IN THE SUPRME COURT OF THE STATE OF MONTANA
DA 18-0366

COMMUNITY ASSOCIATION FOR NORTH SHORE CONSERVATION, INC.,
Plaintiff-Appellee/Appellant,

vs.

FLATHEAD COUNTY AND ITS BOARD OF COUNTY COMMISSIONERS,
Defendant-Appellee,

and

JOLENE DUGAN,
Intervenor-Appellant,

MONTANA ENVIRONMENTAL INFORMATION CENTER'S AMICUS BRIEF IN SUPPORT OF PLAINTIFF-APPELLEE/APPELLANT REGARDING ATTORNEY'S FEES

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INTRODUCTION

Amicus curiae Montana Environmental Information Center (MEIC) encourages the Court to construe the private attorney general doctrine in this case to support an award of reasonable attorney's fees for the Community Association for North Shore Conservation, Inc. (Association) because the doctrine:

- Advances the American Rule's fundamental goal of improving access to justice;
- Ensures government accountability; and
- Promotes healthy communities in Montana.

DISCUSSION

I. The American Rule Was Created to Further Equal Access to Justice.

It is important that common law rules of venerable vintage be occasionally reexamined to assure the purpose for which they were developed persists. As Justice Holmes explained:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Oliver W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897).

The "American Rule" on attorney's fees by which each party is responsible for paying its own attorney's fees regardless of outcome, is not an artifact of statute, but of the common law. *E.g.*, *Bovee v. Helland*, 52 Mont. 151, 156 P. 416, 417 (1916) (collecting cases); *Parker v. Bond*, 5 Mont. 1, 1 P. 209, 213-14 (1883). The American Rule is contrasted with the "English Rule" by which the losing party pays the attorney's fees of both parties. Md. Access to Justice Comm'n, *Fee-Shifting to Promote the Public Interest in Maryland*, 42 U. Balt. L.F. 38, 40 (2011).

The ground on which the American Rule rests is the goal of assuring equal access of citizens to the courthouse. *E.g.*, *Maytown Sand & Gravel, LLC v. Thurston Cnty.*, 423 P.3d 223, 246 (Wash. 2018) ("The primary justification for adopting the American rule is that it encourages aggrieved parties to air their grievances in court."); *Sally-Mike Properties v. Yokum*, 365 S.E.2d 246, 249-50 (W. Va. 1986) ("[T]he American rule promotes equal access to the courts for the resolution of *bona fide* disputes.").

Thus, the Supreme Court explained:

> In support of the American rule, it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel.

Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967).

There is little doubt that access to justice—the purpose animating the American Rule—remains a pressing concern across the United States, including in Montana. *E.g.*, Carmody & Associates, The Justice Gap in Montana: As Vast as Big Sky Country (2014) [hereinafter, Justice Gap]. However, while the American Rule provides greater access to the court system than does the English Rule, the one-way fee shift for successful plaintiffs under the private attorney general doctrine provides *still greater access to justice* than the American Rule. John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 Am. U. L. Rev. 1567, 1635 (1993) ("In general, the English Rule operates as a greater impediment to access to justice than does the American Rule. A fee shifting rule that operates as a one-way shift in favor of injured plaintiffs [like the private

attorney general doctrine] *affords the greatest access to justice*." (emphasis added)).

Thus, the private attorney general doctrine *advances* the American Rule's goal of providing access to justice. Accordingly, the doctrine should be construed broadly, like other remedial doctrines. *Compare Clark Fork Coal. v. Tubbs*, 2017 MT 184, ¶¶ 14, 16, 388 Mont. 205, 399 P.3d 295 (noting prior "narrow" application of doctrine on basis that it is an "exception" to the American Rule), *with Bitterroot Protective Ass'n v. Bitterroot Conservation Dist.* (*Bitterroot III*), 2011 MT 51, ¶¶ 22-37, 359 Mont. 393, 251 P.2d 131 (broadly construing doctrine).

II. The Private Attorney General Doctrine Advances Access to Justice.

Recent research and analysis by the Maryland Access to Justice Commission concluded that one-way fee shifting for plaintiffs who successfully enforce rights under state statutes or the state constitution—i.e., the private attorney general doctrine—would incentivize lawyers to represent individuals in cases involving little or no monetary relief and thereby significantly expand access to justice. Md. Access to Justice Comm'n, *supra* at 38. "To strengthen and render more uniform the award of attorney's fees in Maryland, the Commission

endorsed the principle of a general fee-shifting provision as a means to promote access to justice through an award of attorney's fees for individuals successfully enforcing their rights under Maryland law or the Maryland Constitution." *Id.* (internal quotation omitted) (quoting Md. Access to Justice Comm'n, Interim Report & Recommendations (2009)).

The Supreme Court of California adopted the private attorney general doctrine in its seminal decision *Serrano v. Priest*, 569 P.2d 1303, 1313-14 (Cal. 1977), for the same reasons: to create a legal mechanism to incentivize attorneys "whether private attorneys acting pro bono publico or members of 'public interest' law firms" to represent public interest litigants who have meritorious cases but limited resources. This Court adopted the doctrine from *Serrano* in *Montanans for the Responsible Use of the School Trust v. State* (*Montrust*), 1999 MT 263, ¶¶ 65-67, 296 Mont. 402, 989 P.2d 800.

In Montana, many people cannot meet their legal needs because they "simply cannot afford to hire an attorney." Justice Gap, *supra* at 3. MEIC witnesses this problem across the state. While polluting activities regularly threaten Montanans' health and the health of the

environment, MEIC and many other small public-interest conservation and public health groups are often unable to obtain pro bono legal representation. There are probably fewer than ten attorneys in the entire state who provide pro bono legal representation in environmental cases. This problem is particularly acute because environmental and public health litigation is, as the California Supreme Court recognized in *Serrano*, "often extremely complex . . . time-consuming and costly." 569 P.2d at 1313. Conservation and public health groups like MEIC simply cannot afford to pay an attorney an hourly fee to litigate cases to enforce Montana's environmental laws. Unfortunately, this often means violations of state environmental law go unenforced.

As courts and commissions have concluded, straight forward means of addressing the lack of access to justice are to "[i]ncrease [the] availability and types of free legal assistance" and "[i]ncrease the legal areas in which legal assistance is available." Justice Gap, *supra* at 4; *accord* Md. Access to Justice Comm'n, *supra* at 38-39; *Serrano*, 569 P.2d at 1313. Fortunately, Montana, like many western states,[1] has adopted

[1] *E.g.*, *Serrano*, 569 P.2d at 1314 (California); *In re Honolulu Constr. v. Hawaii*, 310 P.3d 301, 302 (Haw. 2013); *Utahns For Better Dental Health-Davis, Inc. v. Davis County Clerk*, 2007 UT 97, ¶ 5; *Fox v. Bd. of*

the private attorney general doctrine, which serves to open the courthouse doors to Montanans who "simply cannot afford to hire an attorney." Justice Gap, *supra* at 3; *Montrust*, ¶ 67. Unfortunately, application and development of this salutary doctrine appears to have been hindered by its perceived conflict with the American Rule. *E.g.*, *Clark Fork Coal.*, ¶¶ 14, 16; *W. Tradition P'ship, Inc. v. Attorney General*, 2012 MT 271, ¶ 13, 367 Mont. 112, 291 P.3d 545 (characterizing doctrine as "exception" to the American Rule that is "invoked sparingly"); *cf. Bitterroot III*, ¶¶ 22-37 (broadly construing doctrine). As noted above, no such conflict exists. The private attorney general doctrine advances the purpose of the American Rule and should, accordingly, be construed broadly to advance access to justice.

III. The Private Attorney General Doctrine Assures Good Government, Lower Costs, and Healthy Communities.

A government that cannot be held accountable will not be responsive to the public. Thus, government accountability through the

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Cnty. Comm'rs, 827 P.2d 697, 698 (Idaho 1992); *Arnold v. Ariz. Dep't of Health Servs.*, 775 P.2d 521, 537 (Ariz. 1989); *see also Moro v. Oregon*, 384 P.3d 504, 510 (Or. 2016) (recognizing availability of fees at common law for successful plaintiff vindicating important constitutional rights benefitting the broader public).

court system is a fundamental element of our national and state constitutional structures. Erwin Chemerinsky, *Against Sovereign Immunity*, 53 Stan. L. Rev. 1201, 1213 (2001); Mont. Const. Art. 2, § 18 (no sovereign immunity in Montana). As a practical matter, however, if citizens cannot afford to challenge unlawful government conduct in court, as is the case for many Montanans, including local conservation and public health groups like MEIC, there is for them no government accountability. This is especially true in environmental cases, as here, where public interest plaintiffs do not seek monetary relief and are, therefore, not subject to contingency fees. Worse, this creates a perverse *incentive* for permitting the *most* environmentally harmful activities near those communities with the *least* economic means of challenging the harmful activity in court, thereby creating environmental injustice.

Fee shifting under the private attorney general doctrine is an effective antidote to unlawful government action and environmental injustice because it "levels the playing field for individuals who would otherwise have little opportunity to insist on enforcement of existing laws that check corporate and government behavior." Md. Access to Justice Comm'n, *supra* at 44-46; *see generally*, *Bitterroot III*, ¶¶ 19-

49 (allowing local public interest group to recover fees for decade-long litigation to keep water way open to the public). It also minimizes the social cost of assuring agencies and private parties follow the law, while shining needed light on administrative decision-making. Md. Access to Justice Comm'n, *supra* at 46.

Critically, the private attorney general doctrine does *not* lead to either excessive litigation or excessive costs. As the Maryland Access to Justice Commission explained:

> One incentive-based analysis suggests "one-way" or "Pro-plaintiff" fee-shifting generates the *least litigation*. One-way fee-shifting encourages both lawsuits, by enhancing access to the courts, and simultaneously encourages settlement, because low non-compliance rates result in low predicted probabilities of success, which in turn reduce the settlement gap between plaintiffs and defendants. This describes the ideal incentive scenario and suggests one-way fee-shifting creates the most robust market for legal services.
>
> The ideal scenario is one in which the legislature passes laws to express its values and priorities. While the legislature may not have the means to police enforcement, private citizens are able to secure counsel, and counsel are willing to take those cases precisely because they know that, even if their client has limited means, their fee will be covered by a fee award. Attorneys still bear the risk of losing their fee should they not prevail at trial and, thus, have an incentive to only accept meritorious cases. *Potential defendants know that should they fail to comply with the law, the aggrieved will have few barriers in seeking redress. Thus, rational defendants have a strong incentive to comply with*

> *the law in the first place. It follows that few cases will be brought, and when they are brought, they will be worth litigating.*

Md. Access to Justice Comm'n, *supra* at 47 (internal citations and quotations omitted, emphasis added). Thus, while the private attorney general doctrine subjects government agencies to the *risk* of fees for unlawful action, it also creates a strong incentive for agencies to avoid that risk by following the law in the first place. *Compare Clark Fork Coal.*, ¶ 22 (raising concern that "virtually any case challenging the Department's administration of the Act could subject the agency to a potential fee award"), *with In re Honolulu Constr.*, 310 P.3d at 310 (broadly allowing fees under doctrine if "resolution of the litigation in favor of the organization vindicates a public policy goal" even where the "public policy [is not] *the subject* of the litigation itself" (emphasis in original)). Because unmeritorious claims cannot obtain fees under the doctrine, and plaintiffs who bring frivolous litigation are themselves subject to fees, the private attorney general doctrine does not incentivize unmeritorious or frivolous litigation.

Ultimately, the private attorney general doctrine operates to significantly improve access to justice, which "benefits us all by creating

healthier families, neighborhoods, and communities." Pamela Cardullo Ortiz, *Courts and Communities: How Access to Justice Promotes a Healthy Community*, 72 Md. L. Rev. 1096, 1105 (2013). This is particularly important in the case of environmental litigation, as here, because, as Montana Constitution recognizes, environmental rights are fundamental to citizens' ability to secure all other rights. Mont. Const. Art. II, § 3; *Gateway Vill., LLC v. Mont. Dep't of Envtl. Quality*, 2015 MT 285, ¶ 13, 381 Mont. 206, 357 P.3d 917 ("In this case, the District Court acknowledged the constitutional importance of protecting Montana's environment and water quality."); *see, e.g.*, *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016) ("I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society. Just as marriage is the 'foundation of the family,' a stable climate system is quite literally the foundation of society, without which there would be neither civilization nor progress." (internal quotation omitted)).

CONCLUSION

The private attorney general doctrine advances much-needed access to justice, the guiding purpose of the American Rule. It also

assures government accountability and healthier communities. As such, this doctrine should be construed broadly. MEIC urges this Court to reverse the district court and hold that the Association is entitled to reasonable attorneys' fees pursuant to this Court's private attorney general jurisprudence.

Respectfully submitted this 30th day of November, 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I hereby certify that the foregoing brief is proportionately spaced using a 14 point font, Century Schoolbook typeface. The document is double-spaced and contains 2,254 words.

/s/ Shiloh Hernandez
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