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Case Number: DA 25-0618

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 25-0618

SHAWN REAGOR; DANDILION CLOVERDALE; JAMIE DOE; LINDA TROYER; AND JANE DOE,

Plaintiffs and Appellees,

VS.

THE STATE OF MONTANA, by and through AUSTIN KNUDSEN, Attorney General of the State of Montana in his official capacity,

Defendants and Appellants,

ON APPEAL FROM THE MONTANA FOURTH JUDICIAL DISTRICT COURT,
MISSOULA COUNTY, HON. SHANE VANNATTA PRESIDING
CASE NO. DV-23-1245

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[T]he only thing that we, the public, have to alert us as to what is going on in the Legislature, is the title of the bills that are introduced, and we must keep the purity of the titles. Delegate Cedor Aronow (February 1972).[1]

I. STATEMENT OF ISSUES

1. Should this Court decline to address the State's[2] arguments regarding the applicability to Senate Bill 458 ("SB458") of Mont. Const., art. V, § 11(3)'s "clear title" rule, and also regarding SB458's violation of that "clear title" rule, because on this appeal the State has raised all new theories, which this Court should not consider for the first time on appeal?

2. If the Court considers the State's new arguments, did the district court properly conclude that SB458 is not exempt from the Constitution's "clear title" requirement because SB458 is neither a "general appropriation bill" nor "a bill for the codification *and* general revision of the laws," which are the sole exceptions that will allow a bill to evade the Constitution's "only one subject clearly expressed in its title" requirement?

3. If the Court considers the State's new arguments on this issue, did the district court properly conclude SB458 is facially unconstitutional since its title does not clearly express the bill's subject because: (a) SB458's title does not say

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[1] Mont. Const. Conv., Verbatim. Tr. 648 (Feb. 22, 1972) (Del. Aronow during debate whether to keep "clear title" rule from Montana's 1889 constitution).

[2] Appellees use herein the party designations from Appellant's opening brief, *i.e.,* "Plaintiffs" for Appellees and "the State" for Appellant.

whether the bill is defining the word "sex" in its primary English-language meaning of human sexual activity, *e.g.,* "having sex; sexual intercourse," or in its secondary English-language meaning of classifying humans into types, *e.g.,* "female or male; gender;" and (b) also fails to disclose that the words "female" and "male" are newly defined in the bill's body?

4. Did the district court properly award attorneys' fees for this consequential constitutional litigation over the scope of Article V, § 11(3)'s "clear title" requirement by: (a) applying the Private Attorney General Doctrine and (b) awarding fees in the amount expended for championing the constitutional rights of all Montanans to participation and transparency in government?

II. STATEMENT OF THE CASE

Plaintiffs disagree with some of the State's descriptive language employed in its Statement of the Case. Nonetheless, Plaintiffs agree the statement identifies both the nature of the case and the relevant procedural disposition below, so will not burden the Court with a second Statement of the Case.

III. STATEMENT OF FACTS

The Constitution's Language.

The Framers voted to maintain the "purity of the titles."

The 1972 Delegates engaged in heated and lengthy debate regarding whether to retain the "single subject/clear title" requirement in Article V, § 23 of Montana's

1889 constitution. *See* Verbatim Tr. 647-659 (Feb. 22, 1972) (hereafter "Verbatim Tr."). A majority (52-37) determined to keep the requirements in place. *Id.*, 655. The prevailing majority placed particular emphasis on "keep[ing] the purity of the titles;" that the title must stand on its own to clearly express the bill's subject to the public and the legislators, who cannot be required to review a bill's body to ascertain its subject. *Id*., 648-50. Delegate Aronow compared this protection via the voiding even of "good" bills with unclear titles to the "innocent until proven guilty beyond a reasonable doubt" rule:

> True enough, there's a few guilty people get turned loose but it's far better to turn loose 10 or 100 guilty people than to convict and sentence to the penitentiary one innocent person. And likewise, with this provision, the only thing that we, the public, have to alert us what is going on in the Legislature, is the title of the bills that are introduced, and *we must keep the purity of the titles. The system has worked.*

Id., 648 (emphasis added).

Exceptions to "clear title" requirement.

The Delegates agreed to only two exceptions to the "clear title rule," *i.e.*, "general appropriation bills and bills for the codification and general revision of the laws." Mont. Const., art. V, §11(3). Delegate Aronow noted that "codification" refers to "the codification of the law [that] takes place about every five years or so, as a legislative act that codifies the statutes of Montana[.]" Verbatim Tr. 655-56.

SB458's Language.

SB458's title is: "An act generally revising the laws to provide a common definition for the word sex when referring to a human, and amending sections," (thereafter listing 41 MCA sections). *See* App. A.[3] The title does not specify whether the bill's subject is to define "sex" either in that word's primary English-language meaning of sexual activity involving humans, or in that word's secondary meaning of classifying humans biologically. App. A.1; App. B.2, 7-12.

"Sex" is a polysemous word when referring to human beings.

Many of the most frequently used English words are polysemous, *i.e.*, words that have multiple, related meanings.[4] "Sex" is a polysemous word.[5] A simple sentence proves this fact: *John is a human who had **sex** with Jane, a human of a different **sex** than John.*

[3] Plaintiffs cite to the State's appendices, by page number, as App. A – App. D.

[4] The term "run" is the most polysemous English-language word, with "no fewer than 645 meanings. A record." Simon Winchester, *A Verb for Our Frantic Times*, The New York Times (May 28, 2011) (last visited 3-3-26): https://www.nytimes.com/2011/05/29/opinion/29winchester.html.

[5] *See, e.g.*, Vaclav Brezina, *"It's all sex and celebrity now": Page three corpus linguistics*, CASS, ERSC Center for Corpus Approaches to Social Science, 2025, https://cass.lancs.ac.uk/its-all-sex-and-celebrity-now-page-three-corpus-linguistics/ (last visited 3-3-26), at 2 ("[t]he word sex is polysemous and can mean either physical activity or biological dimorphism (male or female)." (hereafter "Brezina").

A Google search ("define sex") produces the following "Oxford Languages Dictionary" entry:

noun

1. (chiefly with reference to people) sexual activity, including specifically sexual intercourse: "they enjoyed talking about sex."

Similar: sexual intercourse, intercourse, lovemaking, making love, sex act, sexual relations, mating, coitus, coition, copulation, fornication ***

2. either of the two main categories (male and female) into which humans and most other living things are divided on the basis of their reproductive functions: "adults of both sexes."

Similar: gender.[6]

Other dictionaries are the same. There are two main definitions for "sex" when referring to humans, which mean two entirely different things: either sexual intercourse or gender. *Compare, e.g.,* "The Free Dictionary" (definition 1: "sexual activity, especially sexual intercourse: *hasn't had sex in months*") https://www.thefreedictionary.com/Sex (last visited 3-8-26) *with* "Merriam-Webster" (definition 1: "either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures") https://www.merriam-webster.com/dictionary/sex?src=search-dict-hed (last visited 3-8-26).

[6] *See* Dkt.5, 7-8.

By failing to provide context in SB458's title to allow readers to discern which meaning of "sex" it was proposing to define, Montana's Legislature enacted a bill that violates the constitutional "clear title" requirement.[7]

Statistical linguistics analyses of the word "sex."

Statistical linguistics analysis shows English-language readers encounter the word "sex" more often in its human "sexual activity" meaning than its human biological, male or female, "classification" meaning. As of 2012, the statistics show that 90% of such reading encounters with the word "sex" involved the "sexual activity" meaning, and 10% involved the "sex classification" meaning.[8]

As the court held below, for SB458, the Legislature did not clearly express which of these meanings it intended to define. Was the Legislature intent on defining what human physical activities constitute "sex," *e.g.,* did President Clinton have "sex" with "that woman, Ms. Lewinsky," or is so-called oral sex not really sex?[9] Or did the Legislature mean "sex" in its secondary meaning of

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[7] *See, e.g.,* Bill Watson, 2021 Univ. of Illinois Law Rev. Online, *Literalism in Statutory Interpretation: What Is It And What Is Wrong With It?* (July 19, 2021), https://illinoislawreview.org/online/literalism-in-statutory-interpretation/ ("legislative speech" should give "a statute's context fixing the operative sense of a polysemous word") (last visited 3-3-26).

[8] Brezina, *supra*, n.3, at 2-3.

[9] *See, e.g.,* Tr., Part 1, p.10; Walter Kirn, *Clinton's Crisis: When Sex is Not Really Having Sex*, Time Magazine (February 2, 1998), https://time.com/archive/6732178/clintons-crisis-when-sex-is-not-really-having-sex/. (last visited 3-3-26).

"classifying" humans by type, *e.g.,* classification of individuals based on characteristics or traits reflecting gender. SB458's title does not say.

IV. STANDARD OF REVIEW

In constitutional litigation, "the intent of the Framers controls [this Court's] interpretation of a constitutional provision." *Bd. of Regents of Higher Educ. of Mont. v. State*, 2022 MT 128, ¶ 11. The summary judgment order declaring SB458 to be facially unconstitutional and void is reviewed de novo "applying the same M. R. Civ. P. 56 criteria used by the district court." *Id.*, ¶ 9. However, even on de novo review of summary judgment, the Court will not consider new arguments first made on appeal. *See, e.g., Seymour v. State*, 2025 MT 88, ¶¶ 9, 14-15 ("declin[ing] to address" on "de novo" review of summary judgment for appellee, the appellant's "new arguments or change [of] legal theory on appeal"). A decision to award attorneys' fees is reviewed de novo. *See, e.g., Forward Mont. v. State*, 2024 MT 75, ¶ 12 ("*Forward Montana*"). A fee award's amount is reviewed for abuse of discretion. *Id*.

V. SUMMARY OF THE ARGUMENT

SB458 is a legislative bill. A bedrock requirement is that such bills "shall contain only one subject, clearly expressed in its title." Mont. Const., art. V, §11(3). The district court correctly concluded SB458 violates the clear title requirement because it is not possible to determine from the title alone which

meaning of the polysemous word "sex" is at issue. This Court's "clear title" case law from 1895 to its 2025 *Netzer* decision just last year, confirms that a misleading title like SB458's must be voided as unconstitutional. *See Netzer, Krautter & Brown, P.C. v. State*, 2025 MT 249 ("*Netzer*").

(1) Even considering the State's improper new argument on appeal, SB458 is subject to the "clear title" requirement.

The district court correctly determined that SB458 is subject to the "clear title" rule because SB458 is neither a "general appropriation bill," nor a bill "for the codification *and* general revision of the laws," which are the sole "clear title" requirement exceptions. The State concedes SB458 is not a general appropriation bill. The State asked the district court to read § 11(3)'s conjunctive language "codification *and* general revision of the laws" as a disjunctive phrase, *i.e.,* "codification *or* general revision of the laws." The court properly rejected this argument, and the State does not raise it again here.

The State did *not* argue below that SB458 is, "in purpose and substance," a bill for both the codification *and* the general revision of the laws, even though its title does not say so. The State makes that argument now, for the first time on this appeal, relying on an 1897 decision (*In re Ryan*) that it never mentioned below. This *Ryan*-based argument is wrong, but this Court need not bother with why. Instead, the Court should apply the venerable rule precluding parties from raising new arguments or changing their theory on appeal.

Even were this Court to consider it, the State's new *Ryan*-based "purpose and substance" theory is wrong. The court correctly determined below that Article V's requirement of "codification" has a specific meaning—it applies only when the Legislature has taken the extraordinary step of ordering the preparation and publication of a new Code of Laws. This is what "codification" meant in Montana's 1889 constitution, and what it continues to mean today, as readopted in 1972 by the Framers into Montana's current constitution. The *Ryan* decision revolved around this specific, and limited, meaning of codification and it has no application to the ordinary facts of SB458's commonplace enactment, which did not even include the codification of a new volume of the Montana Code Annotated, much less of a new Code of Laws.

(2) Even considering the State's improper new arguments, SB458's title does not "clearly express" the bill's subject.

The district court also correctly determined that SB458's title does not "clearly express" the bill's subject because its title does not say which version of "sex" it is defining. This is a fatal flaw that the court determined the State simply refused to address below; further concluding that a bill's title which does not identify what variation of a word with multiple meanings it is defining cannot possibly "clearly express" what that bill's subject is.

On appeal, the State now concedes there *are* two different meanings of the word "sex": (1) the human "sex classification" meaning, and (2) the human "sexual

activity" meaning. With this concession, the State was forced to jettison its arguments below as inapposite, and now offers new ones that attempt to address the actual problem with SB458's title.

These arguments the State has now raised are, of necessity, new theories not argued to the district court. To allow the State for the first time on this appeal to rely on these new arguments addressed to a reality it rejected below, would be "fundamentally unfair" to the district court (and Plaintiffs) by faulting the court for failing to rule on theories it was never given the opportunity to consider. The well-established rule that parties may not raise new arguments or change their legal theory on appeal requires, instead, that this Court reject all the State's new "clear title" arguments and address only the State's attorneys' fee objections. Should the Court, nevertheless, decide to address them, the State's new "clear title" theories all fail on their merits, too, as follows:

First, the State argues this Court's 2025 *Netzer* decision holds it is sufficient for a bill's title to make "average or ordinary readers" curious about what the proposed new law's subject *might be*. The State has misread *Netzer*. Under this purported new "pique the reader's curiosity" standard, bill titles would be rendered meaningless: a title such as "An Act proposing a new and exciting law" would pass muster, effectively nullifying the Constitution's requirement of clear titles. A bill's title must be clear enough for legislators and the public alike to determine what the

subject of a bill *is*, rather than an ambiguous statement that serves as a starting point for a guessing game about what a bill's subject *might be*. This Court did not adopt such a "curiosity" standard in *Netzer*. Doing so would be contrary to the Constitution's language and the intent of the Framers.

Second, the State's new "subordinate components/no indexing" theory is equally flawed. The words "female" and "male" are not "subordinate components" of "sex" in that word's "sexual activity" meaning, and the State does not contend they are. No one who reads SB458's title as addressing "sex" not as a biological classification exercise, but as a law defining what activities constitute "sex," could possibly guess the bill's body re-defines female and male. Here again, the State's arguments can only work if SB458's title clearly expresses what variation of the polysemous word "sex" the bill is addressing, and it does not. This is not a germaneness "indexing" requirement. It's common sense and the intent of the Framers. A bill's title must "clearly express" its subject, which the State concedes for SB458 is to provide definitions for the words "sex," and "female" and "male," limited to body parts at time of birth. The classifying words "female" and "male," however, are not mentioned in SB458's title, rendering it unclear.

Third, the State argued below that SB458's title is sufficiently clear because of what it identified as the bill's "qualifying phrase," *i.e.*, "to provide a Common Definition." The court addressed this argument, pointing out the "common

definition" language is not helpful to the State because the title isn't clear regarding what version of the word the Legislature meant to "commonly" define. The State does not reprise this argument here. Instead, it contends the clarifying language in SB458's title—which it now calls "the modifying clause"—is actually the phrase "when referring to a human." Even were this Court to address it (which it should not), this new theory fails to explain why this phrase provides any context *precluding* a reasonable reading of "sex" to mean sexual activity. After all, like the birds and the bees, humans do have sex.

The State's insistence that the Legislature's use of "sex" in SB458's title can only *reasonably* be read to mean its "human biological classification" definition is belied by reality. Society is awash with uses of the word "sex" that have nothing to do with biological classifications, and everything to do with the question of what human activities constitute "sex." The court correctly concluded below that neither "presumptions of constitutionality" nor "liberal interpretation" rules can fix the manifest error of a statutory title that fails to inform readers which version of a word with multiple meanings is addressed in the bill's body. Summary judgment must be affirmed.

(3) The District Court Properly Awarded Attorneys' Fees.

Under principles reiterated in the recent *Forward Montana* litigation, the district court properly applied the Private Attorney General Doctrine ("PAGD") to

Plaintiffs who prevailed in litigation they championed, on behalf of all Montanans, protecting the right to clearly-titled, non-deceptive proposed new laws enshrined in Article V, § 11(3). The PAGD exists precisely to encourage such consequential constitutional litigation. *Forward Montana* controls here, and the court was right to award fees. Regarding the amount of fees, the court found Plaintiffs' expert more credible than the State's. That decision lies within the court's discretion, and the State has failed to identify anything approaching abuse of that discretion. The attorneys' fee rulings must also be affirmed.

VI. ARGUMENT

A. The State Improperly Relies On New Arguments Not Raised Below.

The State made a fatal decision in its briefing at the district court level. It filed a short, 11-page brief filled in large part with political arguments, which barely addressed the legal issues Plaintiffs raised. *See* Dkt.21, 8-9 (citing "activist idealogues" and "radical gender theory"). Then, at oral argument, the State offered one new argument about its "generally revising" exception theory subsequently rejected by the court in its ruling (App. B.5), but continued to refuse, as the district court put it, "to address the fact that 'sex' has more than one definition, generally … sexual intercourse or gender." App. B.7.

Apparently now unhappy with these arguments, and for some reason unwilling to just concede the obvious as it did in *Forward Montana*, ¶10, the State

offers nothing in its opening brief to support its old theories. As in *Netzer*, "it is not this Court's job to … develop legal analysis that may lend support" to positions taken below, but no longer argued on appeal, and it will not address them further. *Id.*, ¶ 23.

The State's new arguments must suffer the same fate. Even when a general issue has been discussed below, a party cannot raise new theories about that issue on appeal. *See, e.g.*, *State v. Johnson*, 2005 MT 318, ¶ 14 (having objected to certain photographs below as "unfair surprise," the defendant could not switch on appeal to a different theory about them "[a]t no time" raised "before the District Court"). The State raises nothing but new theories on appeal, all of which must be rejected. *Id.*, ¶ 13 ("this Court has made it clear that a party's theory may not change on appeal"); *Seymour*, ¶ 14 (same).

1. The State's *In re Ryan*-Based Theory Regarding the Meaning of Codification is New Argument That Had to Be Raised Below.

For its first new argument, the State relies on *In re Ryan*, 20 Mont. 64 (1897). Opening Br.13-18. Based on *Ryan*, the State argues that a bill's title is not subject to Article V, § 11(3)'s "clearly expressed in its title" requirement as long as the bill "in substance and purpose" is a bill for the codification *and* revision of the laws, which the State now contends SB458 is. Opening Br.13-15. Whether right or wrong (it's wrong) the State failed to raise this argument below, so the Court should not consider it on appeal.

In its summary judgment ruling, the district court noted that the State's briefing "provides no other legal support or argument" on this issue. App. B.5. The State merely recited § 11(3)'s language and capitalized the portion of SB458's title that calls the bill "an act generally revising the laws[.]" *Id*., p.5; Dkt.21, p.4. The district court further noted "[i]n oral argument, the State contend[ed] that the language of [§ 11(3)] must be interpreted as providing three different exceptions to the single subject requirement: general appropriation bills, bills for the codification of the laws, and bills for the general revision of the laws." App. B.5. The district court explained why it found the State's "exception" argument unpersuasive and concluded that SB458 is subject to § 11(3)'s clear title requirement. *Id.*, 5-6. The State never asked the district court to consider the argument it makes now, that SB458 is "in substance and purpose" a bill for the codification *and* revision of the laws. Nor did the State cite *Ryan* (or anything else) below to support such a proposition.

"It is well established that a party may not raise new arguments or change its legal theory on appeal." *Seymour*, ¶ 14 (quoting *State v. Ferguson*, 2005 MT 343, ¶ 38). Both *Seymour* and *Ferguson* are decisions in which the State raised, and prevailed because of, application of the "no new argument on appeal" rule. What is sauce for the goose is surely sauce for the gander here; the State's new "substance and purpose" argument must be rejected. "It would otherwise be

fundamentally unfair to fault the district court for failing to rule on an issue it was never asked to consider." *Id.*; *Smith v. State*, 2024 MT 225, ¶ 21. Because the State has raised only improper new arguments and has abandoned the "exception" argument it made below, its attempt to render SB458 exempt from Article V's "clear title" rule with its new *Ryan*-based argument fails on appeal.

2. The State Has Jettisoned the "Clear Title" Arguments it Made Below and Raised Improper New Arguments Instead.

As it did with its exemption argument, the State raises new arguments on "title clarity" for the first time on appeal. Below, the district court succinctly noted that "[t]he State does not address the fact that 'sex' has more than one definition (generally…sexual intercourse or gender)." App. B.7. Now, the State has conceded that the word "sex" has two meanings, *i.e.*, "sexual activity" and "sex classification." Opening Br.10, 27. A flashing red light signaling that the State has raised new arguments are the ***twelve*** "single subject, clear title" decisions it did not cite below and relies on now. (*Compare* Opening Br.iii-iv *with* Dkt.21 and Tr., Part 1, 21-35). While citing new authority that supports arguments raised below is not forbidden on appeal, throwing out the old arguments and starting over with new ones is not allowed. *Seymour*, ¶ 14.

Although its briefing is a confusing hodgepodge of case law citations and unsupported assertions, the State appears to make three arguments as follows:

> (1) the district court wrongly failed to apply an "average" or "ordinary" reader standard, under which SB458's title is clear enough to notify readers to locate a copy of the bill and review the bill's body to understand its subject. Opening Br.16, 20-25.
>
> (2) the "clear title" rule does not require "indexing" of "subordinate components" contained in the bill's body, like the (purportedly) "superfluous" detail that "female" and "male" are newly defined in SB458's body. Opening Br.19, 23-31.
>
> (3) the district court improperly ignored or misread the phrase "when referring to a human," which "modifying clause" is the contextual key to keeping SB458's merely "ambiguous" title inside the "presumed constitutional" boundary. Opening Br. 21-23, 28-33.

These new arguments were not raised below.

First, the State did not propose any role below for an "average or ordinary" reader standard, much less an "only pique their curiosity" rule, in either its briefing or at oral argument. Quite the opposite. The State's briefing below bemoans "the proliferation of radical gender theory," and assumes that readers of SB458 approach their interpretation of the bill's title as "activist ideologues," part of "a modern political movement" that "reject[s] objective reality." Dkt.21, 7-10. While oral argument toned down the rhetoric, the State did not make an "average" or "ordinary" reader argument there either. It cannot do so now. *Seymour*, ¶ 14.[10]

[10] The State may attempt to argue on Reply that the post-appeal *Netzer* decision created a new standard, so it could not have addressed it below. This is incorrect. First, as shown below, there is no such rule, the State has misread *Netzer*. Second, the State has already agreed that *Netzer* "merely reaffirmed" established precedent, not that it created new rules. Opening Br.10, 18.

Second, the State also did not argue below that the court failed to recognize the terms defined in the bill's body were mere "subordinate components," germane subparts that did not need to be "indexed" in the title. Rather, as the district court noted, "[t]he definition of the words 'female' and 'male' are more than details of the Bill, they are (***as acknowledged by the State***) the subject of the Bill." App. B.11 (emphasis added). And, indeed, the State *did* acknowledge this. *See* Dkt.15, ¶ 3 (Thane Johnson affidavit) ("[i]n sum, Senate Bill 458 defines male and female for purposes of several statutes under the Montana Code"). The State cannot now argue the opposite. *Seymour*, ¶ 14.

Third, the State did not rely below (as the State now does, Opening. Br.21-25) on the bill's language "when referring to a human" as the "qualifying" or "modifying" phrase that (purportedly) gives context in the title necessary for a reader to understand SB458 is addressing the "classification" meaning of "sex" not the "sexual activity" meaning. Instead, it argued below that "to provide a Common Definition" is the key "qualifying phrase." Dkt.21, 8. The district court considered and rejected *that* argument: "However, regarding the title, the phrase 'to provide a common definition' is not problematic. Rather, the title is not clear as to what version of 'sex' the legislature is intending 'to provide a common definition.'" App. B.12. Again, a "party's theory *may not* change on appeal" like the State tries here. *Johnson*, ¶ 13 (emphasis added).

The State cannot treat the district court as if it were holding some kind of moot court exercise wherein the State could try out arguments (politically-charged or otherwise) and finding them wanting simply jettison the old ones and come up with new theories on appeal. Unlike the process this Court approved in *Netzer* (¶¶ 7, 19-22), the State did not even file a Rule 59(e) motion to bring its new case law and theories before the district court, granting it the courtesy to provide "judicial clarity" if the State's new arguments convinced it such was needed. Even worse, in its brief to this Court, the State chastises the district court for "inexplicably" overlooking a case the State did not cite, and accuses the court of conducting a "superficial evaluation," and being "willfully obtuse," based on arguments the State never raised below. Opening Br.5-16, 21.

The proper remedy for this irregular conduct is evident: This Court should reject these new arguments on appeal, and, as in *Forward Montana*, address the merits solely of the State's attorneys' fees theories. Anything else would be "fundamentally unfair to fault the trial court for failing to rule on an issue it was never given the opportunity to consider." *Smith*, ¶ 21.

B. The District Court Properly Concluded SB458 is Facially Unconstitutional Under Article V, § 11(3).

Should the Court decide, despite its contrary precedent, to review the State's new theories on their merits, it will find them meritless. Simply put, Article V, § 11(3) of Montana's Constitution provides a controlling, procedural rulebook for

the *lawful* enactment of enforceable laws. SB458 took the most common route to become law, via enactment of a legislative bill. Plaintiffs prevailed below because in enacting SB458 into law, the Legislature violated the rulebook. The district court properly concluded that SB458's title does not clearly express the bill's subject as required by Article V, §11(3) because that title fails to clarify which meaning of the polysemous word "sex" SB458 intended to define. The Constitution's rulebook prohibits such obfuscation in the title of a bill, whether by mistake or on purpose. No matter how complex the State strives to make this matter, it really is that simple.

1. SB458 Must Comply With Article V, § 11(3)'s Clear Title Rule.

Even were this Court to consider the State's new *Ryan*-based "substance and purpose argument," that argument is wrong on the law. In their briefing below, Plaintiffs pointed to the particular meaning of "codification" as used in § 11(3)'s exemption language. *See* Dkt.23, 5-12 (explaining that "codification" in Article V, § 11(3) means the promulgation and publication of new Codes of Laws, as has occurred on occasion in Montana's history, *e.g.,* in 1895, 1907, 1921, 1947 and with the MCA in 1978). The court addressed this issue in its summary judgment order, explaining: "Plaintiffs' legal analysis on this point is persuasive. Past 'codifications of the law' have included the creation of a new code on a particular subject" or similar extraordinary occurrences, citing *State ex rel. Nelson v. District*

Court, 173 Mont. 221, 229 (1977). The district court explained that in *Nelson*, this Court determined that "an Act creating a Montana Code of Criminal Procedure" was a codification. App. B.6. Neither SB458's title nor its ordinary enactment process are at all similar to this creation of a new Code of Law.

Below, the State simply ignored this issue regarding the precise meaning of "codification" in Article V, §11(3). It tries to ignore it here as well. But based on the case law and the Framer's words, the district court correctly concluded "Plaintiffs have shown that SB458 is not a codification of the laws within the meaning of Article V, §11(3) and the state has not shown otherwise." App. B.6.

Ryan does not change this conclusion. In that 1897 case, this Court first addressed the extraordinary legislative session of 1895, which "was essentially a session of codification and general revisions of all the laws of the state, both those which had been carried forward from the Session Acts of the Territory, and those which had been enacted at the third [legislative] session of 1893." 20 Mont., 65.

It was in this far from ordinary 1895 session where Montana's first "four proposed codes—the Civil Code, Code of Civil Procedure, Penal Code and Political Code"—were enacted along with certain tagalong bills like HB 291, which were "*incidental to* [this] codification and general revision of all the laws in force." *Ryan*, 66 (emphasis added). HB 291 was enacted in 1895 to "codi[fy] and revis[e] the general laws governing municipal corporations," which were found in

both the new "Political Code and in the act of 1893." *Id.* It was "[u]nder these conditions" that the *Ryan* Court determined the constitutional requirement for a "clear title" did not void HB 291 despite the "mere clerical oversight" of omitting from its title a reference to a particular section. This is because HB 291 was, "in substance and purpose," a bill for "the codification and revision of the general laws governing municipal corporations." *Id.*

From this extraordinary set of circumstances in 1895, the State argues that SB458 should be exempt today from the clear title rule. Opening Br.12-18. This is a preposterous stretch. SB458 had nothing to do with codification of a Code of Laws or even of a volume thereof. It merely revises provisions in random sections of scattered volumes of the MCA. This is nothing like 1895's HB 291 that this Court held in *Ryan* to be a codification "in substance and purpose" *because* it was "incidental" to the concurrently proceeding "*codification* and general revision *of all the laws then in force*." 20 Mont., 66 (emphasis added). In sum, *Ryan* dealt with circumstances not at all similar to SB459's enactment, and provides no support to the State's new argument here.

The State next suggests *State ex. rel. Cotter v. Dist. Court*, 49 Mont. 146, 150 (1914), supports its contention that despite not saying so in its title, SB458 is really a "codification" of the laws. Opening Br.14-18. It is not. As with *Ryan*, the *Cotter* decision involved another of the tagalong laws "incidental" to the massive

codification of Montana's first four Codes of Law in 1895. *Id.*, 150. The tagalong in *Cotter*, HB 142, was similar to *Ryan's* HB 291 in that both were enacted along with the 1895 multiple Codes codification, and both had titles that left out a section number by mistake. *Id.* As in *Ryan*, the *Cotter* Court exempted HB 142 from the clear title requirement as being part of a huge "codification and general revision," an occurrence "so extraordinary in [its] character that both the legislative body and the public are presumed to know what is being done." *Id.*, 152.

Nothing about SB458's enactment is similar to this extraordinary 1895 codification process. The existence of a similar extraordinary process is required for the codification exception to apply. This Court so held in *Cotter*:

> It must be borne in mind that the Act in question [HB 142] was introduced and was on its passage at the same time the Code itself was under consideration. The title so far as it expressed the subject was not misleading. Indeed, it was in a sense legislation being considered concurrently with that embodied in the Code, intended to become a substantial part of it and to become operative at the same time the Code itself went into effect, vis, on July 1, 1895. It would never have become operative unless the Code itself had been adopted. ***For the reason that HB [142] was introduced as a part of the general plan of codification and revision in hand, we think, it should*** be classed under the head of revisionary legislation on divorce, and to ***fall within the exception of the Constitution applicable to such legislation, and as not rendered invalid by the apparent defect in its title***.

Id., 15 (emphasis added).

In short, SB458 is nothing like the tagalong bills at issue in *Ryan* and *Cotter*. It was not enacted as part of a new Code of Laws, it was not introduced as part of a "general plan of codification" at all, much less "incidental" to a plan like the huge 1895 codification of four Codes of Law at issue in *Ryan* and *Cotter*. Like *Ryan*, the *Cotter* decision does not support the State's new "substance and purpose" argument. It, too, is inapposite.

Next (Opening Br.16), the State tries to distinguish *Nelson*, which was relied on by the court and Plaintiffs below. App. B.6; Dkt. 23, 10-12. But *Nelson*, 173 Mont. 221, is precisely on point. In *Nelson*, this Court held two laws (one enacted in 1967, the other in 1974) met the "codification" exception to the Constitution's "clear title" requirement because they created new Code volumes. The first "created a Montana Code of Criminal Procedure," and the second "Codifi[ed]" the laws for the Department of Institutions. *Nelson*, 229. Both of these bills were very different in their scope from SB458. And unlike SB458, these two bills both stated *in their titles* that they were acts "to codify" or "for the codification of," the laws. *Nelson*, 229.

The Framers of the 1972 Constitution who readopted Article V, § 11(3)'s "clearly expressed in its title" language from Article V, § 23 of Montana's 1889 Constitution (applied in *Ryan*, *Cotter* and *Nelson*), addressed this same limited nature of the "codification" exception. Toward the end of a lengthy argument that

resulted in "the purity of the titles" requirement being maintained in the current constitution, Delegate Aronow put the "codification and generally revising" exception in context, explaining that "the codification of the law takes place periodically about every five years or so, as a legislative act *that codifies the statutes of Montana*," *i.e.,* codification of a new Code of Laws, not a mere revision of part of a pre-existing statute already included in a Law Code. Verbatim Tr. 655-56 (emphasis added). The Framers were aware of *Ryan* and *Cotter* and their discussions of what "codification" meant in those early years. Indeed, Delegate McNeil suggested that "a very good reason to retain [the 1899 Constitution's] language [is] so we won't throw 82 years of Supreme Court decisions out the window." Verbatim Tr. 649.

Accordingly, it is clear from their words and actions that the Framers intended for Article V, §11(3) to retain the same specific meaning of "codification" that this Court applied in *Ryan* and *Cotter* (and after 1972, in *Nelson*). That is, occurrences out of the ordinary, involving whole codes, not a single, ordinary bill like SB458. This plainly expressed "intent of the Framers controls [the] interpretation of a constitutional provision." *Bd. of Regents*, ¶ 12.

Adopting the State's attempted new interpretation would eliminate the "clear title" requirement, contrary to the insistence of the Framers to keep the "purity of titles" in place, by the mere artifice of bill sponsors adding the words "codifying

and generally revising the laws" to all new statutes, even when they do not codify anything as the Framers understood the term.[11] This Court rejects proffered interpretations that would allow the Constitution's "requirements to be easily undermined by simple drafting techniques." *Mont. Ass'n of Counties ("MACo") v. State*, 2017 MT 267, ¶ 24.

In sum, SB458 is a common bill, not an extraordinary one. The Framer's own words and this Court's prior precedents preclude the State's attempt to warp the specific meaning of "codification" included in the Constitution's "clear title" clause into something unrecognizable and unworkable. This Court must affirm.

2. SB458 Does Not Have a Title That Clearly Expresses its Subject.

a. <u>There is no "pique the average reader's" curiosity test</u>.

Even if the Court were to decide to address the merits of the State's new "title clarity" arguments, and it should not, those new arguments also fail. In the

[11] This is not conjecture. The 2025 Legislature's substitute for the voided SB458—SB 437—does just this, calling SB 437 an "act for the codification and general revision of the laws," even though it codifies nothing in the constitutional sense intended by the Framers. https://legiscan.com/MT/bill/SB437/2025 (last visited 3-12-26). Oddly, this substitute bill has not become law. House Leadership has kept it on hold, not sending it to the Governor to sign, "to prevent it from being immediately tied up with ongoing litigation over [SB458] passed last session." Montana House Republicans, *Press Release* (Aug. 25, 2025), https://x.com/MTHouseGOP/status/1959988918373552176 (last visited 3-12-26).

court below, the State refused to come to grips with the fact that "sex" has more than one definition. App. B.7. At oral argument, for example, it provided no counter to the Clinton-Lewinsky example raised by counsel (Tr., Part 1, at 10) and did not address the reality that "sex" is a polysemous word, despite being pressed by the court to do so. *Id*., 33-35.

On appeal, the State concedes that two different meanings— "human sex classification [and] sexual activity"—exist. Opening Br.21. It accuses the district court, however, of being "willfully obtuse" and "feign[ing] confusion about whether the bill surreptitiously concerned sexual intercourse, despite the title's express limitation to sex 'when referring to a human,'" because that is "a reading that no average reader would ever embrace." *Id.*

The State never explains how it reaches this conclusion, and it is wrong. The Clinton-Lewinsky example makes this clear. Whether sexual intercourse is the only human activity covered by the word "sex" has long been an issue of national interest. Moreover, as shown in the Statement of Facts, empirical linguistics statistics demonstrate that an average reader, when faced with the undefined term "sex," is much more likely to encounter "sex" in its meaning "as activity" than in its "classification" meaning "as dimorphism (male or female)." *See Brezina*, 2-3. The State has offered nothing to the contrary. Calling the district court's conclusion "willfully obtuse" is just another version of the old legal

saying that when you have the law, argue the law. When you have the facts, argue the facts. When you have neither, pound the table. The State has neither the facts nor the law, and is left only with making noise.[12]

The State further asserts the district court "compounded [its] contrived ambiguity" by ruling SB458's title is unclear because "a person must read the text of the body of the Bill to learn which meaning of 'sex' is intended." Opening Br.21 (quoting App. B.11-12). The State blusters the Constitution does not "prohibit consulting the bill's text." *Id.* Perhaps not, but as mandated by the Framers, the Constitution certainly *does* prohibit an "impure" title that *requires* such a consultation for a reader to apprise herself of what the bill's subject is. Verbatim Tr., 648-655. *See also Netzer*, ¶ 34 (citing *Forward Montana*, ¶ 26, for the understanding that this Court *does* "require that a title not mislead, but fairly apprise the public and legislators of its most pertinent subjects … to prevent the legislators and the people generally being misled by false or deceptive titles").

The State cites to *Netzer* for its contrary argument, quoting language that "[a] title is constitutional where it is sufficient to direct a person with an ordinary,

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[12] The old saying about empty noise goes back centuries. William Shakespeare gave us one version: "sound and fury, signifying nothing," *Macbeth* (Act 5, Scene 5). Perhaps the most puzzling "sound and fury" here is the State's seemingly irritated insistence that the district court "ignored" the five *McKinney* principles reiterated in *Netzer*, ¶¶ 24-30. Opening Br.19. In fact, the court quoted and "addresse[d] each of these principles in turn." App. B.8-12 (analyzing and applying the five *State v. McKinney* principles, 29 Mont. 375, 380-82 (1904)).

reasonably inquiring mind to an act's body." Opening Br.21 (citing *Netzer*, ¶ 35). This is not this Court's language, however, but merely a "see also" cite to a quote from a treatise. *See Netzer*, ¶ 35 (quoting 1A Shambie Singer, *Sutherland Statutory Construction*, § 17:2 (8th ed.)). "Purity of the titles" is the requirement in Montana, not title language ambiguous enough to confuse readers and fail to put them on notice of "the subjects" *actually* "embraced" in the bill's body. *Netzer,* ¶ 35 (citing cases); Verbatim Tr., 648-655. The State is wrong to insist otherwise; an absurd title like "Read this Bill, it's Interesting" could pass muster under its suggested new test. In short, there is no "pique the average reader's curiosity" notice standard for assessing a title's clarity under Article V, §11(3); a proper legislative title in Montana must put readers on notice of a bill's actual subject.

State v. Ross, 38 Mont. 319 (1909) and *Yegen v. Bd. of Comm'rs of Yellowstone Cnty*, 34 Mont. 79 (1906), the sole cases other than *Netzer* the State relies on are not to the contrary. Opening Br.22. The complaint in *Ross* was the title was too comprehensive, proving the bill had "more than one subject," not that its title was deceptive. 38 Mont., 321. The court here did not reach the "more-than-one-subject" issue, only the misleading title issue. App. B.12.

Conversely, the *Yegen* decision *is* a deceptive title case. It involved an act regarding powers of the *state* board of health that Yellowstone County relied on to "establish a *county* detention hospital." 34 Mont., 81 (emphasis added). This

Court explained: "no one would conclude from a reading of its title [about the *state* board of health] that the Act had concealed in its bosom a provision creating *county* boards of health," and found the bill "invalid." *Id.*, 85. *Yegen*, then, nicely makes the district court's point: no one reading SB458's title and understanding it to embrace the "sexual activity" meaning of "sex" would possibly conclude that "concealed within its bosom" are provisions defining "female" and "male" to limit gender by body parts at birth. App. B.11-12. Thus, under *Yegen*, SB458's title is constitutionally invalid. *See also State v. Cuningham*, 35 Mont. 547, 549-50 (1907) (finding deceptive a title about regulating "estrays upon the public domain" when the bill's body addressed any estray "away from its accustomed range," because 'public domain' and 'range' have different dictionary meanings).

Among its twelve newly-cited decisions, the State fails to address the case most on point *against* its new "curiosity piquing" theory. In *Russell v. Chicago, B. &. O. RR*, 37 Mont 1 (1908), the Court addressed "An Act to amend [several Political Code sections] relating to Bonds of Officers and Other Bonds." *Id.*, 17. "Bond" is a classic polysemous word. It can encompass everything from a 30-year U.S. Treasury note to the result of the use of Superglue on a broken item. Just as it is not enough here to include "sex" in SB458's title without defining the version meant, in *Russell* it was not enough to use "other Bonds"—without definition or context—to allow the Legislature to amend the amount of "a bond" necessary to

file an appeal in the Supreme Court. But that's what the Legislature did, and that's what this Court voided under the "clear title" constitutional requirement. *Id.*, 17.

No matter that "other bonds" might well have piqued a 1907 reader's curiosity, this Court held clarity is required, not ambiguity: "[E]ven upon the most liberal rule of construction," this title with its undefined polysemous word "bond" could not satisfy the Constitution's "clear title" rule. *Id.*, 13-14. No matter how much the State may wish it so, there is no "put an average reader on notice to track down and read the bill's body" standard. Article V, §11(3) requires clarity of legislative titles to inform readers what the bill's subject actually is *without* resort to the bill's body, not misleading titles with curiosity-invoking ambiguity.

b. <u>"Female" and "male" in SB458's body are not mere "subordinate components" of the bill's title.</u>

The State's new "subordinate components" argument fails on the State's own words below and here. In a nutshell, the State argues that by faulting the Legislature for failing to include in SB458's title notice that the words "female" and "male" are newly defined in the bill's body, the district court violated the "germaneness" principle. Opening Br.23. That principle requires only that a title state "its general purpose," and that every detail necessary to accomplish that purpose, *i.e.,* which is "germane" to the purpose, "need not be separately listed" or "indexed" in the title. *Id.*

In fact, the district court acknowledged the "germaneness" doctrine, which is the fourth *McKinney* principle, but found it inapplicable on the facts of SB458 because "the definition of the words 'female' and 'male' are more than details of the Bill, they are (*as acknowledged by the State*) the subject of the bill." App. B.10-11 (emphasis added).

As shown above, the State acknowledged this reality below. *See* App. B.8 (citing Thane Johnson affidavit, Dkt.15, ¶ 3) (attesting that SB458 "defines male and female for purposes of several statutes under the Montana Code"). It also acknowledges this reality here, proffering the testimony of SB458's main proponent that the bill "*just adds three simple definitions* to the Montana Code," 'female,' 'male' and 'sex.'" Opening. Br.4 (quoting Glimm legislative hearing testimony). Nothing "subordinate" here. Adding these ***three*** definitions is the Bill's purpose and its subject: define all three words, not just "sex." *Id.*

In these undisputed circumstances, "female" and "male" are not mere definitional or subordinate "components" that are "germane" to the bill's subject. They *are* that bill's "subject" and had to be referenced in the title for SB458 not to be deceptive. As the district court explained this reality:

> Here, the body of the Bill does not treat only the subject in the title (definition of the word 'sex') – the body of the Bill also addresses the definitions for the words 'female' and 'male.' While the definitions of 'female' and 'male' in the body of the Bill is germane to the definition of 'sex' which the title mentions, the Court has already described how the word 'sex'

> in the title is not clearly distinguished (i.e. intercourse or gender). A person must read the text of the body of the Bill to learn which meaning of 'sex' is intended in the title.

App. B.10-11.

And, of course, requiring "an examination of the whole amendatory Act" is precisely what the "clear title" requirement prohibits. *Russell*, 37 Mont., 13; Verbatim Tr. 648-642. The State offers no response that could fix this conundrum of its own making. The district court did not require the legislature to include "a complete list of all matters covered by the Bill" in SB458's title, as the State wrongly suggests, or demand that "superfluous detail" be included therein. Opening Br.23-29. Instead, the court reviewed what the State promulgated to determine whether SB458 has a clear title which informs readers what version of "sex" the bill's body addresses, and that the body defines "female" and "male." *See* App. B.11. Because the legislature failed to do its job to provide a clear title, there was nothing else the district court could do but its job, and hold SB458 void as a deceptive bill. *Cuningham*, 35 Mont., 549-50; *Russell*, 37 Mont., 13.

The new cases the State cites are, again, not to the contrary. Opening Br.29. *State v. Driscoll*, 101 Mont. 348 (1936), dealt with a comprehensive "intoxicating liquor" bill. Nothing in the title was deceptive, it simply did not index the myriad of details related to that one subject the title clearly expressed. *Id.*, 357-58. That is not at all similar to SB458's fatal flaw. *Lewis & Clark County v. Industrial*

Accident Bd., 52 Mont. 6 (1916), is much the same. It involved a comprehensive title stating the act was a bill "providing for the protection and safety of workmen in all places of employment." *Id.*, 7. The complaint was that the title did not specifically say it covered "county" workmen. Nothing misleading, the title simply did not provide a list of all specific types of workmen it covered, because it covered them all. *Id.*, 11-12.

Again, this is nothing like SB458's problem of failing to provide a definition for a word with multiple meanings. *State v. Pippi*, 59 Mont. 116, 1 20 (1921) is similar. It involved a clear title about prostitution prohibitions that listed one but not all "means for the effective enforcement of the statute," again nothing like SB458's fatal "misleading title" flaw.

The State's "no indexing required" argument is inapposite. The district court did not require indexing of a multitude of details; it simply held the Legislature to the Constitution's requirement of "clearly expressing" a bill's subject in its title. Senator Glimm himself explained the purpose of SB458 is to define all three words: sex, female and male. Opening Br.3-4. Because SB458's title does not "clearly express" that purpose, summary judgment must be affirmed.

c. <u>The phrase "when referring to a human" in SB458's title does not provide distinguishing context.</u>

The State's switch on appeal to arguing "when referring to a human" is really the key context-providing "modifying" phrase in SB458's title makes little

sense. Opening Br.21-23, 32-33. Both definitions of 'sex' that the State now concedes exist, *i.e.,* "sexual activity" and "classifications," refer to human beings. There is nothing about the phrase "when referring to a human" that clarifies which version of "sex" SB458 addresses. Humans have sex, and humans can be classified by sex. Either definition fits SB458's title.

This is the intractable problem the State has no answer for. It accuses the district court of failing to "presume constitutionality" if at all "in doubt," but offers no answer to the misleading nature of a polysemous word like "sex" when referring to humans left undefined in a bill's title. Opening Br.25-27, 31-33. The district court answered the State's query: "After the application of all [the *McKinney*] principles, the court ***is not in doubt*** of the constitutionality (pursuant to Mont. Const. art. V, § 11(3)) of SB458. The subject of the Bill is not clearly expressed in its title." App. B.11 (emphasis added).

One last time, the new cases the State cites for this new argument offer nothing useful, here to sow the "reasonable doubt" the State tries so hard to find. Opening Br.26, 32. *Netzer* dealt with an essentially clear title addressing "vaccines" that was not misleading; it just did not list as many details as the defendant argued it should. *Netzer*, ¶¶ 38, 59. That is nothing like SB458's fatal "misleading" flaw caused by an undefined polysemous word. As shown above, *Ross* was a "single subject" case, not one alleging an unclear title. *Id*., 38 Mont.,

321-23. *Evers v. Hudson*, 36 Mont. 135, 144 (1907) involved a "title [that is] clear and comprehensive … indicat[ing] the object to be accomplished." The problem was "a meaningless portion" the Court held it was fine to strip out of the bill. Nothing like SB458's title with its undefined polysemous word.

In conclusion, the State has failed to offer any argument or precedent in support of its new theories that make them any better than the old arguments the district court properly rejected below. The problem is not the lack of case law; it's the lack of any possible fix to the problem at hand other than voiding the bill. Because the Legislature chose a deceptive and misleading title for SB458, the district court had no choice under the Constitution's "clear title" mandate but to declare SB458 unconstitutional. That decision must be affirmed.

C. The District Court Properly Awarded Attorneys' Fees.

1. The District Court Correctly Determined Plaintiffs are Entitled to Attorneys' Fees.

The district court closely followed this Court's precedent in awarding fees under the PAGD. The State has no persuasive argument to the contrary. The Court should affirm.

First, the State argues plaintiffs failed to vindicate any public policy of sufficient societal importance. Opening Br.34-36. But as the district court explained, this argument fails. In *Forward Montana*, citing cases covering well over a century of law, this Court ruled in no uncertain terms that when "clear title"

policies are vindicated, as here, "to restrict legislative enactments to those made known to lawmakers and the public, to prevent legislators and the people from being misled, and to guard against obfuscation by the Legislature," those *are*—as a matter of law—policies "sufficiently weighty to justify fees." App. C.6; *Forward Montana*, ¶ 35.

The State insists Plaintiffs did not "restrain governmental overreach." Opening Br.36. That is not a standalone PAGD factor. Even if it were, the State ignores the fact that Plaintiffs prevailed against the State's new argument, made here, regarding "generally revising" bills. This theory (not raised in *Forward Montana*, despite the bill there, like SB458, also saying it was "an act generally revising" laws. *Id.*, ¶ 28) argues that SB458 is exempt from the "clear title" requirement because of a title drafting trick. As explained, *supra*, in section IV, B.2, if this piece of "government overreach" had prevailed, it could well have written the "clear title" requirement out of the constitution. By prevailing, Plaintiffs protected the public from the possible loss of the very constitutional right this Court has declared "sufficiently weighty to justify fees." *Forward Montana*, ¶ 35. Factor one is met.

Second, the State concedes (Opening Br.37) the "necessity for private enforcement" factor, but insists Plaintiffs somehow failed to demonstrate a sufficient "magnitude of the resultant burden" on them. But as the district court

explained, the sworn evidence of the "hours spent on litigating the constitutionality of SB458" alone has "sufficiently shown the magnitude of the resultant burden on Plaintiffs in litigating the MSJ." App. C. 8. The State could have conceded when faced with its losing hand. It did not. Nothing more is required; factor two is met.

Third, the State argues Plaintiffs failed to "identify a concrete group of people benefiting" from their victory. Opening Br.38. As the district court explained, and this Court has as well, the important policies protected by Article V, §11(3) mean that prevailing in "clear title" litigation is itself "sufficient to pass muster under the third factor." App. C. 9-10 (quoting *Forward Montana*, ¶ 42, and the State's concession there that challenges like this one are to "enforce[e] important constitutional restraints affecting all Montanans"). Thus, it is *all Montanans* who benefit from Plaintiffs prevailing here. That is "a concrete group of people benefiting." *See also Barrett v. State*, 2024 MT 86, ¶ 63 (all Montanans "benefit when constitutional interests are vindicated") (Justice Gustafson concurring). Factor three is met.

Fourth, the fact that the State has now jettisoned all its arguments made below goes a long way toward establishing it has been litigating this case in bad faith all along, which also meets the "bad faith guidepost." *Forward Montana*, ¶ 19. Even before this happened, the district court had already determined "the State chose to defend the MSJ" here, despite "no bona fide difference of opinion that

omitting 'female' and 'male' from the title of SB458 violates the single subject rule[.]" App. C. 19-20.

Moreover, the district court was clearly correct that the Legislature had to have known that SB458's title was deficient, but used it, nonetheless. App. C. 16-18. Sponsor Glimm was crystal clear regarding his proposed new law's purpose of providing new definitions for three words, but left any mention of two of the three out of the title. *Id.*, 17. Only a few years earlier, this Court had warned about the potential for confusion arising from "specific definition[s] of 'sex,'" and required care to be taken to assist "voters [in] understanding how" use of that term "may apply to transgender and intersex individuals." *ACLU of Montana Found., Inc. v. State*, OP 17-0449, 2017 Mont. LEXIS 627, **4-5.

Care was not taken with SB458: "willful disregard" by the Legislature "of constitutional obligations" also meets the PAGD guidepost. *Forward Montana*, ¶¶ 20, 30. The State wants this case to be "garden-variety," but offers nothing to show it was. Under this Court's precedents, the district court correctly applied the PAGD and should be affirmed.

2. The District Court Awarded an Appropriate Amount of Attorneys' Fees.

On this final issue, the district court properly held a hearing, listened to the witnesses and experts, and found the testimony of Plaintiffs' expert more convincing. That expert established how the rates counsel charged were

reasonable for the level of their experience and special knowledge in constitutional matters, on the high end, but by no means the highest of reasonable rates charged in Montana. App. D. 5-7, 14, 17. Likewise, he established that the time spent, particularly with the write off of non-productive associate time, was also reasonable. *Id.*, 10-11, 14-16.

The State is unhappy, but proffers nothing to show abuse of discretion by the district court in reaching these conclusions. The State concedes that it had a difficult-to-meet standard for reversal. Opening Br.9 ("[a]n abuse of discretion exists if the district court acted arbitrarily, without the employment of conscientious judgment, or exceeded the bounds of reason resulting in substantial injustice"). The State did not meet that standard. This Court should affirm.

VII. CONCLUSION

In conclusion, SB458's title is deceptive. The bill's subject is not "clearly expressed" in the title in violation of Article V, §11(3). Because the State failed to protect the public from this reality, other counsel were required to remedy the situation on behalf of all Montanans, protecting their constitutional rights of government transparency and freedom from legislative obfuscation. The PAGD exists for this very reason; encouraging private attorneys to take on consequential constitutional litigation when the State declines to provide the protections its citizens require. The district court correctly applied that doctrine and properly

entered an award of attorneys' fees well within its broad discretion. This Court should affirm.

Respectfully submitted this 13th day of March, 2026.

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CERTIFICATE OF COMPLIANCE

The undersigned, Kyle A. Gray, certifies that this Brief complies with the requirements of Mont. R. App. P. 11. The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with Times New Roman Font typeface consisting of fourteen characters per inch. The total word count is 9,973 words, excluding the caption, certificates of compliance and service, signature block, tables of contents and authorities. The undersigned relies on the word count of the word processing system used to prepare this document.

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Representing: Austin Miles Knudsen, State of Montana
Service Method: eService

Electronically Signed By: Kyle Anne Gray
Dated: 03-13-2026