

IN THE SUPREME COURT OF THE STATE OF MONTANA  
No. DA 25-0809

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RIKKI HELD, et al.

Plaintiffs and Appellees,

v.

STATE OF MONTANA, et al.

Defendants and Appellants.

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**APPELLANTS DEPARTMENT OF ENVIRONMENTAL QUALITY,  
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION,  
DEPARTMENT OF TRANSPORTATION, AND GOVERNOR  
GIANFORTE OPENING BRIEF**

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On Appeal from the Montana First Judicial District Court, Lewis and Clark County  
Cause No. CDV-2020-307, the Honorable Kathy Seeley, Presiding

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## **STATEMENT OF THE ISSUES**

1. Did the District Court err in awarding attorney's fees under the Private Attorney General Doctrine when it applied a rebuttable presumption in favor of fees and rejected consideration of separation-of-powers concerns?
2. Did the District Court err in awarding fees under the Uniform Declaratory Judgments Act when its reasoning would apply equally to any constitutional challenge brought by a private litigant against a government entity?
3. Did the District Court err in awarding nearly \$3,000,000 in taxpayer dollars to ten attorneys for a case resolved via a highly publicized trial, despite the modest relief ultimately awarded—the facial invalidation of a single statute?

## **STATEMENT OF THE CASE**

When Plaintiffs filed this case, they sought ongoing judicial supervision over all state activities that may result in increased greenhouse gas (“GHG”) emissions. Ultimately, after a weeklong trial that received unprecedented national media attention, the District Court granted modest relief, holding discrete subsections of a single statute facially unconstitutional. This Court affirmed, with the greater part of its opinion focused on the relatively more difficult question of Plaintiffs’ standing to bring a facial challenge to MEPA’s permitting provisions.

Following resolution of the appeal, the Plaintiffs sought—and the District Court awarded—nearly \$3,000,000 in attorney’s fees. The District Court applied “a rebuttable presumption” in favor of attorney’s fees under the private attorney general doctrine. The District Court also determined that fees should be awarded under the Uniform Declaratory Judgments Act (“UDJA”), concluding that, because the State has greater “governmental resources” than private parties, the equities necessarily support an award of fees.

Plaintiffs initially sought \$3,072,189 in fees for the work of ten attorneys and \$122,354.13 in costs. *See* Docs. 447-455. In their reply brief, they contended that, if the District Court reduced their fees, the minimum award should be \$2,857,193 in fees and \$98,667.73 in costs. Doc. 464 at 18-20. After a hearing the District Court awarded nearly the full measure of attorney’s fees requested, reducing the requested fee to precisely the amount Plaintiffs discussed in their reply brief. Order on Fees at 28-29 (Doc. 485).<sup>1</sup> Defendants timely appealed.

## **STATEMENT OF FACTS**

In March 2020, sixteen children and youth—the youngest only two years old—sued the State of Montana. The lawsuit fell within a worldwide climate

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<sup>1</sup> The District Court’s fee order is attached to this brief. Additional documents are included in the State of Montana’s appendix, referenced in this brief at “State App.”

litigation strategy, led by nonprofit law firm Our Children’s Trust.<sup>2</sup> And it was the first of its kind to succeed, as similar cases brought by the same firm had been dismissed, primarily on jurisdictional grounds. Bolstered by the success in this matter, the lawsuits continue apace.<sup>3</sup> Since this Court affirmed the District Court’s invalidation of § 75-1-201(2)(a), MCA (“MEPA Limitation”), Our Children’s Trust filed a new case in federal district court in Montana, which was dismissed as nonjusticiable, *Lighthiser v. Trump*, CV 25-54-BU-DLC, 2025 WL 2930569, and a new state court matter, pending in district court after this Court declined to exercise original jurisdiction over the case, *Held v. Montana*, No. OP 25-0853 (Mont. Dec. 23, 2025).

These lawsuits share common features. The plaintiffs are children, the cases are highly publicized, and the requests for relief are expansive. For example, in Our Children’s Trust’s first significant case, *Juliana v. United States*, the plaintiffs sought “an order requiring the [federal] government to develop a plan to phase out fossil fuel emissions and draw down excess atmospheric CO<sub>2</sub>,” a request the Ninth Circuit found to fall outside the federal judiciary’s remedial authority. 947 F.3d 1159, 1164–65 (9th Cir. 2020) (quotation omitted); *see also In re United States*, D.C.

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<sup>2</sup> *See* Our Children’s Trust, <https://www.ourchildrenstrust.org>.

<sup>3</sup> *See* Our Children’s Trust, *Legal Proceedings in all 50 States*, <https://www.ourchildrenstrust.org/legal-proceedings-in-all-50-states>.

No. 6:15cv-1517, 2024 WL 5102489 (May 1, 2024) (granting government’s petition for mandamus when district court allowed plaintiffs to amend their complaint), *cert. denied sub nom.* 145 S. Ct. 1428 (2025).

So, too, did Plaintiffs seek extraordinary relief when they filed their 104-page Complaint initiating this case in 2020. Unlike in *Juliana*, their prayer for relief included a request that the District Court declare unconstitutional and enjoin enforcement of specific statutory provisions. State App., Ex. C, at ¶ 102. But, like in *Juliana*, Plaintiffs requested far more than the invalidation of specific statutes, seeking:

[1] [a]n order requiring Defendants to prepare a complete and accurate accounting of Montana’s [greenhouse gas (“GHG”)] emissions, including those emissions caused by the consumption of fossil fuels extracted in Montana and consumed out of state, and Montana’s embedded emissions;

[2] [a]n order requiring Defendants to develop a remedial plan or policies to effectuate reductions of GHG emissions in Montana consistent with the best available science and reduction necessary to protect Youth Plaintiffs’ constitutional rights from further infringement by Defendants, and to reduce the cumulative risk of harm to those rights; to submit the remedial plan to the Court by a date certain; and to implement the plan;

[3] [a]n order that, if necessary, a special master or equivalent, with appropriate expertise, be appointed to assist the Court in reviewing the remedial plan for efficacy; [and]

[4] An order retaining jurisdiction over this action until such time as Defendants have fully complied with the orders of this Court, or there are adequate assurances that Defendants will continue to comply in the future absent continuing jurisdiction[.]

State App. Ex. C, ¶103.

On Defendants’ motion to dismiss, the District Court concluded that this case was distinguishable from *Juliana* in that Plaintiffs sought declaratory relief relating to specific statutory provisions under the unique environmental protections of the Montana Constitution. Importantly, however, it rejected the vastly greater portion of the relief requested—a sweeping, seemingly interminable injunction and ongoing judicial supervision over state energy policy. The District Court found that this request, like that in *Juliana*, “presents a political question and exceeds the court’s powers.” State App. Ex. D at 16-17 (Doc. 46). Defendants therefore succeeded in large part, preventing the separation-of-powers crisis that would have arisen from a court taking control of all state activities that may result in net positive GHG emissions.

Once the District Court resolved the first motion to dismiss, the only questions left were purely legal questions of whether specific statutory provisions were facially unconstitutional. Defendants filed another motion to dismiss following legislation passed during the 2023 legislative session and separately moved for summary judgment. State App. Ex. E (Doc. 379).

Although the only remaining issue was the facial constitutionality of the MEPA Limitation, Plaintiffs did not seek summary judgment. Trial was highly publicized and featured prominently in Our Children’s Trust’s fundraising efforts.<sup>4</sup>

Following trial, the District Court found for Plaintiffs, holding the MEPA Limitation unconstitutional. This Court affirmed. *Held v. State*, 2024 MT 312, 419 Mont. 403, 560 P.3d 1235.

On remand, Plaintiffs moved for attorney’s fees under the private attorney general doctrine and the Uniform Declaratory Judgments Act (“UDJA”). The District Court awarded fees under both theories, applying reasoning that would be equally true in any constitutional case. Order at 22-23 (Doc. 485). Additionally, it shifted the burden to Defendants to prove that fees should not be awarded under either or both theories. Within the “Findings of Fact” portion of its order, it wrote: “Defendants have not overcome the rebuttable presumption that ‘when a Montana citizen has to resort to litigation in order to vindicate a constitutional right, the

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<sup>4</sup> See Wayback Machine Our Children’s Trust, *Held v. State* - Countdown to Trial, <https://web.archive.org/web/20220305003149/https://www.youthvgov.org/held-v-montana> (archived from Mar. 5, 2022) (stating, on March 5, 2022, that “*Held v. State of Montana* will be the first ever children’s climate trial in U.S. history” and featuring calls to action such as “Donate today!”); Press Release (Oct. 4, 2022), available at [https://www.climatecasechart.com/documents/held-v-state-press-release\\_8d01](https://www.climatecasechart.com/documents/held-v-state-press-release_8d01).

citizen is entitled to a rebuttable presumption [sic] that he should not bear the expense of that litigation.’” Order at 19 (Doc. 485).

The District Court reasoned that the private attorney general doctrine should apply because the case vindicated constitutional interests, the Defendants otherwise would have enforced unconstitutional statutes, and the relief afforded “ha[s] become a part of the body of law applicable to all Montanans in many situations.” *Id.* at 23. Under the UDJA, it concluded that the parties are “not similarly situated,” as “Defendants have significantly more resources in terms of governmental structure, personnel, and power”; that Plaintiffs needed to seek a declaration to “stop the continued violation of the constitution by Defendants’ defense and application of unconstitutional statutes.” *Id.* at 24-25. The court awarded the full amount requested by Plaintiffs in their reply brief: \$2,857,193.00 in attorney’s fees and \$98,667.73 in costs. *Id.* at 28-29.

## **STANDARDS OF REVIEW**

Whether the District Court applied the correct legal standard to the threshold issue of eligibility for attorney’s fees is one of law, reviewed for correctness. *Burns v. Cnty. of Musselshell*, 2019 MT 291, ¶ 10, 398 Mont. 140, 454 P.3d 685. “If legal authority exists, [the Court] review[s] for an abuse of discretion the court’s order granting or denying fees.” *Forward Mont. v. State*, 2024 MT 75, ¶

12, 416 Mont. 175, 546 P.3d 778. An 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.” *Id.* It also “occurs if a lower court exercises lawful discretion based on . . . an erroneous conclusion or application of law[.]” *Cook v. Bodine*, 2024 MT 189, ¶ 10, 418 Mont. 49, 555 P.3d 236.

### SUMMARY OF THE ARGUMENT

In awarding fees, the District Court erred as a matter of law—several times over. As a threshold matter, it applied a presumption in favor of fees and faulted Defendants for not overcoming that presumption. If its approach to the private attorney general doctrine were applied universally, then courts would be required to award fees universally. But the exceptions cannot be allowed to “swallow” the American rule, regardless of whether the winning party’s fees would come from a private litigant or from Montana taxpayers. *Forward Mont.*, ¶ 14.

The District Court again erred in applying the private attorney general doctrine without regard to separation-of-powers concerns. This Court has repeatedly cautioned that fees should be awarded against the State in only narrow circumstances to avoid judicial interference with the policy-making functions of the legislative branch and the executive branch’s obligations to enforce and defend

legislation. The District Court (appropriately) did not find that Defendants acted in bad faith, but it refused to consider the absence of bad faith within its analysis. Nor did it consider the novelty of Plaintiffs' claims and the weighty interests advanced by Defendants.

The District Court's analysis under the UDJA fares no better. The court disregarded all equitable considerations other than the parties' relative power, and its analysis there can be reduced to a determination that fees should issue because Defendants are government entities. In reality, Defendants were not better-resourced than Plaintiffs. The UDJA is also a poor fit for fees because Plaintiffs sought continuing judicial oversight over all state environmental policy and settled for declaratory relief only when the broad relief initially requested became available. And the real-world impacts of this litigation are unsettled.

Finally, even if the private attorney general doctrine or the UDJA authorized fees, the fee award must be reasonable. Nearly \$3 million in fees simply is not. The Plaintiffs received only modest relief, which is dwarfed by the relief they initially sought. This Court should reverse the District Court's fee award.

## ARGUMENT

### **I. Plaintiffs are not entitled to fees under the private attorney general doctrine.**

The District Court's application of the private attorney general doctrine is premised on two significant mistakes of law. First, the District Court applied a presumption in favor of fees, flipping the burden on Defendants to show why fees should not be awarded. Second, the District Court failed to heed this Court's caution that courts must exercise care in awarding fees against the State to avoid interference with the other branches of government. After correcting these mistakes, nothing is left to support an award of fees under the private attorney general doctrine.

#### **A. The District Court applied an erroneous legal standard, under which essentially all successful constitutional litigation would result in an award of fees.**

The District Court profoundly misstated the law in its fees order. The District Court's erroneous expansion of the private attorney general doctrine is premised on two fundamental errors, both of which demand reversal: it created a presumption in favor of fees, and it disregarded all equitable guideposts outside the *Montrust* factors.

**1. The District Court erroneously shifted the burden to Defendants when it applied a presumption in favor of fees.**

The District Court erred as a matter of law in applying a “rebuttable presumption that ‘when a Montana citizen has to resort to litigation in order to vindicate a constitutional right, the citizen . . . should not bear the expense of that litigation.’” Order at FOF ¶ 104 (Doc. 485) (quoting *MEIC v. Governor*, 2025 MT 112, ¶ 44, 422 Mont. 136, 569 P.3d 555 (Shea, J., concurring)). Unequivocally, no such rebuttable presumption exists under the private attorney general doctrine. Rather, the private attorney general doctrine is a “narrow” doctrine that may only be “invoked . . . sparingly.” *Clark Fork Coal. v. Tubbs*, 2017 MT 184, ¶ 16, 388 Mont. 205, 399 P.3d 295; *see also W. Tradition P’ship, Inc. v. Attorney General*, 2012 MT 271, ¶ 13, 367 Mont. 112, 291 P.3d 545.

This Court has never suggested that fees should be inferred whenever a plaintiff brings a successful constitutional claim. In fact, the Court has squarely and repeatedly explained that the opposite is true. *See Forward Mont.*, ¶ 25 (“courts must use caution in awarding fees against the State in ‘garden variety’ constitutional challenges so as not to improperly infringe on the separation of powers”); *W. Tradition P’ship*, ¶¶ 13, 16 (doctrine “has been invoked sparingly” and should be applied with consideration of the “separation of powers between the branches”); *Barrett v. State*, 2024 MT 86, ¶ 67, 416 Mont. 226, 547 P.3d 630

(Gustafson, J., dissenting from denial of fees) (where “legislative acts are at issue,” court “use[s] caution so as not to interfere with proper functioning of the legislative branch”); *id.* ¶ 72 (McGrath, C.J., concurring) (“we use caution in awarding fees against the State under the private AG doctrine so as not to improperly interfere with the separation of powers”).

Nonetheless, the District Court cited to Justice Shea’s concurrence in *MEIC v. Governor* to support a universal presumption in favor of fees in constitutional litigation. But, as this Court well knows, the rebuttable presumption discussed in that case applies in a wholly different context: an award of attorney’s fees under the statutes implementing the Right to Know, which expressly authorize an award of attorney’s fees. *MEIC v. Governor*, ¶¶ 8–18; Mont. Code Ann. § 2-6-1009 (“A person alleging a deprivation of rights who prevails in an action brought in district court to enforce the person’s rights under Article II, Section 9, of the Montana [C]onstitution . . . may be awarded costs and reasonable attorney fees.”). Much differs between the right to know context and the present dispute, including the simplicity of litigation (and the ensuing fee award), the complete relief available to successful plaintiffs, and—most importantly—the existence of a statute expressly authorizing attorney’s fees.

A presumption of attorney’s fees in the absence of a statutory or contractual provision would decimate the separation of powers considerations that have always guided application of the private attorney general doctrine. Absent statutory authorizations, courts make a threshold determination of whether the plaintiff’s goals are important enough to support a fee award, a determination that approaches “the legislative function.” *W. Tradition P’ship*, ¶ 16 (quoting *Bitterroot Protective Ass’n v. Bitterroot Conserv. Dist.*, 2011 MT 51, ¶ 22, 359 Mont. 393, 51 P.3d 131; see also *N.M. Right to Choose/NARAL v. Johnson*, 986 P.2d 450, 451 (N.M. 1999) (the doctrine may tempt courts to “look beyond the proceedings . . . to determine which rights are of more societal importance than others, which classes of litigants have protected such rights, and which class of people have benefitted from such protection.”); *Alyeska Pipeline Co. v. Wilderness Soc’y*, 421 U.S. 240, 269 (1975) (warning that judicially created exceptions to the American Rule leave courts free to “pick and choose among the plaintiffs and the statutes under which they sue and to award fees in some cases but not in others,” depending on how the court views “the importance of the public policies involved in particular cases.”)).

The District Court misstated the law when it recognized and applied a presumption in favor of its fee award. This error alone—the error of presuming

that fees should be awarded under the private attorney general doctrine—compels reversal.

**2. The District Court erroneously rejected any separation of powers considerations in its application of the private attorney general doctrine.**

The District Court again erred as a matter of law when it applied the *Montrust* factors without regard to the separation of powers and to the exclusion of all other considerations. To be sure, the District Court addressed a *single* equitable consideration within its discussion of UDJA fees—the relative strength and resources of the parties. Setting aside its error in weighing the equities within the UDJA, *see infra* Part II, the District Court erred as a matter of law in wholly disregarding the degree to which the fee award may interfere with the separation of powers—a consideration essential whenever fees are awarded against the State. *See W. Tradition P’ship*, ¶ 16; *Forward Mont.*, ¶ 25.

Because the private attorney general doctrine is an equitable exception to the American Rule, the Court must “consider whether an award of fees would be unjust under the circumstances.” *W. Tradition P’ship*, ¶ 14 (citing *Finke v. State ex rel. McGrath*, 2003 MT 48, ¶ 33, 314 Mont. 314, 65 P.3d 576). Simplistic application of the *Montrust* factors, with no additional guardrails, would mandate attorney fees in virtually every constitutional case. But that has never been this

Court’s approach to the private attorney general doctrine. Rather, this Court’s “reluctance to invade the province of” its “coequal branch[es] of government,” has demanded greater caution. *Forward Mont.*, ¶ 19.

*Forward Montana* and *Western Tradition Partnership* exemplify this approach. In each case, the Court examined certain criteria to avoid interfering with the separation of powers: (1) whether there were important public or constitutional interests on both sides; (2) whether the case involves novel or settled legal issues; and (3) whether the legislature enacted, or the executive defended, the challenged law in bad faith. *Forward Mont.*, ¶¶ 18, 19, 25–34; *W. Tradition P’ship*, ¶¶ 18, 20. These criteria may factor into the *Montrust* framework or be separately considered. In any event, though, this Court “generally do[es] not apply the Doctrine when a government agency represents a public interest and complies with its duties.” *Forward Mont.*, ¶ 37 (citing *In re Dearborn Drainage Area*, 240 Mont. 39, 43, 782 P.2d 898, 900 (1989)).

To be fair, some confusion about how to synthesize these criteria with the *Montrust* analysis is natural. In *Burns v. County of Musselshell*, a case brought against a local government entity, this Court looked no further than the *Montrust* factors. 2019 MT 291, 398 Mont. 140, 454 P.3d 685. And this Court’s recent decision in *Barrett* was fractured, with no single controlling rationale. Two justices wrote that

“while a court may *consider* frivolousness or bad faith, . . . the three *Montrust* factors, and the ultimate determination of whether the government, for some reason, failed to properly enforce interests which are significant to its citizens, remain dispositive.” *Barrett*, ¶ 57 (Gustafson, J., joined by McKinnon, J., dissenting). Two justices emphasized that “bad faith” was the “predicate” of the attorney fees award in *Forward Montana* and wrote that “other equitable considerations can be relevant beyond the three *Montrust* factors, such as bad faith, that may be used as a guidepost in determining fee awards.” *Id.* ¶¶ 75–77 (McGrath, C.J., joined by Baker, J., concurring). One justice did not need to address the significance of bad faith because he would affirm the denial of fees based on failure to satisfy the *Montrust* factors. *Id.* ¶ 86 (Shea, J. concurring). And the remaining two justices would have reversed on other grounds, without reaching the issue of attorney’s fees. *Id.* ¶¶ 87–98 (Rice, J., dissenting); *id.* ¶ 99 (Sandefur, J., dissenting).

This case presents an opportunity to provide much-needed clarity for lower courts and litigants. *Cf. Upper Missouri River Waterkeeper*, 2025 MT 137, ¶¶ 38–39, 422 Mont. 449, 571 P.3d 626 (Bidegaray, J., concurring). Under *any* applicable framework, the separation of powers matters. Even those justices who dissented from the denial of fees in *Barrett* agreed that caution is warranted where legislative

acts are at issue, even if those concerns could appropriately be considered within the *Montrust* framework. *Id.* ¶ 67, 416 Mont. 226, 547 P.3d 630 (Gustafson, J., joined by McKinnon, J., dissenting). Thus, the simplest way to synthesize this Court’s precedents about the private attorney general doctrine is to consider competing constitutional interests, the novelty of the issues, and bad faith within the first *Montrust* factor. *See Forward Mont.*, ¶ 19 (We have discussed that the separation of powers cautions us to avoid interfering with other branches under the first factor).

Regardless of the precise formulation of the test, however, this Court must correct the lower court’s error in ignoring the separation of powers concerns inherent in its fee award.

**B. The private attorney general doctrine does not authorize a fee award.**

The three “*Montrust* factors” guide the threshold question of whether fees may be available under the private attorney general doctrine: “(1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity of private enforcement and the magnitude of the resultant burden on the plaintiff, (3) the number of people standing to benefit from the decision.” *W. Tradition P’ship*, ¶ 14, (quoting *Montanans for the Responsible Use of the Sch. Trust v. State ex rel. Bd. of Land Comm’rs*, 1999 MT 263, ¶ 66, 296 Mont. 402, 989 P.2d 800

(“*Montrust*”).<sup>5</sup> The first factor appropriately encompasses the separation-of-powers considerations discussed in *Forward Montana* and *Western Tradition Partnership*. See *supra* Part I.A.2.

The District Court erred in its bare-bones application of the *Montrust* factors, which disregarded all separation of powers and would, if applied consistently, lead to a fee award in every constitutional case.

- 1. Although Plaintiffs vindicated important constitutional interests, Defendants did not act in bad faith, advanced competing constitutional interests, and defended against novel (and previously unsuccessful) claims.**

When appropriately cabined by the concerns animating this Court’s most significant cases under the private attorney general doctrine, the first *Montrust* factor is not satisfied. While “the strength or societal importance of the public policy vindicated by the litigation” is relevant, that is not the be-all and end-all of the first *Montrust* factor. *Montrust*, ¶ 66. If it were, then fees would be available in every successful constitutional claim brought against the state—which is decidedly

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<sup>5</sup> The *Montrust* factors derive from California precedents beginning with *Serrano v. Priest*, 569 P.3d 1303 (Cal. 1977). The California legislature separately amended the California code to include a private attorney general statute in 1977; although that statute was not yet in effect when *Serrano* was decided, the bill had been passed. Thus, the judicially created private attorney general doctrine had an extraordinarily short shelf-life in California. See *Serrano v. Unruh*, 652 P.2d 985, 985 n.1; Cal. Code Civ. P. § 1021.5.

not the rule. *See Barrett; W. Tradition P’ship; Finke*. Notably, this factor does not invite courts to “assess[] . . . the relative strength or weakness of public policies furthered by their decisions.” *W. Tradition P’ship*, ¶ 16.

Rather, even where “[t]he constitutional principles underlying th[e] litigation cannot be doubted,” this Court considers the degree to which an award of fees would invade the separation of powers. *Id.*; *accord Forward Mont.*, ¶¶ 18–19. Here, the first *Montrust* factor is not satisfied because Defendants’ arguments were “grounded in constitutional principles,” involved novel legal issues, and did not evince either executive or legislative bad faith. *W. Tradition P’ship*, ¶ 20.

First, like in *Western Tradition Partnership* and unlike in *Forward Montana*, Defendants’ arguments advanced competing constitutional interests regarding the structure of government. Although they did not win the day, these interests were recognized by members of this Court. *Held*, ¶¶ 77–78 (Sandefur, J., concurring); *id.* ¶¶ 81–102 (Rice, J., dissenting). And they have succeeded in other state and federal courts confronted by comparable lawsuits, including many brought by Our Children’s Trust. *See, e.g., Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020); *G.B. v. United States EPA*, No. CV 23-10345-MWF (AGRx), 2025 U.S. Dist. LEXIS 24811 (C.D. Cal. Feb. 11, 2025); *United States v. United States Dist. Ct. for the Dist. of Or. (In re United States)*, No. 24-684, 2024 U.S. App. LEXIS 31945 (9th

Cir. May 1, 2024); *Sagoonick v. State*, 503 P.3d 777 (Alaska 2022); *Chernaik v. Brown*, 367 Or. 143, 475 P.3d 68 (2020); *Funk v. Wolf*, 144 A.3d 228 (Pa. Commw. Ct. 2016); *Layla H. v. Commonwealth*, 81 Va. App. 116, 902 S.E.2d 93 (2024); *Aji P. v. State*, 16 Wash. App. 2d 177, 480 P.3d 438 (2021); *Natalie R. v. State of Utah*, Case No. 220901658 (3rd Jud. Dist. Ct., Ut., Nov. 9, 2022); *Reynolds v. State of Florida*, Case No. 2018-CA-819 (Fla. Cir. Ct., Jun. 9, 2020), *aff'd*, No. 1D20-2036 (Fla. First Dist. Ct. App., May 18, 2021).

Defendants' arguments, like those successfully made by other governments in these other cases, were grounded in federalism, justiciability, and state separation of powers concerns, essential features of our system of ordered liberty. *See In re Knudsen*, 2025 MT 304, ¶ 110, 2025 WL 3771396, -P.3d- (“The ultimate purpose of [the] separation of powers is to protect the liberty and security of the governed.”) (quoting *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 272 (1991)). Two independently elected members of the Executive branch, the Governor and the Attorney General, “deemed” these interests “equally significant to its citizens” and both had constitutionally grounded duties to defend those concerns. *W. Tradition P’ship*, ¶¶ 17, 20; *Bullock*, ¶ 33; § 2-15-101, MCA.

And the Governor and Attorney General were not alone in their assessment, as evidenced by the multitude of *amicus* briefs filed in the appeal. Fifteen other States echoed the state’s concerns, arguing that questions of energy policy are best answered by the political branches and the federal government. *See* Br. of *Amici Curiae North Dakota, et al.*, (“Multistate Br.”) at 1, 2–3, 7–10, 14–17. The Navajo Transitional Energy Company agreed that Commerce Clause concerns existed and argued that this Court’s decision would harm the energy development—and economic interests—of the Navajo Nation. *See* Br. of *Amicus Curiae Navajo Transitional Energy Co.* (Feb. 23, 2024). A labor and business association worried that this Court’s order would infringe on other “inalienable rights,” like the right to pursue basic necessities like “energy, food, transportation, property use and ownership.” *See* Br. of *Amicus Curiae Treasure State Resources Ass’n*, at 9–10 (Feb. 16, 2024). And many other *amici* worried about the effect of a broad ruling on Montana’s business environment. *See id.* Br. of *Amici Curiae U.S. Chamber of Commerce, et al.*, (Feb. 16, 2024); *see also id.* Br. of *Amici Curiae Frontier Institute, et al* (Feb. 20, 2024). Again, although these arguments did not convince a majority of the members of this Court, they are not frivolous and they have deep roots in the federal and state constitutions.

Second, like in *Western Tradition Partnership* and unlike in *Forward Montana*, this case was litigated in a “shifting legal landscape[.]” *W. Tradition P’ship*, ¶ 20. Indeed, it was this case that *shifted* the landscape. No one disputes that *Held* is unprecedented. Before *Held*, this Court had not reached the “difficult exercise of determining what attributes constitute a ‘clean’ or ‘healthful’ environment, or an ‘unreasonable’ amount of degradation, or what the judiciary’s role should be in answering these questions.” *Park Cnty. Env’tl Council v. Mont. Dep’t of Env’tl Quality*, 2020 MT 303, ¶ 78, 402 Mont. 168, 477 P.3d 288. And while these questions have not been definitively resolved, this case was the first to squarely present Montana courts with them, and it did so in the context of the complicated issue of global climate change. Not only was it a first for Montana; it was a first for the nation. *Held* was “the *first time* in which an American court decided on the merits that a law promoting the use and consumption of fossil fuels infringed upon constitutional rights.” Recent Case, *Mont. Court Holds that Mont. Youth Can Access Equitable Relief for Climate Change*, 137 Harv. L. Rev. 1491, 1495 (2024) (emphasis added).

Third, like in *Western Tradition Partnership* and unlike in *Forward Montana*, this case involves no finding of bad faith. The District Court did not suggest that bad faith existed. Order, COL ¶ 15 (Doc. 485). Rightly so.

The Attorney General and Governor did not act in bad faith in defending this action. “A legal defense is made in bad faith ‘when it is outside the bounds of legitimate argument on a substantial issue on which there is a bona fide difference of opinion.’” *W. Tradition P’ship*, ¶ 10; *see also Barrett*, ¶ 76 (McGrath, C.J., concurring). The Attorney General’s and Governor’s justiciability arguments were not “outside the bounds of legitimate argument” — they were successful in similar cases from other jurisdictions. *See supra* Section I.B.1 (listing cases). And they persuaded the District Court to dismiss some of Plaintiffs’ claims here. *See State App. Ex. D at 19-21 (Doc. 46) (dismissing four of Plaintiffs’ claims under the political question doctrine).*

Nor did the Legislature act in bad faith. The 2011 MEPA Limitation was passed through an ordinary legislative process and garnered bipartisan support. Nor do the circumstances surrounding the 2023 Legislature’s amendment of the MEPA Limitation through HB 971 evince legislative bad faith. HB 971 was passed in response to a district court’s decision in *another* case, which held that “the plain language of § 75-1-201(2)(a), MCA (2011), did not absolve DEQ of its MEPA obligation . . . to evaluate a project’s environmental impacts—including impacts from GHG emissions—within Montana.” *Held*, ¶ 11. Although the Court

ultimately found the enactment unconstitutional, it was motivated by a legitimate legislative purpose, to clarify the law in response to a different lawsuit.

**2. This case was an opportunity, not a necessity, for Plaintiffs and their counsel.**

The second factor, the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, likewise weighs in favor of Defendants. *Montrust*, ¶ 66. At bottom, a fee award does not serve the ultimate goal of the private attorney general doctrine, to incentivize public interest litigation that otherwise may not be brought. *See Forward Mont.*, ¶ 24 (citing *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 91, 338 Mont. 259, 165 P.3d 1079). This is not the typical *pro bono* case in which such an incentive might be necessary—instead, it is part of a well-funded and strategic global effort to combat climate change spearheaded by a highly sophisticated and well-funded nonprofit law firm.

The District Court entirely disregarded the circumstances of this case, reducing the second factor to the questions of whether (a) unconstitutional laws existed causing harm to Plaintiffs and (b) litigation was resource intensive. FOF ¶¶ 33–39. But both features were equally true of the claims presented in *Western Tradition Partnership*, which involved a successful First Amendment challenge and a reversal by the U.S. Supreme Court. *See W. Tradition P'ship*, ¶ 42 (Nelson, J., dissenting); *Forward Mont.*, ¶ 51 (Rice, J., dissenting); *Am. Tradition P'ship v.*

*Bullock*, (2012), 576 U.S. 516, 132 S. Ct. 2490. If the litigation burden in *Western Tradition Partnership* could not overcome separation of powers concerns, nor should it do so here.

This litigation also was not *necessary*, as the MEPA Limitation was separately challenged in a different case after a permit was issued for the Laurel Generating System. *MEIC v. Mont. DEQ*, 2025 MT 3, ¶¶ 7, 420 Mont. 50, 561 P.3d 1033. The parallel challenge to the MEPA limitation in *MEIC* leads to the possibility of bizarre outcomes. Had that case been resolved first, Plaintiffs in this case may have seen their claims mooted, resulting in the unavailability of fees. Three million in taxpayer dollars should not hang on arbitrary factors such as timing. Moreover, *MEIC* reveals the limits of this litigation, which does not compel consideration of GHG emissions in permitting decisions. *See infra* Section I.B.3.

Further, the magnitude of the *burden* reflects Plaintiffs' litigation choices far more than the facial unconstitutionality of the MEPA Limitation, which could have been addressed at summary judgment. Plaintiffs sought extraordinary relief in the form of ongoing judicial oversight over all state environmental regulation, Plaintiffs chose to go to trial, and Plaintiffs introduced more evidence than necessary to facially invalidate the MEPA Limitation. *See infra* Section II.B. There is nothing wrong with Plaintiffs' all-in litigation strategy, which successfully raised public

awareness for their cause and for Our Children’s Trust. But it suggests that this case was a strategic opportunity for an organization focused on changing national energy policy, not a strict necessity. The second *Montrust* factor weighs against a fee award.

**3. The tangible impact of this case for other Montanans remains unclear.**

The third *Montrust* factor, the number of people standing to benefit from the litigation, remains unclear. The District Court held that “[t]he number of people standing to benefit from this Court’s decision . . . is the number of persons who benefit from the rights in Montana’s Constitution.” Order at 9 (Doc. 485). The District Court rejected the State’s argument that *Held* “does not have broad effect within the context of State review and permitting of activities affecting Montana’s environment,” and asserted that this ignored “the holdings of this Court and the Montana Supreme Court[.]” *Id.* Here, too, the District Court’s reasoning would apply across the board, to every successful constitutional claim.

The practical effect of this case is not so clear-cut. *See* Quinn Yeargain, *Against Environmental Rights Supremacy*, 26 PENN. J. CONST’L L. 1323, 1341–45 (section titled “The Overblown Outcome of *Held v. Montana*”). As one prominent state constitutional law scholar argues, “The magnitude of the reaction to such a narrow ruling—which treated the outcome as a revolutionary event that would

precipitate similar constitutional changes and even more litigation—is genuinely difficult to fathom.” *Id.* at 1345.

In this litigation, the Court decided “only that the Constitution does not permit the Legislature to *prohibit* environmental reviews from evaluating GHG emissions” and left “[o]ther issues” to be decided “in the context of specific permitting cases.” *Held*, ¶ 68 (emphasis added). *MEIC v. DEQ*, decided a few weeks after *Held*, addressed those “other issues.” First, it clarified: “We did not hold in *Held*, and do not hold here, that DEQ is required to analyze GHG emissions for every potential state action. Nor do we hold that DEQ must regulate GHG emissions in an air quality permit application.” *MEIC*, ¶ 57. *MEIC* thus ruled out the possibility that GHG emissions analysis will be required in every MEPA review after *Held*. Instead, agencies must analyze GHG emissions for certain high-emitting projects—like the Laurel Generating Station—but DEQ need not analyze GHG emissions in every MEPA review. *See MEIC*, ¶¶ 43–58. This is consistent with this Court’s reasoning that “declaring the MEPA Limitation unconstitutional *is not* congruent with commanding the State to consider climate change in every project or proposal.” Doc. 379 at 14 (emphasis added).

Second, *MEIC* reaffirmed that, even after *Held*, DEQ cannot deny permits based on MEPA analysis of GHG emissions without additional *substantive*

regulation authorizing the agency to do so. *See MEIC*, ¶¶ 52–58. In so holding, the Court confirmed that MEPA governs the provision of information, not substantive permitting authority. *See* § 75-1-201(4)(a), MCA. Thus, even now, an “agency may not withhold, deny, or impose conditions on any permit or other authority to act” based on its MEPA analysis. § 75-1-201(4)(a), MCA (2023). While *MEIC* did not answer every question about how *Held* will impact environmental reviews and permitting decisions, it did make clear that *Held* does not provide independent constitutional authority for DEQ to deny a permit or require GHG analysis for every state action.

Make no mistake: Plaintiffs’ victory is important, as is every case vindicating constitutional rights. But the public conception of this case is greater than its practical impact. All three *Montrust* factors weigh against an award of fees.

## **II. The District Court erred in awarding fees under the Uniform Declaratory Judgment Act.**

To avoid “eviscerating the American Rule,” UDJA fee awards are available only in “narrow” circumstances. *City of Helena v. Svec*, 2014 MT 311, ¶ 18, 37 Mont. 158, 339 P.3d 32 (quoting *W. Tradition P’ship*, ¶ 11). “[S]imply because a party filed an action seeking a declaratory judgment it is not automatically presumed that an award of attorney fees is necessary and proper.” *Mungas v. Great Falls Clinic, LLP*, 2009 MT 426, ¶ 44, 354 Mont. 50, 221 P.3d 1230. This is true

regardless of whether the defendant (or, for that matter, the plaintiff) is a government entity. *Town of Kevin v. N. Cent. Mont. Reg. Water Auth.*, 2024 MT 159, 417 Mont. 325, 553 P.3d 392.

“The threshold question for an award of attorney fees under the UDJA is whether the equities support an award.” *Town of Kevin*, ¶ 20; *Upper Missouri Waterkeeper v. Broadwater Cnty.*, 2025 MT 137, ¶ 19, 422 Mont. 449, 571 P.3d 626. At times, the three-part “tangible parameters test” may be helpful to “guid[e] . . . future applications of [the UDJA],” but the test should not be seen as “defin[ing] the exclusive circumstances justifying an award.” *Trs. of Ind. Univ, v. Buxbaum*, 2003 MT 97, ¶¶ 42–46, 315 Mont. 210, 69 P.3d 663; *see also Mungas*, ¶ 46 (declining to address the tangible parameter test when claims were brought by “relatively sophisticated, well-educated, well-informed physicians” who were on “equal footing” with defendants).

Here, as under the private attorney general doctrine, the District Court’s erroneous legal reasoning would apply with equal force in *any* constitutional challenge. Here, too, the District Court erred in both stating and applying the relevant standard, mechanically reciting an erroneous legal standard and ignoring all evidence that did not support its fee award. The equities do not support the fee

award because Plaintiffs do not lack resources relative to Defendants and because the tangible parameters test is not satisfied.

**A. Attorney’s fees are not appropriate in every UDJA claim against a government entity, and after correcting the District Court’s erroneous statement to the contrary, the litigants’ relative power counsels against a fee award.**

The District Court erred in explaining when the parties’ relative power supports a fee award. The District Court concluded that “[t]he equities . . . support a grant of attorney fees pursuant to the UDJA” because “[t]he parties are not similarly situated.” Order at COL ¶19 (Doc. 485). It gave two reasons for its conclusion. First, it wrote that “Defendants have significantly more resources in terms of governmental structure, personnel, and power to devote to the duty to protect Montana’s natural resources and environment, including in any court case.” *Id.* Second, it wrote that “[t]he parties are not similarly situated in that Defendants have significantly more resources in terms of legal services.” Order at COL ¶ 20 (Doc. 485). The District Court’s analysis is erroneous both because it misstates the legal standard and because it misapplies that incorrect standard.

As a threshold matter, whether the parties have unequal power, such that the equities support an award of fees, cannot be reduced to whether the plaintiff is a private party and the defendant is a government entity. Yet that is exactly how the District Court viewed it: a government defendant will *always* have more

“governmental structure, personnel, and power” than a private litigant. Order at COL ¶19 (Doc. 485) (emphasis added). But when this Court has considered the propriety of a fee award against a government defendant, its approach has never been to merely ask whether the defendant is a government entity. *See Upper Missouri Waterkeeper*, ¶¶ 19–21 (weighing resources of “standalone 501(c)(3) organization” that “receives no litigation support” against “the combined power of a state agency, county government, and an alleged powerful local landowner”); *Town of Kevin*, ¶¶ 18–20 (affirming award of attorney’s fees to a government entity against another, vastly larger and better funded government entity); *Svee*, ¶¶ 20–21 (city government not similarly situated to homeowners subject to criminal and civil proceedings for attempting DIY home repair due to financial constraints).

Rather, the parties’ relative power refers to the litigation burden suffered by one who must go to court to achieve declaratory relief. “Equity generally does not support an award of attorney fees . . . if similarly situated parties genuinely dispute their rights.” *Hughes v. Ahlgren*, 2011 MT 189, ¶ 13, 361 Mont. 319, 258 P.3d 439; *see also New Hope Lutheran Ministry v. Faith Lutheran Church of Great Falls*, 2014 MT 69, ¶ 75, 374 Mont. 229, 328 P.3d 586, *overruled on other grounds by Warrington v. Great Falls Clinic, LLP*, 2020 MT 174, 400 Mont. 360, 467 P.3d 56. Thus, even where a case “require[s] complex legal analysis of competing claims,” attorney’s

fees are inappropriate when parties are “similarly situated” and “exceptionally well represented by competent legal counsel in the face of settled, but uncommonly litigated, law.” *New Hope Lutheran Ministry*, ¶ 76. The District Court applied an erroneous legal standard when it reduced the question of the parties’ relative power to the question of whether Defendants are government entities.

Remove the District Court’s erroneous statement of the law, and *nothing* in its fees order supports a conclusion that Plaintiffs were relatively less well-resourced than Defendants. The District Court described Plaintiffs as “younger persons suffering the effects of climate change, with arguably no power beyond bringing suit to address their state government’s failure to abide by constitutional provisions.” Order at FOF ¶51 (Doc. 485). This statement ignores the obvious fact that the children involved in this case are not responsible for paying legal counsel; it cannot be that the ages of the plaintiffs selected by legal counsel is a factor weighing in favor of fees. As for the much more important issue of the resources enjoyed by Plaintiffs’ *counsel*, the Court noted merely that, while Plaintiffs’ counsel “were knowledgeable and experienced in the subject matter of the case,” “Defendants also were represented by multiple attorneys, many who regularly work on environmental and constitutional issues.” Order at FOF ¶53 (Doc. 485). In other words, looking only to the District Court’s analysis, it’s a wash.

And if this Court looks beyond the District Court’s Order, the picture becomes even clearer. The State’s resources are not unlimited. Indeed, the Constitution mandates that “appropriations . . . not exceed anticipated revenue.” Mont. Const. art. VIII, § 9. Not only does a multimillion-dollar award of attorney’s fees stretch the State’s finite resources, but the cost ultimately is borne by the taxpayers. This reality reinforces the need for caution, *especially* in litigation involving the State. The District Court’s approach throws that caution to the wind.

For their part, Plaintiffs’ counsel are well-resourced and effective at fundraising and building publicity. *See* Doc. 448 at 16-17 (“Our Children’s Trust is the world’s only law firm dedicated exclusively to securing the legal rights of youth to a healthy atmosphere and safe climate, based on the best available science.”); *see also* Our Children’s Trust, *From Trails to Trials: Fund Democracy in Action* (describing ways to support the organization, including by creating “personalized peer-to-peer fundraising page[s]” and becoming a sustaining donor to receive “postcards that feature our youth plaintiffs”).<sup>6</sup> Our Children’s Trust publicly reports \$4,816,766 of revenue for FY 2023 alone.<sup>7</sup> More than \$3.5 million of that 2023 revenue was allocated to salaries for individuals employed by Our Children’s

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<sup>6</sup> <https://www.ourchildrenstrust.org/donate>.

<sup>7</sup> [https://static1.squarespace.com/static/655a2d016eb74e41dc292ed5/t/6696b5b123059c5e251f98fb/1721152945734/2023\\_990\\_Our\\_Childrens\\_Trust.pdf](https://static1.squarespace.com/static/655a2d016eb74e41dc292ed5/t/6696b5b123059c5e251f98fb/1721152945734/2023_990_Our_Childrens_Trust.pdf)

Trust. And since 2020, the year this case began, Our Children’s Trust has reported \$13,372,165 in revenue.<sup>8</sup> Plaintiffs are not poorly resourced in comparison to Defendants, and the equities do not support an award under the UDJA.

**B. Attorney’s fees also are not appropriate under the UDJA’s tangible parameters test.**

The “tangible parameters test,” initially articulated by Ohio in the insurance context, can also help courts assess the equities. *Buxbaum*, ¶¶ 42–46. The test asks whether (1) the defendant “possesses what the plaintiffs sought in the declaratory relief action”; (2) “it is necessary to seek a declaration showing the plaintiffs are entitled to the relief sought”; and (3) “the declaratory relief sought was necessary in order to change the status quo.” *Svee*, ¶ 22. The first factor has no clear applicability here because of the nature of Plaintiffs’ claims. *See Upper Missouri Waterkeeper*, ¶¶ 28–29. Like the equitable consideration of the parties’ relative power, the remaining two factors weigh heavily against fees.

First, it was not *necessary* for Plaintiffs to seek declaratory relief in this action when they did not challenge any specific permit. The MEPA Limitation was separately challenged in another lawsuit in which greater (though still limited) relief was granted. *See MEIC*, ¶¶ 52–58. Second and relatedly, the declaration

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<sup>8</sup> *Id.*

awarded does not meaningfully alter the status quo between the parties when it does not compel a specific result regarding future permitting decisions. *See id.*; *cf. Davis v. Jefferson Cnty. Election Office*, 2018 MT 32, ¶¶ 14–17, 390 Mont. 280, 412 P.3d 1048 (UDJA fees inappropriate when plaintiffs received greater relief under another statutory provision).

**III. The District Court erred in awarding nearly \$3,000,000 in attorney’s fees when it discounted or ignored all evidence undermining the request—including the staggering scope of the relief initially sought and Plaintiffs’ responsibility for the bulk of the resources expended.**

“If attorney fees are recoverable by statute or contract, an award of fees must be reasonable.” *Ferdig Oil Co. v. ROC Gathering, LLP*, 2018 MT 307, ¶ 24, 393 Mont. 500, 432 P.3d 118. All the more here, where the theory for fee recovery arises by neither statute nor contract. Even if Plaintiffs had established entitlement to attorney’s fees, the District Court abused its discretion in awarding \$2.86 million in fees and nearly \$100,000 in costs. The District Court failed to exercise independent judgment in assuring the reasonableness of the fee award, and the award reflects two fatal errors. First, any award should have been reduced in light of Plaintiffs’ modest degree of success. Second, Plaintiffs’ requested award is not only unreasonable, it shocks the conscience.

**A. Under the lodestar method, Plaintiffs’ fees should be reduced because they achieved minimal success when compared to the relief sought.**

All parties agree that, if fees should be awarded, the lodestar method is the appropriate method of calculation. *Gendron v. Mont. Univ. Sys.*, 2020 MT 82, ¶ 10, 399 Mont 470, 461 P.3d 115 (affirming district court award of \$511,463.40 for class action claim when plaintiffs claimed entitlement to approximately \$3 million).

Seven *Plath* factors generally govern the reasonableness of a fee award under the lodestar method. *Plath v. Schonrock*, 2003 MT 21, ¶ 36, 314 Mont. 101, 63 P.3d 984.

“The *Plath* factors serve as a guideline for district courts to determine reasonable attorney fees, but the factors are non-exclusive.” *Laudert v. Richland Cnty. Sheriff’s Dep’t*, 2001 MT 287, ¶ 29, 307 Mont. 403, 38 P.3d 790.

One of these factors — “the ‘result obtained’” — “may be the dominate consideration where,” as here, “a party is deemed prevailing even though the party succeeded on only some of the claims for relief.” *Plath*, ¶ 37. “If a party’s claims involve a common core of facts or are based on related legal theories . . . then the court may focus on the significance of the overall relief obtained in relation to the hours reasonably expended on the litigation.” *Id.*

Thus, even when applying a fee-shifting statute—in other words, even where the legislature has authorized a fee award and no separation-of-powers concerns

exist—courts should consider whether to adjust a fee downward based on the plaintiff’s success relative to the goals of the litigation. *See Laudert v. Richland Cnty. Sheriff’s Dep’t*, 2001 MT 287, ¶¶ 18–26, 307 Mont. 403, 38 P.3d 790. As the U.S. Supreme Court has stated, where (as here) a plaintiff brings multiple interrelated claims, a court “should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.” *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) (discussing recovery under § 1988, which expressly authorizes fees); *see Laudert*, ¶¶ 18–20 (citing *Hensley* favorably).

The plaintiffs’ relative degree of success is particularly important in cases involving sweeping constitutional theories:

If . . . a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff’s claims were interrelated, nonfrivolous, and raised in good faith. . . . Again, the most critical factor is the degree of success obtained.

Application of this principle is particularly important in complex civil rights litigation involving numerous challenges to institutional practices or conditions. This type of litigation is lengthy and demands many hours of lawyers’ services. Although the plaintiff often may succeed in identifying some unlawful practices or conditions, the range of possible success is vast. That the plaintiff is a “prevailing party” therefore may say little about whether the expenditure of counsel’s time was reasonable in relation to the success achieved.

*Hensley*, 461 U.S. at 436.

On appeal, the central substantive question—whether the Montana Constitution’s strong environmental protections extend to “a stable climate system that sustains human lives and liberties”—was an “easy” one. *Held*, ¶ 76 (Sandefur, J., concurring). The Constitution’s application to the MEPA limitation, once the Court established Plaintiffs’ standing, was similarly straightforward. *Compare Held*, ¶¶ 56–69 (discussing the constitutionality of the MEPA Limitation), *with id.*, ¶¶ 31–55 (discussing standing). And the Court noted that its decision in no way depended on the facts particular to Our Children’s Trust’s brand of litigation, which centers on presenting the testimony of children to courts and sharing images of these children with the greater public. *Id.* ¶ 55 (trial testimony regarding injuries “not necessary for our constitutional standing analysis”).

Certainly, Plaintiffs and their counsel used the trial as an opportunity to raise awareness for their cause throughout the nation.<sup>9</sup> But how much of that trial was necessary to invalidate the MEPA provision? To be sure, it is Plaintiffs’ prerogative to pursue the claims they wish the way they see fit, which extends using nonfrivolous litigation to increase public awareness about their cause. But their

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<sup>9</sup> See Our Children’s Trust, *Historic Climate Trial: Held v. State of Montana*, June 12–20, 2023, available at <https://www.youthvgov.org/held-v-montana> (giving daily trial updates, including daily photos and videos from trial, and providing press kits).

exercise of that prerogative should not become the taxpayers' burden to fund their litigation choices.

Plaintiffs received overwhelming success in the news media but only limited success in the courtroom. *See* *Yeargain*, *supra*, 26 PENN. J. CONST'L L. at 1324 (“The gulf between the relief that the *Held* plaintiffs originally sought (a court order that the state of Montana dramatically reduce its greenhouse gas emissions) and what they actually received (a declaratory judgment invalidating a state statute barring state agencies from considering climate change) was massive.”). At minimum, this matter should be remanded for a reduction in fees in line with Plaintiffs' modest degree of success.

**B. The fee award is unreasonable; invalidation of the MEPA Limitation should not cost \$3 million.**

“When attorney fees are authorized, the controlling standard in all actions ... is that the amount of fees awarded be reasonable.” *Gendron v. Mont. Univ. Sys.*, 2020 MT 82, ¶ 11, 399 Mont. 470, 461 P.3d 115 (citation omitted). Courts must reduce an award by the number of hours that were excessive, redundant, or otherwise unnecessary. *Gendron*, ¶ 16. Plaintiffs “bear[] the burden of showing the reasonableness of the hours billed.” *Tacke v. Energy W., Inc.*, 2010 MT 39, ¶ 32, 355 Mont. 243, 227 P.3d 601 (citation and quotation marks omitted).

To be sure, “trial courts need not, and indeed should not, become green eyeshade accountants,” and the ultimate goal of fee shifting “is to do rough justice, not to achieve auditing perfection.” *Fox v. Vice*, 563 U.S. 826, 838 (2011).

Defendants do not ask the Court to go line-by-line through Plaintiffs’ billing entries. But a few examples demonstrate that the fee award falls far short of the standard required, no matter how relaxed it is:

- Plaintiffs used ten attorneys throughout this case, nine of whom attended trial. State App. Ex. F, ¶ 39 (Riskin Decl.) (Doc. 461).
- Six attorneys billed over 300 hours to draft the complaint, Riskin Decl. ¶ 31, and seven attorneys billed over 50 hours to decide not to amend the complaint when most of it was dismissed, *id.*
- Six attorneys billed 112.9 hours to prepare one attorney for a hearing on the Defendants’ first motion to dismiss. *Id.* ¶ 33.
- Eight attorneys billed 62.3 hours (which they ultimately discounted by 17%) for a half-hour Rule 26(f) conference. *Id.* ¶ 35.
- Five attorneys attended a three-hour deposition. Three asked for fees for all of their time; one asked for fees for one-third of their time; and the District Court awarded all fees requested. *Id.*

- Seven attorneys billed 228 hours and nearly \$100,000 for work related to the appeal before Defendants filed their opening briefs; six attorneys billed 29 hours (\$12,584) to read the opening briefs; and six attorneys billed 251.9 hours (\$120,565) to prepare one attorney for oral argument. *See* Docs. 449-452; Defendants’ Proposed FOFCOL (filed 5/29/2025) at 57, nn. 22-25 (calculating time from Plaintiffs’ declarations).

No client would pay for this level of staffing. *See Ihler v. Chisholm*, 2000 MT 37, ¶ 51, 298 Mont. 254 995 P.2d 439 (“Hours that are not properly billed to one’s client are not properly billed to one’s adversary.”).

Just as it is not wrong to use nonfrivolous litigation to increase public awareness of one’s cause, it is not wrong to take an all-hands-on-deck approach to a major public interest litigation effort. But that does not make it right to shift the costs of this choice to the taxpayer.

Two recent highly complex environmental cases serve as useful comparators. Start with the recent Rosebud Mine litigation. *See Mont. Env’t Info. Ctr. v. Westmoreland Rosebud Mining, LLC*, 2023 MT 224, 414 Mont. 80, 545 P.3d 623 (“*Rosebud*”); *see also Mont. Env’t Info. Ctr. v. Mont. Dep’t of Env’t Quality*, No. DV 2019-34, Order Awarding Reasonable Attorney Fees and Costs (Mont. 16th Jud. Dist. May 13, 2022) (“*Rosebud Fees Order*”). That case involved a challenge

to DEQ's permit for a coal mine expansion in the Rosebud mine. *Rosebud*, ¶ 2–3. It was “actively litigated” and hotly contested “in multiple forums over six years.” *Rosebud Fees Order* at 2–3. The facts of the case involved complicated technical and scientific issues, requiring unique lawyering skills. *See, e.g., Rosebud Fees Order* at 12–14. As DEQ put it during the litigation, “simply *reviewing* the voluminous material in a coal-mining application can consume a couple thousand manhours, potentially stretched out over months to years.” *Rosebud Fees Order* at 3 (citation omitted; emphasis original). The legal issues in *Rosebud* were also highly complex: they “required the Court to consider the interlocking statutes and regulations of two comprehensive federal laws . . . and two state laws” in an area with little to no binding precedent. *Rosebud Fees Order* at 4. Plaintiffs’ attorneys received \$862,755 in attorney fees and costs. *Rosebud Fees Order* at 27. The *Rosebud* district court noted that this award was high, but it is less than one-third of what Plaintiffs’ attorneys were awarded here. *See id.* at 25.

Consider next the *Abbey/Land* litigation. *Abbey/Land* involved ten years of uniquely contentious litigation across multiple federal and state forums. *Abbey/Land, LLC v. Glacier Constr. Partners, LLC*, 2019 MT 19, ¶ 4, 394 Mont. 135, 433 P.3d 1230 (*Abbey/Land II*). Yet the fee award there was about one-quarter of what Plaintiffs’ attorneys received here. That case revolved around Donald G.

Abbey's plans to build one of Montana's largest luxury homes on a private island in Flathead Lake. *Abbey/Land, LLC v. Glacier Constr. Partners, LLC*, 2015 MT 19, ¶ 5, 394 Mont. 135, 433 P.3d 1230 (*Abbey/Land I*). After a few years, construction problems arose, causing significant damage and leading to multi-forum litigation between Abbey/Land, Glacier, and the subcontractors, *Abbey/Land I*, ¶ 4, with previously aligned parties turning against each other, *Abbey/Land II*, ¶¶ 9, 16–27. These parties turned out to be involved in collusion. *See Abbey/Land II*, ¶¶ 16–27. All told, the victor in the case had to slog through over five years of intense litigation, including two trips to this Court, before it finally won the right to intervene and obtain a judgment reversing the collusive settlement and dismissing the case. *See Abbey/Land II*, ¶¶ 29–32. Yet after all this, James River was awarded attorney fees of \$781,751.90—a mere 27% of Plaintiffs' award here. *Abbey/Land Fees Order* at 2, 13.<sup>10</sup>

The fee award here fails to do rough justice and shocks the conscience. At minimum, the Court should reverse and remand for an across-the-board cut to bring the award in line with *Rosebud* and *Abbey/Land*.

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<sup>10</sup> This Court largely upheld this award on appeal, reducing it only by \$16,677.51 for an amount that was withdrawn at hearing. *Abbey/Land II*, ¶¶ 61–72.

## CONCLUSION

The Court should reverse the District Court's award of fees.

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## Certificate of Compliance

I certify that this brief is printed with a proportionally spaced Equity typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word is 9,688 including footnotes. Rule 11(4).

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