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' REPLY BRIEF

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

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INTRODUCTION

"All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole." Mont Const. art. II, § 1. Through the Montana Constitution, the people delegated government power to "three distinct branches," which are constrained by the Constitution. Mont. Const. art. III, § 1. The Legislature holds legislative power, but it must follow constitutional rules that ensure the right of the people to understand and participate in the legislative process. *See* Mont. Const. art. V, § 11.

When the Legislature hijacked Senate Bill 319 ("SB 319") during a closed-door, sixteen-minute-long free conference committee hearing, it broke the rules. Plaintiffs successfully brought the underlying action to enjoin two amendments to SB 319, which were passed in violation of two constitutional provisions—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.").

Relying on decades of precedent, Plaintiffs moved for attorneys' fees after receiving complete relief. The District Court denied the motion, concluding that attorney's fees essentially are unavailable in challenges to clear constitutional violations by the State. The State compounds the error, contending that the Legislature may disregard constitutional constraints with impunity. The State's ultimate goal is evidenced by an onslaught of attacks on Plaintiffs' standing at the trial court and a request to interpret into oblivion the private attorney general doctrine: it seeks to prevent citizens from challenging unconstitutional enactments.

Far from undermining the constitutional system of checks and balances, the imposition of attorney's fees against state actors deters unconstitutional abuses of power. And, contrary to the State's apoplectic rhetoric, Plaintiffs ask the Court only to apply established precedent. The private attorney general doctrine and the Uniform Declaratory Judgment Act entitle Plaintiffs to reasonable fees.

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

ARGUMENT

The District Court erred in denying fees under both the private attorney general doctrine and the Uniform Declaratory Judgment Act ("UDJA") when it concluded that citizens rarely, if ever, may receive attorney's fees from state defendants in litigation arising from unconstitutional legislative enactments. The court's reasoning is inconsistent with this Court's precedents. And if it is endorsed, state actors will receive a dangerous message—that there are no consequences for unconstitutional acts, even when they have been on notice of such consequences for decades.

The Court should reverse the denial of attorney's fees and remand for calculation of an award of reasonable attorney's fees.

I. The District Court erroneously limited the private attorney general doctrine to exclude cases involving clear constitutional violations.

The District Court correctly stated and applied the three factors of the private attorney general doctrine, each of which Plaintiffs met. The court erred in nonetheless denying Plaintiffs' request for fees, concluding that Plaintiffs cannot receive fees under the doctrine because the State is the Defendant. This error is one of law: the State is not entitled to

special treatment. Perverse incentives and absurd results follow if the State—and only the State—is exempt from fees for clear constitutional violations.

A. Plaintiffs satisfied all three factors required under the private attorney general doctrine, which deters unconstitutional state action and rewards citizens for their enforcement of constitutional interests.

As the district court recognized, Plaintiffs handily met each of the three requirements of the private attorney general doctrine. First, Plaintiffs vindicated important constitutional interests. *Montanans for Responsible Use of Sch. Tr. v. State ex rel. Bd. of Land Comm'rs*, 1999 MT 263, ¶¶ 66–67, 296 Mont. 402, 989 P.2d 800 ("*Montrust*");*Am. Cancer Soc'y v. State*, 2004 MT 376, ¶ 21, 325 Mont. 70, 103 P.3d 1085. Second, private enforcement was necessary. *Montrust*, ¶¶ 66–67. Third and finally, the case benefitted all Montanans. *Id.*

The district court erred in denying fees nonetheless. The error arises from a determination that constitutional violations are more excusable when they come at the hands of the State, and when the State's violation of the Constitution is clear. No other jurisdiction that has adopted the private attorney general doctrine has adopted such a rule. More importantly, neither has this Court. The district court's ruling

should be reversed and this matter remanded for a calculation of the fees owed.

1. Plaintiffs enforced constitutional interests of the highest magnitude.

Plaintiffs satisfied the doctrine's first factor when they successfully challenged a legislative enactment passed without regard to constitutional limits on legislative power, demonstrating indifference (at best) to the public's right to participate in and understand government proceedings. "It is the vindication of constitutional interests that demonstrates the societal importance of the litigation." *Burns v. Cty. of Musselshell*, 2019 MT 291, ¶ 10, 398 Mont. 149, 454 P.3d 685. There is no question that Plaintiffs vindicated constitutional interests.

Indeed, the State presents no counterpoint, premising its arguments on mere government exceptionalism, which it describes as "prudential considerations." State's Resp. 19. While it is true that courts must be careful to avoid supplanting the legislature's policy judgments with their own, this case presents no danger of "courts 'assess[ing] . . . the relative strength or weakness of public policies furthered by their decisions.'" *W. Tradition P'ship v. Att'y Gen.*, 2012 MT 271, ¶ 16, 367 Mont. 112, 291 P.3d 545 ("*W. Tradition P'ship II*") (quoting *Bitterroot*

River Protective Ass'n v. Bitterroot Conservation Dist., 2011 MT 51, ¶ 22, 359 Mont. 393, 251 P.3d 131) ("*BRPA*"). First, Plaintiffs enforced constitutional procedural rules that operate irrespective of policy. Second, the State presents no policy considerations justifying the closed-door, last-minute amendments to SB 319.

The State argues only that it has an interest in defending state laws. State's Resp. 21. No dispute there. But its argument is so simplistic as to be reductive. The people's delegation of government power through the Montana Constitution is the reason that the Legislature has the power to enact laws, the Governor has the power to veto them, and the Attorney General has the power to defend them. It hardly stands to reason that the grant of power to government actors excuses them from anticipated consequences for failing to comply with specific constitutional rules.

The State pulls quotes from *Western Tradition Partnership II*, but it flatters itself with the comparison. For example, it claims that its interest in defending amendments made during a surprise, sixteen-minute hearing with no public participation is "equally significant" to the people's interest in holding the Legislature to the few simple

constitutional rules that constrain the legislative process. State's Resp. Br. 22 (quoting *W. Tradition P'ship II*, ¶ 20). In *Western Tradition Partnership II*, "[t]he 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." *W. Tradition P'ship II*, ¶ 20. "The challenge was brought in a time of shifting legal landscapes," *id.*; the State won on appeal before a bare 5-4 majority of the United States Supreme Court reversed, *id.* ¶ 1. This Court held that "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'—ha[d] not been established." *Id.* ¶ 20.

Here, in sharp contrast, no similar serious constitutional interests are implicated in the State's arguments—merely the State's general interest in defending legislation. The State did not defend a century-old law enacted by initiative to curtail government corruption; it defended a law enacted through abuse of government power. *See 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 predicate for an award of fees is satisfied. Not only did "the government . . . fail to properly enforce interests which are significant to its citizens," it violated the only constitutional interests in play. *In re Dearborn Drainage Area*, 240 Mont. 39, 43, 782 P.2d 898, 900 (1989).

The State similarly fails to recognize meaningful distinctions between this case and *Finke v. State ex rel. McGrath*, 2003 MT 48, 314 Mont. 314, 65 P.3d 576. Setting aside that the Court in *Finke* did not need to consider whether attorney's fees could be awarded against the State when the plaintiff did not even request such an award, *id.* ¶ 34, there—unlike here—the State had no role in enforcement, *id.*

Through a series of false starts scattered throughout its brief, the State attempts to argue that this case presents the same distinction between enforcement and enactment that was noted in *Finke*. It claims that Plaintiffs' claim for fees is weaker than if they had waited for SB 319 to go into effect and be enforced—but enjoining future enforcement is not meaningfully distinguishable from enjoining ongoing enforcement. State's Resp. 15. The State goes on to argue that Plaintiffs sued the wrong parties, citing one paragraph buried in its response to Plaintiffs'

motion for a preliminary injunction—a paragraph that does not contain a single citation. State's Resp. 22 (quoting Doc. 6, State's Resp. to Pls.' Mot. Prelim. Inj. 8 (June 21, 2021)). Even if this defense had been properly raised as a basis for relief before the trial court and on appeal (it was not), Plaintiffs named the proper party—the State of Montana and its Governor, who would oversee execution of the challenged provisions. Mont. Const. art. VI, § 4(1) ("The executive power is vested in the governor who shall see that the laws are faithfully executed."); *see also Bullock v. Fox*, 2019 MT 50, ¶ 33, 395 Mont. 35, 435 P.3d 1187. Indeed, declaratory and injunctive relief was awarded, fully preventing SB 319's enforcement.

Plaintiffs vindicated essential constitutional interests, and the State has presented no significant interests justifying the secretive, rushed, and unconstitutional amendments giving rise to this challenge. The first factor is met.

2. Private enforcement was essential, requiring Plaintiffs to bear the full burden of litigation.

"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*, ¶ 21. This factor, too, is satisfied. There

is no serious question that private enforcement was necessary given that the State first presented a full-throated defense of SB 319.

The State argues only that Plaintiffs cannot receive fees because one plaintiff, Leo Gallagher, served as the Lewis & Clark County Attorney. Gallagher did not bring this action as the County but as a private attorney general uniquely affected by SB 319's mandatory judicial recusal rule—as a result of donations he had made to nonpartisan judicial candidates in his capacity as a citizen, not a government official.

And, even if that were not true, the private attorney general doctrine authorizes fee awards when private plaintiffs and government plaintiffs join forces to challenge unconstitutional government acts. *BRPA*, ¶¶ 40–42. Where, as here, the private litigant's participation "was essential to the vindication of rights," the second factor is satisfied. *Id.* ¶ 42 (concluding that the second *Montrust* factor was met, awarding fees to private plaintiffs, and declining to apportion fees relating to agency involvement).

Tellingly, the State offers no theory by which Plaintiffs' challenge could be brought exclusively by government actors. Nor can it. *See San*

Diego Mun. Emps. Ass'n v. City of San Diego, 244 Cal. App. 4th 906, 913–15, 198 Cal. Rptr. 3d 355 (2016) (denying fees when government plaintiff's "participation in a lawsuit reflect[ed] its required public function"); *State Water Res. Control Bd. Cases*, 161 Cal. App. 4th 304, 317, 73 Cal. Rptr. 3d 842, 851 (2008) (awarding fees to private and public litigants when "there was no public attorney general available to pursue litigation against the [government entity] . . . because the Attorney General represented the [entity]"). The second *Montrust* factor is satisfied.

3. All Montanans benefit from enforcement of the few constitutional safeguards constraining the legislative process to serve constitutional interests of transparency, participation, and limited government.

"The third factor of the private attorney general doctrine considers the number of people standing to benefit from the decision." *Burns*, ¶ 23. The State concedes this factor, and for good reason: all Montanans benefit from the enforcement of rules requiring the Legislature to accord its conduct with the people's delegation of legislative authority through the Constitution. The third factor is likewise met.

B. Attorney's fees should be awarded to Plaintiffs under the private attorney general doctrine because the State is not entitled to special treatment, particularly for clear constitutional violations.

Despite the District Court's recognition that the requirements of the private attorney general doctrine were satisfied, it counterintuitively determined that the government gets a break for "straightforward constitutional challenges"—*i.e.*, the clearest violations of the Constitution. App'x 7. The State's two arguments in defense of the denial bleed into its analysis of the first factor under *Montrust*, which it describes as mandating "prudential considerations." *See supra* § I(A)(1).

Neither argument succeeds. First, the State argues that Plaintiffs brought a "garden variety" constitutional challenge (a phrase appearing no less than ten times in its brief), and that fees are *per se* unallowable. State's Resp. 11–14. The State misconstrues both the phrase and the Court's precedents. Second, the State doubles down on its exceptionalism argument, claiming that it is immune from attorney's fees simply because it is the State. But statutory immunity does not apply, and no one is more responsible for upholding the Constitution than the state actors who hold office only pursuant to its terms, at the will of the people. The Court should reverse the denial of attorney's fees.

1. Attorney's fees are available in constitutional challenges to unconstitutional state legislation.

The Court adopted the private attorney general doctrine over two decades ago in a case challenging state action. *Montrust*, ¶¶ 59–69. From the beginning, attorney's fees have been available against the State for claims arising out of unconstitutional legislative enactments—the precise circumstance considered in *Montrust*. While the Court later denied attorney's fees against the State in two later cases, *Finke* and *Western Tradition Partnership II*, it has never created the bright-line rule that the State asserts. And each of the government actors involved—the Legislature, the Governor, and the Attorney General—have long been on notice of the private attorney general doctrine. *See Musselshell Ranch Co. v. Seidel-Joukova*, 2011 MT 217, ¶ 14, 362 Mont. 1, 261 P.3d 570 ("We presume that the legislature is aware of the existing law.").

As a threshold matter, the State relies heavily on *Montana Immigrant Justice Alliance v. Bullock*, to support its argument, but that case has a fundamental distinguishing feature—it does not involve a request for fees under (or any analysis of) the private attorney general doctrine. 2016 MT 104, 383 Mont. 318, 371 P.3d 430. Its only relevance

is to the equitable considerations relevant to Plaintiffs' request for fees under the UDJA. *See infra* § II(A).

That point of clarification aside, the implications of the State's arguments are extraordinary. It believes it should be less constrained by the Constitution than local governments and private entities. To be sure, there may be times, as in *Western Tradition Partnership II*, when both plaintiffs and State defendants seek to enforce constitutional interests. But that is not the case here. *See supra* § I(A)(1).

The State argues that "[i]mposition of attorneys' fees in constitutional cases chills a full and faithful defense of the state's interest in seeing its laws enforced." State's Resp. 19. But it neglects to consider that attorney's fees play an essential role in preventing constitutional violations from occurring in the first instance: attorney's fees are an essential and effective mechanism to prevent state actors from exceeding their constitutionally delegated roles. *See Serrano v. Unruh*, 652 P.2d 985, 991 (Cal. 1982) (en banc) ("A central function [of fee-shifting] is 'to call public officials to account and to insist that they enforce the law[.]") (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 267 (1975)); *see also Claremont Sch. Dist. v. Governor*, 761 A.2d 389, 394

(N.H. 1999) ("The public interest in preserving constitutional rights against governmental infringement is paramount. Only private citizens can be expected to 'guard the guardians.' . . . Because the benefits of this litigation flow to all members of the public, the plaintiffs should not have to bear the entire cost of this litigation.").

Relatedly, the private attorney general doctrine promotes government accountability by giving private citizens necessary resources when general deterrence is not enough. *Watkins v. Labor & Indus. Rev. Comm'n*, 345 N.W.2d 482, 488 (Wis. 1984) ("Without the assistance of counsel, the ability to vindicate one's rights . . . is so impaired that it renders the existence of those rights nearly meaningless."); *DeWils Interiors, Inc. v. Dines*, 678 P.2d 80, 86 (Idaho Ct. App. 1984), *abrogated on other grounds by BECO Constr. Co. v. J-U-B Eng'rs Inc.*, 233 P.3d 1216 (Idaho 2010) ("[T]he purpose of the fee awards is to provide an incentive for representing litigants who assert publicly favored claims. Fees for fee-related work are allowed in order to avoid dilution of this overriding purpose.").

Nor does application of a longstanding, generally applicable doctrine interfere with the separation of powers. Despite the State's arm-

waving, it is entirely unclear how the private attorney general doctrine could upset the system of checks and balances. Pursuant to its constitutionally delegated authority, the Court has the power of judicial review. Mont. Const. art. VII, § 1. Because the Court may reach the merits of constitutional claims, it may grant equitable relief arising from those claims. And here, far from inserting the judiciary into other branches' policy determinations, the doctrine operates to keep the branches in check because Plaintiffs' claims arose from unconstitutional government overreach.

The possibility of fees does not lessen the Attorney General's ability to make litigation decisions. Instead, it is a factor for the Attorney General to consider in deciding both whether and how to defend government action. All other litigants regularly make precisely this type of assessment, weighing the risks and benefits of their conduct and acting prudently to avoid adverse outcomes. The private attorney general doctrine requires government litigants to consider not only the constitutionality of the challenged government action but also the reasonableness of their litigation positions, promoting judicial economy. *See* Mont. R. Civ. P. 1.

2. Statutory provisions do not exempt the State from paying attorney's fees.

Finally, the State cites to two statutes—the Legislature's general immunity from suit (§ 2-9-111, MCA) and the statute directly authorizing fees against the State for bad faith litigation (§ 25-10-711, MCA). Neither advances the State's arguments; rather, they again reveal the State's self-asserted exceptionalism unsupported by principle or precedent—the kind of government exceptionalism that the Framers roundly rejected.

Section 2-9-111 immunity is irrelevant here for several reasons. First, Plaintiffs did not sue the Legislature, which is what § 2-9-111, MCA, applies to. Plaintiffs did not merely challenge the passage of a law; they brought this action against the Governor to enjoin its enforcement. *See Finke*, ¶ 34; *Supreme Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 737-39 (1980). The State's argument, if adopted, would essentially end judicial review of constitutional challenges to statutes by construing them as challenges to legislative action. This is not what § 2-9-111, MCA, immunizes; if it were, the separation of powers would not allow it.

Second, Plaintiffs brought suit under Article V, § 11(6), which expressly provides a cause of action when a law, like SB 319, is passed in

violation of Section 11. Even if there were a conflict—and there is not—the specific constitutional right of action supersedes the general statutory grant of immunity.

And third, if anything, the legislative immunity statute weighs in favor of the private attorney general doctrine's application because the State is asking the Court to recognize a form of privilege that would apply only to the State—in the absence of any clear statutory authority for it. *See* Mont. Const. art. II, § 18 ("The state . . . shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature."); *see also* Report of the Bill of Rights Comm., 1972 Mont. Const. Conv., Vol. II, at 637–38 (Sovereign immunity is "repugnant to the fundamental premise of . . . American justice: all parties should receive fair and just redress whether the injuring party is a private citizen or a governmental agency.").

Nor does § 25-10-711, MCA, immunize the State from attorney's fees. The statute expressly provides for an award of fees against the

State when the State proceeds frivolously or in bad faith.[1] Although bad faith and frivolousness may help assess the propriety of a fee award under any theory, § 25-10-711, MCA, stands alone; it does not supplant the private attorney general doctrine.

In adopting the private attorney general doctrine, Montana is far from an outlier. But it will become one if it adds an additional requirement of frivolousness. Not only was this position expressly rejected in *Montrust*, ¶ 60, it finds no support in other jurisdictions that apply the doctrine—none impose additional burdens on plaintiffs seeking fees from state actors (or treat state actors differently from other litigants). As the Idaho Supreme Court has reasoned:

> We continue to adhere to the so-called 'American Rule' . . . . [T]he question then becomes whether the . . . limitation restricting the award to those cases which are 'defended frivolously, unreasonably, or without foundation' is applicable. We hold that the limitation does not apply where, as here, the award of attorney fees is under the Private Attorney General doctrine.

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[1] The state attempts to make hay from Plaintiffs' decision not to appeal from the denial of fees under § 25-10-711. But a decision not to appeal is not a "conce[ssion]" on the merits of the theory. State's Resp. 4. The State knows as much; it did not appeal the district court's rejection of its justiciability defenses and nonetheless argues that the district court "erred" in its analysis of the same. *Id.*

Hellar v. Cenarrusa, 682 P.2d 524, 531 (Idaho 1984) (awarding fees against secretary of state); *see also Ansley v. Banner Health Network*, 459 P.3d 55, 64–65 (Ariz. 2020) (applying three-factor test); *Honolulu Constr. & Draying Co. v. Haw. Dep't of Land & Nat'l Res.*, 310 P.3d 301 (Haw. 2013) (applying three-factor test and reversing denial of fees against the state); *Bedard v. Town of Alexandria*, 992 A.2d 607, 611 (N.H. 2010) ("[T]he good or bad faith of the defendants is not a consideration in the award of attorney's fees under this exception. . . . The bad faith conduct of the defendant is relevant only to the . . . exception[] applicable to vexatious litigation."); *Utahns for Better Dental Health–Davis, Inc. v. Davis Cty. Clerk*, 175 P.3d 1036, 1040–41 (2007) (reversing denial of attorney's fees when district court imposed additional requirements); *Deleon Guerrero v. N. Mar. Is. Dep't of Pub. Safety*, No. 2012-SCC-0030-CIV, 2013 WL 6997105, at *8 (N. Mar. Is. Dec. 19, 2013) (adopting *Serrano* test and applying it against commonwealth agency).

In sum, the State's request for special treatment should be denied. Plaintiffs respectfully ask the Court to reverse the denial of fees under the private attorney general doctrine.

II. The District Court erred in denying attorney's fees under the UDJA when it concluded that fee awards against the State are inequitable "absent extraordinary circumstances."

The District Court repeated its error when it denied fees under the UDJA, concluding 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. The issue ultimately is whether the State is entitled to special treatment or whether instead the generally applicable test applies to the State as to other entities. Plaintiffs ask the Court to reverse and remand either for (1) a calculation of the appropriate fee award; or (2) an analysis of the propriety of fees under the UDJA under the correct legal standard.

A. The equities support Plaintiffs' request for fees when Plaintiffs vindicated constitutional interests that the State ignored.

By its terms, the UDJA authorizes fee awards in declaratory actions when "necessary or appropriate." Section 27-8-13, MCA; *see Trs. of Ind. Univ. v. Buxbaum*, 2003 MT 97, ¶¶ 41, 46, 315 Mont. 210, 69 P.3d 663. The first question under the UDJA is "whether the equities support an award." *City of Helena v. Svee*, 2014 MT 311, ¶ 20, 377 Mont. 158, 339 P.3d 32 (quoting *United Nat'l Ins. Co. v. St. Paul Fire Marine Ins.*

Co., 2009 MT 269, ¶ 38, 352 Mont. 105, 214 P.3d 1260). Under the circumstances, they do.

The State restates its entitlement to exceptional treatment and its reliance on legislative immunity, Attorney General discretion, and inapposite caselaw. *See supra* § I(B). But it fails entirely to address the key feature that shifts the balance of equities: the State never presented a constitutional interest in enforcing SB 319's unconstitutional provisions. Instead, the State only repeats that this is a law that was passed by the Legislature—and ignores that the Legislature usurped its constitutionally delegated authority.

The State mischaracterizes Plaintiffs' position as "ask[ing] this Court to create several per-se like rules contrary to controlling case law." State's Resp. 27. Not so. Plaintiffs seek only a rule that the State, like other powerful defendants, receives no special privileges as a result of its power. Under this approach, courts will continue to analyze the equities and the tangible parameters test, and attorney's fees will continue to be awarded only in "the rare instances in which equitable considerations necessitated an award." *Mont. Immigrant Justice All.*, ¶ 52. This case presents just such an instance.

B. The tangible parameters test is satisfied, and an award of attorney's fees is "necessary or proper."

Because it erred in its analysis of the equities, the District Court did not address the three-part tangible parameters test. Each of the three requirements are met here.

The first factor is satisfied when a plaintiff appropriately seeks declaratory relief because a defendant will not otherwise provide the plaintiff with what it needs. *See Svee*, ¶¶ 23–24 (factor satisfied when municipality lacked authority to take particular government action, forcing citizen suit). Again relying heavily on *Montana Immigrant Justice Alliance*, the State argues that because no one can force the Attorney General to apply his discretion to defend (or choose not to defend) laws, no one can satisfy the first factor. This makes no sense. Absent court orders, citizens cannot force municipalities to drop prosecutions, *Svee*, ¶¶ 3–6, insureds cannot force insurers to issue payments, *Renville v. Farmers Ins. Exch.*, 2004 MT 366, ¶ 25, 324 Mont. 509, 105 P.3d 280, and entities cannot change the terms of fraudulent agreements between third parties, *Abbey/Land, LLC v. Glacier Const. Partners*, 2019 MT 19, ¶ 69, 394 Mont. 135, 433 P.3d 1230. The party

defendants—the State of Montana and the Governor—held the keys to SB 319's enforcement, and therefore the first factor is satisfied.

Second, Plaintiffs could not win without declaratory relief. *Abbey/Land*, ¶ 67. Although Plaintiffs also sought injunctive relief, that relief was premised on the unconstitutionality of SB 319, established through declaratory judgment. *See Davis v. Jefferson Cty. Elec. Office*, 2018 MT 32, ¶¶ 16–17, 390 Mont. 280, 412 P.3d 1048 (second factor unsatisfied when plaintiffs' "ultimate goal" met through specific injunctive remedy statute). Indeed, Plaintiffs brought this action under a specific constitutional provision authorizing challenges to laws passed in violation of Article V, § 11. Mont. Const. art. V, § 11(6).

Third and relatedly, "the declaratory relief sought was necessary in order to change the status quo." *Abbey/Land*, ¶ 67. Setting aside that the tangible parameters test is not an exclusive explanation of the UDJA's "necessary and proper" standard, *Svee*, ¶¶ 23–24, the State inserts discussions of the status quo from a distinguishable context, *see* State's Resp. 37 (quoting *Planned Parenthood of Mont. v. State*, 2022 MT 157, ¶ 6, 409 Mont. 378, 515 P.3d 301). Because it results in a measurable change to the relationship between the parties, a pre-enforcement

challenge may satisfy this prong. *Abbey/Land*, ¶ 69 ("Without a declaration . . . , James River potentially would have been liable . . . for the inflated judgment[.]").

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 12th day of October, 2023.

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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 4,892 words, including footnotes.

/s/ *Constance Van Kley*

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