IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 22–0639

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

Plaintiffs and Appellants,

v.

STATE OF MONTANA, by and through GREG GIANFORTE, GOVERNOR

Defendant and Appellee.

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, Cause No. ADV-21-611,
The Honorable Mike Menahan, Presiding

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STATEMENT OF ISSUES

1. Whether the District Court erred in denying Plaintiffs and Appellants attorneys' fees.

STATEMENT OF THE CASE

On June 4, 2021, Plaintiffs Forward Montana, Leo Gallagher, Montana Association of Criminal Defense Lawyers, and Gary Zadick (collectively "Forward Montana"), challenged the constitutionality of SB 319 (2021). (Doc. 5.) Counts I and II alleged violations of Article V, Section 11(1) and (3) of the Montana Constitution. (Doc. 5 at 12–15.) Lewis and Clark County Attorney Leo Gallagher verified the complaint on behalf of Plaintiffs. (Doc. 5 at 3–4, 23.)

Forward Montana moved for a preliminary injunction before SB 319's effective date of July 1, 2021. (Doc. 6.) After initial briefing and a hearing on June 28, 2021, the district court issued a preliminary injunction against Sections 21 and 22 on July 1, 2021. (Doc. 28 at 6.) The district court later relied on testimony from the preliminary injunction hearing to finally determine issues such as standing. (Doc. 106 at Ex. H, Hrg. Tr., 12:8–19, 13:18–19.).

Defendant State of Montana by and through Greg Gianforte, Governor ("the State") moved to dismiss and filed a brief in support on August 4, 2021. (Doc. 32.) Forward Montana responded in opposition and moved for summary judgment on Claims I and II on August 18, 2021. (Doc. 34.) Briefing on the motion to dismiss

was completed on September 7, 2021. (Doc. 40.) The court denied the Motion to Dismiss on October 20, 2021, which was also the first time the district court made a ruling regarding Forward Montana's standing. (Doc. 61.)

On September 8, 2021, the State filed a Mont. R. Civ. P. 56(f) motion to stay Forward Montana's motion for summary judgment until discovery could be completed. (Doc. 43.) The State's motion presumed that at this stage, the district court relied on the untested allegations of Forward Montana and that jurisdictional questions remained. (Doc. 43.) Forward Montana opposed the motion because "[t]hat standing is a threshold consideration is no basis for delaying the presentation of purely legal issues…." (Doc. 46 at 3.) The State filed its reply on September 24, 2021. (Doc. 51.) The district court set a status conference for October 25, 2021, at which the court set a hearing date for the pending partial motion for summary judgment on January 25, 2022. (Doc. 67.)

The State served discovery requests on Forward Montana on October 25, 2021, after which Forward Montana sought a protective order against any discovery in the case. (Doc. 69.) On November 11, 2021, the district court stayed discovery. (Doc. 70.) The State responded that thus far, because no discovery occurred in the case, the district court was relying on Forward Montana's untested allegations and noting that relying on preserving an issue for appeal is different from adequately developing a record. (Doc. 71.) The State's Answer on November 16, 2021,

reflected the factual deficiencies in the record. (Doc. 72.) Still, the district court issued a protective order barring any discovery in the case. (Doc. 77.)

The State responded in opposition to the partial motion for summary judgment on December 20, 2021. (Doc. 78.) The State included exhibits that raised issues of redressability, including university policies that prohibited the same activities in the same locales as SB 319. (Doc. 79.) Forward Montana completed briefing on January 11, 2022 (Doc. 82), and a hearing and order granting the motion followed on February 3, 2022. (Doc. 93.) After the district court certified the case under Rule 54(b), the State ultimately elected not to appeal the order on summary judgment given its limitations to Article V, Section 11 of the Montana Constitution. (Doc. 93.)

Forward Montana moved for attorneys' fees under three theories: (1) private attorney general doctrine; (2) uniform declaratory judgment act; and (3) the State litigated in bad faith regarding issues of standing. (Doc. 106.) The State opposed (Doc. 116), and the district court denied fees on September 16, 2022. (Doc. 122.) Forward Montana timely appealed the denial as to the private attorney general doctrine and uniform declaratory judgment act ("UDJA") (Op. Br. at 1), but

concedes for purposes of appeal that the State litigated in good faith. (Op. Br. at 3 n.1.)[1]

STATEMENT OF FACTS

Senate Bill 319 (2011) involved a general revision of campaign finance laws. As originally introduced, the title read:

> A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING CAMPAIGN FINANCE LAWS; CREATING JOINT FUNDRAISING COMMITTEES; PROVIDING FOR CERTAIN REPORTING; AND AMENDING SECTIONS 13-1-101, 13-35-225, 13-35-237, 13-37-201, 13-37-202, 13-37-203, 13-37-204, 13-37-205, 13-37-207, 13-37-208, 13-37-216, 13-37-217, 13-37-218, 13-37-225, 13-37-226, 13-37-227, 13-37-228, AND 13-37-229, MCA."

As enacted, the title read:

> AN ACT GENERALLY REVISING CAMPAIGN FINANCE LAWS; CREATING JOINT FUNDRAISING COMMITTEES; PROVIDING FOR CERTAIN REPORTING; ESTABLISHING THAT IF STUDENT ORGANIZATIONS THAT ARE REQUIRED TO REGISTER AS POLITICAL COMMITTEES ARE FUNDED THROUGH ADDITIONAL OPTIONAL STUDENT FEES, THOSE

[1] Forward Montana, while conceding, continues to re-argue the propriety of the State's jurisdictional defenses. (Op. Br. at 6–7.) To be clear, as the State argued below, the district court erred by relying on testimony at the preliminary injunction stage to finally decide an issue and then prohibit any testing of allegations related to jurisdictional defenses. (Doc. 116 at 11–13.) The State properly relied on this Court's precedents that issues heard at the preliminary injunction stage cannot finally determine an issue at the merits stage; *see Four Rivers Seed Co. v. Circle K Farms, Inc.,* 2000 MT 360, ¶12, 303 Mont. 342, 16 P.3d 342, and the burden placed on plaintiffs to establish standing changes at each successive stage in litigation. *See Lujan v. Def. of Wildlife,* 504 U.S. 555, 561 (1992). If it needs to be said, jurisdictional and justiciability defenses are valid defenses. *See 350 Mont. v. State*, 2023 MT 87, ¶¶ 24–25, 412 Mont. 273, 529 P.3d 847 (dismissing appeal on standing issues).

> 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; AMENDING SECTIONS 13-1-101, 13-35-225, 13-35-237, 13-37-201, 13-37-202, 13-37-203, 13-37-204, 13-37-205, 13-37-207, 13-37-208, 13-37-216, 13-37-217, 13-37-218, 13-37-225, 13-37-226, 13-37-227, 13-37-228, AND 13-37-229, MCA; AND PROVIDING AN EFFECTIVE DATE.

(differences underlined). The House and Senate appointed a free conference committee that added SB 319's amendments to the body and title. (Doc. 5, ¶ 29.)

Forward Montana challenged Sections 21 and 22 of the Act that were part of those amendments. (Doc 5.) Counts I and II alleged violations of Article V, Section 11(1) and 11(3) of the Montana Constitution which govern legislative procedure.[2] The district court preliminarily and permanently enjoined Sections 21 and 22 based solely on the Article V, Section 11 claims and not a violation of any right guaranteed under Article II of the Montana Constitution. (Doc. 93.) Given the limited nature of the district court's order, the State elected not to appeal.

In seeking fees, Forward Montana largely focused on the State's jurisdictional defenses. (*E.g.* Doc. 106 at 9, contending it was unreasonable for the State to

[2] Section 11(1) provides: "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…." Section 11(3) 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. If any subject is embraced in any act and is not expressed in the title, only so much of the act not so expressed is void."

challenge Forward Montana's standing at all; *see also* Op. Br. at 6–7.) The district court did not, however, agree that the State's defenses were frivolous or in bad faith. (Appx. 8.) Forward Montana does not appeal that finding. (Op. Br. at 3 n.1.)

STANDARDS OF REVIEW

"[A]bsent a specific statutory or contractual provision, a prevailing party generally is not entitled to recovery of its attorneys' fees." *Western Tradition P'ship v. AG of Mont.*, 2012 MT 271, ¶ 9, 367 Mont. 112, 291 P.3d 545. Whether statutory, contractual, or equitable authority for an award of attorneys' fees exists is a question of law. *Mont. Immigrant Justice Alliance v. Bullock*, 2016 MT 104, ¶ 15, 383 Mont. 318, 371 P.3d 430. If legal authority exists, this Court reviews for "abuse of discretion a district court's ruling granting or denying attorneys' fees under either the UDJA or the private attorney general doctrine." *Western Tradition P'ship*, ¶ 7. "[A]buse of discretion is whether the trial court acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice." *Peterson v. St. Paul Fire & Marine Ins. Co.*, 2010 MT 187, ¶ 22, 357 Mont. 293, 239 P.3d 904.

SUMMARY OF THE ARGUMENT

Montana follows the American Rule that prevailing parties are not entitled to attorneys' fees. *See Western Tradition P'ship*, ¶ 9. This Court repeatedly cautions any exception to the rule must be narrow, and in cases involving the State, narrower

still. *See Finke v. State ex rel. McGrath*, 2003 MT 48, ¶ 34, 314 Mont. 314, 65 P.3d 576; *see also Clark Fork Coalition v. Tubbs*, 2017 MT 184, ¶ 29, 388 Mont. 205, 399 P.3d 295 (McKinnon, J. specially concurring) ("The private attorney general doctrine must be consistent with the legislature's determination of the standard to be employed when a state agency is a party."). The Court has *never* awarded attorneys' fees in a routine case seeking declaratory and injunctive relief based only on the purported unconstitutionality of a challenged statute. *See Western Tradition P'ship*, ¶ 13; *Clark Fork Coalition*, ¶¶ 25–26; *Mont. Immigrant Justice Alliance*, ¶ 51.

This Court's prior precedents respect separation of powers issues inherent in legislative enactments depending on executive branch legal defense. *Western Tradition P'ship*, ¶ 16 ("The separation of powers between the branches requires us to use the same caution to avoid interference with the executive function as well."). That caution must be especially true in a case like this where the sole basis for the injunction rests on a procedural, not substantive, constitutional violation. (Doc. 93 at 11.) The Attorney General must presume—not second-guess—that the Legislature made an independent judgment as to whether its actions complied with Article V, Section 11, and defend the law in good faith. *Cf. Brown v. Gianforte*, 2021 MT 49, ¶ 32, 404 Mont. 269, 488 P.3d 548 (courts presume legislative acts constitutional).

The narrow exceptions to the American Rule this Court recognizes rely on unique facts and exceptional circumstances. See *Montanans for the Responsible Use of the Sch. Tr. v. State ex rel. Bd. of Land Comm'rs*, 1999 MT 263, 296 Mont. 402, 89 P.2d 800 ("Montrust") (State breached its fiduciary duty to maintain trust lands); *City of Helena v. Svee*, 2014 MT 311, 377 Mont. 158, 339 P.3d 32 (municipal government filed civil and criminal charges before plaintiffs filed their declaratory judgment action); *Burns v. Cnty. of Musselshell*, 2019 MT 291, ¶ 22, 398 Mont. 140, 454 P.3d 685 (county stipulated to an election recount procedure in violation of state law that prejudiced candidate for office). The absence of such circumstances here necessitates affirming the district court. *See Western Tradition P'ship*, ¶ 17 ("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."). Forward Montana ignores this Court's cautions and instead advocates for an entitlement that eviscerates the American Rule. This Court, like the court below, should instead follow its clear precedents and affirm the denial of fees.

ARGUMENT

Absent a specific statutory or contractual provision, a prevailing party generally is not entitled to recovery of its attorneys' fees. *Western Tradition P'ship*, ¶ 9. Courts construe equitable exceptions to the American Rule narrowly "lest they

swallow the rule." *Id*. (quoting *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶ 23, 351 Mont. 464, 215 P.3d 649); *see also id.*, ¶ 13 (the private attorney general doctrine "has been invoked sparingly" and "just once to a party prevailing against the State.").

This Court "reject[s] the expansion of such equitable exceptions when the effect would 'drive a stake into the heart of the American Rule.'" *Western Tradition P'ship*, ¶ 9 (quoting *Jacobsen*, ¶ 22). Thus, the exceptions rely on unique facts and exceptional circumstances. *See Montrust*, ¶¶ 13–14; *Burns*, ¶ 22. This Court considered and rejected Forward Montana's argument that any garden variety constitutional challenge qualifies for attorneys' fees. *Western Tradition P'ship*, ¶¶ 17–19.

This Court also stated a "claim for injunctive relief simply does not provide a basis for the imposition of attorneys' fees against the State." *Finke*, ¶ 34. That's because Montana law provides immunity for any legislative act or omission by the Montana Legislature. Mont. Code Ann. § 2-9-111; *see also Finke*, ¶ 34. So when the "only potential liability of the State for fees would lie for the actions of the Legislature in enacting an unconstitutional bill" then "no avenue" exists to impose a fee award. *Finke*, ¶ 34.

I. THE DISTRICT COURT CORRECTLY DENIED FEES UNDER THE PRIVATE ATTORNEY GENERAL DOCTRINE.

A prevailing party must satisfy three factors, at a minimum, to invoke 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, (3) the number of people standing to benefit from the decision."[3] *Western Tradition P'ship*, ¶ 17 (quoting *Montrust*, ¶ 66). Even if a party satisfies each factor, equity must also favor an award. *Id*., ¶ 21 (denying fees based in part on "equitable considerations"). Equitable considerations naturally follow the doctrine's equitable roots. *Montrust*, ¶ 64; *Western Tradition P'ship*, ¶ 18.

This Court stressed that even if a party can meet all three prongs, it would be unjust under the circumstances to award fees against the State in "garden variety" constitutional challenges to a legislative enactment. *Id.*, ¶ 19. That's because the people retain an inherent interest in the defense of democratically enacted laws. *Id.*, ¶ 20. Thus, in the garden variety challenge, "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." *Id.*

The district court correctly premised its denial of fees on this case being a "garden-variety" constitutional challenge. (Appx. at 7, quoting *Western Tradition P'ship*, ¶ 19.) The district court decision naturally follows *Western Tradition Partnership* and *Finke*. *Id.* The absence of a heightened duty precludes an award of

[3] Only the first and second prongs are at issue.

fees where the only liability to the State comes "the actions of the Legislature in enacting an unconstitutional bill." *Western Tradition P'ship*, ¶ 19 (quoting *Finke*, ¶ 34). The district court didn't abuse its discretion by following this Court's precedents in denying fees under the private attorney general doctrine. This Court should affirm.

A. THE DISTRICT COURT CORRECTLY DENIED FEES BASED ON EQUITABLE CONSIDERATIONS.

The district court correctly applied this Court's precedents in *Finke* and *Western Tradition Partnership* in denying fees. (Appx. 7.) Because this case presents a straightforward challenge to SB 319's manner of enactment, it falls in the "garden variety" category. Thus, the district court properly denied fees on equitable grounds. *Western Tradition P'ship*, ¶ 17.

1. *Montrust*, *Finke*, and *Western Tradition Partnership* create a clear rule that fees are unavailable in "garden variety" constitutional challenges.

The private attorney general doctrine doesn't apply to ordinary constitutional challenges to a legislative enactment. *See Western Tradition P'ship*, ¶ 20; *Finke*, ¶ 34. Equitable considerations favor the Attorney General mounting good faith defenses to state law. *See Western Tradition P'ship*, ¶¶ 16–20. The doctrine's predicate—"when the government, for some reason, fails to properly enforce interests which are significant to its citizens"—fails because of the significant interest in defending state laws. *Id*., ¶ 20. The Attorney General's defense of state

statute is "grounded in constitutional principles and in an effort to enforce interests the executive deemed equally significant to its citizens," compared to the constitutional challenge itself. *Id*. In other words, the competing constitutional interests— plaintiffs challenge to a statute, and the State's defense of that statute— disfavor fee awards because the presumption must be towards good-faith defense of the law. *Id*.

This Court recognized that presumption at the doctrine's beginning. *In re Dearborn Drainage Area*, 240 Mont. 39, 43, 782 P.2d 898, 900 (1989). *Montrust* provided a set of facts overcoming the presumption, not replacing the presumption with a different test. *Western Tradition P'ship*, ¶ 19. From *In re Dearborn Drainage Area* through *Montrust*, *Finke*, and *Western Tradition Partnership*, the consistent rule provides a presumption against awarding fees when the State defends the law in good faith. *Western Tradition Partnership*, ¶¶ 16–20.

In *Western Tradition Partnership*, this Court declined to award fees against the State even though the State defended the law contrary to strong counter-precedent. *Id.*, ¶¶ 3, 5 (The U.S. Supreme Court "summarily" rejected the State's arguments that "there can be no serious doubt that the holding of *Citizens United* applies to the Montana statute.") (quoting *American Tradition P'ship, Inc. v. Bullock*, 567 U.S. 516 (2012)). The Court made clear that Mont. Code Ann. § 25-10-711 guided the analysis because of the strong interests in the full defense of state

law. *Id.*, ¶¶ 18, 20. Absent "unique issues," like those in *Montrust*, the American Rule remains in place. *Id.*, ¶ 19.

Forward Montana raises *Montrust* and *Burns* in opposition. (Op. Br. at 15–16.) Neither applies here. *Montrust* involved "unique issues" where the State breached its fiduciary duties "imposed by the Montana Constitution and federal enabling laws under which the federal government's grant of lands to Montana for support of common schools constitutes a trust for which the State is the trustee." *Western Tradition P'ship*, ¶ 19 (citing *Montrust*, ¶¶ 13–14). *Montrust* remains the only case in which this Court awarded or upheld fees against the State under the private attorney general doctrine. *Id.*, ¶ 13; *see also Clark Fork Coalition*, ¶ 15 (noting the doctrine has been invoked "sparingly"). The county in *Burns*, meanwhile, adopted election recount procedures that clearly violated Mont. Code Ann. § 13-15-206. *Burns*, ¶ 22. Lesnik had to intervene to protect his rights as the winner of the Musselshell County Sheriff election. *Id.*, ¶¶ 2–3, 8, 22. *Burns* stands as the only other case granting fees under the private attorney general doctrine against a government entity.

Neither case supports an award here. First, as the district court noted, no unique issues or extraordinary circumstances exist. (Appx. 7.) This case closely follows both *Finke* and *Western Montana Partnership* in that plaintiffs successfully enjoined a legislative enactment, but there are no allegations that the State breached

a heightened duty. Second, unlike *Burns*, where Lesnik had to intervene to protect his rights because of the county's ongoing actions, Forward Montana began this case before SB 319's enforcement. In other words, those cases involved exceptional circumstances not present here.

By contrast, if Forward Montana prevails, it blows a hole through the American Rule and creates a presumption that fees are available in any garden variety declaratory judgment action. Such a holding would erode the separation of powers and weaken the public policy favoring the Attorney General's defense of state law. Forward Montana has not, on this record, presented sufficient cause for such a departure from stare decisis. Because this case more closely follows the ordinary constitutional challenges in *Finke* and *Western Tradition Partnership*, the district court didn't abuse its discretion in denying fees.

2. Statutory immunity and limitations on damages against the State also require denial of fees.

This Court has always applied a presumption against awarding fees under the private attorney general doctrine in cases involving the State. *See In re Dearborn Drainage Area*, 240 Mont. at 43, 782 P.2d at 900 (denying fees under the private attorney general doctrine). This presumption against fees, absent extraordinary circumstances, is rooted in the liability shield found in § 2-9-111. *Finke*, ¶ 34. But the Legislature created sideboards where fees are allowed if the State litigates in bad faith. § 25-10-711. And this Court recognizes that sideboard as a guidepost for

reviewing an award of fees under equitable doctrines. *Western Tradition P'ship*, ¶ 18; *Clark Fork Coalition*, ¶¶ 25–29 (McKinnon, J. concurring).

"[F]ees against the State would not be appropriate under the private attorney general doctrine where 'the only potential liability of the State for fees would lie for the actions of the Legislature in enacting an unconstitutional bill.'" *Western Tradition P'ship*, ¶ 19 (quoting *Finke*, ¶ 34). The district court granted summary judgment for Forward Montana based solely on how the Legislature passed SB 319. (Doc. 93 at 11). The liability thus rests on "the actions of the Legislature [] enacting an unconstitutional bill." *Western Tradition P'ship*, ¶ 19. The district court order denying fees properly recognized this fact. (Appx. 7.) Forward Montana identifies no state actor who sought to enforce SB 319. Because neither the Attorney General nor anyone else *enforced* Sections 21 and 22 of SB 319, the liability rests solely with the legislative process at issue. Forward Montana recognizes this. (*See* Op. Br. at 10, 28 (the claims arose because of legislative process); Op. Br. at 20–21 (distinguishing between enactment and enforcement)); *see also Finke*, ¶ 34 (the private attorney general doctrine doesn't attach to claims where the only liability rests with enactment).

Montana statutes provides a limited exception to the presumption against fees:

> (1) In any civil action brought by or against the state, a political subdivision, or an agency of the state or a political subdivision, the opposing party, whether plaintiff or defendant, is entitled to the costs

> enumerated in 25-10-201 and reasonable attorney fees as determined by the court if:
>
> (a) the opposing party prevails against the state, political subdivision, or agency; and
>
> (b) the court finds that the claim or defense of the state, political subdivision, or agency that brought or defended the action was frivolous or pursued in bad faith.

§ 25-10-711. The limitations contained in § 25-10-711 also inform the limitations of other recognized exceptions. *See Western Tradition P'ship*, ¶ 20 (denying fees under the private attorney general doctrine because the "State mounted a good faith defense); *Mont. Immigrant Justice Alliance*, ¶¶ 49, 52 (finding an award of fees under the UDJA wasn't proper because the State's defense was not frivolous or in bad faith). As one Justice put it, "[w]hether an agency acted frivolously or in bad faith are guideposts within which to assess—under the particular facts, procedural history, and relevant principles of law of the case—whether an award of attorneys' fees under the private attorney general doctrine is equitable and consistent with § 25-10-711, MCA." *Clark Fork Coal.*, ¶ 29 (McKinnon, J. specially concurring).

Forward Montana concedes on appeal that the State defended the law in good faith. (*See* Op. Br. at 3 n.1 ("The denial of fees under § 25-10-711, MCA, is not challenged on appeal"); Appx 8 (district court determined the State's defense was not frivolous or in bad faith).) That acknowledgment severely constrains any available avenue of relief. *See Western Tradition P'ship*, ¶ 18.

Even if Forward Montana hadn't conceded on this point for appeal, its briefing below highlights the good-faith basis of the State's defense. (Doc. 106 at 15, justifying its fee request in part because the Article V, Section 11 issue presented "an issue of first impression" and noting the "dearth of caselaw.") Forward Montana paints a wholly inaccurate picture that the State lacked any justifiable basis for defending the law. (*E.g.*, Op. Br. at 14, accusing the Attorney General of "abdicating" his obligation to uphold the constitution; at 28 (same); at 31–32 (it is inequitable for the Attorney General to defend a law later found unconstitutional.) This is egregious post-hoc rationalization. It also ignores the facts of *Western Tradition Partnership*, where the state law was subject to strong, disfavorable, precedent. (*Compare* Doc. 106 at 15 to *Western Tradition P'ship*, ¶ 20.) At bottom, Forward Montana fails to appreciate that the Attorney General's defense of democratically enacted laws vindicates important constitutional principles. *Western Tradition P'ship*, ¶¶ 16, 20. Here, as in *Western Tradition Partnership*, the district court doesn't abuse its discretion in denying a fee award after finding the State mounted a good faith defense and no extraordinary circumstances exist. *Id.*, ¶ 20. This Court should affirm the district court's denial of fees under the private attorney general doctrine.

3. The Court should not entertain Forward Montana's request to overturn settled precedent.

Forward Montana asks this Court to "overrule" *Finke* and *Western Tradition Partnership* "to the degree" those cases conflict with Plaintiffs' read of *Montrust*. (Op. Br. at 25.) This Court should decline to do so. First, Forward Montana fails to convincingly argue that *Finke* and *Western Tradition Partnership* were manifestly wrong decisions. *See McDonald v. Jacobsen*, 2022 MT 160, ¶ 30, 409 Mont. 405, 515 P.3d 777 (to justify departure from stare decisis, a decision must be manifestly wrong not merely one of several alternatives). Second, Forward Montana's arguments flout this Court's warning about inappropriate balancing of the "relative strength or weakness of public policies" at stake. *Western Tradition P'ship*, ¶ 16.

Forward Montana's central argument departs from this Court's precedents on two major points. First, it fails to address the separation of powers issues inherent in the executive branch defense of legislative enactments. *Western Tradition P'ship*, ¶¶ 16–17. Second, it asks this Court to ignore the first factor of the private attorney general doctrine when considering the equities. (Op. Br. at 26, arguing that the State failed to advance interest as "weighty" as in *Western Tradition Partnership*; *but see Western Tradition P'ship*, ¶ 16, stating the private attorney general doctrine is not an avenue to assess "the relative strength or weakness of public policies furthered" by the litigation.) Even if this Court were to consider overturning the dominant line of caselaw, this case presents an especially poor vehicle to do so. Unlike *Western*

Tradition Partnership, which involved a substantive violation of the right to free speech, this case involves only a procedural error by the Legislature. (Doc. 93 at 11.) The district court's denial of fees was proper and should be affirmed.

B. FORWARD MONTANA CANNOT MEET ALL THREE PRONGS OF THE PRIVATE ATTORNEY GENERAL DOCTRINE.

The failure to meet any single factor prevents an award of attorney fees under the private attorney general doctrine. *See Am. Cancer Soc'y v. State*, 2004 MT 376, ¶¶ 7, 20–21, 325 Mont. 70, 103 P.3d 1085 (denying fees under the first factor); *Cmty. Ass'n for N. Shore Conservation, Inc. v. Flathead Cnty.,* 2019 MT 147, ¶ 52, 396 Mont. 194, 445 P.3d 1195 (same); *San Diego Municipal Employees Ass'n v. City of San Diego*, 244 Cal. App. 4th 906, 914–15; 198 Cal. Rptr. 3d 355 (2016) (denying fees under the second factor). The district court erred by finding Forward Montana met the first two factors. Accordingly, even if the Court finds an award of fees just under the circumstances, it should nevertheless affirm denial on the alternative grounds that Forward Montana doesn't meet all three factors.

1. Prudential considerations counsel against Forward Montana on the first factor.

The private attorney general doctrine's first factor considers "the strength or societal importance of the public policy vindicated by the litigation." *Western Tradition P'ship*, ¶ 14. The Court cautioned "that the first factor not become for courts 'assessments of the relative strength or weakness of public policies furthered

by their decisions … a role closely approaching that of the legislative function.'" *Id*., ¶ 16 (quoting *Bitterroot River Protective Assn. v. Bitterroot Conserv. Dist.*, 2011 MT 51, ¶ 22, 359 Mont. 393, 251 P.3d 131 ("BRPA"). While only constitutional claims may satisfy this factor, not all constitutional claims do. *Id*. Instead, courts balance the claims at issue against the Attorney General's constitutional prerogative to defend all laws enacted by the people, or the people's representatives. *Id*., ¶¶ 16–20.

Claims arising under Article V, Section 11 of the Montana Constitution counsel more caution, not less. Article V, Section 11 concerns legislative process, not substantive rights. Mont. Const. art. V, §§ 11(1)–(5) (*see also* Op. Br. at 28, where Plaintiffs describe the litigation as concerning "constitutional limits on the legislative process.") The Attorney General should presume the legislature made an independent judgment as to whether its actions complied with the constitution. *Cf. Brown*, ¶ 32 (courts presume legislative acts constitutional). The alternative inserts the Attorney General's judgment, post-sine die, as to the validity of the legislature's procedural choices. That creates a second, extra-constitutional, executive branch veto point in the legislative process. The separation of powers concerns embedded in factor one must be heightened in cases like this. *Western Tradition P'ship*, ¶ 16.

Forward Montana's own arguments demonstrate how they fail the first factor. (*E.g.* Op. Br. at 24.) For example, Forward Montana adopts the post-hoc argument

that "Sections 21 and 22 of SB 319 were unconstitutional when they were enacted because of how they were enacted." (*Id.*) Then compares that legislative process with the "constitutional principles of democracy and preventing corruption" in *Western Tradition Partnership*. (*Id.*) Such "assessments of the relative strength or weakness of public policies" are precisely what *Serrano* and *Western Tradition Partnership* warn against. *See Western Tradition P'ship*, ¶ 16.

Instead, this Court looks to the separation of powers between the branches. *Id.* The defense of state law vindicates important public interests. *Id.*, ¶ 17. The people—through their elected legislators and governor—enacted SB 319. Thus, the public retains an interest in defending the law's validity. *See Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2195 (2022) (states possess an interest in defending their laws). The Attorney General is charged with defending the constitutionality of state laws. *Western Tradition P'ship*, ¶ 17; *see also* Mont. R. Civ. P. 5.1; Mont. R. App. P. 27 (a party who challenges any act of the Montana legislature must give notice to the Attorney General). While the Attorney General possesses discretion in defending the constitutionality of a state law, the exercise of that discretion necessarily implicates inter and intra branch separation of powers issues. *Western Tradition P'ship*, ¶¶ 16–17. The Legislature, not the Attorney General, makes law, and the Governor, not the Attorney General, possesses the veto power. Mont. Const. art. V, § 1; art. VI, § 10. But Forward Montana asks this Court

to create a new rule where the Attorney General inserts himself to act as another veto point. (Op. Br. at 28, implying the Attorney General ought to "referee[] the boundaries of state power delegated by the People to the Legislature.") But the law does not confer this power on the Attorney General. To the contrary, this argument ignores the weighty constitutional interests expressed in Article III, Section 1 of the Montana Constitution that the Attorney General offers a good-faith, robust defense of state law. *Western Tradition P'ship*, ¶ 17.

Finally, the Attorney General defended SB 319, but doesn't possess any enforcement authority over Sections 21 and 22 of the Act. The Commissioner of Political Practices oversees Section 21 which is codified at Title 13, chapter 35. The judiciary oversees Section 22 which is codified at Title 3, chapter 1. This fact distinguishes this case from *Burns*, where the government agency that failed to properly enforce state law also defended the action. *Burns*, ¶¶ 12, 20–21. Forward Montana acknowledges this distinction but blows right past in haste. (Op. Br. at 20–22.) Forward Montana failed to name the appropriate enforcement officials. (Doc. 26 at 8.)[4] So under Forward Montana's theory distinguishing enforcement and enactment, the State's defense relates solely to the law's enactment. (Op. Br. at 20.) And that enactment only concerns legislative process. (Op. Br. at 24.) Thus, this

[4] The State raised this issue below, but the district court failed to resolve the issue either at the preliminary injunction stage, (Doc. 28), or at summary judgment (Doc. 93.)

case aligns with *Finke*. *Id.*, ¶ 34. Fees are inappropriate where "the only potential liability of the State for fees would lie for the actions of the Legislature in enacting an unconstitutional bill." *Western Tradition P'ship*, ¶ 19 (quoting *Finke*, ¶ 34).

The first factor tilts towards the State because the good-faith defense of state law vindicates interests "equally significant" to the people. *Western Tradition P'ship*, ¶ 20.

2. Forward Montana cannot demonstrate the necessity of private enforcement.

"The second factor of the private attorney general doctrine is the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff." *Burns*, ¶ 22; see also *In re Dearborn Drainage Area*, 240 Mont. at 43, 782 P.2d at 900 (the private attorney general doctrine doesn't apply when a government party represents interests significant to its citizens).

The "usual considerations" under the second factor look to government agency involvement in the action. *BRPA*, ¶ 32. The necessity prong prevents the private attorney general doctrine from becoming an "unwarranted cornucopia of attorney fees for those who intervene in, or initiate litigation while actually performing duplicative" services of public parties. *San Diego Municipal Employees Ass'n*, 244 Cal. App. 4th 906 at 914–15 (denying attorney fees because private litigant co-litigated case with a public agency and couldn't show the necessity of

private enforcement).[5] The existence of a public official plaintiff creates a strong presumption against the necessity of private enforcement. *Id.* at 913 ("the private party requesting attorney fees must make a significant showing that its participation was material to the result, i.e., that it proffered significant factual and legal theories, and produced substantial, material evidence, that were not merely duplicative of or cumulative to what was advanced by the governmental agency."). A private party cannot meet the second factor by piggybacking on the efforts of a public party.

This Court made an exception in *Bitterroot River Protective Association* for Fish, Wildlife, and Parks. There, the agency declined to appeal a decision adverse to its interests and had to be joined as an unwilling plaintiff over the agency's objection. *BRPA*, ¶ 32. Thus, while Fish, Wildlife, and Parks appeared as plaintiff, the private plaintiffs "bore the brunt" of the litigation and couldn't rely on the agency to seek full relief. *Id.*

Plaintiff Leo Gallagher sought to enforce Article V, Section 11's limitations through his public office as Lewis & Clark County Attorney. (Doc. 5 at 3–4.) Gallagher verified the complaint on behalf of all plaintiffs. (Doc. 5 at 23.) Unlike *Bitterroot River Protective Association*, Gallagher endorsed and pursued the same legal theories as the other plaintiffs and acted in concert with those plaintiffs. (Doc. 5.) Gallagher participated in a unified legal strategy from beginning to end with the

[5] California codified the *Serrano* decision at Cal. Civ. Proc. Code § 1021.5.

other plaintiffs. (*E.g.* Docs. 5, 6, 35, 36, 128.) Because Gallagher raised the same claims related to Article V, Section 11 as the other plaintiffs, and the district court only decided the Article V, Section 11 claims, his participation precludes an award of fees under the private attorney general doctrine.

The district court erred by ignoring the substance of Gallagher's participation in favor of the form of the caption. (*See* Doc. 122 at 5: "The caption does not indicate Gallagher sued the State in his official capacity"; *but see* Mont. Code Ann. § 1-3-219: "The law respects form less than substance.") Gallagher, regardless of the form of the caption, relied on his official position as the basis for his standing to bring suit. (Doc. 5 at 3–4.) "Leo Gallagher is the duly elected, qualified, and acting County Attorney for Lewis & Clark County, Montana." (*Id.* at 3.) "Gallagher and *his office* are collectively responsible for hundreds of pending criminal cases in Lewis & Clark County." (*Id.* at 3–4) (emphasis added). "SB 319's judicial recusal provisions will injure Gallagher in the performance of his official duties…." (*Id.* at 4; *see also* Doc. 28 at 5–6, granting a preliminary injunction because judicial recusals would affect litigants in ongoing criminal proceedings.) In substance, Gallagher based his standing to sue on his status as the Lewis & Clark County Attorney and that negates the second factor of the private attorney general doctrine. *See BRPA*, ¶ 32 ("usual considerations" under the private attorney doctrine look to whether an agency sought enforcement of the law).

The reliance on a public official to enforce Article V, Section 11 of the Montana Constitution defeats any claim to fees under the private attorney general doctrine. This Court should therefore affirm denial of fees on an alternate basis.

II. THE DISTRICT COURT CORRECTLY DENIED FEES UNDER THE UNIFORM DECLARATORY JUDGMENTS ACT.

"[A]n award of fees to the prevailing party is not warranted in every garden variety declaratory judgment action…." *Mont. Immigrant Justice Alliance*, ¶ 48. "[T]he reach of § 27-8-313, MCA is 'narrow.'" *Id.*, ¶ 48 (quoting *Western Tradition P'ship*, ¶ 11). The Montana Supreme Court only rarely upholds fee awards under § 27-8-313. *See Svee*, ¶ 36 (Baker, J. dissenting); *see also id.*, ¶ 21 (awarding fees when the city first brought civil and criminal charges); *Renville v. Farmers Ins. Exch.*, 2004 MT 366, ¶¶ 8–18, 324 Mont. 509, 105 P.3d 280 (involving extreme circumstances where an insurer withheld payment after this Court affirmed award); *Public Land/Water Access Ass'n v. Jones*, 2015 MT 299, ¶ 35, 381 Mont. 267, 358 P.3d 899 (defendant "acted with malice" and "in violation of prior orders of the District Court and [Montana Supreme Court]"); *Abbey/Land v. Glacier Constr. Partners, Ltd. Liab. Co.*, 2019 MT 19, ¶ 68, 394 Mont. 135, 433 P.3d 1230 (parties engaged in "egregious collusion" and disrespected the judicial process to inflate a stipulated judgment to the detriment of a third-party). No such extreme, outlier conditions exist here.

Instead, this case follows cases like *Western Tradition Partnership* and *Montana Immigrant Justice Alliance* where the Attorney General defended state law against a constitutional challenge. *Western Tradition P'ship*, ¶ 17; *Mont. Immigrant Justice Alliance*, ¶¶ 51–52. The Attorney General mounted a good faith defense of SB 319 on jurisdictional and merits grounds. (Appx. 8; *see also* Doc. 116 at 11–14, detailing the State's arguments on standing and the district court's blanket protective order against any discovery.)

Forward Montana asks this Court to create several per-se like rules contrary to controlling caselaw. (*See e.g.*, Op. Br. at 31 (equities favor an award of fees in cases involving the State); *but see Montana Immigrant Justice Alliance*, ¶ 51; Op. Br. at 32 (plaintiffs meet the first prong of the tangible parameters test whenever the State elects to defend state law); *but see Western Tradition P'ship*, ¶ 17; Op. Br. at 33 (any declaratory relief, regardless of available injunctive relief, against a state statute satisfies the second prong of the tangible parameters test); *but see Davis v. Jefferson Cnty. Election Office*, 2018 MT 32, ¶¶ 15–17, 390 Mont. 280, 412 P.3d 1048; Op. Br. at 33 (declaratory relief changes the status quo, even after successfully obtaining pre-enforcement preliminary injunctive relief); *but see Mont. Immigrant Justice Alliance*, ¶ 52 (a pre-enforcement challenge posture weighs against awarding fees).) Awarding fees under the UDJA here eviscerates the American Rule. And this Court has never read the UDJA exception so broadly. *See Western Tradition*

P'ship, ¶ 11 (the reach of MCA § 27-8-313 is narrow). The district court faithfully and correctly applied this Court's precedents. This Court should affirm denial of attorneys' fees.

A. THE DISTRICT COURT CORRECTLY DENIED FEES BASED ON THRESHOLD EQUITABLE CONSIDERATIONS.

Before considering any other factors, courts must make a threshold determination that equity supports an award of attorneys' fees. *See Western Tradition P'ship*, ¶ 12. Like the private attorney general doctrine, statutory bad-faith provisions guide the equitable consideration analysis for cases involving the State. *See Mont. Immigrant Justice Alliance*, ¶ 52 ("In defending LR 121, the Attorney General grounded his arguments in constitutional principles, and although he was unsuccessful, his defense of the law was not frivolous or in bad faith."); *see also supra* Part I.A.2 (Forward Montana concedes on appeal the State litigated this case in good faith). In *Montana Immigrant Justice Alliance*, the Attorney General unsuccessfully defended the constitutionality of a citizen-passed initiative. *Id*., ¶ 52. In *Western Tradition P'ship*, the Attorney General defended, unsuccessfully, Montana's corporate political speech ban in the wake of *Citizens United v. FEC*, 588 U.S. 310 (2010). *Id*., ¶ 5. The United States Supreme Court summarily rejected the Attorney General's arguments saying "[t]here can be no serious doubt" that the holding of Citizens United applies to the Montana statute. *Am. Tradition P'ship, Inc. v. Bullock*, 567 U.S. 516 (2012). Even then, the Montana Supreme Court

declined to grant attorneys' fees because of the equitable interests in the Attorney General defending the constitutionality of duly enacted statutes. *Western Tradition P'ship*, ¶ 17.

Forward Montana fails to cite a single case in which attorneys' fees were awarded against the State under § 27-8-313. (Op. Br. at 30–32.) *Svee* comes closest, but that case involved a declaratory judgment action filed after the City of Helena first sought criminal and civil penalties against the plaintiffs. *Svee*, ¶ 21. Less than two years later, the Court made clear the unique circumstances of the plaintiffs in *Svee* supported the equitable judgment. *Mont. Immigrant Justice Alliance*, ¶ 51 (quoting *Svee*, ¶ 21). A pre-enforcement posture, by contrast, "weigh[s] against … equitable considerations regarding an award of attorney fees." *Mont. Immigrant Justice Alliance*, ¶ 52.

A fee award here would "eviscerate" the American Rule and undercut the equitable principles supporting the Attorney General defending statutory enactments. *Western Tradition P'ship*, ¶¶ 16, 20. As the Court recognized in *Western Tradition Partnership*, the legislature entrusted 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." *Id*., ¶ 17 (quoting MCA § 2-15-501(1)). Imposition of attorneys' fees in

constitutional cases chills a full and faithful defense of the state's interest in seeing its laws enforced. *Id*.

Forward Montana, however, wants to chill such defenses. (Op. Br. at 31.) It argues because the State has the power "to choose whether or not to defend unconstitutional laws," fees must be warranted. (*Id.*) But nowhere does Forward Montana lay out facts stating why this case differs from *Montana Immigrant Justice Alliance* or *Western Tradition Partnership*. (*See* Op. Br. at 29–33 (failing to cite, much less distinguish, either case).)

Instead, Forward Montana incorrectly merges "necessary and proper" with a post-hoc finding based on the case's outcome. That is not, and has never been, the proper test. *See Martin v. SAIF Corp.*, 2007 MT 234, ¶ 25, 339 Mont. 167, 167 P.3d 916 (reversing district court award because "[t]he District Court focused on the fact that SAIF ultimately prevailed in the litigation rather than thoroughly articulating why an award of attorney fees to SAIF would be 'necessary and proper.'"). That is because, as this Court stated, the Attorney General vindicates important constitutional principles by furthering interests equally important to its citizens—defense of democratically enacted laws. *Western Tradition P'ship*, ¶ 20.

The district court properly found that this case follows *Western Tradition Partnership*. (Appx. at 9.) Like *Western Tradition Partnership* and *Montana Immigrant Justice Alliance*, this case didn't involve any exceptional facts or

circumstances. It was a "garden variety" pre-enforcement constitutional challenge, which precludes an award of fees under the UDJA as a matter of equity. *Mont. Immigrant Justice Alliance*, ¶ 52. The district court didn't abuse its discretion in following this Court's precents, and this Court should affirm.

B. THE TANGIBLE PARAMETERS TEST ALSO REQUIRES DENIAL OF FEES.

Any award of fees under § 27-8-313 must be "necessary and proper." *Martin*, ¶ 22. "The tangible parameters test provides that fees are necessary and proper when (1) an insurance company possesses what the plaintiffs sought in the declaratory relief action; (2) it is necessary to seek a declaration showing that the plaintiffs are entitled to the relief sought; and (3) the declaratory relief sought was necessary in order to change the status quo." *Martin*, ¶ 23 (citations and quotations omitted).[6]

Only after a court finds equitable considerations support an award of fees can the court apply the tangible parameters test. *Mungas v. Great Falls Clinic, LLP*, 2009 MT 426, ¶ 45, 354 Mont. 50, 221 P.3d 1230. Because the district court did not err in finding equitable considerations warrant denial of fees it did not err in declining to reach a determination under the tangible parameters test. If, however, this Court finds equitable considerations support an award then it should nevertheless affirm denial because Forward Montana fails to meet each prong of the

[6] *Svee* stated the first element may apply outside the insurance context. *Id.*, ¶ 24.

tangible parameters test. *See Martin*, ¶¶ 23, 26–27 (test is conjunctive). Forward Montana offers minimal support that it meets each element. (Op. Br. at 32–33.)[7] By contrast, controlling caselaw warrants a denial of fees under each element.

1. The authority to enforce and defend state law falls outside the first prong.

The first element's "possession" requirement infers a legal entitlement to the subject of the declaratory action. *Martin*, ¶ 26. It doesn't equate to an entitlement to control discretionary authority. *See Montana Immigrant Justice Alliance*, ¶ 25 (the Attorney General must "see that the laws are faithfully executed" under his executive powers); *Western Tradition P'ship*, ¶ 17 (the Attorney General, under his executive powers, possesses discretion on whether and how to defend state law). Article VI, Section 4 of the Montana Constitution vests that authority in the Attorney General, not private plaintiffs.

Forward Montana hinges the "possession" prong on the Attorney General's "authority to decline to enforce and defend unconstitutionally enacted laws." (Op. Br. at 32.) This raises two issues. First, this Court held that the Attorney General's

[7] Forward Montana fails to sufficiently develop its arguments. (Op. Br. at 32–33.) For example, for the third element, Forward Montana recites a rule from *Abbey/Land*, ¶ 67, a conclusory application sentence, and then closing statement they met the tangible parameters test. (Op. Br. at 33.) The State cannot fairly be asked to guess at what arguments might be made on reply and preemptively respond to them. *See State v. Makarchuk*, 2009 MT 82, ¶ 19, 349 Mont. 507, 204 P.3d 1213 (the Court must not consider any arguments made for the first time in reply).

disavowal of a statute creates tension with Article VI, Section 4 of the Montana Constitution and therefore cannot have a legal effect. *Montana Immigrant Justice Alliance*, ¶ 25. Second, Forward Montana doesn't possess any legal right to direct the discretionary litigation choices vested by the Montana Constitution with the Attorney General. *See Western Tradition P'ship*, ¶ 17.

Forward Montana cites *Svee*, ¶¶ 23–24, as its only contrary authority. (Op. Br. at 32.) That part of *Svee* dealt with the narrow issue of whether *Buxbaum* applies outside the insurance context, not whether the UDJA serves as a vehicle to direct State litigation. *Svee*, ¶¶ 23–24. In *Montana Immigrant Justice Alliance*, this Court considered whether the Attorney General's disavowal of a statute deprived plaintiffs of standing. *Id.*, ¶ 25. It did not. *Id.*[8] In other words, if the State had declined to enforce SB 319, in a pre-enforcement posture, that would have no legal effect. *Id.* (disavowal of state statutes "has no basis in Montana law"). After *Montana Immigrant Justice Alliance*, it is not clear that the Attorney General "possesses" what Forward Montana seeks, because this Court doesn't recognize disavowal. *Id.*

[8] "[I]f the State's disavowal was enough to deprive MIJA of standing in this case, the invocation of disavowal—*which has no basis in Montana law* and is at odds with the executive branch's constitutional duty to 'see that the laws are faithfully executed,' Mont. Const. art. VI, § 4(1)—would enable the State in any case to negate a claim of standing premised on the threat of future injury." *Id.*, ¶ 25 (emphasis added).

The Attorney General does possess authority to direct litigation in which the State has an interest—including the defense of democratically enacted laws. *Western Tradition P'ship*, ¶ 17. But as this Court cautioned, opening § 27-8-313 as a vehicle to interfere with this authority raises separation of powers concerns. *Id.*, ¶ 16; *see also* Mont. Const. art. VI, § 4(4); Mont. Code Ann. § 2-15-501(1) (Both the constitution and statute confer this legal authority on the Attorney General). The exercise of this authority, moreover, vindicates important constitutional interests that the State's democratically enacted laws receive a full and fair defense. *Mont. Immigrant Justice Alliance*, ¶ 52. And, finally, it's the Attorney General's right, not a private party's right, "to represent the state in all litigation of a public character." *State ex rel. Olsen v. Public Serv. Comm'n*, 129 Mont. 106, 115, 283 P.2d 594, 599 (1955). Thus, Forward Montana isn't entitled to direct the authority to "decline … to defend" state law. (Op. Br. at 32.)

Forward Montana's arguments also conflict with this Court's warnings not to confuse case outcomes with the necessary and proper analysis. *Martin*, ¶ 25. That's precisely what the "decline … to defend" argument does. It takes the case outcome then presumes that the State should have known at the onset of litigation the act was unconstitutional. *But see Powder River Cnty. v. State*, 2002 MT 259, ¶ 73, 312 Mont.

198, 60 P.3d 357 (legislative acts are presumed constitutional).[9] That offends established precedent. *Martin*, ¶ 25. Forward Montana therefore cannot establish that it satisfies the first element of the tangible parameters test.

2. Forward Montana's litigation choices preclude an award of attorney fees.

This Court's precedents show that merely pleading a declaratory judgment cause of action fails to satisfy the "necessary" prong. *See Trs. of Ind. Univ. v. Buxbaum*, 2003 MT 97, ¶ 44, 315 Mont. 210, 69 P.3d 663 (adopting limitations expressed in *McConnell v. Hunt Sports Ent.* (Ohio Ct. App. 1999), 132 Ohio App. 3d 657, 725 N.E.2d 1193); *see also Davis*, ¶ 15 (recognizing "attorney fees are not available at common law in actions for injunctive relief"). *McConnell* made clear that "[t]actical decisions do not equal necessary or proper…." 132 Ohio App. 3d 657, 702, 725 N.E.2d 1193, 1225. In that case, plaintiffs chose to file a declaratory judgment action rather than a breach of contract or breach of fiduciary duty claim—claims with which attorney fees are unavailable. *Id.* *Davis* recognized those same limitations in Montana law, that to satisfy the second prong, a declaratory judgment must be the only available avenue to afford relief. *Id.*, ¶ 16.

"Actions for injunctive and declaratory judgment are often filed together," but the Court looks towards whether an injunction affords relief for purposes of attorney

[9] Forward Montana's representations below that this matter is a matter of first impression only further weighs against its arguments on appeal. *Supra* Part.I.A.2.

fees. *Id.* In *Davis*, a group of elected officials filed a petition for injunctive and declaratory relief to halt an impending recall effort. *Id.*, ¶ 16. Because an injunction halted the recall and afforded relief to those officials, the declaratory judgment claim wasn't necessary. *Id.*, ¶ 17.

Forward Montana sought pre-enforcement preliminary and permanent injunctions against SB 319. (Doc. 5 at 22.) As Forward Montana argues under the first prong, the litigation sought to enjoin enforcement of SB 319. (Op. Br. at 32.) Second, the district court's orders on the preliminary and permanent injunctions barred enforcement, independent of any declaratory judgment. (Doc. 28 at 6; Doc. 93 at 11). *Davis* controls under these circumstances. *Davis*, ¶¶ 15–17. Attorney fees are unavailable at common law for injunctive claims and the injunctive claims afforded full relief. *Id.* Forward Montana cannot satisfy the requirement that declaratory relief was "necessary."

Forward Montana also errs by stating that Article V, Section 11, provides an express declaratory relief cause of action. (Op. Br. at 33.) The Montana Constitution provides no such "express" language. *See* 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."); *see also* "express" definition, Black's Law Dictionary at 701 (10th ed. 2014) ("clearly and unmistakably communicated; stated with directness and clarity"). Article V, Section 11(6) of the Montana Constitution

contains an express statute of limitations, but not an express cause of action.[10] Forward Montana therefore cannot establish the second element either.

3. Forward Montana fails to satisfy the third element because declaratory relief did not change the status quo.

Forward Montana's declaratory relief also failed to "change the status quo." *Martin*, ¶ 23 (quoting *Renville*, ¶ 27). "[S]tatus quo" means "the last actual, peaceable, noncontested condition which preceded the pending controversy." *Planned Parenthood of Mont. v. State*, 2022 MT 157, ¶ 6, 409 Mont. 378, 515 P.3d 301.

Svee provides the relevant analysis. *Id.*, ¶¶ 4, 26. There, the city initiated civil and criminal action against the Svees based on the existing status quo—an unchallenged enacted ordinance. *Id.*, ¶ 26. The declaratory action then challenged the validity of the ordinance. *Id.* The successful challenge, therefore, changed the status quo from what existed at the onset of the litigation.

Montana Immigrant Justice Alliance made clear the order of actions in *Svee* made all the difference. *Mont. Immigrant Justice Alliance*, ¶ 52. The pre-

[10] Forward Montana raised this same theory in defense of its standing by citing Utah, not Montana, caselaw. (Doc. 34 at 2–5, citing *Gregory v. Shurtleff*, 2013 UT 18, ¶ 27, 299 P.3d 1098.) The district court never affirmatively accepted that theory as a basis for standing. (Doc. 61 at 6.) This Court, should not, as a prudential matter, accept that theory either given the conclusory briefing by Forward Montana on appeal. *See Griffith v. Butte Sch. Dist. No. 1*, 2010 MT 246, ¶ 44, 358 Mont. 193, 244 P.3d 321 (declining to consider underdeveloped arguments on appeal).

enforcement posture in that case weighed against the award of fees. *Id.* Similarly, here, the district court preserved the status quo of SB 319's non-enforcement through its preliminary injunction. (Doc. 28 at 5–6; *see also* Doc. 93 at 11) (making preliminary injunction permanent.) But Forward Montana's argument relies on an understanding that declaratory judgment changed this status quo. (Op. Br. at 33.) If the district court preserved the status quo, how can it be changed? It cannot. By contrast, in *Svee*, the plaintiffs sought to change the status quo of enforcement. *Svee*, ¶ 26. In cases like this, where the status quo is preserved through injunctive, not declaratory, relief, § 27-8-313 doesn't authorize attorneys' fees. *Svee*, ¶ 26 (citing *Martin*, ¶ 27 (in cases that fail to seek to change the status quo, the tangible parameters test is not met).)

CONCLUSION

This Court should affirm the district court's denial of fees.

DATED this 29th day of August, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,206 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature, and any appendices.

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