IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. DA 25-0200

MONTANANS AGAINST IRRESPONSIBLE DENSIFICATION, LLC,

Plaintiff and Appellee/Cross-Appellant,

v.

STATE OF MONTANA,

Defendant and Cross-Appellee,

SHELTER WF, INC.,

Defendant-Intervenor and Appellant/Cross-Appellee,

MONTANA LEAGUE OF CITIES AND TOWNS,

Defendant-Intervenor and Appellant/Cross-Appellee,

DAVID KUHNLE, and CLARENCE KENCK,

Defendant-Intervenors and Cross-Appellees.

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, DV-16-2023-1248,
Hon. Michael Salvagni, Presiding Judge

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE

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INTEREST OF *AMICUS CURIAE*

The Institute for Justice is a nonprofit, public-interest law firm dedicated to defending the foundations of a free society, including private property rights. As part of that mission, IJ has become a leading national advocate for the rights of ordinary people to use their property in normal, harmless ways to build a life, pursue their dreams, and help their communities. IJ regularly challenges unjust and arbitrary zoning and land-use requirements that violate those rights under the federal and state constitutions. *See, e.g.*, *Flathead Warming Center v. City of Kalispell*, 756 F. Supp. 3d 985 (D. Mont. 2024) (finding likelihood of success on the merits of a due process claim challenging the arbitrary revocation of a homeless shelter's conditional use permit); *Catherine H. Barber Mem'l Shelter, Inc. v. Town of North Wilkesboro*, 576 F. Supp. 3d 318 (W.D.N.C. 2021) (town violated federal equal protection clause by imposing arbitrary zoning requirements on its only homeless shelter).

In this case, rather than restrict rights, the challenged zoning reforms protect and strengthen property rights, including the historical right to build housing on one's land. IJ has an interest in preserving those rights, which would be stripped from countless Montanans if Plaintiff-

Appellee MAID's arguments prevail. MAID also seeks to transform zoning restrictions that Montana's constitution sometimes *tolerates* into a "right" to restrict other people's rights that is constitutionally *mandated*. That argument would upend settled understandings about how constitutions protect private property and individual rights and would directly impact IJ's efforts to protect people from abusive zoning laws.

INTRODUCTION

For centuries, our legal tradition has recognized the fundamental right to use private property in normal, harmless ways. And people have always exercised that right in the most basic way imaginable: to build homes for themselves, for loved ones, and for others in their community. For as long as we have owned property, we have used it for housing.

A century ago, zoning laws began to disrupt traditional understandings of private property rights. Zoning now dictates minute details about how we can use our property and what we can build on it. Today, invisible lines on a map control where we can live, work, and play. *See infra* Section I.A.

The result has been a disaster for ordinary Americans. From the beginning, zoning sought to exclude people based on race and income. Yet even as society made progress on racial issues, exclusionary economic zoning has persisted. Restrictions on multi-family housing, lot sizes, home sizes, and more exclude lower-income (and increasingly middle-income) Americans from more and more communities. *See infra* Section I.B. After decades of limiting housing, zoning has spawned an affordable housing crisis, exacerbated environmental harms, increased segregation, contributed to intergenerational poverty, and dragged down economic growth for everyone. *See infra* Section I.C.

Responding to this crisis, Montana enacted a series of bipartisan zoning reforms to increase the housing supply. Two reforms make it possible for two families instead of one family to live on a parcel of land: All cities must now allow accessory dwelling units (ADUs) on single-family lots, while cities with at least 5,000 residents must also allow duplexes. Mont. Code Ann. §§ 76-2-345 (codifying SB 528 (2023)), -304(3) (codifying SB 323 (2023)). Those reforms stop no one from living in a single-family home. And they force no one to build an ADU or duplex.

They simply restore the right of thousands of Montanans (including MAID's members) to build an ADU or duplex if they choose.

The reforms also revamped land-use planning for larger cities located in more populous areas (counties with at least 70,000 residents). *Id.* §§ 76-25-101 to –504 (codifying SB 382 (2023)). In addition to mandating efforts to encourage housing construction, *id.* § 76-25-302, the new planning regime streamlines certain zoning and subdivision applications. If an application substantially complies with the existing regulations, and if the impacts from the proposal have already been incorporated into the applicable plans and regulations following public review and comment, then the application ordinarily should be granted without further hearings. *See id.* §§ 76-25-305, -408; *see also* SB 121 §§ 11–12 (2025) (amendments, which expire in 2027, that provide for additional hearings on such applications).

MAID claims that the ADU and duplex reforms and the reduction in red tape in more populated areas violates its members' rights to equal protection. But the zoning reforms do not violate MAID's constitutional rights because they restrict no one's constitutional rights. Instead, they restore property rights to MAID's members and thousands of other

Montanans. MAID's suggestion that it has a constitutional right to restrict its neighbors' constitutional rights gets our system of constitutional rights backwards. *See infra* Section II.

ARGUMENT

I. Zoning laws harm ordinary people by denying their right to use their property in normal, harmless ways.

This lawsuit's bedrock assumption—that it is unconstitutional to allow certain homes in single-family neighborhoods and to allow people to make private decisions about their land that comply with existing regulations without holding public hearings—fundamentally conflicts with our constitutional order. As described below, zoning upended the deeply rooted right to build housing, it did so for the express purpose of excluding people, and it continues to impose widespread harms today, especially for ordinary Americans who can least afford it. That context confirms that even if courts tolerate zoning restrictions, those restrictions do not deserve constitutional protection.

A. Zoning laws restrict the historic right to build housing on one's land.

The right to build a home on one's property is a longstanding and fundamental right. Before there were any federal and state constitutions,

private property was one of the three "principal or primary" rights, along with personal security and personal liberty. 1 William Blackstone, *Commentaries* *129. This "absolute" and "inherent" right included "the free use, enjoyment, and disposal" of property "without any control or diminution, save only by the laws of the land." *Id.* at *138. And from the beginning, a critical feature of this right—perhaps its earliest incarnation—was the freedom to build housing on one's land. *See* 2 William Blackstone, *Commentaries* *4–5 (describing earliest uses of property for housing); 3 William Blackstone, *Commentaries* *216–17 (property owner's right to "erect what he pleases upon the upright or perpendicular of his own soil"); *see also Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (noting, among others, the fundamental right to "establish a home").

The federal and Montana constitutions were instituted to protect this preexisting right. *See Buchanan v. Warley*, 245 U.S. 60, 74 (1917) (explaining that the "essential attributes" of property that the Constitution protects are the "right to acquire, use, and dispose of it"). James Madison, as just one example, understood that government was "instituted to protect property of every sort," and thus "that alone is a

just government, which *impartially* secures to every man, whatever is his own." James Madison, On Property (Mar. 29, 1792). Later, Montana sought statehood in large part so that people could "seek homes in this our favored land of Montana." Joseph K. Toole et al., *An Address to the People*, *reprinted in* Constitution of the State of Montana 75 (1889). Montana's constitution protects that right to "seek homes," *id.*, recognizing that individuals are born with certain "inalienable rights," including the right of "acquiring, possessing and protecting property." Mont. Const. art. II, § 3. "Private real property ownership" is therefore "a fundamental right" in Montana. *City of Bozeman v. Vaniman*, 264 Mont. 76, 79, 869 P.2d 790, 792 (1994).

Modern zoning laws turn this fundamental right on its head. In a typical formulation, property "may not be used for any purpose unless that use is shown [in a list or table] as permitted in the district in which the structure or land is located."[1] Zoning codes say where we're allowed to live, where we're allowed to work, and where we're allowed to shop or

[1] Helena Code of Ordinances § 11-2-1(A), *available at* https://codelibrary.amlegal.com/codes/helenamt/latest/helena_mt/0-0-0-4516.

dine. Even for harmless uses, if it's not listed, zoning codes probably say it's illegal.

Even when zoning codes allow us to do something, they still micromanage the details of that use. Residential areas, in particular, face severe "restrictions … on the amount and types of housing that property owners are allowed to build"—a practice known as "exclusionary" or "economic" zoning.[2] Examples include "prohibitions on multifamily homes, height limits, minimum lot sizes, square footage minimums, and parking requirements."[3]

The prevalence of exclusionary practices is no accident. As discussed below, excluding people has been central to zoning from the beginning.

B. Zoning seeks to exclude people.

Measured against the broad sweep of historical property rights, zoning is a novel concept. Cities and private property owners alike have

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[2] Joshua Braver & Ilya Somin, *The Constitutional Case Against Exclusionary Zoning*, 103 Tex. L. Rev. 1, 4 (2024).

[3] Council of Economic Advisors, *Annual Report* 152 (Mar. 2024), *available at* https://www.govinfo.gov/content/pkg/ERP-2024/pdf/ERP-2024.pdf [hereinafter "CEA Report"].

long exercised various tools to avoid conflicting uses and to plan for growth. *See, e.g.*, *Buchanan*, 245 U.S. at 74–75 (describing examples of historically permissible regulations).[4] But modern zoning—dictating how all land in a jurisdiction may be used and what may be built on it—did not appear until the early twentieth century.

From the beginning, zoning codes sought to exclude people.[5] When New York City passed the first zoning code in 1916, it hoped to keep young, Jewish immigrants working in the garment industry from window-shopping at upscale Fifth Avenue shops during their lunch breaks.[6] That same year, Berkeley, California pioneered single-family-only zoning to exclude Black and Chinese residents from certain neighborhoods.[7] But just after these codes appeared, the U.S. Supreme Court struck down explicitly racial zoning codes. *Buchanan*, 245 U.S. 60.

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[4] *See generally* M. Nolan Gray, *Arbitrary Lines: How Zoning Broke the American City and How to Fix It* 14–17 (2022) (describing regulatory mechanisms and robust tradition of city planning before zoning).

[5] Michael Allan Wolf, *The Zoning of America:* Euclid v. Ambler 138–39 (2008).

[6] *See id.* at 140–41; Gray, *supra* note 4, at 21.

[7] *See* Gray, *supra* note 4, at 24–25; CEA Report, *supra* note 3, at 154.

So with that option gone, cities turned to less overt zoning tactics to achieve the same exclusionary goals (racial, economic, or both).[8]

The U.S. Supreme Court's decision upholding zoning in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), illustrates the trend. The trial court had invalidated the code, recognizing that it bore the illicit goals from *Buchanan* dressed up in different clothing: the "result to be accomplished" was "to classify the population and segregate them according to their income or situation in life." *Ambler Realty Co. v. Vill. of Euclid*, 297 F. 307, 316 (N.D. Ohio 1926). The Supreme Court reversed, but it did not dispute the zoning code's exclusionary goals. Instead, it described apartments as "a mere parasite" that come "very near to being nuisances" to nearby single-family homes. *Ambler Realty Co.*, 272 U.S. at 394–95.

After expanding rapidly following *Buchanan* and *Euclid*, there was a second wave of zoning expansion in the 1970s.[9] Before then, many codes

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[8] *See* CEA Report, *supra* note 3, at 154; *see also* Richard D. Kahlenberg, *Excluded: Why Snob Zoning, NIMBYism, and Class Bias Build the Walls We Don't See* 74 (2023); Gray, *supra* note 4, at 83–85.

[9] *See* CEA Report, *supra* note 3, at 154–55 (noting increase in "economically discriminatory zoning"); Gray, *supra* note 4, at 3, 64; Kahlenberg, *supra* note 8, at 52–53, 60, 73–74.

remained "somewhat flexible by modern standards."[10] But this second phase involved a "large expansion of exclusionary zoning" and even more restrictions on multifamily housing.[11] "[C]ities and suburbs across the country aggressively expanded use segregation, significantly tightened density rules, and imposed months of additional public review on development applications."[12] Meanwhile, the U.S. Supreme Court effectively renounced any intention of protecting property owners and would-be residents from exclusionary zoning laws. Instead, it blessed zoning as a way to impose the government's "spiritual" and "aesthetic" values and to promote "family values, youth values, and the blessings of quiet seclusion." *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

Following these developments, economic exclusion is now one of the most important features of modern zoning practice.[13] Most homeowners

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[10] Gray, *supra* note 4, at 63.

[11] Kahlenberg, *supra* note 8, at 60.

[12] Gray, *supra* note 4, at 64.

[13] *See* Kahlenberg, *supra* note 8, at 9–11, 103–09, 128–33, 137; Gray, *supra* note 4, at 64. *See also* Kahlenberg, *supra* note 8, at 16 (describing political pledge to protect suburbs from being "bothered" by "low income housing"); Jenny Schuetz, *Fixer-Upper: How to Repair America's Broken Housing Systems* 90–91 (2022) (same).

support affordable housing in theory, as long as it is built somewhere else. Local politicians, in turn, only approve of uses that their most vocal constituents (overwhelmingly homeowners) approve of. So they also support affordable housing in theory, as long as it is built somewhere else. And once everyone agrees that affordable housing should be built somewhere else, the outcome is that it can't be built anywhere.[14]

C. Zoning continues to harm ordinary people today.

The result of all of this—zoning's infringement on traditional property rights in order to divide and exclude people—has been nothing short of a disaster. Housing affordability, of course, is the main casualty. And the most predictable. Decades of telling people that they can't build housing, and that they *definitely* can't build affordable housing, have led to a widely acknowledged national crisis in affordable housing.[15]

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[14] *See generally* Gray, *supra* note 4, at 64; Schuetz, *supra* note 13, at 20–21; 90–91, 135–37.

[15] *See* CEA Report, *supra* note 3, at 144–55; Gray, *supra* note 4, 51–65; Kahlenberg, *supra* note 8, at 52–59; Braver & Somin, *supra* note 2, at 2–3 & n.1.

Zoning has other consequences, too. It creates and entrenches racial and economic segregation.[16] It blocks lower-income Americans from accessing better jobs and better schools, entrenching intergenerational poverty.[17] It exacerbates environmental impacts by forcing people to build housing that uses more energy and requires them to drive greater distances.[18] And it makes society as a whole less prosperous.[19]

As dismal as they are, the statistics often mask the day-to-day human toll of zoning policies.[20] The experiences of IJ clients around the country show the many ways that abusive zoning laws harm ordinary Americans.

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[16] *See* Richard Rothstein, *The Color of Law* 48–57 (2017); Gray, *supra* note 4, at 79–90; Wolf, *supra* note 5, at 138–43.

[17] *See* Kahlenberg, *supra* note 8, at 43–50.

[18] *See* Schuetz, *supra* note 13, at 37–43; Gray, *supra* note 4, at 93–105.

[19] *See* Gray, *supra* note 4, at 68–78; Braver & Somin, *supra* note 2, at 8–9.

[20] *See, e.g.*, Kahlenberg, *supra* note 8, at 51–52, 87–89 (recounting experiences of families impacted by exclusionary zoning).

In one case, for instance, a city shut down a well-maintained, three-decade old automotive shop. The reason? It was inconsistent with city officials' vision of luring a "Starbucks or Macaroni Grill" to the area.[21]

Another city tried to use its zoning code to shut down a single mother's small, home-based daycare. People have traditionally used their homes to care for their neighbors' children, so why target this small daycare? Because the sound of children playing annoyed a former mayor who played golf nearby.[22]

In yet another case, an Arizona city tried to evict an elderly, disabled woman from her manufactured home during the pandemic. She was allowed to live in her manufactured home, so why try to evict her? Because she was only allowed to live in that *type* of manufactured home down the block in the manufactured-home "park" zone, which requires a company to own the lots and rent them to residents. Her home was

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[21] Mark Hyman, *Immigrant fights city hall to keep 30-year-old business open*, News 4 San Antonio (Aug. 4, 2016), https://news4sanantonio.com/news/local/immigrant-fights-city-hall-to-keep-30-year-old-business-open.

[22] Henry Grabar, *A Texas suburb is trying to shut down a home day care after golfers complained*, Slate (Jan. 30, 2023), https://slate.com/business/2023/01/lakeway-texas-daycare-golf-rainbows-edge.html.

banned in the manufactured-home "subdivision" where she actually lived, and where people are allowed to live on land that they own. In other words, her home was legal—as long as it was down the road on someone else's land, not her own.[23]

Zoning is particularly hostile to private efforts to alleviate the housing affordability crisis. As several IJ clients have learned, unaffordable homes are not an unanticipated side-effect of zoning; all too often they are the goal. For instance, when a couple in Blaine, Minnesota wanted to build an ADU in their backyard, the mayor, city staff, and planning commission all agreed that they had met all the zoning code's requirements for a permit. But the mayor and council still voted to deny the permit. The reason? In the near term, the couple wanted to offer the ADU at an affordable rent (30% of income) to help a family in need of housing after experiencing homelessness or other financial misfortune. (The couple planned to later use the ADU to help their own aging parents.) After neighbors complained that the neighborhood was never

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[23] Chorus Nylander, *Sierra Vista residents sue City to keep their homes in place*, KVOA (Feb. 16, 2021), https://www.kvoa.com/news/local/sierra-vista-residents-sue-city-to-keep-their-homes-in-place/article_75c96b95-520f-55a4-89f3-0e46445cde1f.html.

intended for low-income housing, and falsely suggested that a family in need would endanger children playing in a nearby park, the city denied the permit.[24]

In still another case, a Georgia city refused to let a local nonprofit build smaller, affordable single-family homes. They could have built a truck terminal or a scrap metal processor, so why not smaller homes? Because nearby residents complained that the homes might have "low-income" residents, who would have trouble with "trash pickup" and attract "riff raff" to the area.[25]

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[24] Eric Roper, *Tiny house fight is a microcosm of affordable housing resistance*, Minn. Star Trib. (July 25, 2025), https://www.startribune.com/blaine-adu-affordable-housing-lawsuit/601440558 (noting how similar tactics had been used to thwart affordable homes throughout the region); Jason Rantala, *Proposed tiny home to help homeless stirs controversy in Blaine*, CBS Minn. (May 27, 2025), https://www.cbsnews.com/minnesota/news/proposed-tiny-home-to-help-homeless-stirs-controversy/.

[25] Kelcey Caulder, *Calhoun, Georgia, sued by proponents of tiny homes project*, Chattanooga Times Free Press (Nov. 1, 2021), https://www.timesfreepress.com/news/2021/nov/01/calhoun-georgia-sued-proponents-tiny-homes/; *see also* Kahlenberg, *supra* note 8, at 40, 109, 128–33 (describing Calhoun's denial and other examples of opposition to housing associated with lower-income residents based on similar sentiments).

And so on. These stories play out in zoning hearings every day around the country. Equipped with vague criteria like "character," local governments presume free rein to ban disfavored uses and housing, especially those associated with lower-income Americans. Given zoning's history of exclusion, it should come as no surprise that the burdens fall hardest on ordinary Americans who can least afford it.

II. There is no constitutional right to restrict your neighbors' property rights.

MAID's cross-appeal claims that the zoning reforms violate its members' rights to the equal protection of the laws. It argues that the ADU and duplex reforms are unconstitutional because they will have a different impact on neighborhoods without restrictive covenants than on those with them. MAID Br. 62–79. It also argues that having different zoning and planning procedures for larger cities in more populous areas violates equal protection because it results in different opportunities for members of the public to weigh in about property owners' private decisions about how to build on their land. *Id.* at 54–56. Given the many harms that zoning inflicts on so many, especially the most vulnerable in our society, *see supra* Section I, the zoning reforms should survive

whatever level of scrutiny this Court applies. This brief, however, focuses on several elemental problems with MAID's theories.

First, MAID's challenge to the ADU and duplex reforms fails to even identify a classification, let alone an impermissible one. Typically, equal protection claims assert that the government is "impermissibly classifying persons and treating them differently on the basis of that classification." *State v. Price*, 2002 MT 229, ¶ 31, 311 Mont. 439, 449, 57 P.3d 42, 50, *overruled on other grounds by City of Helena v. Frankforter*, 2018 MT 193, 392 Mont. 277, 423 P.3d 581. Courts resolving such claims then "measure the basic validity of the legislative classification." *Pers. Adm'r v. Feeney*, 442 U.S. 256, 271–72 (1979). "Absent any classification" in the statute, "no impermissible classification exists as a matter of law." *State v. Tadewaldt*, 277 Mont. 261, 270, 922 P.2d 463, 468 (1996).[26]

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[26] A law with no facial classification can still implicate equal protection if, for example, officials administer it in an unequal manner or if its disparate impacts can be traced to an impermissible discriminatory purpose. *See State v. Spina*, 1999 MT 113, ¶ 85, 294 Mont. 367, 394–95, 982 P.2d 421, 437. But MAID rightly does not suggest that either situation applies here. Nor is there reason to believe that the ADU and duplex reforms were a pretext for discriminating against homeowners without restrictive covenants, who are among the primary beneficiaries of the reforms.

Here, MAID does not challenge any legislative classification in the ADU and duplex reforms (which seek, ironically, to *forbid* discrimination against duplexes and ADUs). It argues instead that reforms will have disparate *impacts* based on the "geographic happenstance" of whether a neighborhood has restrictive covenants. MAID Br. 60. That is, even though the reforms treat MAID "no differently from all other members of the class described by the law," MAID asserts there will be "uneven effects upon particular groups within [the] class." *Pers. Adm'r*, 442 U.S. at 271–72. Such effects, however, are "ordinarily of no constitutional concern." *Id.* at 272. MAID's challenge to the ADU and duplex reforms therefore lacks the core ingredient of an equal protection claim. *See, e.g.*, *Vacco v. Quill*, 521 U.S. 793, 800 (1997) ("laws that apply evenhandedly to all 'unquestionably comply' with the Equal Protection Clause" (citation omitted)); *Christy v. Hodel*, 857 F.2d 1324, 1332 (9th Cir. 1988) (holding that neutral restriction on killing grizzly bears was not a classification between people raising livestock near grizzly bear habitats and others).

Second, and relatedly, the claims here fail because Montana's equal protection clause "offers protection only against state action." *Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶ 10, 392 Mont. 1, 6, 420 P.3d

528, 532–33. Here, by contrast, MAID is not trying to stop the government from doing anything. It is trying to stop its members' neighbors from exercising their own constitutional rights to use and enjoy their own property. Yet courts are reluctant to find state action where a statute has simply "restored" rights that were "historically exercised," or where a government simply declines to intervene in private decisions. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 54 (1999). For instance, when a property owner develops their property in compliance with pre-existing land-use plans and zoning regulations, that is not a "governmental affair[]" requiring a public hearing, MAID Br. 56; it is someone exercising their own fundamental constitutional right to use and enjoy their property. *See* Mont. Const. art. II, § 3; *Vaniman*, 264 Mont. at 79. The zoning reforms here simply restore a longstanding status quo where people could use their property as they always have.

MAID's complaint that only some people are "fortunate enough" to have restrictive covenants against ADUs and duplexes, MAID Br. 63, spotlights the lack of state action. Entering a restrictive covenant is a private decision, and nothing prevents MAID's members from agreeing to covenants if their neighbors are willing. MAID counters that in

neighborhoods without restrictive covenants, it will be difficult to get the diverse group of residents to agree to replicate through restrictive covenants the exclusionary practices that the ADU and duplex reforms abolished. *Id.* at 69. Yet even assuming that's true, it would only be because some of those residents exercised their own right to decide whether to enter into such private agreements. Foisting such arrangements on them via this lawsuit will would invite its own constitutional scrutiny. And it would be a bizarre form of equal protection indeed to say that *state actors* must use exclusionary zoning practices simply because too few *private actors* are willing to adopt private agreements that "serve exactly the same purpose." *Exclusionary Zoning and Equal Protection*, 84 Harv. L. Rev. 1645, 1669 (1971) (cited by MAID Br. 60).

Third, MAID's equal-protection theories are ultimately self-defeating. If it's unconstitutionally arbitrary to allow ADUs and duplexes to be built in some neighborhoods when they cannot be built in others, then it is hard to see how most current zoning restrictions could survive. Zoning, after all, is full of lines that are, "by nature, more or less

arbitrary." *Bd. of Supervisors of Fairfax Cnty. v. Pyles*, 224 Va. 629, 638, 300 S.E.2d 79, 84 (1983).

Indeed, MAID's focus on disparate impacts necessarily implicates exclusionary zoning. It is well-established that zoning restrictions, and particularly single-family zoning, impose greater burdens on lower income residents and minorities. *See, e.g.*, John Infranca, *Singling Out Single-Family Zoning*, 111 Geo. L.J. 659, 662–63 & n.15 (2023); *supra* 10 n.8. And unlike the zoning reforms here, which do not involve animus towards people without restrictive covenants (and, if anything, confers the greatest benefits on them), history confirms that zoning has always intended "to classify the population and segregate them according to their income or situation in life." *Ambler Realty Co.*, 297 F. at 316. If MAID's framework is correct, the result should be to invalidate most restrictions on building housing, not to constitutionally mandate such restrictions.

Similar issues plague MAID's asserted equal protection interest in subjecting private decisions to develop land (in ways that comply with existing land-use plans and zoning regulations) to public hearings. Such hearings, under MAID's approach, may produce equal protection

concerns of their own. If someone wants to use and enjoy their property in a way that already complies with the previously adopted rules, then a hearing often serves no purpose other than to pressure decision-makers to deny applications for impermissible or unconstitutional reasons. Indeed, public hearings are often wielded specifically against applications associated with lower income residents. *See, e.g.*, *supra* pp. 12–14 & n.24.[27]

Fourth, and finally, the claims in this lawsuit are in tension with Montana's heightened constitutional protections for private property rights. The challenged reforms here do not restrict anyone from exercising their right to use and enjoy their property. *See* Mont. Const. art. II, § 3; *Vaniman*, 264 Mont. at 79. To the contrary, the reforms restored the rights of countless Montanans, including MAID's members,

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[27] *See also* Braver & Somin, *supra* note 2, at 51–52; Anika Singh Lemar, *Overparticipation: Designing Effective Land Use Public Processes*, 90 Fordham L. Rev. 1083, 1117–22 (2021). To be sure, Montana's Constitution requires agencies to "afford such reasonable opportunity for citizen participation in the operation of the agencies," Mont. Const. art. II, § 8, but that does not address the antecedent question whether an individual's decision about their property should be a governmental decision rather than the private exercise of other constitutional rights, such as the right to use and enjoy property. *See* Mont. Const. art. II, § 3.

to use their property in normal, harmless ways: to build homes on their land and to decide how to improve their private property. Although MAID's members benefit from those reforms, too, they seek to use the Montana Constitution not to defend constitutional rights but to take them away from thousands of other nonparties.

MAID's argument (at 71–73) that the challenged zoning reforms should be subject to strict or heightened scrutiny thus reverses the typical role of constitutional rights. It is not the reforms that impair anyone's fundamental right to private property, but MAID's requested relief. And the only threat here to Montana's interest in "a clean and healthful environment," MAID Br. 72 (quoting Mont. Const. art. II, § 3), comes from this lawsuit, not the zoning reforms that were specifically intended to reduce sprawl and conserve greenspace. *See supra* p. 13 & n.18. If anything, heightened scrutiny should apply, not to Montana's salutary zoning reforms, but to MAID's effort to strip fundamental rights from countless fellows Montanans.

That accords with broader constitutional principles—in Montana and nationwide. Mere "negative attitudes" about a property's use or who might use it "are not permissible bases" for imposing zoning restrictions.

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985); *accord Catherine H. Barber Mem'l Shelter, Inc. v. Town of North Wilkesboro*, 576 F. Supp. 3d 318, 340 (W.D.N.C. 2021). Stripping thousands of Montanans of their right to build a duplex or ADU because some property owners have an unfounded fear of two families living next door instead of one raises similar constitutional red flags. As does transforming a right to participate in government affairs into a right to impede and veto private decisions about property that already comply with existing regulations.

Although distinctions "[b]earing some relation to economic status" are not categorically impermissible under Montana law, *Gazelka*, 2018 MT 152, ¶ 27, exclusionary zoning does much more than just bear "some relation to" economic status; its *primary goal* is to "classify the population and segregate them according to their income or situation in life." *Ambler Realty Co.*, 297 F. at 316. Even if courts are too often willing to *tolerate* that goal, this Court should not interpret Montana's Constitution to *mandate* it.

CONCLUSION

Montanans and all Americans share an inherent, inalienable right to use their private property for normal, harmless things, like building

homes. A century of increasingly restrictive zoning practices has eroded that right—often with the express purpose of excluding undesirable people from desirable neighborhoods. Whether measured against the housing crisis, environmental concerns, or economic prosperity, the costs of eroding those rights have been disastrous.

Montana's reforms seek to undo some of this damage by restoring Montanans' pre-existing property rights. Doing so violates no one's constitutional rights. The Court should therefore affirm the lower court's holding that the zoning reforms do not violate the Equal Protection Clause.

Respectfully submitted this 5th day of August, 2025.

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CERTIFICATE OF COMPLIANCE

Under Rule 11 of the Montana Rules of Appellate Procedure, I certify that this amicus curiae brief is printed with a proportionately spaced Century Schoolbook typeface in 14-point font, is double spaced, and the word count calculated by the word processing software is 4,999 words, excluding the cover page, tables, and certificates.

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