IN THE SUPREME COURT OF THE STATE OF MONTANA
No. 22-0639

FORWARD MONTANA; LEO GALLAGHER; MONTANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; GARY ZADICK,

Plaintiffs and Appellants,

v.

THE STATE OF MONTANA, by and through GREG GIANFORTE, Governor,

Defendant and Appellee.

APPELLANTS' OPENING BRIEF

On Appeal from the Montana First Judicial District
Lewis & Clark County
Cause No. ADV-2021-611
Honorable Judge Mike Menahan

RAPH GRAYBILL
Graybill Law Firm, PC
300 4th Street North
P.O. Box 3586
Great Falls, MT 59403
Phone: (406) 452-8566
rgraybill@silverstatelaw.net

RYLEE SOMMERS-FLANAGAN
CONSTANCE VAN KLEY
Upper Seven Law
P.O. Box 31
Helena, MT 59624
Phone: (406) 396-3373
rylee@uppersevenlaw.com
constance@uppersevenlaw.com

Attorneys for Plaintiffs and Appellants
(additional counsel listed on the next page)

AUSTIN KNUDSEN
Montana Attorney General
BRENT MEAD
Assistant Solicitor General
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
david.dewhirst@mt.gov
prisken@mt.gov
brent.mead2@mt.gov

EMILY JONES
Special Assistant Attorney General
Jones Law Firm, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
Phone: 406-384-7990
emily@joneslawmt.com

Attorneys for Defendant and Appellee

TABLE OF CONTENTS

Statement of Issues 1

Statement of the Case 1

Statement of Facts 3

Standards of Review 8

Summary of the Argument 9

Argument 11

I. The District Court erred in ruling that the private attorney general doctrine does not apply to "straightforward constitutional challenges to a bill enacted by the Legislature." 11

A. The private attorney general doctrine applies to constitutional challenges to legislation. 14

1. As the District Court recognized, Plaintiffs met all three factors under the private attorney general doctrine. 14

2. *Finke* and *Western Tradition Partnership II* do not stand for the proposition that attorney's fees are unavailable in constitutional challenges to legislation. 18

3. To the degree prior cases have confused the *Montrust* factors, the Court should take this opportunity to clarify the boundaries of the private attorney general doctrine. 25

B. Under the private attorney general doctrine as correctly stated, Plaintiffs are entitled to fees. 27

II. The District Court erred in denying attorney's fees under the UDJA when it concluded that the UDJA does not allow a fee award against the State "absent extraordinary circumstances." 29

A. The equities support Plaintiffs' request for fees because they vindicated constitutional interests ignored by the State. 30

B. An award of attorney's fees is "necessary or proper" for complete relief under the UDJA because the State gave Plaintiffs no option but to seek declaratory relief. 32

Conclusion 33

TABLE OF AUTHORITIES

Cases

Abbey/Land, LLC v. Glacier Constr. Partners, LLC, 2019 MT 19, 394 Mont. 135, 433 P.3d 1230 ..... 30, 33

Am. Tradition P'ship, Inc. v. Bullock, 567 U.S. 516 (2012) 23

Barrett v. Montana, No. DV-21-581-B (18th Judicial D. Ct., Gallatin Cty.) 22

Bd. of Regents of Higher Ed. v. Knudsen, 2022 MT 128, 409 Mont. 96, 512 P.3d 748 11

Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist., 2011 MT 51, 359 Mont. 393, 251 P.3d 131 (*BRPA*) 17

Burns v. Cty. of Musselshell, 2019 MT 291, 398 Mont. 140, 454 P.3d 685 ..... 8, 16, 27

Citizens United v. FEC, 558 U.S. 310 (2010) 22, 23

City of Helena v. Svee, 2014 MT 311, 377 Mont. 158, 339 P.3d 32 ..... 29, 30, 32

Clark Fork Coal. v. Tubbs, 2017 MT 184, 388 Mont. 205, 399 P.3d 295 27

Cmty. Ass'n for N. Shore Conservation, Inc. v. Flathead Cty., 2019 MT 147, 396 Mont. 194, 445 P.3d 1195 8

Davis v. Jefferson Cty. Election Office, 2018 MT 32, 390 Mont. 280, 412 P.3d 1048 ..... 8, 29

Driscoll v. Stapleton, 2020 MT 247, 401 Mont. 405, 473 P.3d 386 9

Finke v. State ex rel. McGrath, 2003 MT 48,
314 Mont. 314, 65 P.3d 576 ..... 18, 19, 20, 21, 25

In re Dearborn Drainage Area, 240 Mont. 39,
782 P.2d 898 (1989) 12

In re Marriage of Buck, 2017 MT 84N,
388 Mont. 553, 393 P.3d 186 20

Montanans for Responsible Use of Sch. Tr. v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 Mont. 402,
989 P.2d 800 ..... *passim*

Mungas v. Great Falls Clinic, LLP, 2009 MT 426,
354 Mont. 50, 221 P.3d 1230 30

Payne v. Tennessee, 501 U.S. 808 (1991) 15

Renville v. Farmers Ins. Exchange, 2004 MT 366,
324 Mont. 509, 105 P.3d 280 30

State v. Kirkbride, 2008 MT 178, 343 Mont. 409, 185 P.3d 340 ..... 14, 15

Supreme Ct. of Va. v. Consumers Union of U.S., Inc.,
446 U.S. 719 (1980) 21

Trs. of Ind. Univ. v. Buxbaum, 2003 MT 97,
315 Mont. 210, 69 P.3d 663 ..... 29, 32

W. Tradition P'ship v. Att'y Gen, 2011 MT 328,
363 Mont. 220, 271 P.3d 1 ..... 23, 24

W. Tradition P'ship v. Att'y Gen., 2012 MT 271,
367 Mont. 112, 291 P.3d 545 ..... 17, 19, 21, 23, 24, 26

Statutes

MCA § 2-9-111 ..... 20, 2, 25

MCA § 2-9-101 25

MCA § 25-10-711 26

MCA § 27-8-13 29

42 U.S.C. § 1988 21

Other Authorities

Mont. Const. art. II..... 1, 9

Mont. Const. art. III 1, 11

Mont. Const. art. IV..... 1

Mont. Const. art. V 1, 2, 6, 21, 33

Mont. Const. art. XIV 1

William B. Rubenstein, *On What a "Private Attorney General" Is —And Why It Matters*, 57 Vand. L. Rev. 2129 (2004)..... 13

STATEMENT OF ISSUES

1. Did the District Court err in denying Plaintiffs' motion for attorney's fees under the private attorney general doctrine when Plaintiffs successfully enforced express constitutional limitations on the legislative process, safeguarding values of legislative transparency and public participation?

2. Did the District Court err in denying attorney's fees under the Uniform Declaratory Judgments Act when it concluded, as a matter of law, that attorney's fees cannot be awarded against the State—and the State alone—absent "extraordinary circumstances"?

STATEMENT OF THE CASE

By constitutional design, the Montana Legislature must follow a small number of straightforward procedural rules when passing bills, each of which secures public awareness and participation around the legislative process. Mont. Const. art. V, § 11. These rules reinforce the People's role as the source of government power by promoting public participation and transparency, consistent with themes that pervade the Montana Constitution. *See, e.g.*, Mont. Const. art. II, §§ 1, 2, 8, 9, 13, 34; Mont. Const. art. III, §§ 4–6; Mont. Const. art. IV; Mont. Const. art. V, § 1; Mont. Const. art. XIV, §§ 2, 9.

Immediately before the close of the 2021 legislative session, legislators "hijacked" Senate Bill 319 ("SB 319") behind closed doors and

added in entirely new, different provisions that had nothing to do with the bill's original purpose. The eleventh hour conversion of the bill violated two separate constraints on the legislative process: the Rule on Amendments, art. V, § 11(1)—"A law shall be passed by bill which shall not be so altered or amended on its passage through the legislature as to change its original purpose"—and the Single Subject Rule, art. V, § 11(3)—"Each bill, except general appropriation bills and bills for the codification and general revision of the laws, shall contain only one subject, clearly expressed in its title."

Following a hearing and before SB 319's effective date, the District Court preliminarily enjoined the law. Prelim. Inj. Ord. at 6. Plaintiffs then successfully moved for summary judgment on their claims under Article V, § 11 of the Montana Constitution. Ord. on Mot. for Summ. J. at 11 ("Summ. J. Ord."). Plaintiffs' preliminary injunction and summary judgment motions were based solely on their constitutional claims, and the District Court reached only constitutional issues. *Id.* The State chose not to appeal.

Because Plaintiffs vindicated constitutional interests on behalf of all Montanans, they filed a motion seeking attorney's fees under several

theories—the private attorney general doctrine, the Uniform Declaratory Judgments Act ("UDJA"), and § 25-10-711, MCA.[1] Br. in Supp. of Mot. for Att'y Fees at 4, 8, 10. Despite its determination that Plaintiffs satisfied all requirements under the private attorney general doctrine, the District Court denied the motion, concluding as a matter of law that the equities could not support an award of attorney's fees when plaintiffs raise a "straightforward constitutional challenge[] to a bill enacted by the Legislature." App'x 7. The District Court similarly denied fees under the UDJA on the grounds that "[a]bsent extraordinary circumstances, it is inequitable to award attorney fees against the State for choosing to defend the constitutionality of a statute." App'x 9.

Plaintiffs timely appealed the denial of attorney's fees.

STATEMENT OF FACTS

Senator Greg Hertz introduced SB 319 on February 19, 2021. Verified Am. Compl., Ex. B, at 2 ("Compl."). Originally titled "An Act Generally Revising Campaign Finance Laws; Creating Joint Fundraising Committees; Providing for Certain Reporting; and Amending [statutes within Title 13]," SB 319 had a single purpose—to authorize and regulate

[1] The denial of fees under § 25-10-711, MCA, is not challenged on appeal.

"joint fundraising committees," committees through which candidates and committees may share contributions and expenditures. Summ. J. Ord. at 6.

Through most of the 2021 legislative session, SB 319 proceeded unremarkably. Proponents and opponents debated the bill's merits, and amendments adjusted—but did not fundamentally alter—the legislation. Summ. J. Ord. at 2; Compl. at 9.

That changed on April 27, 2021, when a free conference committee, tasked with reconciling barely different House and Senate versions of the bill, dramatically expanded SB 319's scope in a sixteen-minute hearing. Compl. at 2. No public notice preceded the changes. Summ. J. Ord. at 7. Nor was there any opportunity for public comment. *Id.* at 2–3. The title was modified to include: "Establishing that if Student Organizations that are Required to Register as Political Committees Are Funded through Additional Optional Student Fees, Those Fees Must Be Opt-in; Prohibiting Certain Political Activities in Certain Places Operated by a Public Postsecondary Institution; Providing for Judicial Recusals under Certain Circumstances; Providing Penalties." *Id.* at 3. Relevant to Plaintiffs' challenge, SB 319 was amended to ban certain political

activities in specific locations on college campuses, SB 319, § 21, and to force judicial recusal when a lawyer or litigant in a particular case has contributed more than half of the maximum allowable campaign contribution, SB 319, § 22.

Sections 21 and 22 reach far outside the bill's original purpose and scope, regulating activities never considered when SB 319 was introduced and debated. Neither provision has any relationship to joint fundraising committees specifically or campaign finance regulation generally. As the District Court noted, Section 21—banning on-campus political activities—

> has no effect on campaign contributions, spending or disclosures. It does not regulate money in political activities. Rather, it places conditions on those who may participate in campaign activities like "voter identification" in on-campus residential, dining, and athletic facilities according to the identity of the person or organization engaged in the conduct. Section 21 regulates campaign activities. It does not regulate campaign finance.

Summ. J. Ord. at 8.

The District Court concluded Section 22—mandating judicial recusal—also diverged from the bill's original purpose:

> Section 22 regulates judicial recusal—not campaign finance. Its purpose is to establish and define a judicial conflict of interest and to regulate when judges may preside over cases

> in which they've received certain campaign contributions. Section 22 does not change Montana's campaign finance law. It does not place limits on campaign contributions or alter campaign reporting requirements. Similarly, it does not change disclosure requirements or otherwise modify the regulatory framework which governs campaign financing.

Id. at 9.

Thus, the District Court granted Plaintiffs' motion for summary judgment, agreeing that SB 319 violates two separate constitutional provisions. "SB 319 contains two subjects not related to campaign finance," *id.* at 9, contrary to the Single Subject Rule, which provides: "Each bill, except general appropriation bills and bills for the codification and general revision of the laws, shall contain only one subject, clearly expressed in its title," Mont. Const. art. V, § 11. In the same way, "the Legislature altered the original purpose of the bill," Summ. J. Ord. at 9, in violation of the Rule on Amendments—"[a] law shall be passed by bill which shall not be so altered or amended on its passage through the legislature as to change its original purpose," Mont. Const. art. V, § 11.

The State elected not to appeal, and enforcement of Sections 21 and 22 has been permanently enjoined. Throughout the litigation, the State largely focused not on the merits but on Plaintiffs' standing to pursue their claims. Indeed, the State raised the issue five separate

times: (1) in opposition to Plaintiffs' motion for a preliminary injunction, Def.'s Resp. to Pls.' Mot. for Prelim. Inj. at 2; (2) as the exclusive basis for its motion to dismiss, State's Br. in Supp. of Mot. to Dismiss at 7, 10, 13; (3) as the exclusive basis for its motion to delay summary judgment briefing under Rule 56(f), Def.'s Br. in Supp. of Mot. to Stay Pls.' Mot. for Summ. J. to Allow Disc. at 4; (4) as the only reason to oppose Plaintiffs' motion for a protective order against depositions the State noticed while Plaintiffs' motion for summary judgment was pending, State's Br. in Opp. to Pls.' Mot. for Protective Ord. at 8, 11; and (5) as the premise for roughly half of the State's opposition to Plaintiffs' motion for summary judgment, Def.'s Resp. in Opp. to Mot. for Summ. J. at 4.

The District Court rejected the arguments each time, Prelim. Inj. Ord. at 5; Ord. on Mot. to Dismiss at 6; Ord. on Mot. for Protective Ord. at 2, finally stating, during the hearing on Plaintiffs' motion for summary judgment: "I ruled previously that the parties had standing. I think that [additional evidence relating to standing] just muddies the waters and invites an opportunity to further discuss standing, and I've made my ruling on that[.]" Summ. J. Hrg. Tr. at 7 (Jan. 25, 2022). Nonetheless, the State continued to argue standing at the hearing, contending it

"simply want[s] to do discovery to understand if the allegations in the complaint [regarding standing] are true . . . ." *Id.* at 19.

Plaintiffs enforced express constitutional limits on legislative power and furthered constitutional values of transparency and public participation in the legislative process. They successfully enjoined Sections 21 and 22—the full measure of the requested relief. Thus, Plaintiffs moved for attorney's fees under the private attorney general doctrine, the UDJA, and § 25-10-711, MCA. The District Court denied Plaintiffs' motion, and Plaintiffs appeal the denial under the private attorney general doctrine and the UDJA.

STANDARDS OF REVIEW

The question of whether the district court applied the correct legal standard to award or deny attorney's fees is a question of law, reviewed for correctness. *Burns v. Cty. of Musselshell*, 2019 MT 291, ¶ 10, 398 Mont. 140, 454 P.3d 685. If the district court applies the correct legal standard, the determination to award or deny fees is reviewed for abuse of discretion. *Cmty. Ass'n for N. Shore Conservation, Inc. v. Flathead Cty.*, 2019 MT 147, ¶ 45, 396 Mont. 194, 445 P.3d 1195 (private attorney

general doctrine); *Davis v. Jefferson Cty. Election Office*, 2018 MT 32, ¶ 8, 390 Mont. 280, 412 P.3d 1048 (UDJA).

SUMMARY OF THE ARGUMENT

The People are the source of all political power in Montana. Mont. Const. art. II, § 1 ("All political power is vested in and derived from the people."); Mont. Const. art. II, § 2 ("The people have the exclusive right of governing themselves as a free, sovereign, and independent state."). Government power exists only because—and to the degree—it has been delegated by the People through the Constitution. Mont. Const. art. II, § 1 ("All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole."); *Driscoll v. Stapleton*, 2020 MT 247, ¶ 11 n.3, 401 Mont. 405, 473 P.3d 386 ("The Constitution, with the rights and powers it contains and delegates to the various branches of government, is the 'mandate of a sovereign people to its servants and representatives. No one of them has a right to ignore or disregard its mandates, and the legislature, the executive officers, and the judiciary cannot lawfully act beyond its limitations.'") (citation omitted).

Plaintiffs' claims arose when the State ignored simple, express limitations on the legislative process, exceeding its delegated authority to enact laws on behalf of the People of Montana. Plaintiffs succeeded although the State made every attempt to avoid the merits of Plaintiffs' constitutional claims. Plaintiffs had no choice but to vindicate Montanans' constitutional interests because the State first refused to adhere to its constitutional mandate and next rejected the fundamental principle that government power is constrained.

Both the private attorney general doctrine and the UDJA require an award of attorney's fees under the present circumstances. The District Court nonetheless denied Plaintiffs' request for fees. The denial flows from erroneous statements of law. As to Plaintiffs' request under the private attorney general doctrine, the District Court erred in concluding that attorney's fees are never available against the State in "straightforward constitutional challenges to a bill enacted by the Legislature." App'x 7. The District Court likewise erred in determining that "extraordinary circumstances" are required before the State (and only the State) may be required to pay attorney's fees in a constitutional action. App'x 9. While the tests for fees under the doctrine and the UDJA

are and should be different, the District Court's error under each is essentially the same. Far from providing special treatment for the State when it violates the Constitution, the doctrine and the UDJA are checks on unconstitutional government action. *Cf. Bd. of Regents of Higher Ed. v. Knudsen*, 2022 MT 128, ¶ 12, 409 Mont. 96, 512 P.3d 748 ("Montana's Constitution is a prohibition upon legislative power, rather than a grant of power.").

Plaintiffs ask the Court to reverse the denial of attorney's fees and remand for calculation of the fee award.

ARGUMENT

C. The District Court erred in ruling that the private attorney general doctrine does not apply to "straightforward constitutional challenges to a bill enacted by the Legislature."

Bound by oath to "support, protect and defend" the Montana Constitution, legislators and executive branch officers must ensure that unconstitutional laws are neither enacted nor enforced. Mont. Const. art. III, § 3. And yet, at times—including during the midnight-hour amendment to SB 319 and ensuing litigation—"the government, for some reason, fails to properly enforce" the Constitution, and private citizens

must bring legal actions to vindicate constitutional rights. *In re Dearborn Drainage Area*, 240 Mont. 39, 43, 782 P.2d 898, 900 (1989).

The private attorney general doctrine, an equitable exception to the American Rule, was adopted in Montana as a solution to precisely this problem. *Montanans for Responsible Use of Sch. Tr. v. State ex rel. Bd. of Land Comm'rs*, 1999 MT 263, ¶¶ 59–69, 296 Mont. 402, 989 P.2d 800 (*Montrust*) (adopting doctrine). *Montrust*'s reasoning drew directly from *Serrano v. Priest*, which recognized that public interest litigation may be the only economically viable mechanism to "secure representation on any large scale" when government officials tasked with protecting and promoting the public interest fail to satisfy their obligations. 569 P.2d 1303, 1313 (Cal. 1977) (en banc); *Montrust*, ¶ 69 ("Montrust has successfully litigated issues of importance to all Montanans and incurred significant legal costs. We conclude that the District Court ignored recognized principles in denying Montrust reasonable attorney fees, resulting in 'substantial injustice.'"). The doctrine's promotion of the public interest runs parallel to its deterrent function; just as attorney's fees make public interest litigation feasible, they serve to check unconstitutional government action. *See, e.g.*, William B. Rubenstein,

On What a "Private Attorney General" Is—And Why It Matters, 57 Vand. L. Rev. 2129, 2140 (2004).

The private attorney general doctrine applies here. The underlying litigation (1) vindicated important constitutional interests; (2) enforced the Montana Constitution when government actors, sworn to uphold it, refused to do so; and (3) benefited all Montanans, with regard to both the specific law enjoined and the deterrent function served by effective enforcement. *See Montrust*, ¶ 66. The District Court agreed with Plaintiffs that the doctrine's requirements were met; nonetheless, it denied fees on the grounds that "issues of equity and legislative immunity" insulate the State (and the State alone) from paying fees when a plaintiff raises a "straightforward constitutional challenge[] to a bill enacted by the Legislature." App'x 7. Reserving a special protection exclusive to the State is inconsistent with this Court's precedents and with the interests the doctrine serves.

The District Court erred as a matter of law in setting forth the applicable framework; thus, it erred in its application of the framework. The denial of fees under the private attorney general doctrine should be

reversed and this matter remanded to the District Court for a calculation of the appropriate fee award.

A. The private attorney general doctrine applies to constitutional challenges to legislation.

When elected and appointed state officials pass and enforce unconstitutional legislation, those who are best positioned to enforce the Constitution have renounced their roles. The People become attorneys general of last resort. The private attorney general doctrine both incentivizes effective constitutional enforcement and deters state actors from abdicating their obligation to uphold the Constitution.

Plaintiffs have met all three factors under the private attorney general doctrine, and fees should be awarded. Attorney's fee awards are available in actions challenging the constitutionality of statutes—particularly where, as here, the State plainly violated the Montana Constitution and would have, but for an injunction, enforced an unconstitutional law.

1. As the District Court recognized, Plaintiffs met all three factors under the private attorney general doctrine.

The private attorney general doctrine has been the law of the land for decades, developing considerable reliance interests. *See State v.*

Kirkbride, 2008 MT 178, ¶ 12, 343 Mont. 409, 185 P.3d 340 ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). When the Court adopted the doctrine, it expressly rejected an approach similar to that applied by the District Court. *Montrust*, ¶¶ 60–63. To depart from this precedent would require serious justification. But no reason exists to justify it.

In *Montrust*, the Court held specific state laws unconstitutional on the ground that they violated the requirement that lands granted by the federal government to the State are held in trust for the benefit of the People and according to the purposes set forth in the grant. *Montrust*, ¶¶ 13–58. The Court next considered whether the district court, after properly enjoining certain laws and erroneously denying an injunction as to others, erred in denying attorney's fees to the successful litigants. It concluded that the denial of fees was, in fact, erroneous, adopting and applying the private attorney general doctrine. *Id.* ¶¶ 59–69.

As adopted, the private attorney general doctrine comprises three factors: "(1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, [and] (3) the number of people standing to benefit from the decision." *Id.* ¶¶ 66, 67 (quoting *Serrano*, 569 P.2d at 1314). This Court continues to recognize and apply the private attorney general doctrine against government entities. *See Burns*, ¶¶ 10–25. Recently, in *Burns*, the Court reversed the denial of attorney's fees against Musselshell County when a successful candidate for County Sheriff was forced to engage in litigation following the "failure of the County to follow statutorily required processes for conducting a recount." *Id.* ¶ 14. Applying the *Montrust* factors, the Court concluded that the litigant (1) vindicated constitutional interests (2) when he was "forced . . . to pursue private enforcement of the election laws," bearing the full burden of enforcement (3) to the benefit of all voters in Musselshell County. *Id.* ¶ 22.

Consistent with *Montrust*, the first factor is satisfied only where the vindicated public interests derive from the Constitution. *Am. Cancer Soc'y v. State*, 2004 MT 376, ¶ 21, 325 Mont. 70, 103 P.3d 1085; *see also*

Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist., 2011 MT 51, ¶¶ 22–26, 359 Mont. 393, 251 P.3d 131 (*BRPA*). Just so here, where Plaintiffs prevailed in a case premised on the State overstepping the bounds of its delegated power under the Constitution. And although the equities may not necessarily be satisfied even where the three factors are met, the superseding reason should be similarly consequential—for example, when "[t]he State's defense also was grounded in constitutional principles and in an effort to enforce interests the executive deemed equally significant to its citizens." *W. Tradition P'ship v. Att'y Gen.*, 2012 MT 271, ¶ 20, 367 Mont. 112, 291 P.3d 545 (*W. Tradition P'ship II*).

Equitable considerations are relevant to any award of fees; but the State's position as a defendant does not automatically turn the equities in its favor. Indeed, the Court has considered and rejected an argument that the private attorney general doctrine requires a showing that "the State has . . . acted frivolously or in bad faith." *Montrust.*, ¶ 63. Nonetheless, the District Court injected essentially the same requirement into the doctrine when it wrote that "issues of equity and legislative immunity" prevent the doctrine's application in

"straightforward constitutional challenges to a bill enacted by the Legislature." App'x 7.

The private attorney general doctrine is not so limited. Far from entitling it to special protections, the State's constitutional obligations weigh in favor of applying the doctrine here. And, as the District Court correctly determined, the three *Montrust* factors are satisfied, entitling Plaintiffs' to attorney's fees. *See infra* p. 29–31; *Burns*, ¶¶ 11–24 (district court erred in denying attorney's fees when all *Montrust* factors satisfied).

2. *Finke* and *Western Tradition Partnership II* do not stand for the proposition that attorney's fees are unavailable in constitutional challenges to legislation.

The District Court correctly stated and applied the *Montrust* factors, determining that Plaintiffs satisfied each. It nonetheless denied fees. The District Court's legal error is two-fold. First, the District Court erred in concluding that legislative immunity from suit, as set forth in § 2-9-111, MCA, equates to State immunity from attorney's fees under *Finke v. State ex rel. McGrath*, 2003 MT 48, ¶ 30–31, 314 Mont. 314, 65 P.3d 576. Second, and relatedly, the District Court erred in its reading of *Western Tradition Partnership II*, which does not set forth a bright-

line rule that attorney's fees are generally unavailable in cases invalidating legislation.

The District Court's denial of fees rests primarily on its reading of *Finke*. In *Finke*, cities and individual electors brought suit against the State, a state agency, and the counties in which the cities were located. *Finke*, ¶¶ 7–8. The plaintiffs prevailed on their claim that a recently enacted law unconstitutionally disenfranchised voters who do not own real property. Although the State enacted the law, the counties were responsible for enforcing it such that the district court ultimately enjoined the counties' actions, and not the State's. *Id.* ¶ 8. The Court denied attorney's fees—apparently without considering whether a lawsuit brought in part by municipalities could meet the threshold requirement of "private enforcement." *Id.* ¶¶ 31–35. The Court concluded that "it would be unjust to force the Counties to pay for unconstitutional actions of the Legislature" and that fees likewise were unavailable against the State—against whom the plaintiffs "did not specifically seek attorneys' fees." *Id.* ¶¶ 33–34.

Finke allows two readings, neither of which is consistent with the District Court's reasoning. First and most obviously, *Finke* may be read

as holding only that fees are unavailable when a plaintiff does not specifically request them. *Id.* ¶ 34; *see, e.g.*, *In re Marriage of Buck*, 2017 MT 84N, ¶ 11, 388 Mont. 553, 393 P.3d 186 (unpublished) (district court erred in requiring monetary relief when it was not requested). Under that interpretation, the Court's general discussion of fee awards against the State is *dicta* and "not binding precedent." *In re Marriage of Fontenot*, 2006 MT 324, ¶ 23, 335 Mont. 79, 149 P.3d 28. And that interpretation cannot apply here because Plaintiffs did specifically request fees against the State, the only defendant.

Second, *Finke* might be understood to draw a line between enaction and enforcement—with attorney's fees available against the State only when it is tasked with enforcing an unconstitutional law. In *Finke*, the Court wrote that the plaintiffs' "claim for injunctive relief [against the county defendants] simply does not provide a basis for the imposition of attorneys' fees against the State." *Id.* ¶ 34. Citing § 2-9-111, MCA, which "provides that the Legislature, as a governmental entity, is immune from suit for any legislative act or omission by its legislative body," the Court wrote that the State is immune when "the only potential liability of the State for fees would lie for the actions of the Legislature in enacting an

unconstitutional bill." *Id.* There, the State was a party because of the mere existence of an underlying statute; the challenged "action" was undertaken by counties. This reading is consistent with the lines the United States Supreme Court has drawn around attorney's fees under 42 U.S.C. § 1988. *See, e.g.*, *Supreme Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 737–39 (1980) (attorney's fees may not be premised "on acts or omissions for which appellants enjoyed absolute legislative immunity," but immunity does not lie against the very same government actors when they are "subject to suit in their direct enforcement role").

Moreover, § 2-9-111 immunity has no relevance here. The Constitution itself provides a cause of action when the Legislature violates the rules in Article V, Section 11. Mont. Const. art. V, § 11(6)("A law may be challenged on the ground of noncompliance with this section only within two years after its effective date.").

In sum, even if the Framers had not specifically provided for private enforcement against violations of the Single Subject Rule and the Rule on Amendments in the Constitution itself, *Finke* would not bar fees

because the defendant here—unlike in *Finke*—is appropriately named as an enforcement official. *Finke*, ¶ 34.

Western Tradition Partnership II, in which the Court considered the scope of *Finke*, does not meaningfully change the analysis. The District Court read *Western Tradition Partnership II* and *Finke* as standing together for the proposition that "'garden variety' constitutional challenges"—or "straightforward constitutional challenges"—cannot form the basis for an award of fees against the State. App'x 7 (quoting *W. Tradition P'ship II*, ¶ 19). But the District Court ignored this Court's reasoning—in *Western Tradition Partnership II*, attorney's fees were denied not simply because the plaintiffs challenged the constitutionality of a law but also in light of the unique background of the case. *Id.* ¶ 20.

Although the case has been cited to suggest that attorney's fees cannot be awarded against the State unless it proceeded in bad faith,[2] a chasm separates frivolity from the State's defense in *Western Tradition Partnership II*. The plaintiffs there used the recently decided *Citizens United v. FEC*, 558 U.S. 310 (2010), to challenge a century-old law

[2] *See, e.g.*, Ord. & Final Judgment, *Barrett v. Montana*, No. DV-21-581-B (18th Judicial D. Ct., Gallatin Cty.).

restricting certain corporate political expenditures. The State initially succeeded; the Court concluded that the State's asserted interest—distinguishable from the interest rejected in *Citizens United*—was compelling and justified the law. *W. Tradition P'ship v. Att'y Gen*, 2011 MT 328, ¶ 48, 363 Mont. 220, 271 P.3d 1 (*W. Tradition P'ship I*). The United States Supreme Court reversed, over the dissent of four justices. *Am. Tradition P'ship, Inc. v. Bullock*, 567 U.S. 516 (2012).

Following remand, the Court denied fees to the corporate plaintiffs, despite their eventual success in enjoining a campaign finance law passed in 1912. Far from establishing a bright-line rule that attorney's fees are never available in constitutional challenges to legislation, the Court ruled that fees were not available under the circumstances.

> In the final analysis, even though [the plaintiff] vindicated principles of constitutional magnitude, the State's defense was also grounded in constitutional principles and in an effort to enforce interests the executive deemed significant to its citizens. The Attorney General defended a statute with deep roots in the State's history, enacted by initiative of the people to combat corruption that had resulted in the bribery of state judges and the embarrassment of seeing one of the State's U.S. Senators unseated for also accepting bribes. The challenge was brought in a time of shifting legal landscapes, the contours of which still have not been fully defined. Under these circumstances, the predicate for an award of fees under the private attorney general doctrine—"when the government, for some reason, fails to properly enforce

> interests which are significant to its citizens"—has not been established.

W. Tradition P'ship II, ¶ 20.

It hardly needs to be stated that the circumstances giving rise to this litigation are distinguishable from those presented in *Western Tradition Partnership II*. There, the State made strong constitutional arguments—strong enough to convince "five members of this Court . . . of their merits." *Id.* ¶ 20. Here, in contrast, Sections 21 and 22 of SB 319 were unconstitutional when they were enacted because of how they were enacted. "If a challenge is brought to a state statute, the Attorney General has discretion to decide whether or not to defend its constitutionality." *Id.* ¶ 17. In *Western Tradition Partnership II*, the State's defense was premised in constitutional principles of democracy and preventing corruption in the political process. Here, the State made no attempt to advance such weighty interests.

Neither *Finke* nor *Western Tradition Partnership* alters application of the *Montrust* factors to Plaintiffs' case. The District Court erred in reducing these cases to a rule that attorney's fees are unavailable in "straightforward constitutional challenges" to statutes. App'x 7.

3. To the degree prior cases have confused the *Montrust* factors, the Court should take this opportunity to clarify the boundaries of the private attorney general doctrine.

Because *Finke* and *Western Tradition Partnership II* are distinguishable, there is no need to overrule either of them. If, however, the Court finds that either *Finke* or *Western Tradition Partnership II* binds, it should overrule the case to the degree that it conflicts with the private attorney general doctrine as adopted in *Montrust*.

Finke is distinguishable because the State is responsible for enforcing—not merely enacting—the legislation successfully challenged by Plaintiffs. *See supra* p. 21–24. But if it does stand for the proposition the District Court perceived in it—that legislative immunity from suit under § 2-9-111, MCA, necessarily equates to immunity from attorney's fees—that proposition is incorrect as a matter of law.

Instead, the immunity conferred under the Montana Tort Claims Act provides only that the State cannot be held liable under a tort theory for enacting laws. Section 2-9-111, MCA. Of course, legislative immunity does not leave citizens without judicial recourse against unconstitutional laws. *See* § 2-9-101, MCA (a "claim," within the meaning of the immunity statute, refers to "any claim against a governmental entity, for money

damages only, that any person is legally entitled to recover as damages because of personal injury or property damage caused by a negligent or wrongful act or omission committed by any employee of the governmental entity while acting within the scope of employment"). The private attorney general doctrine has nothing to do with limitations on tort claims against the State.

Similarly, *Western Tradition Partnership II* is distinguishable because, in the present case, the State did not defend the challenged laws on the basis of weighty constitutional interests. *See supra* p. 24–26. If it were not distinguishable, however, *Western Tradition Partnership II* likewise would rest on a legal error.

In *Western Tradition Partnership II*, the Court considered § 25-10-711, MCA—which specifically authorizes attorney's fees against the State or a political subdivision when "the court finds that the claim or defense of the state, political subdivision, or agency that brought or defended the action was frivolous or pursued in bad faith." *W. Tradition P'ship II*, ¶ 18. The Court wrote that the statute, "[w]hile not dispositive," "serves as a guidepost in analyzing a claim for fees under the private attorney general doctrine." *Id.* But § 25-10-711, MCA, is a

separate route to attorney's fees and does not so infiltrate the private attorney general doctrine as to conflate the two tests. *See Montrust*, ¶ 63 (rejecting such an approach). Under the doctrine, attorney's fees are available even in the absence of bad faith. *Id.*

The District Court applied an incorrect legal standard to Plaintiffs' request for attorney's fees under the private attorney general doctrine.

B. Under the private attorney general doctrine as correctly stated, Plaintiffs are entitled to fees.

Three factors govern the propriety of an award of fees under the private attorney general doctrine: "(1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, [and] (3) the number of people standing to benefit from the decision." *Montrust*, ¶ 62. The District Court correctly determined all three factors were met.

Plaintiffs vindicated constitutional interests, satisfying the first factor. *See Burns*, ¶ 21 ("It is the vindication of constitutional interests that demonstrates the societal importance of the litigation."); *see also Clark Fork Coal. v. Tubbs*, 2017 MT 184, ¶¶ 14–23, 388 Mont. 205, 399 P.3d 295 (explaining that doctrine allows for fees only when private

litigants vindicate constitutional, rather than strictly statutory interests). As the District Court noted, "Plaintiffs challenged SB 319 on purely constitutional grounds and argued the bill interfered with Montana citizens' interest in transparency and public participation." App'x 4. Plaintiffs enforced constitutional limits on the legislative process, refereeing the boundaries of state power delegated by the People to the Legislature.

Second, there was no alternative to private enforcement of Article V, Section 11(1) and (3) when the Legislature enacted and the State otherwise would have enforced an unconstitutional law. Plaintiffs bore the burden of enforcement because the State abdicated its constitutional duty. The second factor is satisfied.

Third, all Montanans benefit from the effective enforcement of the Montana Constitution against government officials who act without regard to constitutional constraint. In fact, the State conceded this factor below. Thus, the third factor is also met, and all three requirements of the private attorney general doctrine are satisfied.

This Court should reverse the District Court's denial of attorney's fees under the private attorney general doctrine.

D. The District Court erred in denying attorney's fees under the UDJA when it concluded that the UDJA does not allow a fee award against the State "absent extraordinary circumstances."

Plaintiffs separately sought fees under the UDJA, which authorizes supplemental relief in declaratory actions when "necessary or appropriate." § 27-8-13, MCA; *see Trs. of Ind. Univ. v. Buxbaum*, 2003 MT 97, ¶¶ 41, 46, 315 Mont. 210, 69 P.3d 663. The "threshold question for an award of attorney fees [pursuant to the UDJA] is 'whether the equities support an award'"—in large part, whether the parties are similarly situated and on equal footing. *City of Helena v. Svee*, 2014 MT 311, ¶ 20, 377 Mont. 158, 339 P.3d 32. Contrary to this principle, the District Court concluded that "[a]bsent extraordinary circumstances, it is inequitable to award attorney fees against the State for choosing to defend the constitutionality of a statute," applying an erroneous standard to Plaintiffs' request for fees. App'x 9.

Where, as here, the equities favor the prevailing party, the second question is whether attorney's fees are "necessary or proper" under the UDJA, § 27-8-313, MCA. To analyze this issue, the Court applies the "tangible parameters test." *Davis*, ¶ 13. This three-part test asks whether: "(1) the other party 'possesses' what the party filing the

declaratory judgment sought in the litigation; (2) the party filing the declaratory judgment action needed to seek a declaration showing that it is entitled to the relief sought; and (3) the declaratory relief sought was necessary in order to change the status quo." *Abbey/Land, LLC v. Glacier Constr. Partners, LLC*, 2019 MT 19, ¶ 67, 394 Mont. 135, 433 P.3d 1230. All three factors are met. The District Court erred in denying fees under the UDJA.

A. The equities support Plaintiffs' request for fees because they vindicated constitutional interests ignored by the State.

The equities support an award of attorney's fees under the UDJA when the parties "are clearly not similarly situated or on equal footing." *Svee*, ¶ 21. For example, a declaratory action "involv[ing] partnership agreements entered into by sophisticated and well-informed parties dealing with one another on equal footing" will not give rise to an award of attorney's fees. *Id.* ¶ 20 (citing *Mungas v. Great Falls Clinic, LLP*, 2009 MT 426, ¶ 46, 354 Mont. 50, 221 P.3d 1230). On the other hand, when a government abuses its power, forcing citizen litigation, the threshold is met. *Id.* ¶ 21; *see also, e.g. Renville v. Farmers Ins. Exchange*, 2004 MT 366, ¶¶ 23–28, 324 Mont. 509, 105 P.3d 280 (even absent a finding of bad faith, the equities support an award of fees

against an insurer when the insured had no option but litigation to secure coverage).

The District Court concluded that "[a]bsent extraordinary circumstances, it is inequitable to award attorney fees against the State for choosing to defend the constitutionality of a statute." App'x 9. But the balance of power between citizen and State cuts in the opposite direction. The State has all the power: the power to enact or to avoid enacting unconstitutional laws and the power to choose whether or not to defend unconstitutional laws. Plaintiffs have none. Indeed, they were unable even to voice objections when SB 319 was amended to include the challenged provisions. It is the State's abuse of power that led directly to this action. The State contravened one of the limited constitutional constraints on the legislative authority delegated to it by the People.

The constitutional interests vindicated further counsel in Plaintiffs' favor. Plaintiffs enforced safeguards on the legislative process, serving as a check on an exercise of unconstrained and unconstitutional state action. In doing so, they furthered the interests of transparency and public participation in the legislative process, helping to curb future violations of Article V, Section 11. An award of fees is neither unjust nor

inequitable because the State is responsible for the unconstitutional law, and the State chose to defend it. The equities support Plaintiffs' fee request.

B. An award of attorney's fees is "necessary or proper" for complete relief under the UDJA because the State gave Plaintiffs no option but to seek declaratory relief.

The District Court did not address the three-part tangible parameters test when it erroneously concluded that the balance of equities supported the State. The test serves as a tool to assist courts in determining whether an award of fees is "necessary or proper" under the UDJA. *Buxbaum*, ¶ 42. Generally, the test is satisfied when a plaintiff has no alternative mechanism to seek relief to which they are entitled. *Id.* ¶ 44. Each of the three requirements are met here.

First, the State "possessed" what Plaintiffs sought in the litigation—the authority to decline to enforce and defend unconstitutionally enacted laws. *Svee*, ¶¶ 23–24 (factor satisfied by citizen's suit against municipality premised on absence of legal authority to take particular government action). Had the State passed Sections 21 and 22 of SB 319 through a constitutionally sufficient process or declined to enforce it, Plaintiffs would not have been forced to litigate their claims.

Second, Plaintiffs "needed to seek a declaration showing that [they were] entitled to the relief sought." *Abbey/Land*, ¶ 67. Without judgment in Plaintiffs' favor, Sections 21 and 22 of SB 319 would have gone into effect. Indeed, the Montana Constitution expressly provides that a declaratory action is the enforcement mechanism available to citizens injured by legislative overreach. Mont. Const. art. V, § 11(6) ("A law may be challenged on the ground of noncompliance with this section only within two years after its effective date.").

Third and relatedly, "the declaratory relief sought was necessary in order to change the status quo." *Abbey/Land*, ¶ 67. Had Plaintiffs not litigated this action, under-vetted and unconstitutionally enacted laws would have gone into effect. The tangible parameters test is satisfied, and the District Court's order denying fees under the UDJA should be reversed.

CONCLUSION

Plaintiffs respectfully request that the Court reverse the denial of attorney's fees and remand to the District Court to determine the amount of the fee award.

DATED this 1st day of May, 2023.

/s/ *Constance Van Kley*
Rylee K. Sommers-Flanagan
Constance Van Kley
Upper Seven Law

/s/ *Raphael Graybill*
Raphael J.C. Graybill
Graybill Law Firm, PC

Attorneys for Plaintiffs and Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that this Brief is printed with a double-spaced, proportionately spaced Century typeface of 14 points and that the word count, as calculated by Microsoft Word, is 6592 words, including footnotes.

/s/ *Constance Van Kley*

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. 22-0639

FORWARD MONTANA; LEO GALLAGHER; MONTANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; GARY ZADICK,

Plaintiffs and Appellants,

v.

THE STATE OF MONTANA, by and through GREG GIANFORTE, Governor,

Defendant and Appellee.

APPENDIX

On Appeal from the Montana First Judicial District
Lewis & Clark County
Cause No. ADV-2021-611
Honorable Judge Mike Menahan

Order on Motion for Attorney Fees ..... Tab 1

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

FORWARD MONTANA, LEO GALLAGHER, MONTANA ASSOCIATION OF CRIMINLAL DEFENSE LAWYERS, and GARY ZADICK, Plaintiffs, v. THE STATE OF MONTANA, by and through GREG GIANFORTE, Governor, Defendant.	Cause No. ADV-2021-611 **ORDER ON MOTION FOR ATTORNEY FEES**

Before the Court is Plaintiffs' motion for attorney fees. Raph Graybill, Rylee Somers-Flanagan, and Constance Van Kley represent Plaintiffs Forward Montana, Leo Gallagher, Montana Association of Criminal Defense Lawyers, and Gary Zadick. Austin Knudsen, David M.S. Dewhirst, Brent Mead, and Emily Jones represent Defendant State of Montana, by and through Greg Gianforte, Governor.

ISSUES

The only issue remaining before the Court is whether Plaintiffs are entitled to attorney fees. Plaintiffs request attorney fees under three separate legal theories: the private attorney general doctrine; Montana Code Annotated § 25-10-711; and Montana Code Annotated § 27-8-313.

STATEMENT OF FACTS

On April 28, 2021, both the Montana Senate and House of Representatives passed Senate Bill 319 (SB 319). Governor Gianforte signed SB 319 into law on May 12, 2021. Plaintiffs filed an amended complaint on June 4, 2021, alleging SB 319 violates the Single Subject Rule, Montana Constitution, Art. V, § 11(3) and the Rule on Amendments, Montana Constitution Art. V, §11(1). On August 18, 2021, Plaintiffs filed a motion for summary judgment asking the Court to declare SB 319 unconstitutional and void it in its entirety, or, alternatively, to void Sections 21 and 22 of the bill.

On February 3, 2022, the Court issued an order granting Plaintiffs' motion for summary judgment and declaring Sections 21 and 22 of SB 319 violated Montana Constitution, Article V, §§ 11(1) and (3). The Court issued a permanent injunction against Sections 21 and 22 but applied the bill's severability clause and declined to declare the entirety of SB 319 void. Plaintiffs now ask the Court for an award of attorney fees in the amount of $105,719.50.

/////

/////

/////

/////

/////

PRINCIPLES OF LAW

Whether legal authority exists to support a grant of attorney fees is a question of law. *City of Helena v. Svee*, 2014 MT 311, P7, 377 Mont. 158, 161, 339 P.3d 32, 35 (citing *Hughes v. Ahlgren*, 2011 MT 189, ¶ 10, 361 Mont. 319, 258 P.3d 439). If legal authority exists, granting or denying attorney fees is a matter of the court's discretion. *Id.*

Montana follows the "American Rule" as the default in awarding attorney fees. "Under the American Rule, a party in a civil action is generally not entitled to fees absent a specific contractual or statutory provision." *Finke v. State ex rel. McGrath*, 2003 MT 48, ¶ 30-31, 314 Mont. 314, 324, 65 P.3d 576, 582 (quoting *Matter of Dearborn Drainage Area* (1989), 240 Mont. 39, 42, 782 P.2d 898, 899). The Montana Supreme Court has recognized several equitable exceptions to the American Rule, including the private attorney general doctrine. *Id.* at ¶ 30 (citing *Montanans for the Responsible Use of the School Trust v. State ex rel. Bd. of Land Comm'rs (Montrust)*, 1999 MT 263, 296 Mont. 402, 989 P.2d 800).

ANALYSIS

The private attorney general doctrine

Plaintiffs first argue they are entitled to attorney fees under the private attorney general doctrine. The private attorney general doctrine "is primarily used 'when the government, for some reason, fails to properly enforce interests which are significant to its citizens.'" *Finke* at ¶ 31 (quoting *Dearborn* at 43). In determining whether to award attorney fees under the private attorney

/////

/////

general doctrine, the Court must consider three threshold factors: "(1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, (3) the number of people standing to benefit from the decision. *Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist.*, 2011 MT 51, P20, 359 Mont. 393, 400, 251 P.3d 131, 137 (quoting *Montrust* at ¶ 62). If all three factors weigh in favor of awarding attorney fees, the Court must still consider "whether an award of fees would be unjust under the circumstances." *Western Tradition P'ship v. AG of Mont.*, 2012 MT 271, ¶ 14, 367 Mont. 112, 117, 291 P.3d 545, 549.

The first factor may be satisfied "only in litigation vindicating constitutional interests." *Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist.*, 2011 MT 51, P22, 359 Mont. 393, 401, 251 P.3d 131, 137 (quoting *Montrust* at ¶ 66). In their motion for summary judgment, Plaintiffs challenged SB 319 on purely constitutional grounds and argued the bill interfered with Montana citizens' interest in transparency and public participation. Plaintiffs were successful and the Court found Sections 21 and 22 of SB 319 in violation of Article V, §§ 11(1) and (3) of the Montana Constitution. "It is the vindication of constitutional interests that demonstrates the societal importance of the litigation." *Burns v. Cty. of Musselshell*, 2019 MT 291, ¶ 21, 398 Mont. 140, 150, 454 P.3d 685, 691. Plaintiffs have satisfied the first factor.

The State argues Plaintiffs cannot satisfy the second factor, the necessity for private enforcement, because Plaintiff Leo Gallagher (Gallagher) "relie[d] on his official status [as County Attorney for Lewis and Clark County] to bring this lawsuit." The Court disagrees. The fact Gallagher is an elected

official does not mean he is representing a government entity through his participation in this lawsuit. The caption does not indicate Gallagher sued the State in his official capacity. To the extent Gallagher's elected position is relevant to this litigation, it is only because it requires him to appear in court consistently and Section 22 of SB 319 would have caused his personal campaign donations to interfere with his ability to fulfill his job duties efficiently. The record does not support the State's argument that Gallagher was acting as a public official in a way that would defeat Plaintiff's claim regarding the necessity of private enforcement.

As the Attorney General chose to defend the constitutionality of SB 319, private enforcement was necessary to prevent the unconstitutional sections of the law taking effect. The State does not argue Plaintiffs did not bear the financial burden of litigating this constitutional issue. Plaintiffs have satisfied the second factor.

The final factor requires the Court to consider the number of people who benefit from the vindication of the constitutional interest. The State concedes Plaintiffs satisfy the third factor because the litigation involves a statewide constitutional challenge. The Court agrees and the third factor is satisfied.

Equity and Immunity

Although all three factors of the private attorney general doctrine weigh in favor of Plaintiffs, the Court must still consider whether an award of fees would be equitable under the circumstances. Additionally, Defendants raise the issue of legislative immunity under Montana Code Annotated § 2-9-111. The Montana Supreme Court has stated, "The courts necessarily must use caution in

awarding fees against the State in a 'garden variety' declaratory judgment action that challenges the constitutionality of a statute that the Attorney General, in the exercise of his executive power, has chosen to defend." *Western Tradition P'ship* at ¶ 17.

When the Montana Supreme Court adopted the private attorney general doctrine and the three-factor inquiry in *Montrust*, it did so in the context of a challenge to the constitutionality of fourteen statutes concerning Montana's school trust lands. The *Montrust* court found the district court had abused its discretion in denying the plaintiff attorney fees under the private attorney general doctrine because the denial resulted in a "substantial injustice." *Montrust* at ¶ 69. Although the *Montrust* court did not discuss legislative immunity, it clearly did not consider such statutory immunity a complete bar to an award of attorney fees.

In contrast, the court in *Finke* found the plaintiffs had met all three private attorney general factors yet declined to award attorney fees against the State. The court identified two reasons for denial of attorney fees. First, the plaintiffs in *Finke* asked for attorney fees against the county defendants but not the State. Second, the court found the only basis for attorney fees against the State:

> . . .would lie for the actions of the Legislature in enacting an unconstitutional bill, as it is the enactment of [the bill] that prompted the filing of this action. However, § 2-9-111, MCA, provides that the Legislature, as a governmental entity, is immune from suit for any legislative act or omission by its legislative body.

Finke at ¶ 34.

/////

/////

Despite both cases were grounded in constitutional challenges to statutes, the court did not attempt to distinguish its application of legislative immunity in *Finke* from its decision to award attorney fees in *Montrust*.

In *Western Tradition Partnership*, the court attempted to clarify the differing outcomes of the previous cases. The court concluded:

> *Montrust*...was not a 'garden variety' constitutional challenge to a legislative enactment. It involved unique issues raising the State's breach of fiduciary duties imposed by the Montana Constitution and federal enabling laws...the statutes in question were held to violate the State's constitutional obligation and its duty of undivided loyalty to the trust beneficiary.

Western Tradition P'ship at ¶ 19 (internal citations omitted).

The court determined *Finke* was a "garden-variety" declaratory judgment action because the State's only liability was from "the actions of the Legislature in enacting an unconstitutional bill." *Id* (quoting *Finke* at ¶ 34).

Thus, the issues of equity and legislative immunity both depend on whether Plaintiffs' action was a "garden-variety" declaratory judgment action or not. The Court determines this case is closer to *Finke* in that Plaintiffs raised straightforward constitutional challenges to a bill enacted by the Legislature. Unlike in *Montrust* where the Legislature violated additional fiduciary duties, this case involved no heightened duty to Montana citizens that would remove it from the realm of a "garden-variety" declaratory judgment action. The Court finds the legislature's actions to be protected by Montana Code Annotated § 2-9-111 and thus Plaintiffs cannot collect attorney fees under the private attorney general doctrine.

/////

/////

Montana Code Annotated § 25-10-711

Montana Code Annotated § 25-10-711(1) entitles prevailing parties in a civil suit against the State to reasonable attorney fees if the court determines the State's defense was frivolous or pursued in bad faith. "A claim or defense is frivolous or in bad faith under § 25-10-711(1)(b), MCA, when it is 'outside the bounds of legitimate argument on a substantial issue on which there is a bona fide difference of opinion.'" *Jones v. City of Billings*, 279 Mont. 341, 344, 927 P.2d 9, 11 (quoting *Armstrong v. State, Dept. of Justice* (1991), 250 Mont. 468, 469-70, 820 P.2d 1273, 1274). The court may award costs in such situations "notwithstanding any other provision of the law to the contrary." Mont. Code Ann. § 25-10-711(2).

Plaintiffs argue the State proceeded in bad faith by continuing to challenge Plaintiffs' standing even after the Court denied the State's motion to dismiss for lack of standing. However, the State's standing argument is secondary to the constitutional issues. Although the Plaintiffs ultimately prevailed, the Court would not go so far as to say the State's substantive arguments were frivolous or in bad faith.

Montana Code Annotated § 27-8-313

Under Montana's Uniform Declaratory Judgments Act, the court may grant further relief, such as attorney fees, based on a declaratory judgment "whenever necessary or proper." Mont. Code Ann. § 27-8-313. The Montana Supreme Court has repeatedly made it clear that "the availability of attorney fees

/////

/////

/////

is not presumed…As a threshold question, the equities must support a grant of attorney fees." *Abbey/Land v. Glacier Constr. Partners, LLC*, 2019 MT 19, ¶ 66, 394 Mont. 135, 162, 433 P.3d 1230, 1248 (citing *United Nat'l Ins. Co. v. St. Paul Fire & Marine Inc.*, 2009 MT 269, ¶ 38, 352 Mont. 105, 214 P.3d 1260). If the threshold equity requirement is met, courts must then apply three "tangible parameters" to determine whether attorney fees under Montana Code Annotated § 27-8-313 are "necessary and proper":

> (1) the other party "possesses" what the party filing the declaratory judgment sought in the litigation; (2) the party filing the declaratory judgment action needed to seek a declaration showing that it is entitled to the relief sought; and (3) the declaratory relief sought was necessary in order to change the status quo.

Id. at ¶ 67 (citing *Renville v. Farmers Ins. Exch.*, 2004 MT 366, 324 Mont. 509, 105 P.3d 280; *Trs. of Ind. Univ. v. Buxbaum*, 2003 MT 97, 315 Mont. 210, 69 P.3d 663).

Although Plaintiffs were successful in their declaratory judgment action, the Court finds an award of attorney fees under Montana Code Annotated § 27-8-313 does not meet the threshold requirement of equitability. "It is the duty of the Attorney General 'to prosecute or defend all causes in the supreme court in which the state or any officer of the state in the officer's official capacity is a party or in which the state has an interest.'" *Western Tradition P'ship* at ¶ 17 (quoting Mont. Code Ann. § 2-15-501(1)). Absent extraordinary circumstances, it is inequitable to award attorney fees against the State for choosing to defend the constitutionality of a statute. This case does not present extraordinary circumstances. As the Court does not believe an award of attorney fees would be equitable in this matter, application of Montana Code Annotated § 27-8-313 fails on the threshold question and it is unnecessary to apply the tangible parameters.

ORDER

IT IS HEREBY ORDERED Plaintiffs' motion for attorney fees is **DENIED.**

DATED this 16th day of September 2022.

MIKE MENAHAN
District Court Judge

cc: Raph Graybill,(via email to: rgraybill@silverstatelaw.net
Ryle Sommers-Flanagan, via email to: rylee@uppersevenlaw.com
Kristin N. Hansen, via email to: kris.hansen@mt.gov
Brent Mead, via email to: Brent.mead@mt.gov
David M.S. Dewhirst, via email to: david.dewhirst@mt.gov
Patrick M. Risken, via email to: prisken@mt.gov

MFM/sm/ADV-2021-611 Forward Montana, et al. v. State of Montana - Order on Motion for Attorney Fees