species and habitat. This model should be celebrated, protected, and expanded.

States have rightfully made NAMWC the entire basis of their wildlife management agencies. In states with the initiative process, ballot box biology threatens the NAMWC and the ability to ensure science-based wildlife management decisions. Most often, consumptive users represent a minority of voters. The intricacies of the S-BWM decisions are difficult to explain and promote during a majority-decision popular vote initiative campaign. Consumptive users are left unable to properly defend the NAMWC and S-BWM decisions. The decisions made at the ballot box by a simple majority

---

[203] *See* Maher, *supra* note 73, at 1103-04.
[204] *Id.* at 1104.
[205] *Id.* at 1103-04 (quoting Samual Issacharoff, *Democracy and Collecting Decision Making*, 6 INT'L CONST. L.J. 231, 249-50 (2008).
[206] Whittaker, *supra* note 71.

can therefore overturn decades of sound science-based management and destroy NAMWC.

Utah successfully implemented a supermajority requirement for wildlife management initiatives to pass. The Utah supermajority requirement survived a federal court challenge and remains the best current option to help combat ballot box biology in other states. Using this note as a guide, state legislators and consumptive users can examine issues of ballot box biology and the successes and pitfalls of attempts to restrict it. Each state has its own unique process for implementing supermajority requirements. Legislators and advocates should review their own state process, then prepare implementing legislation or petition language within the guiderails discussed in this note. Being on the offensive against ballot box biology is the strongest position to be in versus constant defense against proposed initiatives targeting S-BWM. By understanding the most likely legal challenges related to supermajority requirements, First Amendment claims and equal protection claims, S-BWM supporters can develop successful legislation or constitutional amendment processes to enact supermajority requirements for wildlife management initiatives in their respective states. Protecting S-BWM and NAMWC from ballot box biology is worth the government and political effort required to implement supermajority restrictions on the initiative process.