IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 22-0586

STEVE BARRETT; ROBERT KNIGHT; MONTANA FEDERATION OF PUBLIC EMPLOYEES; Dr. LAWRENCE PETTIT; MONTANA UNIVERSITY SYSTEM FACULTY ASSOCIATION REPRESENTATIVES; FACULTY SENATE OF MONTANA STATE UNIVERSITY; Dr. JOY C. HONEA; Dr. ANNJEANETTE BELCOURT; Dr. FRANKE WILMER; MONTANA PUBLIC INTEREST RESEARCH GROUP; ASHLEY PHELAN; JOSEPH KNAPPEN-BERGER; and MAE NAN ELLINGSON,

Plaintiffs and Appellees/Cross-Appellants,

v.

STATE OF MONTANA; GREG GIANFORTE; and AUSTIN KNUDSEN,

Defendants and Appellants/Cross-Appellees.

On Appeal from Montana Eighteenth Judicial District Court, Gallatin County
Cause No. DV-21-581B, Hon. Rienne McElyea, District Court Judge

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APPELLEES/CROSS-APPELLANTS' REPLY BRIEF IN SUPPORT OF CROSS-APPEAL

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The State's response fails to engage with most of Plaintiffs' argument about *Western Tradition Partnership*, which is the crux of the cross-appeal. The State just invokes *stare decisis* without any analysis. State's Br., pp. 14–15.

The law favors adherence to precedent because it serves to ensure "stability, predictability and equal treatment . . . ." *State v. Gatts*, 279 Mont. 42, 51, 928 P.3d 114, 119 (1996) (citations omitted). "Court decisions are not sacrosanct, however," and "*stare decisis* does not require [this Court] to follow a manifestly wrong decision." *Id.* (citations omitted); *see also City of Kalispell v. Salsgiver*, 2019 MT 216, ¶ 45, 396 Mont. 57, 443 P.3d 504 (the Court is not required to "perpetuate incorrectly decided precedent" and is "*obligated*" to overrule manifestly incorrect precedent (emphasis original) (citations omitted)).

Plaintiffs are not asking the Court to break from precedent. They are observing that the Court has already done so. *See Clark Fork Coalition v. Tubbs*, 2017 MT 184, ¶ 28, 410 Mont. 174, 518 P.3d 29 (McKinnon, J., dissenting) (the majority opinion "appears to have accepted" that § 25-10-711, MCA, is a separate statutory sanction provision "not at issue" in the setting of a PAGD claim); *City of Helena v. Svee*, 2014 MT 311, ¶¶ 38, 377 Mont. 158, 339 P.3d 32 (Baker, J., concurring and dissenting) (the majority's refusal to consider the § 711 factors as

"guideposts" for UDJA fee shifting breaks from *WTP*). Plaintiffs simply ask the Court to eliminate lingering confusion—which would advance the goals of stability, predictability and equal treatment—by expressly recognizing that *WTP* is no longer good law and § 711 does not control a fee claim brought under a separate theory. *WTP* is, in any case, "manifestly wrong" for the reasons set forth in Plaintiff's opening cross-appeal brief, none of which the State addresses.

The balance of the State's brief seeks to distinguish *Montrust* with mostly new arguments that did not form the basis for the district court's decision. *See* State's Br., pp. 9–14.

For example, the State urges the Court to deny fees because this is just a "routine" declaratory judgment action, citing UDJA and pre-*Tubbs* PAGD cases. *See id.* at 10. Plaintiffs do not seek fees under the UDJA supplemental relief provision and the State's concern about opening the PAGD floodgates is unfounded. The first and second *Montrust* factors (public importance and number of benefitted people) serve to hold the gates and ensure that fee shifting will not become routine. PAGD fees are only awardable in cases involving constitutional issues that vindicate public policies of statewide importance, which was uncontested by the State in this case. The State did not just concede the point. It expressly agreed that these factors were met and that "these are important public

issues that impact *all Montanans* . . . .” Doc. 55, p. 19. The State cannot credibly argue, after the fact, that this is a “routine” and unimportant case.

The State next argues that the PAGD “does not apply to cases like this, which involve constitutional challenges to legislative enactments.” State’s Br., p. 11 (citing *Finke v. State ex rel. McGrath*, 2003 MT 48, 314 Mont. 314, 6 P.3d 576). This is another new argument. It is also contrary to *Montrust* which involved a direct challenge to an unconstitutional statute. If anything, the opposite is true. This Court has sometimes expressed reticence about holding political subdivisions financially accountable when they have no choice but to enforce unconstitutional legislation that they had no hand in passing. *See Finke*, ¶ 33; *see also, e.g., In re Dearborn Drainage Area*, 240 Mont 39, 43, 782 P.3d 898 (1989). The same equities favor holding the State accountable in situations like this one—the State, not some other entity, passed the laws at issue here, then continued to defend them when this Court’s ruling in *Regents* made the State’s merits defenses untenable.

The State also argues that it cannot be liable for PAGD fees simply because the legislature passed unconstitutional laws. State’s Br., p. 12 (citing *Finke* and § 2-9-111, MCA). This argument is a red herring in several respects.

First, § 2-9-111, the legislative immunity statute, is not at issue in this case. Plaintiffs are not suing the legislature or the bill sponsors for damages and the State

did not invoke § 111 or claim immunity below. *See* Doc. 55, pp. 18–20.

Second, *Finke* did not hold that § 111 categorically immunizes the State against PAGD fees, as the State urges. *Finke* found there *was no* PAGD claim against the State then cited § 111 in concluding that there was no other basis to recover fees. *Finke*, ¶ 34. Under those facts, there was no avenue for fee shifting. *Finke* is thus distinguishable and its discussion of § 111 was dicta.

Third, the State's argument—that it did not do anything wrong by choosing to defend duly enacted legislation—continues to miss the point by embracing the fallacy that the State's conduct is the animating factor. As discussed in Plaintiffs' opening cross-appeal brief, the PAGD is not a sanction. The purpose is to encourage and reward private plaintiffs who bring important public issues before the courts, which is the fundamental error in *WTP* that the State ignores.

Finally, this is not a case where the legislature simply enacted unconstitutional legislation, but one where the government has "fail[ed] to properly enforce interests significant to its citizens." *Dearborn Drainage Area*, 240 at 43, 782 P.3d at 900. The legislature knowingly overstepped in order to draw out a constitutional conflict. The Board of Regents declined to bring the claims itself. When Plaintiffs stepped up, the Attorney General's office declined the option to concede the unconstitutionality of the bills and defended the legislature's actions

with paper-thin arguments, most of which the State has since dropped. It sought to avoid adjudication of the merits of legislation that it does not even bother to defend on appeal. If "exceptional circumstances" are necessary to award PAGD fees, as the State argues, they are present here.

CONCLUSION

The Court should reverse the district court's fee decision, reaffirm *Montrust*, overturn *WTP* in relevant part, and direct a fee award.

Submitted this 12th day of June, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e), the undersigned certifies that this brief complies with the requirements of the Montana Rules of Appellate Procedure. It is set in a proportionately spaced typeface (Equity) of 14 points. It is double spaced, except that footnotes are single spaced. It contains less than 5,000 words as calculated by Microsoft Word (1,059), excluding the Caption and Appearances, Tables of Contents and Authorities, and this Certificate of Compliance.

Dated this 12th day of June, 2023.

Jeffrey J. Tierney

CERTIFICATE OF SERVICE

I, Jeffrey J. Tierney, hereby certify that I have served true and accurate copies of the foregoing Brief - Cross Appellant Reply to the following on 06-12-2023:

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