IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23-0689

LAKE COUNTY,

Plaintiff and Appellant,

v.

STATE OF MONTANA,

Defendant and Appellee.

STATE OF MONTANA'S ANSWER BRIEF

On Appeal from the Montana Twentieth Judicial District, Lake County,
Cause No. DV-22-117
Honorable Judge Amy Eddy

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ISSUES PRESENTED

1. Are Lake County's claims justiciable given that it (1) has sued the State for damages without specific statutory or constitutional authorization; (2) asks this Court to assess the propriety of a legislative appropriation; and (3) seeks a hypothetical declaratory judgment about whether the State or County must pay for PL 280 enforcement should the County decide not to withdraw?

2. Did the District Court correctly conclude that the equitable tolling and continuing tort doctrines do not apply to Lake County's belatedly filed unfunded mandate and unjust enrichment claims?

3. Even if Lake County's unfunded mandate, unjust enrichment, and declaratory relief claims were justiciable and timely filed, would they fail as a matter of law?

STATEMENT OF THE CASE

This appeal arises from Lake County's lawsuit against the State of Montana seeking reimbursement for costs associated with the County's enforcement of Public Law 280 (PL 280) jurisdiction in the Flathead Indian Reservation. Lake County consented to the State's assumption of PL 280 jurisdiction in 1964. And it

enforced that jurisdiction for over 50 years without complaint. But in 2017, the County began asking the State to pay for its enforcement efforts.

After its efforts to lobby the Legislature for funding failed, the County filed suit, seeking damages for the "past and present" costs it had incurred and would incur in enforcing PL 280 jurisdiction. App.1. The County alleged that the State's refusal to reimburse it constituted (1) an unfunded mandate in violation of section 1-2-112, MCA, and (2) unjust enrichment. Lake County also sought a declaratory judgment "establishing the State's obligation to reimburse Lake County for costs incurred in going forward" associated with enforcing PL 280 jurisdiction. *Id.*

The State moved to dismiss, arguing that the County's claims were not justiciable; that the unfunded mandate and unjust enrichment claims were time-barred; and that Lake County failed to state a claim under any of its three theories. Doc. 5, 24, 28. Lake County conceded its damages claims accrued no later than January 2017 and would therefore ordinarily be time-barred, but it argued that these claims were saved by the equitable tolling and continuing tort doctrines. *See* Doc. 27 at 8–9. The District Court rejected Lake County's equitable tolling and continuing tort arguments and dismissed Lake County's unfunded mandate and unjust enrichment claims as time-barred. Doc. 29 at 13–16. The District Court

allowed the County's declaratory relief claim to proceed to summary judgment. Doc. 29 at 18.

After the parties cross-moved for summary judgment on the declaratory relief claim, the District Court granted summary judgment in the State's favor on November 9, 2023. The District Court held that

> [n]othing in Mont. Code Ann. § 2-1-301 obligates the State to appropriate any particular dollar amount, range, or even a reasonable dollar amount, to reimburse Lake County's costs incurred pursuant to P.L. 280. The plain language of the statute obligates the State to reimburse only 'to the extent' the legislature sees fit to appropriate funds. Given this reality, coupled with the ability of Lake County to withdraw consent, this Court lacks the authority to grant the relief Lake County seeks.

Doc. 45 at 10.

The County timely appealed.

STATEMENT OF FACTS

In 1964, Lake County consented to Montana's assumption of Public Law 280 (P.L. 280) jurisdiction over the Flathead Indian Reservation. Lake County enforced the State's PL 280 jurisdiction for over 50 years without complaint. And since July 1, 2021, Lake County has had express statutory authorization to withdraw its consent to enforce the State's PL 280 jurisdiction. In this appeal, Lake County asks the Court to order the State to reimburse it for the obligation it

voluntarily undertook, carried out without objection for 50 years, and may withdraw from at any time.

A. Congress enacts PL 280.

When Montana was admitted to the Union, Congress required it to disclaim jurisdiction over all Indian land in its state constitution. Act of Feb. 22, 1889, ch. 180 § 4, 25 Stat. 676; *see also* 1889 Mont. Const., art. I. *Compact with the United States*. And before 1953, tribal or federal law generally applied to both criminal prosecutions and civil disputes throughout Indian country.[1] *See* Emily Kane, *State Jurisdiction in Idaho Indian Country Under Public Law 280*, 48 Advocate 10, (2005).

In 1953, Congress enacted Public Law 280 (PL 280), which altered the paradigm of federal-tribal jurisdiction over Indian country. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, *codified in part at* 18 U.S.C. § 1162 & 25 U.S.C. § 1321 (hereinafter "PL 280"). PL 280 required certain states to assume criminal jurisdiction over portions of Indian country. *See* 18 U.S.C. § 1162(a)(2). PL 280 allowed other "non-mandatory" states to "assume jurisdiction **at such time and in such manner as the people of the State shall, by affirmative legislation**, obligate and bind the State to assumption thereof." P.L. 280, § 7, 67 Stat. 588,

[1] *See* 18 U.S.C. § 1151 (defining "Indian country").

589, *repealed by* Act of Apr. 11, 1968, Pub.L. 90–284, title IV, § 401, 82 Stat. 78, 79, (emphasis added).

B. Montana accepts PL 280 jurisdiction.

Montana responded to Congress's offer of PL 280 jurisdiction in 1963 by enacting House Bill 55 (HB 55). 1963 Mont. Laws ch. 81 (currently codified at § 2-1-301–306, MCA); *see also Lozeau v. Anciaux*, 2019 MT 235, ¶ 9, 397 Mont. 312, 449 P.3d 930. Through HB 55, Montana agreed to assume "criminal jurisdiction over Indians and Indian territory of the Flathead Indian reservation and country within the state in accordance with" PL 280. Laws 1963, ch. 81, § 1 (currently codified at § 2-1-301(1), MCA). While PL 280 authorized Montana to assume jurisdiction unilaterally—without tribal or county consent—Montana opted to make such tribal and county consent a prerequisite for its assumption of PL 280 jurisdiction:

> (1) Whenever the governor of this state receives from the tribal council or other governing body of the Confederated Salish and Kootenai Indian tribes or any other community, band, or group of Indians in this state, a resolution expressing its desire that its people and lands be subject to the criminal or civil jurisdiction, or both, of the state to the extent authorized by federal law and regulation, he shall issue within 60 days a proclamation to the effect that such jurisdiction applies to those Indians and their territory or reservation in accordance with the provisions of this part.
>
> (2) The governor may not issue the proclamation until the resolution has been approved in the manner provided for

> by the charter, constitution, or other fundamental law of the tribe or tribes, if said document provides for such approval, and there has been first obtained the **consent of the board of county commissioners of each county which encompasses any portion of the reservation of such tribe or tribes.**

§ 2-1-302(1) & (2), MCA (emphasis added).

In May of 1964, the Confederated Salish and Kootenai tribes (CSKT) passed an ordinance accepting the State's PL 280 jurisdiction over the Flathead Indian Reservation. *See* App.10 (*Ordinance 40-A (revised)*).

The same month, Lake County's Board of Commissioners approved a resolution consenting to PL 280 jurisdiction. Doc. 29 at 5; Doc. 36 at 4. Governor Babcock issued the required proclamation under § 2-1-301, MCA, which stated that approval had "been secured from the Counties of Sanders, Lake, Flathead and Missoula" and declared the State's PL 280 jurisdiction to be "in full force and effect." App. 7.

C. Lake County enforces the State's criminal laws in the Flathead Reservation for more than 50 years without complaint.

From the earliest days of the Republic, American states have charged counties with enforcing state criminal law. *See, e.g.*, Alexis de Tocqueville, *Democracy in America*, 105 (Gerald E. Bevan ed. & trans., Penguin Books 2003) (1835) ("Usually the state uses the township or county officials to deal with citizens."). Montana is no different—county officials are responsible for arresting, prosecuting, and

detaining anyone who violates the State's criminal laws in the county. *See, e.g.*, §§ 7-32-2121 (county sheriff must arrest anyone who commits a public offense); 7-32-2201 (county detention centers must be maintained at the expense of the county); 7-4-2712 (the county attorney "is the public prosecutor and shall … institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses"); 7-4-2716 (the county attorney "shall… conduct … all prosecutions for public offenses … at all times and in all places within the limits of the county").

Consistent with Montana law and this longstanding paradigm of county law enforcement, Lake County enforced the State's criminal jurisdiction in the Flathead Reservation for over 50 years. During this time, the County bore the costs of PL 280 enforcement and enjoyed the benefits. *See* App.8-2, (Resolution 17-01) (noting that Lake County's enforcement of PL 280 "has provided significant benefits to all residents of Lake County in respect to crime prevention, investigation, deterrence, prosecution, rehabilitation and treatment"). In 1993, the Legislature enacted SB 368, which provided for retrocession of criminal misdemeanor jurisdiction to CSKT. Lake County opposed SB 368 without voicing complaints about the costs it had incurred while enforcing PL 280. Doc. 36 at 4–5.

Like Montana, other PL 280 states require counties to enforce their PL 280 jurisdiction in Indian country. *See infra*, § III.A.

D. Lake County changes course in 2017 and seeks funding or withdrawal.

In 2017, Lake County began to have second thoughts about its consent to PL 280. In a January 2017 resolution, Lake County acknowledged that PL 280 brought many "benefits to all residents of Lake County." App. 8. (Resolution No. 17-01). But despite acknowledging these benefits, the Commissioners noted that the County's circumstances "had changed significantly in 40 years[.]" *Id.* Namely, costs and crime had increased. *Id.* Thus, Lake County resolved to "[w]ork with the 2017 Montana Legislature to address the funding issues" and "[m]ake a determination regarding continued County participation" in PL 280. *Id.*

In 2021, the Legislature passed HB 656, which allowed Lake County to withdraw its consent to enforce PL 280 jurisdiction, § 2-1-306(3), MCA, and provided that unless CSKT or the County withdraws consent to PL 280 jurisdiction, "the state shall reimburse Lake County for assuming criminal jurisdiction under this section annually to the extent funds are appropriated by the legislature. The annual amount of reimbursement must be adjusted each year based on the consumer price index." § 2-1-301(2), MCA. Under § 2-1-301(2), MCA, the Legislature initially "appropriated $1 … in each year of the biennium beginning

July 1, 2021, to reimburse Lake County for assuming criminal jurisdiction within the Flathead Indian Reservation as required by 2-1-301." Laws 2021, ch. 556, § 3.

After Lake County's efforts to lobby the Legislature for funding failed, it filed this lawsuit.

E. Lake County moves toward withdraw from PL 280.

In January 2023, Lake County's Board of Commissioners passed a resolution to withdraw from PL 280 jurisdiction effective May 26, 2023. Doc. 36 at 7–8. But on May 25, 2023, Lake County announced that it had "extended the effective date" of its withdrawal from PL 280 obligations. Doc. 36 at 8. The County's May 25th letter explained that if the District Court ruled in its favor in this case, the County would remain in PL 280, but if it lost, the County would withdraw. *Id.*

True to its word, soon after the District Court granted summary judgment against the County, the County sent a letter to the Governor, along with Resolution 22-42(b), informing him of its withdrawal of consent to enforce criminal jurisdiction under PL 280 and requesting the issuance of a proclamation to that effect.[2] On May 16, 2024, the Governor notified the County that it had not properly provided him with the necessary January 2023 resolution withdrawing

[2] *See* https://montanafreepress.org/2023/12/01/many-unknowns-as-lake-county-pulls-out-of-decades-old-tribal-law-enforcement-agreement/ (Dec. 1, 2023)

consent, Resolution No. 22-42(a), as required by section 2-1-306(3).[3] As of the filing of this brief, the County has not complied with the requirements of section 2-1-306(3).

STANDARD OF REVIEW

This Court reviews questions of justiciability de novo. *Barrett v. State*, 2024 MT 86, ¶¶ 12, 18, 29, 2024 WL 1818529, — P.3d —. This Court also reviews de novo a district court's ruling on a motion to dismiss and grant of summary judgment. *W. Sec. Bank v. Eide Bailly LLP*, 2010 MT 291, ¶ 18, 359 Mont. 34, 249 P.3d 35.

SUMMARY OF ARGUMENT

In this appeal, the Court must decide whether Montana law requires the State to "reimburse" Lake County for the obligation it voluntarily assumed in 1964, met for half a century without complaint, and may withdraw from at any time. Lake County presses three claims. The County first claims that it is entitled to money damages because its voluntarily enforcement of PL 280 jurisdiction amounted to an "unfunded mandate" under section 1-2-112, MCA. Second, the County seeks money damages under a theory of unjust enrichment. Third, Lake

[3] *See* https://www.kpax.com/news/crime-and-courts/lake-county-to-no-longer-bear-cost-of-providing-felony-law-enforcement-for-cskt (May 20, 2024).

County seeks a declaratory judgment that the State must reimburse the County "for costs incurred in going forward in fulfillment" of PL 280 jurisdiction. For many reasons, the County is not entitled to relief under any of these theories.

First, the County's claims are not justiciable. Under *Musselshell County*, Lake County lacks standing to sue the State for damages because no statute or constitutional provision specifically authorizes the County's damages claims. Lake County's claims violate the political question doctrine because they ask this Court to intrude into the exclusive legal domain of the Legislature and second-guess the amount of a legislative appropriation. Lake County's declaratory relief claim also asks for a nonjusticiable advisory opinion explaining whether the State *might* have to pay the County in the future if County does not withdraw from PL 280 jurisdiction.

Second, should the Court reach the merits, Lake County's unfunded mandate and unjust enrichment claims are time-barred. The County concedes that it brought each claim outside the applicable statute of limitations but asks this Court to apply the equitable tolling and continuing tort doctrines to save its belated claims. But as the District Court correctly held, neither doctrine applies here.

Third, supposing that the County's claims *were* justiciable and timely filed, they would still fail on the merits. The County asserts that Congress intended

States—not their subdivisions—to bear the cost of PL 280 jurisdiction. The proof according to the County? Congress provided that assuming PL 280 jurisdiction would "obligate and bind **the State.**" This proof-texting misses the forest for the trees. PL 280 made clear that non-mandatory states like Montana could shape the contours of their PL 280 obligations as they saw fit. And Montana law—in 1963 and now—charges **counties** with the primary responsibility for enforcing the State's criminal laws within their borders. That is why the Montana Legislature required express consent from counties whose territory encompassed the Flathead Reservation before the State could assume PL 280 jurisdiction. Neither Congress nor the Montana Legislature intended the State—as opposed to counties—to pay for PL 280. As in many other PL 280 states, Montana counties are, and have always been, responsible for PL 280 enforcement.

Set that fundamental problem aside and more remain. Lake County characterizes its voluntarily enforcement of Montana's PL 280 jurisdiction as an "unfunded mandate" under § 1-2-112(1), MCA. But Lake County has never been subject to a "mandate" within the meaning of section 1-2-112—through HB 55, the Legislature made the State's PL 280 assumption contingent on the County's freely-given consent**.** And even if section 1-2-112 did apply, it would not entitle the County to receive money damages. Section 1-2-112 provides that a law imposing an

"unfunded mandate" will be deemed "not effective until specific means of financing are provided." It does not authorize a local government to sue the State for money damages.

Lake County's unjust enrichment claim is just as flawed. Unjust enrichment requires a plaintiff to show "enrichment that lacks an adequate legal basis." *Mountain Water Co. v. Mont. Dep't of Revenue*, 2020 MT 194, ¶ 16, 400 Mont. 484, 469 P.3d 136, 143 (citation and quotation marks omitted). But there is a clear legal basis for the County's exercise of PL 280 jurisdiction—its own consent to that jurisdiction in 1964 pursuant to HB 55. Equity also precludes Lake County from claiming the State "unjustly enriched" itself at the County's expense after the County voluntarily carried out PL 280 jurisdiction for over 50 years, only began to seek State funding in 2017, and only sued in 2022 when its efforts to lobby the Legislature for funds failed.

Finally, Lake County's declaratory relief claim misinterprets section 2-1-301. While section 2-1-301 provides that the Legislature shall biannually reimburse the County, the statue expressly provides that the Legislature will determine, in its sole discretion, the "extent" of that appropriation. Lake County tries mightily to erase this crucial modifying clause, but Montana courts must give effect to **every** provision in a statute. Plus, the Legislature considered several proposed bills that

would have required it to reimburse Lake County up to a specific dollar amount. It rejected each of them. It is not plausible to claim that the Legislature bound itself to reimburse Lake County up to a specific dollar amount after it rejected several bills that would have required it to do so.

ARGUMENT

I. Lake County's claims are not justiciable.

The Montana Constitution limits the judicial power of Montana courts to deciding justiciable controversies. *Greater Missoula Fed'n of Early Childhood Educators v. Child Start, Inc.*, 2009 MT 362, ¶ 22, 353 Mont. 201, 219 P.3d 881.

A. Under Musselshell, Lake County lacks standing to sue the State for damages.

Standing "is a threshold requirement of justiciability applicable to all claims for relief," *Larson v. State*, 2019 MT 28, ¶ 45, 395 Mont. 167, 434 P.3d 241, which "asks whether the plaintiff asserting a complaint is the proper party to bring that matter to court for adjudication." *350 Mont. v. State*, 2023 MT 87, ¶ 14, 412 Mont. 273, 529 P.3d 847.

The County lacks standing to sue the State for damages under *District Number 55 v. Musselshell County.*, 245 Mont. 525, 528–29, 802 P.2d 1252, 1254–55 (1990). In *Musselshell*, this Court held that "one governmental entity may not sue another for damages" unless "a specific statutory or constitutional provision" authorizes it to

do so. *Musselshell*, 245 Mont. at 528–29, 802 P.2d at 1254–55. As a "political subdivision of the State" and a "creation[] of the state," Lake County has "no existence, no functions, no rights and no powers" except as provided by the State. *Id.*, 245 Mont. at 528, 802 P.2d at 1254. So, under *Musselshell*, Lake County lacks standing to sue the State for damages without specific statutory or constitutional authority. *Id.*, 245 Mont. at 528–29, 802 P.2d at 1254–55.

Lake County seeks damages from the State under two theories: (1) an "unfunded mandate" theory based on section 1-2-112, MCA; and (2) unjust enrichment. Neither theory arises under a specific statutory or constitutional provision authorizing Lake County to sue the State for damages.

Section 1-2-112—the "unfunded mandate" statute—does not authorize a governmental subdivision to sue the State for money damages. *Musselshell* 245 Mont. at 528–29, 802 P.2d at 1254–55. By its plain language, the statute does not apply because criminal law enforcement is "necessary for the operation of local governments." § 1-2-112(3), (4), MCA. Further, the statute says that a law requiring a local government to perform certain nonessential services "**is not effective**" until the Legislature provides "specific means of financing" those services. §§ 1-2-112(1), (3) MCA (emphasis added). Section 1-2-112's remedy is for

the unfunded law to be deemed ineffective until financing is provided—not money damages.

Lake County's unjust enrichment claim fares no better. Unjust enrichment is a common law claim rooted in a court's inherent equitable powers. *See Mountain Water Co.*, ¶¶ 15–17; *Unjust enrichment*. Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt. b–e (Am. L. Inst. 2011). It does not arise from a "specific constitutional or statutory provision" authorizing a local government to sue the State for money damages. *Musselshell*, 245 Mont. at 528–29, 802 P.2d at 1254–55. The County's resort to an unjust enrichment theory illustrates that no specific statute authorizes the County's suit for damages: "where rights are clearly established and defined by affirmative statutory provision, equity generally has no power to change or upset such rights." *Mountain Water Co.*, ¶ 17 (cleaned up); *accord* § 1-1-108, MCA ("In this state there is no common law in any case where the law is declared by statute."). If there *were* a specific statutory hook for the County's damages claim, it would control over unjust enrichment.

The County lacks standing to sue the State for damages because no specific constitutional or statutory provision authorizes it to do so. *Musselshell*, 245 Mont. at 528–29, 802 P.2d at 1254–55.

B. Ordering the State to reimburse Lake County would violate the political question doctrine and the separation of powers.

All of Lake County's claims also raise a nonjusticiable political question. The political question doctrine preserves the separation of powers by preventing the judiciary from deciding questions committed to other branches of government. *Nixon v. United States*, 506 U.S. 224, 228 (1993). "In contrast to legal questions falling within the exclusive constitutional province of the judiciary …, non-justiciable political questions include issues in the exclusive legal domain of the legislative branch[.]" *Larson*, ¶ 39.

At its core, Lake County's lawsuit asks this Court to order the Legislature to appropriate money to pay the County for the costs associated with enforcing PL 280 jurisdiction. App. 1-16 (Complaint). But the power to appropriate lies exclusively with the legislature. *Meyer v. Knudsen*, 2022 MT 109 ¶¶ 11–14, 409 Mont. 19, 510 P.3d 1246; *see also* Mont. Const. art. III, § 4, art. V, § 1.; *State ex rel. Bonner v. Dixon*, 59 Mont. 58, 78, 195 P. 841, 845 (1921) (emphasis added), *overruled on other grounds by Bd. of Regents v. Judge*, 168 Mont. 433, 447, 543 P.2d 1323, 1331 (1975).

By enacting section 2-1-301(2), the Legislature invoked its exclusive appropriations power and chose to appropriate only $1. Lake County argues that amount is "absurd," but this Court may not intrude into "the exclusive legal

domain of the legislative branch," *Larson*, ¶ 39, and order the Legislature to appropriate funds it has chosen to withhold. "The legislature"—not the judiciary—"commands the purse." THE FEDERALIST No. 78 (Alexander Hamilton); *Meyer*, ¶¶ 11-14. Granting Lake County's requested relief would therefore violate the separation of powers and the political question doctrine.

C. Lake County's declaratory relief asks this Court to issue an advisory opinion.

Aside from its damages claims, Lake County seeks declaratory relief "establishing the State's obligation to reimburse Lake County for costs incurred in going forward" associated with PL 280 enforcement App. 1–16. Granting that relief would amount to issuing a nonjusticiable advisory opinion "advising what the law would be upon a hypothetical state of facts." *Broad Reach Power, LLC v. Mont. Dep't of Pub. Serv. Regul.*, 2022 MT 227, ¶ 10, 410 Mont. 450, 520 P.3d 301.

The County may withdraw from PL 280 jurisdiction at any time. *See* MCA § 2-1-306(3). It has attempted to do so already but failed to properly provide the Governor with the required resolution.[4] The County has the option to fix the defect and make its withdrawal effective.

[4] *See* https://www.kpax.com/news/crime-and-courts/lake-county-to-no-longer-bear-cost-of-providing-felony-law-enforcement-for-cskt (May 20, 2024).

The County may contend that a declaratory judgment would guide the County and the State in making future determinations about PL 280 cost allocation should the County decide not to withdraw from PL 280 enforcement. But this Court is not the County's law firm *See Brisendine v. Dep't of Commerce*, 253 Mont. 361, 365, 833 P.2d 1019, 1021 (1992). It has "no jurisdiction to … enter anticipatory judgments, … deal with theoretical problems, give advisory opinions, [or] provide for contingencies which may hereafter arise[.]" *Id.* (citation omitted). Declaring whether the State or County should bear the costs of PL 280—a legal relationship that may or may not exist in the near future—"would constitute an impermissible advisory opinion … advising what the law would be upon a hypothetical state of facts or upon an abstract proposition." *Wilkie v. Hartford Underwriters Insurance Co.*, 2021 MT 221, ¶ 8, 405 Mont. 259, 494 P.3d 892 (citation and quotation marks omitted).

And even if the County received an advisory opinion that it is entitled to some unspecified amount of payment from the State (assuming it decides not to withdraw from PL 280), that would not resolve the central dispute in this case. The County and the State would continue to litigate what amount of payment is required. And the Legislature would still have sole discretion to determine what amount of money to appropriate. Issuing the advisory opinion Lake County

requests would not resolve a justiciable case or controversy. *Brisendine*, 253 Mont. at 365, 833 P.2d at 1021.

II. The equitable tolling and continuing tort doctrines do not apply to Lake County's untimely unfunded mandate and unjust enrichment claims.

Should this Court conclude that its claims are justiciable, Lake County's unfunded mandate and unjust enrichment claims are time-barred. The District Court held—and Lake County concedes—that it brought each claim outside the relevant statute of limitations. Opn. Br., 17; *see also* §§ 27-22-211(1)(c), MCA (two years, claims arising under statute); 27-2-202(3) (three years, unjust enrichment). But the County argues that this Court should apply the equitable tolling and continuing tort exceptions to save its belated claims. Opn. Br., 16–28. Neither exception applies here.

A. The continuing tort doctrine does not apply.

Lake County's first attempt to avoid the statute of limitations borrows a concept from the law of nuisance and trespass: "the continuing tort" doctrine. That doctrine recognizes that some torts evade "a definition of time and place of injury" and, thus, require more a flexible application of the statute of limitations. *Christian v. Atlantic Richfield Co.*, 2015 MT 255, ¶ 17, 380 Mont. 495, 358 P.3d 131 (citation omitted).

The District Court was right to find the continuing tort doctrine inapplicable here. Doc. 29 at 14. Start with the most basic reason: The Legislature did not commit a "tort" by declining to fund Lake County's PL 280 enforcement. The Legislature is **immune** from tort liability for its legislative acts or omissions. § 2-9-11(2), MCA. Tellingly, Lake County cites no case from any jurisdiction applying the continuing tort doctrine to allow a plaintiff to sue a legislative body for legislative inaction over the course of decades.

Supposing this were a tort case, the doctrine still would not apply. This Court has considered the doctrine in the context of batteries leaching toxic lead onto a neighboring cattle ranch, *Gravely Ranch v. Scherping*, 240 Mont. 20, 21, 782 P.2d 371, 372 (1989); a disgruntled neighbor installing a gate to block "hippies" and "troublemakers" from using an easement, *Shors v. Branch*, 221 Mont. 390, 395–96, 720 P.2d 239, 242–43 (1986); toxic fumes migrating from smelting, *Christian*, ¶¶ 27–45; and, railroad operations, *Burley v. BNSF*, 2012 MT 28, ¶¶ 5, 19, 364 Mont. 77, 273 P.3d 825. In contrast, Lake County has sued the State, seeking money damages for the State's "failure" to give the County the funding it began seeking in 2017. But this Court has recognized that if "the continuing tort doctrine were applied in cases where abatement is only possible through the payment of money for past wrongs, any suit seeking damages would arguably qualify as a continuing

tort." *Christian*, ¶ 54. Applying the doctrine so expansively would flout "the policies underlying the doctrine as an exception to statutes of limitation." *Id.* Yet that is precisely what Lake County asks the Court to do in this case.

While *Christian* applied the doctrine to a plaintiff's negligence and strict liability claims, it did so because the plaintiff used those theories to recover for continuing nuisance and trespass injuries. *Christian*, ¶¶ 49–50. Further evidencing the context-bound nature of the exception, *Christian* use the terms "continuing tort," "continuing **property invasion**," and "continuing **trespass or nuisance**" interchangeably. *Christian*, ¶¶ 18, 30, 33 (emphasis added).

In short, the trespass and nuisance situations in which this Court has applied the continuing tort doctrine are worlds away from a challenge to the Legislature's decision about the extent of an appropriation. A co-equal branch of government passing a law—or declining to pass one—is not akin to a bothersome neighbor who refuses to clean up toxic battery acid or erects a gate to block road access.

Setting aside the factual dissimilarity between the nuisance/trespass context of the doctrine and Lake County's claims, this Court has declined to apply the continuing tort doctrine when a plaintiff knows the source of its injury, continues to willingly encounter it, and fails to timely file suit. *Gomez v. State*, 1999 MT 67, ¶¶ 25–26, 293 Mont. 531, 975 P.2d 1258. Lake County does not contend that its

injuries were concealed or self-concealing. Lake County has been aware of its PL 280 arrangement with the State since 1964.

And even where the continuing tort doctrine (arguably) applies, courts have construed it narrowly to avoid swallowing the rule. Were courts "to conclude that a tort is continuing because a defendant can always choose to stop acting in the manner which a plaintiff alleges is tortious, the continuing tort exception would see a vast expansion and would subvert the purpose of statutes of limitations." *See Senst v. Flagstar Bank F.S.B.*, No. CV-16-29-BU-SEH, 2017 WL 449628, at * 6 (D. Mont. Feb. 1, 2017). Lake County, in contrast, asks this Court to extend the doctrine beyond any recognition.

Lake County's cited cases do not help it. *Benjamin v. Anderson* applied a unique body of federal Title VII law to conclude that an employee's claim arose from a series of discriminatory acts by her employer and was therefore not time-barred. 2005 MT 123, ¶¶ 13–29, 46, 327 Mont. 173, 112 P.3d 1039. *Benjamin* did not cite the continuing tort doctrine or apply it. *Id.* In *Anderson v. BNSF Railway* this Court applied FELA—"an esoteric area of law"—and, thus, found "it unnecessary to apply the continuing tort doctrine to Anderson's FELA claim." 2015 MT 240, ¶¶ 17, 53, 380 Mont. 319, 354 P.3d 1248 (citations and quotations omitted). *Zabrocki* is a nonprecedential memorandum opinion that, in any event,

applied **the discovery doctrine**—not the continuing tort doctrine. *Zabrocki v. Teachers' Ret. Sys.*, 2021 MT 48N, ¶¶ 1, 14–15, 18, 403 Mont. 546, 480 P.3d 833 (unpublished). Unlike the *Zabrocki* plaintiff, Lake County concedes that it has known about all elements of its claims since at least 2017.

Finally, Lake County seems to ask this Court to apply the "continuing violation" doctrine to its claims. *See* Opn. Br., 18–21. This Court has never adopted a "continuing violation" doctrine. Lake County cites cases from other jurisdictions applying this doctrine, but these cases discussed the doctrine's applicability to breach of contract claims, *Anderson v. Boyne USA, Inc.*, No. CV-21-95-GF-BMM, 2022 WL 2528242, at *2 (D. Mont. July 7, 2022), and breach of fiduciary duty claims. *See Marzec v. Nye*, 203 N.C. App. 88, 94, 690 S.E.2d 537, 542 (2010). Lake County has not alleged a breach of contract or fiduciary duty in this case. Lake County never explains why this Court should transplant the doctrine into this case.

This Court should affirm the District Court's conclusion that the continuing doctrine does not apply to Lake County's unfunded mandate and unjust enrichment claims.

B. The equitable tolling doctrine does not apply.

Lake County's second attempt to end-run the statute of limitations is the equitable tolling doctrine. Equitable tolling lets a plaintiff bring an action after the

statutory deadline if it "reasonably and in good faith pursues one of several possible legal remedies" and also "meets three criteria: (1) timely notice to the defendant within the applicable statute of limitations in filing the first claim; (2) lack of prejudice to [the] defendant in gathering evidence to defend against the second claim; and (3) good faith and reasonable conduct by the plaintiff in filing a second claim." *Let the People Vote v. Bd. of Cnty. Comm'rs*, 2005 MT 225, ¶ 18, 328 Mont. 361, 120 P.3d 385. In other words, "while a party is pursuing one of several legal remedies, the statute of limitations on the remedies not being pursued is tolled." *Id.*; *accord Sorenson v. Massey-Ferguson, Inc.*, 279 Mont. 527, 529, 927 P.2d 1030, 1032 (1996).

Lake County's equitable tolling argument fails at step one. The County did not pursue "one of several other legal remedies" before filing its lawsuit against the State. This case is the first action Lake County "has filed to enforce [its] legal rights." *Sorenson*, 279 Mont. at 530, 927 P.2d at 1032.

Case law illustrates the kinds of "legal remedies" a party can pursue to toll the statute of limitations on its other remedies. *Sorenson*, 279 Mont. at 530, 927 P.2d at 1032. The term "legal remedies" "does not include self-help measures such as" one contracting party seeking warranty coverage from another under the UCC. *Sorenson*, 279 Mont. at 530, 927 P.2d at 1032. Pursuing an "informal

intracompany" remedy after being fired also does not count. *Hash v. U.S. W. Comms. Servs.*, 268 Mont. 326, 886 P.2d 442, 446 (1994). Nor does an interest group's "urg[ing]" a County to file suit on its behalf to resolve a question about the correct interpretation of a signature-gathering law. *Let the People Vote*, ¶ 19. Even filing a lawsuit against "an entity immune from suit" is not enough. *Seamster v. Musselshell Cnty. Sheriff's Office*, 2014 MT 84, ¶ 12, 374 Mont. 358, 321 P.3d 829. A clear principle emerges from these cases: to invoke equitable tolling, a plaintiff must have filed another administrative or judicial action to enforce his legal rights related to the same underlying cause of action. *Sorenson*, 279 Mont. at 530, 927 P.2d at 1032. Like these plaintiffs, the County invokes equitable tolling, but it has not filed another action in any forum to enforce its purported rights.

Contrast these cases with ones in which this Court *has* applied equitable tolling and the picture becomes even clearer. In *Chance v. Harrison*, the statute of limitations for filing a claim before the Montana Human Rights Commission was equitably tolled by the plaintiff's **filing a suit** in district court for sexual harassment. 272 Mont. 52, 899 P.2d 537 (1995). In *Nicholson v. Cooney*, the statute of limitations for filing a complaint alleging constitutional violations in a referendum was equitably tolled because the plaintiff had **filed a petition** for declaratory judgment on the same subject. 265 Mont. 406, 877 P.2d 486 (1994). In

Lozeau v. Geico Indemnity Co., a plaintiff injured in a car accident on tribal land sued a tribal defendant in tribal court. 2009 MT 136, ¶¶ 4–5. While the tribal court action was pending, the plaintiff filed suit in state court. Then, the tribal court dismissed the plaintiff's first action on the ground—not argued by any party—that it lacked personal jurisdiction over the **plaintiff**. *Id.* ¶ 5. In these unusual circumstances—and given that the plaintiff had filed a first action—this Court held that the plaintiff was entitled to equitable tolling on her state court claims. *Id.* ¶¶ 16–18.

Lake County suggests that its efforts to "work with the Legislature to address the [PL 280] funding issues," App. 8-2, were a pursuit of alternative "legal remedies." Opn. Br., 25. But Lake County's lobbying efforts are just like the kinds of "informal self-help" measures this Court has repeatedly found insufficient for equitable tolling. *Sorenson*, 279 Mont. at 530, 927 P.2d at 1032. Lobbying the Legislature is not the same as filing a "court or administrative" action to enforce legal rights. *Sorenson*, 279 Mont. at 530, 927 P.2d at 1032; *accord Let the People Vote*, ¶ 19. If the term "legal remedies" were as expansive as Lake County suggests, "equitable tolling would virtually eradicate statutes of limitation." *Sorenson*, 279 Mont. at 530, 927 P.2d at 1032. The County cannot seriously dispute that this case is the first "action or proceeding, administrative or judicial," which it "has filed to

enforce [its] legal rights." *Sorenson*, 279 Mont. at 530, 927 P.2d at 1032. Because Lake County never pursued another "possible legal remedy" before suing the State, it cannot invoke equitable tolling to save its belated unjust enrichment and unfunded mandate claims.

Sensing that the doctrine does not comfortably apply here, Lake County contends that holding it to the statute of limitations here would "serve no policy purpose." Opn. Br., 26–28. True, this Court has explained that the policy "rationale behind the doctrine of equitable tolling serves broader purposes than merely those embodied by th[e] test." *Brilz v. Metro. Gen. Ins. Co.*, 2012 MT 184, ¶ 16, 366 Mont. 78, 285 P.3d 494. But the Court has never embraced the view that good faith alone is enough to equitably toll a statute of limitations. Nothing indicated that the plaintiffs in *Let the People Vote*, *Sorenson*, and *Hash* acted in bad faith. Even so, their claims were not equitably tolled because they had not pursued other "legal remedies." The County's expansive, "good-faith-only" view of equitable tolling has no support in this Court's precedents.

Lake County also relies on *Schoof v. Nesbit*, 2014 MT 6, 373 Mont. 226, 316 P.3d 831, but that case is very different from this one. In *Schoof*, county officials adopted an allegedly unlawful policy during a closed 2007 meeting and concealed the policy from the public until 2011. *Id.* ¶ 5. Soon after he learned about the policy,

Schoof sued to invalidate it, alleging, *inter alia,* a violation of his constitutional right to know. *Id.* ¶ 6. But, *technically*, Schoof's 30-day statute of limitations had run back in 2007. *Id.* ¶¶ 7, 28–30. This Court held that equitable tolling applied because "neither [Schoof] nor the public learned or could have learned" about the policy "until four years after it had been adopted"—and because the county officials' concealment of the policy caused Schoof's delay in suing. It made no sense to hold Schoof to the statute of limitations and "permit the constitutional right to know and right of participation to be abrogated by" the Government's "failure to provide notice or adequate information." *Id.* ¶ 34. This Court took care to note that *Schoof*'s holding applies only "to those instances where a plaintiff is substantially prejudiced by a defendant's concealment of a claim, despite the exercise of diligence by the claim." ¶ 37. It also explained that *Schoof* did not overrule the standard equitable tolling framework. *Id.*

Plainly, Lake County is not in the same position as Schoof: The County concedes it has known about its claims since at least 2017. No one has concealed any fact from the County. And nothing kept the County from timely filing its claims. Nor does this case involve the vindication of a constitutional right. *Schoof*'s narrow extension of equitable dolling does not apply here.

III. Lake County's claims fail on the merits.

As explained above, Lake County's claims are not justiciable. And its unfunded mandate and unjust enrichment claims are time-barred. Should this Court reach the merits, however, each of the County's claims fail.[5]

A. Congress intended nonmandatory States to shape their assumption of PL 280 jurisdiction as they saw fit. Montana made its assumption contingent on county consent.

Each of the County's three claims rests on a basic misunderstanding about Congress's intent in enacting PL 280. According to Lake County, when Congress enacted PL 280, it intended state governments—and not subdivisions of state governments—to shoulder the costs of PL 280 jurisdiction. Opn. Br., 13–14, 30 ("[I]t is clear that Congress intended the State itself, not a small governmental entity like a county, to carry the burden and fulfill the responsibilities assumed under PL 280."). Lake County's only textual evidence is that PL 280 used the word "State" but not "county." *See* Opn. Br., 10, 12, 13, 14.

But Congress's intent in enacting PL 280 was not to require States, as opposed to state subdivisions, to bear the cost of criminal jurisdiction in Indian country. Congress passed PL 280 to (1) reduce the financial burden of federal

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"[T]his Court will uphold the district court's decision, if correct, regardless of the reasons given below for the result." *Musselshell Cnty.*, 245 Mont. at 527, 802 P.2d at 1253.

jurisdiction over reservations, (2) respond to a perceived hiatus in law enforcement protections available to tribal members, and (3) "achieve an orderly assimilation of Indians into the general population." *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 498 (1979). Congress wanted to relieve the federal government of the costs of law enforcement in Indian country—it was not concerned with who would pick up the tab afterward.

Lake County also overlooks that section 7 of PL 280 allowed non-mandatory states to "assume jurisdiction **at such time and in such manner** as the people of the State shall, by affirmative legislation, obligate and bind the State to assumption thereof." PL 280, § 7 (emphasis added). Nothing in PL 280's text required that states fund their assumption of criminal jurisdiction. Instead, PL 280 gave non-mandatory states the flexibility to structure their PL 280 assumption as they saw fit. *See also Yakima Indian Nation*, 439 U.S. at 497–98 ("The critical language in § 7 is the phrase permitting the assumption of jurisdiction 'at such time and in such manner as the people of the State shall … obligate and bind the State to assumption thereof.'")

Montana chose to bind itself to PL 280 jurisdiction only after the governor "obtain[ed] the consent of the board of county commissioners of each county that encompasses any portion of the reservation of the tribe." § 2-1-302(2), MCA. If

Lake County were correct that the State intended to bear the costs of PL 280, there would have been no reason to make county consent a prerequisite for assuming PL 280 jurisdiction. *See Lucas Ranch, Inc. v. Mont. Dep't of Rev.*, 2015 MT 115, ¶ 15, 379 Mont. 28, 347 P.3d 1249 ("We presume that the Legislature does not pass meaningless or useless legislation.").

Lake County mines HB 55's scant legislative history for evidence that the Legislature thought the State would bear the cost of PL 280 jurisdiction. Opn. Br. 15–16. The best it can find is Representative Turnage's comment that PL 280 would impose no "extra burden" on Lake County. *See* Opn. Br. 16. The County ignores, however, that Turnage also believed that PL 280 would not cost the **State** anything. *See* App. 6 ("When asked how much [PL 280] would cost the state, Turnage said it would cost virtually nothing because the state authorities now working would suffice."). Turnage's prediction may have proved less than prescient, but it is not clear why that should change the plain meaning of sections 2-1-302. *Lucas Ranch*, ¶ 15 ("If the statute's language is clear and unambiguous, no further interpretation is necessary."). And in any event, this Court has cautioned against overreliance on the "excerpted" comments of individual legislators since they "can often be used to support almost any position." *State ex rel. Racicot v. First Jud. Dist. Ct.*, 243 Mont. 379, 387, 794 P.2d 1180, 1184 (1990). The plain language

of section 2-1-302 reflects the Legislature's unambiguous intent that counties would carry out the State's assumption of criminal jurisdiction over the CKST.

Lake County's argument also overlooks 50 years of history. From 1964 until 2017, Lake County accepted the benefits and costs of enforcing the State's PL 280 jurisdiction in the Flathead Reservation without complaint. Not until the County filed this action in 2022 did it claim that Congress and the Montana Legislature had always intended for the State to bear the costs of PL 280. The County similarly ignores that in other PL 280 states, counties bear the primary responsibility and cost of enforcing PL 280 jurisdiction. *See, e.g.*, **California,** California Courts, *Appendix A: Public Law 280 Jurisdiction*, 1[6] ("The enactment of PL 280 meant that **the costs of enforcement of criminal laws fell to local government**."); **Idaho,** Office of Performance Evaluations, Idaho Legislature, *State Jurisdiction in Indian Country*, (Mar. 2017)[7] ("Implementing Public Law 280 is **primarily the responsibility of county governments**…. **County governments must fulfill their additional responsibilities without additional funding**.") (emphasis added); **Minnesota**, Minnesota Senate Counsel, Research and Fiscal Analysis, *American Indian Communities in Minnesota: Criminal Jurisdiction and Law Enforcement in*

[6] Available at https://www.courts.ca.gov/documents/PL280-jurisdiction.pdf.
[7] Available at https://legislature.idaho.gov/wp-content/uploads/OPE/Reports/r1702.pdf

Indian Country (1998)[8] (noting that the "Red Lake and Bois Forte Bands have tribal law enforcement agencies" funded by the BIA, other Minnesota tribes "have concurrent jurisdiction" with "**county sheriff's departments**" and that "[l]aw enforcement authority on the other reservations is the responsibility of the respective **county sheriffs**") (emphasis added); **Wisconsin**, Wisc. Legislative Council, Information Memorandum, *Law Enforcement in Indian Country: State Laws and Programs*(2013)[9] (PL 280 "made **county sheriffs**, father than federal marshals, responsible for policing the reservations …. Following the enactment of P.L. 280 in 1953, **county sheriffs in counties including Indian country** (apart from the Menominee Reservation) became responsible for providing law enforcement services on those reservations and trust lands.") (emphasis added).

Lake County relies on *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164, 1169 (8th Cir. 1990), but that case involved an entirely unrelated issue: whether South Dakota could unilaterally re-assert its criminal jurisdiction over highways running through Indian country after the 1968 Indian Civil Rights Act amended PL 280 to require tribal consent. *Id.*, at 1165–1171. *Rosebud Sioux* had nothing to do with whether South Dakota counties or South Dakota itself was responsible for the

[8] Available at https://www.senate.mn/departments/scr/report/bands/law.htm
[9] Available at https://docs.legis.wisconsin.gov/misc/lc/information_memos/2013/im_2013_10

costs of this asserted jurisdiction. Nor does *Kennerly v. District Court*, 400 U.S. 423 (1971), support Lake County's view of Congress's intent. *Kennerly* held that PL 280 required "affirmative legislative action" before a State could assume jurisdiction—thus, a resolution by the Blackfeet Tribal Council could not transfer civil jurisdiction to Montana without Montana also taking "affirmative legislative action with respect to the Blackfeet Reservation." 400 U.S. at 427. *Kennerly* said nothing about how Montana could allocate the costs of PL 280 jurisdiction once it validly undertook that jurisdiction.

In short, nothing supports Lake County's newfound view that Congress—or the Montana Legislature—intended the State itself to bear the costs of PL 280 jurisdiction.

B. Lake County's unfunded mandate claim fails as a matter of law.

Working from its mistaken view of PL 280, Lake County argues that the State has subjected it to an "unfunded mandate" in violation of section 1-2-112, MCA. That statute provides that the legislature may not enact laws requiring local governments to perform certain nonessential services without providing specific funding for the service. § 1-2-112(1), MCA. If a law *does* impose such an unfunded

requirement, the law is "not effective until specific means of financing are provided." *Id.*[10]

There are several fatal problems with Lake County's unfunded mandate claim. The first is straightforward: section 1-2-112 applies to laws that create unfunded "mandates" and "requirements," but no law "mandated" nor "required" Lake County to enforce its criminal jurisdiction in the Flathead Reservation. To the contrary, the State made its PL 280 assumption contingent on the County's *consent.* § 2-1-302(2), MCA. And the Legislature has allowed Lake County to withdraw that consent. § 2-1-306(3), MCA. To characterize any of this as a "mandate" would invert the plain meaning of that word.

Second, section 1-2-112 only applies to "mandates" that are not "necessary for the operation of local governments." § 1-2-112(3), MCA. But arresting, prosecuting, and detaining criminals **is** "necessary for the operation of local governments." *Id.* All counties must enforce the State's criminal laws. *See* §§ 7-32-2201; 7-32-2121; 7-4-2712; 7-4-2716, MCA.

[10] Lake County's opening brief suggests that its unfunded mandate claim also arises under section 1-2-116, MCA. Opn. Br., 16, 21. This is inaccurate. The District Court doubted that section 1-2-116 applied to this case, because "it applies when a state agency has sent a bill to a local government and [the] local government refuses to pay." Doc. 29 at 12. And Lake County clarified at oral argument on the State's motion to dismiss that "it was not making a claim under … §1-2-116[.]" *Id.*

Third, section 1-2-112's title indicates that it applies only to "[s]tatutes imposing **new** local government duties" enacted after 1974—but Lake County had been enforcing the State's criminal jurisdiction in the Flathead Reservation for nearly a decade by 1974. The statute also does not indicate it is to be applied retroactively, and "[n]o law contained in any of the statutes of Montana is retroactive unless expressly so declared." § 1-2-109, MCA; *see also* 38 Mont. Op. Att'y Gen. 390 at *5 (1980) (analyzing the 1974 and 1979 versions of the statute and concluding that neither could affect laws enacted before the respective effective dates). Thus, section 1-2-112 cannot be construed to apply to HB 55, which was enacted in 1963 and became effective with Governor Babcock's 1965 proclamation in 1965.

Fourth, even if section 1-2-112 applied, it would not authorize the remedy Lake County seeks. Lake County seeks "reimbursement" via money damages, but section 1-2-112 does not authorize a suit for money damages. Instead, it provides that a law imposing an unfunded mandate "**is not effective** until specific means of financing" are provided. § 1-2-112(1), MCA (emphasis added). Lake County does not argue that Montana's statutory scheme for assuming PL 280 jurisdiction should be deemed "ineffective"—it seeks money damages.

C. Lake County's unjust enrichment claim fails as a matter of law.

Lake County's unjust enrichment claim also fails. "Unjust enrichment is an equitable claim for restitution to prevent or remedy inequitable gain by another." *Mont. Digit., LLC v. Trinity Lutheran Church*, 2020 MT 250, ¶ 10, 401 Mont. 482, 473 P.3d 1009. To prove unjust enrichment, a plaintiff must show "(1) a benefit conferred upon the recipient by the claimant; (2) the recipient knew about or appreciated the benefit; and (3) the recipient accepted or retained the benefit under circumstances rendering it inequitable for the recipient to do so." *Mont. Digit.*, ¶ 10.

Lake County does not meet the first two elements because it consented to PL 280 jurisdiction for its own benefit. But even if it could meet them, it fails at the third. The critical third element "narrowly focuses on 'enrichment that lacks an adequate legal basis,' such as 'the transfer of a benefit without adequate legal ground.'" *Mountain Water Co.*, ¶ 16 (quoting Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt. b). That, at the very least, the County cannot show. As explained, Montana counties are responsible for enforcing the State's criminal laws. Thus, the State made its assumption of PL 280 jurisdiction contingent on Lake County's consent. § 2-1-302(2), MCA. Lake County consented in 1964 and enforced the State's PL 280 jurisdiction for more than 50 years without

complaint. And, as explained above, nothing in federal or Montana law entitled Lake County to receive payment for its voluntary assumption of PL 280 jurisdiction on the Flathead Indian Reservation.

Moreover, "[a]s an equitable remedy, unjust enrichment is fact-dependent, applicable when there has been retention of a benefit 'under such circumstances that would make it inequitable' for the receiving party to retain it." *Missoula Cnty. v. State*, 2024 MT 98, ¶ 33, __Mont. __, __ P.3d __ (quoting *N. Cheyenne Tribe v. Roman Catholic Church*, 2013 MT 24, ¶ 39, 368 Mont. 330, 296 P.3d 450).

Equity does not support Lake County here. The County voluntarily consented to carrying out the State's PL 280 jurisdiction in 1964. It continued to enforce PL 280 jurisdiction for over 50 years and noted the "many benefits" that flowed to its citizens as a result. App. 6 (Resolution No. 17-01). Only after the County's financial circumstances changed—and the Legislature declined to give Lake County the additional funding it wanted—did the County claim that its voluntary exercise of PL 280 jurisdiction constituted unjust enrichment. It is fundamentally inequitable for Lake County to claim, nearly 60 years later, that the arrangement Lake County voluntarily undertook—and benefited from—was the State unjustly enriching itself at the County's expense. *See Missoula Cnty.*, ¶¶ 34–37 (holding that Missoula County did not suffer an inequity supporting an unjust

enrichment claim where the County, "despite having a contract providing a higher rate, accepted payment at the [lower] rate authorized by the Legislature … without contesting the issue and did so … for years"). Moreover, Lake County did not sue for nearly 60 years. "The County thus bears some responsibility for whatever benefit inured to the [State] over that period." *Missoula Cnty.*, ¶ 34; *see also Filler v. Richland Cnty.*, 219 Mont. 48, 56, 711 P.2d 777, 782 (1985) ("Equity aids only the vigilant").

D. Lake County's declaratory relief claim fails as a matter of law.

Finally, Lake County's declaratory relief claim fails. Lake County's Complaint sought declaratory judgment "establishing the State's obligation to reimburse Lake County for costs incurred **in going forward** in" enforcing PL 280 jurisdiction. App. 1-16 (emphasis added). During oral argument on the State's motion to dismiss, the County clarified that its declaratory judgment request was "based solely on the 2021 amendments to Mont. Code Ann. § 2-1-301" and that it therefore sought "a declaration that beginning in 2021 and until such time as Lake Cou[nty]'s withdrawal of consent becomes effective, the State is responsible for reimbursing Lake County." Doc. 29 at 16. On appeal, the County recasts its claim as a request for a broad "judgment stating that the State has an obligation to

reimburse Lake County for its costs associated with implementing PL 280 jurisdiction on the State's behalf." Opn. Br., 37.

The plain language of § 2-1-301(2), MCA defeats the County's declaratory judgment claim—whatever its form. It provides: "the state shall reimburse Lake County for assuming criminal jurisdiction under this section annually **to the extent funds are appropriated by the legislature**." § 2-1-302(2), MCA (emphasis added). Lake County focuses on the statute's first clause—"the state shall reimburse"—but ignores the subsequent modifying clause—"to the extent funds are appropriated by the Legislature." Every rule of statutory construction weighs against the County's reading. Read as a whole, the statute makes clear that the Legislature obligated itself to reimburse the County only to the extent it sees fit to appropriate funds for that purpose**.** § 1-2-101, MCA ("Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all"). Section 2-1-301(2) could only require the State to reimburse Lake County if this Court excised the modifying clause. This Court cannot. *Bryer v. Accident Fund Gen. Ins. Co.*, 2024 MT 104, ¶ 42, 412 Mont. 347, 530 P.3d 801 (in interpreting a statute, "[i]t is not a court's function to insert what has been omitted or omit what has been inserted").

Lake County points out that "reimburse" means "to pay back someone." Opn. Br., 35. This is true, but irrelevant. Section 2-1-301(2) provides that the State will "reimburse" (pay back) Lake County *only* to the extent the Legislature appropriates funds for that purpose. Lake County also notes section 2-1-301(2) provides that "[t]he annual amount of reimbursement must be adjusted each year based on the consumer price index." But this does not change section 2-1-301(2)'s modifying clause. Read together, these provisions make clear that whatever amount (if any) the Legislature appropriates to reimburse Lake County "must be adjusted based on the consumer price index."

The context in which the Legislature enacted section 2-1-301(2) further shows that the Legislature did not intend to obligate itself to reimburse Lake County. In 2017, Representative Hertz introduced HB 450, which would have held the State "responsible for the costs incurred to enforce its criminal jurisdiction on the Flathead Indian reservation." Doc. 36 at 5–6. In 2021, Representative Joe Read introduced House Bill 656, the original version of which would have obligated the State to "reimburse Lake County for assuming criminal jurisdiction under this section annually." Doc. 36 at 6. In 2023, Senator Hertz proposed Senate Bill 127, which would have created a mechanism through which the State would be required to reimburse Lake County for assuming criminal jurisdiction under § 2-1-301,

MCA, "in an amount that is mutually agreed to by the state and Lake County" under a set structure. Doc. 36 at 7. The Legislature rejected each of these proposed bills but passed section 2-1-301(2), which requires it only to reimburse to the extent it sees fit. Doc. 36 at 5–7; Doc. 29 at 7.

This Court considered a similar pattern in *Montana Society of Anesthesiologists v. Montana Board of Nursing*, 2007 MT 290 ¶¶ 33–34, 339 Mont. 472, 171 P.3d 704. That case involved whether Certified Registered Nurse Anesthetists ("CRNAs") were subject to § 37-3-102, MCA. *Id.* ¶¶ 26–38. The Legislature had rejected multiple bills that would have brought CRNAs within the statue's purview. *Id.* ¶ 33–34. So, this Court refused to "insert language into" § 37-3-102 that the Legislature specifically rejected. *Id.* ¶¶ 35–36. The same analysis should apply here. If the Legislature had intended to bind itself to reimburse Lake County, it would not have rejected several bills that would have required it to do so. *See* § 1-2-101, MCA (in construing a statute, a court may not "insert what has been omitted").

With the statute's plain language and history against it, Lake County asserts that section 2-1-301's plain language leads to "absurd results." *See* Opn. Br., 8, 33, 34, 35, 36. But the absurd results canon is not a license for courts to second-guess the wisdom of a statute. *United States v. Lucero*, 989 F.3d 1088, 1098 (9th Cir. 2021). It applies only under "rare and exceptional circumstances" where an

interpretation leads to "absurdity [that is] so gross as to shock the general moral or common sense." *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). The County does not explain why the Legislature's choice to reserve to itself the discretion to appropriate (or not appropriate) funds is "absurd"—much less shockingly absurd. Yes: the Legislature opted not to reimburse Lake County for the costs it incurred in PL 280 enforcement. The County dislikes the Legislature's choice. But that does not make it absurd. *Accord City of Missoula v. Pope*, 2021 MT 4, ¶¶ 14–18, 402 Mont. 416, 478 P.3d 815. Deciding whether to appropriate funds is a policy choice within the Legislature's purview. *Meyer*, ¶¶ 11–14. And it was entirely legitimate for the Legislature to decline to reimburse the County for an obligation it had freely undertaken in 1964, carried on for half a century without complaint, and may withdraw from.

Lake County also argues—for the first time on appeal—that section 2-1-306(3) created a **new** unfunded mandate, because it did not allow Lake County to withdraw its consent to "enforce criminal jurisdiction on behalf of the State" until July 1, 2021, and provided that such withdrawal would not be effective until 6 months after receipt of Lake County's resolution. *See* Opn. Br., 36–37. Generally, this Court does not address issues raised for the first time on appeal or change in legal theory on appeal. *See, e.g.*, *Unified Indus., Inc. v. Easley*, 1998 MT 145, ¶¶ 15–

17, 289 Mont. 255, 9681 P.2d 100. Setting that aside, section 2-1-306(3) did not create a mandate—it allowed the County to withdraw from an obligation it had undertaken more than 50 years prior.

CONCLUSION

For these reasons, Defendant-appellee State of Montana respectfully requests that this Court affirm the District Court's rulings on the State's motion to dismiss and motion for summary judgment.

DATED this 24th day of May, 2024.

By /s/ *Dale Schowengerdt*

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Certificate of Compliance

I certify that this Brief is printed with a proportionately spaced Equity typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word is 9,990 words including footnotes. Mont. R. App. P. Rule 11(4).

By /s/ *Dale Schowengerdt*

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