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

MONTANANS AGAINST IRRESPONSIBLE DENSIFICATION, LLC,

Plaintiff, Appellees, and Cross-Appellant,

v.

STATE OF MONTANA,

Defendant and Cross-Appellee,

SHELTER WF, INC.,

Defendant-Intervenor, Appellant, and Cross-Appellee,

DAVID KUHNLE, CLARENCE KENCK, MONTANA LEAGUE OF CITIES AND TOWNS,

Defendant-Intervenors, Appellants, and Cross-Appellees,

# STATE OF MONTANA'S ANSWER BRIEF

On Appeal from the Montana Eighteenth Judicial District court,
Gallatin County, The Honorable Mike Salvagni, Presiding

APPEARANCES:
Austin Knudsen
*Montana Attorney General*
Michael D. Russell
Thane Johnson
Alwyn Lansing
Michael Noonan
*Assistant Attorneys General*
MONTANA DEPARTMENT OF JUSTICE
PO Box 201401
Helena, MT 59620-1401
Tel: (406) 444-2026
Michael.Russell@mt.gov
Thane.Johnson@mt.gov
Alwyn.Lansing@mt.gov
Michael.Noonan@mt.gov

*Attorneys for Defendant and Cross-Appellee*

James H. Goetz
Henry J.K. Tesar
Goetz, Geddes & Gardner, P.C.
35 North Grand Avenue
P.O. Box 6580
Bozeman, MT 59771-6580
Phone: (406) 587-0618
jim@goetzlawfirm.com
htesar@goetzlawfirm.com

Brian K. Gallik
Gallik & Bremer, P.C.
777 East Main Street, Suite 2023
P.O. Box 70
Bozeman, MT 59771
Phone: (406) 404-728
brian@galliklawfirm.com

*Attorneys for Montanans Against Irresponsible Densification, LLC*

Jesse Kodadek
Parsons Behle & Latimer
127 East Main Street, Suite 301
Missoula, MT 59802
Phone: (406) 317-7220
jkodadek@parsonsbehle.com

*Attorneys for Shelter WF, Inc*

Ethan W. Blevins
Pacific Legal Foundation
839 W 3600 S
Bountiful, UT 84010-8423
Phone: (916) 288-1392
eblevins@pacificlegal.org

Mark Miller
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
Phone: (561) 691-5000
mark@pacificlegal.org

David McDonald
Pacific Legal Foundation
3100 Clarendon Blvd., Suite 1000
Arlington, VA 22201
Phone: (202) 888-6881
dmcdonald@pacificlegal.org

*Attorneys for David Kuhnle and Clarence Kenck*

Murry Warhank
Scott Svee
Jackson, Murdo & Grant, P.C.
203 N. Ewing Street
Helena, MT 59601
Phone: (406) 422-1300
mwarhank@jmgattorneys.com
ssvee@jmgattorneys.com

*Attorneys for Montana League of Cities and Towns*

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2. Whether the district court correctly declined to decide whether MLUPA violated equal protection where it had already decided MLUPA on public participation grounds?

3. Whether, because they do not implicate fundamental rights, rational basis is the proper standard of review for the Housing Reform Provisions?

## STATEMENT OF THE CASE

Appellee/Cross-Appellant Montanans Against Irresponsible Densification, LLC ("MAID") is challenging recent Montana housing reform legislation, which removed several regulatory hurdles to new development in Montana's most densely populated areas. *See* Mont. Code Ann. §§ 76-2-345; 76-2-304; 76-2-309; tit. 76, ch. 25., pts. 1–5; *see infra* at 4–8. The specific laws challenged by MAID were SB 528, SB 323, SB 382, and SB 245 (2023) (hereafter collectively the "Housing Reform Provisions"). MAID alleges these provisions violate (1) equal protection of the laws; (2) substantive due process; (3) the right to know and the guarantee of public participation; and (4) home-rule charters. It sought declaratory and injunctive relief against the challenged laws. (Doc. 3.)

MAID first moved for a preliminary injunction of the laws. (Doc. 4 at 1–2.) Following a hearing, the district court granted MAID's motion and temporarily enjoined enforcement of SB 323, codified as § 76-2-304(3), (5), and § 76-2-309, MCA; and SB 528, codified as § 76-2-345. (Doc. 17 at 17.) The State of Montana appealed the preliminary injunction. (Doc. 23 at 1–2.) The Montana Supreme Court reversed the district court and vacated the preliminary injunction. (Doc. 55 at 15.)

Back before the district court, multiple defendant-intervenors—the Montana League of Cities and Towns, Shelter WF, Inc., and individuals David Kuhnle and Clarence Kenck—entered the fray, opposing MAID and defending the legislation's constitutionality. (Docs. 22 at 16–17, 70 at 13.)

MAID next filed a Second Motion for Summary Judgment, renewing its constitutional challenges. (Doc. 93 at 2–3.) The State timely opposed both this second motion and the original motion. Doc. 113 at 1. Together with the State's opposition, all defendant-intervenors cross-moved for summary judgment, advancing distinct legal arguments supporting the reforms against MAID's constitutional theory. (Docs. 116, 117, 119, 120, 121, 122.)

After oral argument, the district court found that none of the Housing Reform Provisions violate equal protection because they did not create similarly situated classes. (Doc. 152 at 35.) The Provisions also did not violate substantive due process because they were not arbitrary and were reasonably related to a legitimate

governmental objective—namely, addressing Montana's housing crisis. (Doc. 152 at 43–44.) Further, the Legislature did not arrogate local powers because it lawfully exercised its constitutional and statutory authority to establish planning and zoning standards in the interest of statewide housing policy. (Doc. 152 at 49–50.) The district court found for MAID on one of its claims, holding that the challenged laws may not be used to invalidate or displace covenants that are more restrictive than zoning regulations. (Doc. 152 at 15.) The district court also enjoined §§ 76-25-106(4)(d), 76-25-305(4)–(6), and 76-25-408(7)–(8), MCA of MLUPA, concluding that it violates public participation by limiting public input on site-specific development decisions. (Doc. 152 at 54.)

Defendant-intervenor Shelter WF, joined by the Montana League of Cities and Towns, timely appealed the district court's order for declaratory relief and injunction of MLUPA. MAID responded and cross-appealed, seeking reversal of the district court's holding that the challenged laws do not violate equal protection. The State of Montana respectfully requests that this Court affirm the district court's judgment for the State.

## STATEMENT OF THE FACTS

In recent years, Montana has witnessed an influx of new residents from across the country. The Montana Legislature attacked this issue head on. Following the work of a bipartisan housing task force, the 2023 Legislature passed four laws,

SB 528, SB 245, SB 323, and SB 382 and to reform existing housing laws and address Montana's housing shortage. For the Court's convenience, the State briefly describes the Housing Reform Provisions below.

## I. Senate Bills 528, 245, & 323.

| Enacted Statute | Original Bill | Bill Topic | Applies to | Key Concepts |
|---|---|---|---|---|
| MCA § 76-2-345 | SB 528 | ADUs | All Municipalities | • Creates regulations related to accessory dwelling units ("ADU").<br>• All municipalities must allow for at least one ADU on a lot or parcel containing a single-family dwelling.<br>• Defines ADU. |
| MCA § 76-2-304 & § 76-2-309 | SB 245 | Zoning | Municipalities designated as Urban Area | • Urban areas must permit multiple-unit dwelling and mixed-use developments on lots that: (1) have a will-serve letter from the municipal water and sewer systems; and (2) is in a commercial zone.<br>• Limits municipal parking requirements.<br>• Defines mixed-use development and multiple-unit dwelling.<br>• Inserts an exception for § 76-2-304(3)'s restriction on regulations to the otherwise permitted municipal regulations. |
| MCA § 76-2-304 & § 76-2-309 | SB 323 | Zoning | Municipalities of at least 5,000 | • Requires cities with at least 5,000 residents to permit duplex housing on lots where the city permits single-family residences.<br>• Prohibits the enactment of more restrictive zoning regulations than what cities apply to single-family residences.<br>• Defines duplex housing, family unit, and single-family residence as defined in § 70-24-105.<br>• Inserted an exception for § 76-2-304(3)'s restrictions to otherwise permitted municipal regulations. |

## II. Senate Bill 382 ("MLUPA").

SB 382 is a new statutory scheme called the Montana Land Use Planning Act (MLUPA). Mont. Code Ann. tit. 76, ch. 25, pts. 1–5. This scheme "promote[s] the health, safety, and welfare" of Montanans by creating "a system of comprehensive

planning" which balances many considerations related to property. *Id.* § 76-25-102(1). It applies to municipalities with populations at or exceeding 5,000 in a county with a population at or exceeding 70,000. *Id.* § 76-25-105(1).

As a new regulatory scheme, MLUPA proffers the Legislature's purpose, intent, and findings for this legislation. Substantively, it reworks how Montana's municipalities go about planning and development, streamlining burdensome regulations to increase opportunities for new developments and, in turn, increase the supply of housing. MLUPA front-loads development with a proactive review from planning commissions and the public. At the heart of this reform is the goal to rein in municipal zoning laws to simplify the approval process for new developments.

MLUPA empowers local governments to enact proactive development plans that respond to the needs of the community. To encourage development, municipalities have fifteen development strategies. MLUPA requires them to pick just five.

As it relates to public involvement, the law specifically creates public participation in the land use planning process. The public may submit verbal and written comments, participate in public meetings, have open access to documents, and receive responses to their comments. This participation becomes part of the administrative record. And MLUPA requires municipalities to "adopt a public participation plan detailing how the local government will meet" the public

participation requirements. *Id.* § 76-25-106(5). It also creates an appeals process for those who disagree with the municipality's adopted resolution or ordinance. *Id.* § 76-25-503(1)–(7). Finally, as plans develop, the public can comment as new decisions must be made.

MAID facially challenged the Housing Reform Provisions as violating equal protection. (Doc. 3 at 40–43.) The district court found that the Provisions did not violate equal protection because the classes identified by MAID "are not similarly situated." (Doc. 152 at 34–35.) Therefore, MAID failed to satisfy the threshold requirement of an equal protection analysis. (Doc. 152 at 35.)

MAID also challenged SB 382 on public participation grounds, and the district court entered a limited declaratory judgment and enjoined select provisions of SB 382. (Doc. 151 at 2–4.) The Legislature passed SB 121 in 2025, revising MLUPA.[1] Intervening parties subsequently appealed the public participation ruling, asking this Court to reverse the district court's decision to enjoin MLUPA. (Docs. 164, 166.) MAID answered the intervenors and cross-appealed the district court's judgment for the State on the other challenged laws. (Appellee/Cross-Appellant's Combined Answer and Opening Cross-Appeal Brief (hereafter, "MAID Br.") at 79–80.) The State responds only to MAID's equal protection appeal and requests that

[1] Senate Bill 121 (2025) is available at: https://bills.legmt.gov/#/laws/bill/2/LC0016?open_tab=bill

this Court affirm the district court's judgment that the Housing Reform Provisions do not violate equal protection.

## STANDARD OF REVIEW

The Montana Supreme Court reviews a district court's grant of summary judgment de novo. *McClue v. Safeco Ins.*, 2015 MT 222, ¶ 8, 380 Mont. 204, 354 P.3d 604 (internal citations omitted). Summary judgment is appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c)(3). Under de novo review, this Court must determine whether (1) the district court's conclusions of law are correct and (2) its findings of fact are not clearly erroneous. *Pilgeram v. GreenPoint Mortg. Funding, Inc.*, 2013 MT 354, ¶ 9, 373 Mont. 1, 313 P.3d 839 (internal citations omitted).

The party presenting a facial challenge must prove that "no set of circumstances exists under which the [challenged sections] would be valid." *Mont. Cannabis Ass'n v. State*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131 (internal citations and quotations omitted); *see also Advocates for Sch. Tr. Lands v. State*, 2022 MT 46, ¶ 29, 408 Mont. 39, 505 P.3d 825 (stating if any constitutional application is shown, the facial challenge fails).

The Montana Supreme Court's "review of constitutional questions is plenary." *Williams v. Bd. of Cnty. Comm'rs*, 2013 MT 243, ¶ 23, 371 Mont. 356, 308 P.3d 88 (internal citations omitted). "The party challenging the constitutionality

of a statute bears the burden of proving that it is unconstitutional 'beyond a reasonable doubt' and, if any doubt exists, it must be resolved in favor of the statute." *Hernandez v. Bd. of Cnty. Comm'rs*, 2008 MT 251, ¶ 15, 345 Mont. 1, 189 P.3d 638 (quoting *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877).

"Statutes are presumed to be constitutional, and it is the duty of this Court to avoid an unconstitutional interpretation if possible." *Hernandez*, ¶ 15. "The constitutionality of a legislative enactment is prima facie presumed," and "[e]very possible presumption must be indulged in favor of the constitutionality of a legislative act." *Powder River Cnty. v. State*, 2002 MT 259, ¶¶ 73–74, 312 Mont. 198, 60 P.3d 357.

## SUMMARY OF THE ARGUMENT

The district court correctly granted summary judgment for the State because the Housing Reform Provisions do not violate equal protection under Article II, Section 4 of the Montana Constitution. Despite MAID's argument to the contrary, the Housing Reform Provisions do not create similarly situated classes. MAID's alleged classification, municipal residents subject to restrictive covenants and those who are not, fails at the first step of the equal protection analysis. These purported classes are neither similarly situated nor do the Housing Reform Provisions create those classifications. In other words, the Housing Reform Provisions do not violate

equal protection because the laws do not treat individuals within the same group differently. Any different treatment flows not from a regulatory classification but from this simple fact: these are different groups.

The Housing Reform Provisions merely reform municipal zoning regulations to address Montana's housing shortage. They do not create or alter private restrictive covenants—contracts made independent of zoning laws. MAID's contention that these provisions discriminate against certain property owners rests not on law or fact but on policy preference. Its equal protection analysis collapses at the threshold. Because the laws do not infringe on any constitutionally protected rights, this Court, as the district court did, should apply the deferential rational basis review test under Montana's equal protection clause. And under rational basis review, MAID fails to refute the rational relationship between the Housing Reform Provisions and a legitimate government purpose. On the contrary, the Housing Reform Provisions rationally relate to the State's interest in increasing Montana's housing supply. The district court easily found a rational relationship. This Court should do the same, affirming that Housing Reform Provisions are constitutional.

The district court did not reach the issue of whether MLUPA violates equal protection, so that issue is not before this Court to decide. The district court correctly exercised judicial restraint and respected the doctrine of constitutional avoidance after deciding MLUPA's constitutionality on public participation grounds.

Alternatively, should this Court find it necessary to reach the issue for the first time on appeal here, MAID's equal protection challenge fails under Montana's three-step analysis. First, the purported classes—cities in more populated counties vs. cities in less populated—are not similarly situated due to their differing infrastructure, economic, and demographic needs. Second, because no fundamental right or suspect class is involved, rational basis review applies. Third, MLUPA's focus on more populous areas is rationally related to the legitimate government interest in addressing the housing shortage where it is most severe.

MAID failed to engage in the required three-step analysis, therefore MAID cannot show that MLUPA treats similarly situated municipalities differently. Population thresholds are common considerations in regulations for tailoring according to different regional needs. MLUPA's geographic scope promotes comprehensive land use planning where population growth and housing demands are most acute. Any distinctions between municipalities rationally relate to longstanding legal principles concerning zoning laws and land use. MLUPA does not violate equal protection.

## ARGUMENT

This Court should affirm the district court's judgment that the Housing Reform Provisions do not violate equal protection. MAID fails to prove the Provisions treat similarly situated classes differently. Article II, Section 4 of the

Montana Constitution provides that no person shall be denied equal protection of the laws. Mont. Const. art. II, § 4. The Court need not and should not reach the question of whether MLUPA violates equal protection because the district court disposed of MLUPA on public participation grounds and properly did not reach that equal protection claim.

As this Court has held, the "cardinal principle of judicial restraint" is that "if it is not necessary to decide more, it is necessary not to decide more." *State v. Tome,* 2021 MT 229, ¶ 31, 405 Mont. 292, 495 P.3d 54 (quoting *Morse v. Frederick,* 551 U.S. 393, 431 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part)). Like in *Planned Parenthood of Montana v. State,* this Court should not reach the MLUPA equal protection claim that was not decided by the district court because the public participation ruling concerning MLUPA "is sufficient to settle the case at bar, [and] principles of judicial restraint counsel us to decline ruling further." 2024 MT 228, ¶ 58, 418 Mont. 253, 557 P.3d 440 (quoting *In re Powder Drainage Area,* 216 Mont. 361, 376, 702 P.2d 948, 957 (1985)).

Courts use a three-step process to evaluate equal protection claims. First, courts identify the classes involved to determine whether the classes are similarly situated. *Goble v. Mont. State Fund*, 2014 MT 99, ¶ 28, 374 Mont. 453, 325 P.3d 486. "If the classes are not similarly situated, then it is not necessary for [the Court]

to analyze the challenge further." *Vision Net, Inc. v. State*, 2019 MT 205, ¶ 16, 397 Mont. 118, 447 P.3d 1034 (cleaned up); *see also Powell*, ¶ 22.

If the classes are similarly situated, courts next determine "the appropriate level of scrutiny to apply to the challenged legislation." *Goble*, ¶ 28. Rational basis review applies when the statute does not threaten constitutional rights and does not affect a suspect class. *Jaksha v. Butte-Silver Bow Cnty.*, 2009 MT 263, ¶ 17, 352 Mont. 46, 214 P.3d 1248.

Finally, courts "apply the appropriate level of scrutiny to evaluate the constitutional challenge." *Goble*, ¶ 36. To survive a rational basis review, the goal of the law needs only to be legitimate and rationally related to the classification used by the legislature. *See Jaksha*, ¶ 21.

MAID contends the district court erred when it rejected MAID's purported classifications based on covenant status, ending its analysis there. MAID also posits the district court erred when it did not declare MLUPA unconstitutional for violating equal protection on a theory of geographic discrimination.

The district court correctly exercised judicial restraint in declining to resolve MLUPA on equal protection grounds when it had already been decided on public participation grounds. But even if the district court had reached that claim, MLUPA does not violate equal protection either. As discussed above, this Court should not

reach the MLUPA equal protection claim based on the fundamental principles of judicial restraint and constitutional avoidance.

But both theories fail the threshold step of the equal protection analysis because the proposed classes in each are not similarly situated. Any difference in treatment flows not from the Housing Reform Provisions but from contractual obligations created independent of those laws. And city classifications derive from population realities: cities in counties with higher, more concentrated populations have diametrically different needs than cities in less populated counties. Those former cities face distinct economic, infrastructural, and social challenges making them intrinsically different. Again, despite the Housing Reform Provisions, those types of cities are different.

Even if MAID could get past the threshold for an equal protection analysis, rational basis review is the correct level of scrutiny to apply here. The Court should apply rational basis scrutiny because these laws do not impact a constitutional right nor a suspect classification. Under this deferential standard, MAID fails to show the Housing Reform Provisions cannot rationally relate to the State's legitimate objective of addressing Montana's housing shortage. These laws create opportunities directly responsive to Montana's endemic housing shortage. They streamline the process to increase the supply of available housing, excising burdensome restrictive

zoning regulations. This Court should accordingly affirm that the Housing Reform Provisions do not violate equal protection.

## I. The District Court Correctly Found that the Housing Reform Provisions do not Violate Equal Protection.

### A. There are no similarly situated classes because citizens who live with a restrictive covenant are different from citizens who live without one.

The Housing Reform Provisions do not create similarly situated classes treated differently by the laws. As zoning regulations, the Housing Reform Provisions apply equally to all Montanans. But MAID disagrees. Under MAID's construction, the Housing Reform Provisions treat "[t]hose who are fortunate enough to live in areas protected by restrictive covenants" differently than those who do not. (MAID Br. at 63.) Because of this classification, MAID contends, certain Montanans "who in many cases reside just across the street from those so protected, will suffer inordinately the full burden of these legislative measures." (MAID Br. at 63.) MAID's problem is that the Housing Reform Provisions do not create those purported classes.

As the district court correctly found, "[t]he classes are not similarly situated. They are not alike in all respects." (Doc. 152 at 35.) The court continued that those differences "existed before the enactment of MLUPA." (Doc. 152 at 35.) MAID finds the district court's finding "intellectually unsatisfying." (MAID Br. at 64.) But this critique is neither here nor there. The district court simply rejected MAID's

equal protection claim because it failed at the first step of identifying similarly situated classes.

Although covenants and zoning laws can create restrictions on a landowner's use of property, they are different. Restrictive covenants, being neither an ordinance nor a provision of a zoning code, create entirely different rights: contractual rights. *See Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 39*6 F.3d 895, 899 (7th Cir. 2005); *see also Sheridan v. Martinsen*, 164 Mont. 383, 388, 523 P.2d 1392, 1394–95 (1974). A restrictive covenant therefore is a private agreement where the contracting parties impose land use restrictions on *themselves*. *See Sheridan*, 164 Mont. at 388, 523 P.2d at 1394–95. Governments, on the other hand, use zoning laws and ordinances, as an exercise of its police power in the public's interest, to regulate how *everyone* uses their land. *See Lewington v. Parsons*, No. 47022-5-II, 2016 Wash. App. LEXIS 957, *21 (Ct. App. May 3, 2016).

MAID's criticisms of the district court miss the point. MAID opposes the district court's findings because, it argues, the lower court should have looked to the end goal of the regulation to determine whether the classes are similarly situated. (MAID Br. at 64–71.) But that is wrong. This Court "identif[ies] similarly situated classes by isolating the factor allegedly subject to impermissible discrimination; if two groups are identical in all other respects, they are similarly situated." *Hensley v. Mont. State Fund*, 2020 MT 317, ¶ 19, 402 Mont. 277, 477 P.3d 1065 (citing *Goble*,

¶ 29); *see also Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 27, 325 Mont. 148, 104 P.3d 445.

The factor allegedly subject to impermissible discrimination, according to MAID, is "impact[] by the 2023 Montana zoning changes." (MAID Br. at 67.) But when that factor is isolated, the classes are not identical—because regardless of the Housing Reform Provisions, citizens living subject to restrictive covenants *are still* different from citizens who do not. With restrictive covenants, citizens have additional contractual obligations which limit their use of their property. Other citizens do not have those same or similar obligations.

*Snetsinger* highlights where MAID's analysis goes awry. In *Snetsinger*, the governmental policy at issue prohibited employees in a same-sex relationship from receiving insurance coverage for their same-sex domestic partner. *Snetsinger*, ¶¶ 6–7. The Court there isolated the factor for discrimination—being in a same-sex relationship—and then determined the classes, being in an unmarried relationship, were identical. *Id.* ¶ 27. "These two groups, although similarly situated in all respects *other than* sexual orientation, are not treated equally and fairly." *Id.* And that is logically consistent. Whether a government employee's domestic partner could receive insurance coverage hinged on whether the domestic partner was the opposite sex of the employee. The different treatment thus came from the policy.

That is not the case here. Montanans enter covenants regardless of the Housing Reform Provisions. And by voluntarily contracting, Montanans restrict their own land use in a way that makes them different from their neighbors. They are no longer similarly situated because they are not identical in all respects.

Moreover, MAID's purported classes cannot be similarly situated based on covenant status; otherwise, "any contract facilitated by a statute could become the basis for an equal protection challenge by those who have not received the benefit of the contract." *See Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶ 23, 392 Mont. 1, 420 P.3d 528. The *Gazelka* court did not find patients who contracted for insurance to be similarly situated to patients who had not, reasoning that the contracting patients had incurred the costs of contracting and paid premiums, making them dissimilar. *See id.* ¶¶ 23–24. Like a patient who contracts for insurance, a landowner subject to a restrictive covenant bore the cost of contracting and is bound by those terms. *Gazelka*, ¶¶ 23–24.

MAID points out that there are financial and practical costs associated with enacting covenants, whether it is the cost of drafting or the practical considerations of negotiating with one's neighbors. (MAID Br. at 69.) But that is just the cost of contracting. Although property owners are free to enter covenants, there are costs associated with that choice. But costs are not dispositive here. Indeed, such costs are no different from a patient's costs for contracting with an insurance provider. For

covenants, those costs can even extend beyond the originally contracting parties. But being subject to a covenant cannot be the basis of a similarly situated analysis.

The Housing Reform Provisions do not create that difference, nor do the laws impose different treatment where none previously existed. Even before the Housing Reform Provisions, Montanans could use covenants to restrict their (and others') use of property beyond what zoning laws required. And those not already party to a covenant could freely contract with neighbors to create covenants. So property owners not bound by covenants could (and still can) consent to be bound by more than just zoning laws. After the Housing Reform Provisions' enactment, that is still true. If some property owners like more restrictive zoning, they have the tool to achieve that through covenants. Under Montana law, the more restrictive measure supersedes the other. The Housing Reform Provisions do not alter this; they just rein in burdensome zoning.

Even if MAID's backward analysis is correct (it is not), the Provisions pull back regulations on everyone. The laws do not burden property owners who are only governed by zoning laws. Instead, the Provisions remove undue restrictions on everyone. This allows and encourages landowners to develop their land, thereby increasing the supply of housing—alleviating the current housing shortage crisis. Even a Montanan living subject to a restrictive covenant can still have a neighbor build an ADU if the covenant does not restrict that land use.

If MAID's claim is successful, *all* zoning laws violate equal protection if just a single person has a covenant that is more restrictive than the zoning law. Under MAID's theory, if the State enacted a law that prohibits municipalities from enacting zoning laws that restrict new developments to one story, single-family homes, if a single neighborhood is subject to a common scheme covenant that did not allow for homes to be taller than one story, there is an equal protection violation. The result of MAID's argument is that all state zoning laws could be struck down as an equal protection violation. This cannot be true, especially in light of the State's police power.

MAID also criticizes the district court's findings because it found dispositive the fact the Housing Reform Provisions did not create the classes. (MAID Br. at 64.) It contends "[t]his could be said about any number of equal protection cases" and that "a statute which arbitrarily distinguishes between genders can never be considered a violation of equal protection because the statute did not" create the differences. (MAID Br. at 64.) But this is not the law.

The threshold question of an equal protection claim is "whether the statute *created* a discriminatory classification." *Caldwell v. MACo Workers' Comp. Tr.*, 2011 MT 162, ¶ 19, 361 Mont. 140, 256 P.3d 923 (internal citations omitted) (emphasis added). *Planned Parenthood* illustrates this point. The Court found the legislation at issue in *Planned Parenthood* created two similarly situated classes,

"pregnant minors who want to obtain an abortion" and "pregnant minors who do not want an abortion." *Planned Parenthood v. State*, 2024 MT 178, ¶¶ 27–28, 417 Mont. 457, 554 P.3d 153. Absent the regulation, the two classes were identical: pregnant minor girls. The legislation thus created classes based on intent and then imposed a new burden for minor girls seeking an abortion, which was different for minor girls continuing their pregnancies. *See id.* ¶ 28. The legislation there thus created the classification in question.

In another case, a statute amending the definitions of an "injury" created two similarly situated classes—workers who were injured once and workers who were injured more than once. *See Henry v. State Comp. Ins. Fund*, 1999 MT 126, ¶¶ 21, 27, 294 Mont. 449, 982 P.2d 456. Before the amendment, both classes would have received the same treatment. *See id.* ¶ 28. The amendment, however, created different classes of injuries and the employees received different treatment because of their classification. *Id.* ¶ 21. The legislation in that case also created the classification.

This case is fundamentally different. Unlike either case above, the Housing Reform Provisions do not create a discriminatory classification. To this point, landowners—not the Housing Reform Provisions—determine class membership. Montanans are free to buy property subject to restrictive covenants or to create new covenants or enjoy their land without any covenants. The Housing Reform

Provisions pull back on certain zoning laws—not impose new or different requirements. If landowners find current zoning laws insufficient to maintain "architectural diversity" or prevent "gentrification," then neighbors can band together to create new covenants. (MAID Br. at 20.) The Housing Reform Provisions have nothing to do with that though. So MAID's equal protection argument here fails.

Unlike either case above, the Housing Reform Provisions do not "discriminate[] by impermissibly classifying persons and treating them differently on the basis of that classification." *See State v. Spina*, 1999 MT 113, ¶ 85, 294 Mont. 327, 982 P.2d 421. Indeed, they preserve the well-established relationship between zoning laws and private restrictive covenants. They do not arbitrarily create two classes of citizens then treat those citizens differently. Indeed, the Housing Reform Provisions apply to Montanans equally, regardless of living subject to a restrictive covenant. Because the district court correctly found that MAID's purported classes are not similarly situated, this Court should affirm.

## II. The Court Should not Reach the Question of Whether MLUPA Violates Equal Protection as it is not Properly Before the Court.

The district court correctly declined to reach the issue of whether MLUPA violates equal protection because the district court had already decided MLUPA based on public participation. Thus, the question of MLUPA's constitutionality under an equal protection theory is not before this Court on appeal and the Court

should not consider it for the first time here. The district court was right to decide MLUPA on the narrowest grounds possible. It did not need to reach equal protection. The "cardinal principle of judicial restraint" is that "if it is not necessary to decide more, it is necessary not to decide more." *Tome*, ¶ 31 (quoting *Morse v. Frederick,* 551 U.S. 393, 431 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part)). Like in *Planned Parenthood of Montana v. State,* this Court should not reach the MLUPA equal protection claim that was not decided by the district court because the public participation ruling concerning MLUPA "is sufficient to settle the case at bar, [and] principles of judicial restraint counsel us to decline ruling further." *Planned Parenthood of Montana v. State*, ¶ 58 (quoting *In re Powder Drainage Area,* 216 Mont. at 376, 702 P.2d at 957).

## III. Alternatively, if the Court is Inclined to Remand with Respect to the Issue of Whether MLUPA Violates Equal Protection, MLUPA's Geographical Scope does not Violate Equal Protection Either.

While the other parties exchange salvos regarding the constitutionality of MLUPA, one thing is certain: MAID failed to properly analyze whether MLUPA violates equal protection. As the district court correctly concluded, "MAID does not engage in the analysis of the test to determine if an equal protection violated has occurred based on" MLUPA. (Doc. 152 at 28.) That is fatal. Just like the Housing Reform Provisions, MLUPA does not create similarly situated classes. But even if it did, the classes rationally relate to an important government interest: addressing

housing shortage crisis in cities with higher populations, according to differing regional needs. To be similarly situated, two classes must be alike in all ways except for the factor which is the basis for the alleged discrimination. *See Planned Parenthood*, ¶ 27.

Statutes may treat certain people differently when a classification relates to "some legitimate state purpose." *See Gazelka*, ¶ 16 (citing *McDermott v. DOC*, 2001 MT 134, ¶ 30, 305 Mont. 462, 29 P.3d 992). "Accordingly, a 'statute does not violate the right to equal protection simply because it benefits a particular class[.]'" *Id.* (quoting W*rzesien v. State,* 2016 MT 242, ¶ 9, 385 Mont. 61, 380 P.3d 805). Rather, "[t]o prevail on an equal protection challenge, the injured party must demonstrate that the law at issue discriminates by impermissibly classifying individuals or entities and treating them differently on the basis of that classification." *Town & Country Foods, Inc. v. City of Bozeman, 20*09 MT 72, ¶ 19, 349 Mont. 453, 203 P.3d 1283 (internal citations omitted).

The Legislature enacted MLUPA to address the housing shortage crisis. In its legislative purpose, findings, and intent section, MLUPA states:

> The legislature finds that coordinated and planned growth will encourage and support: sufficient housing units for the state's growing population that are attainable for citizens of all income levels …

SB 382 (2023), § 2(2)(a). This law encourages the development of more housing by streamlining the planning process. It specifically addresses the housing shortage in

areas where it is most prevalent—higher population regions. MLUPA thus focuses on cities of at least 5,000 in counties of at least 70,000.

This does not create similarly situated classes because those who live in cities located in more populated counties are different from those in less populated counties. Counties with higher populations have distinct economies, varying infrastructure needs, and greater diversity of citizens. Even cities of the same size are different: Butte has traditional municipal bus routes; Helena does not. The result is that different cities in densely populated counties have different needs for zoning regulation.

MAID simply did not do the leg work here. Before the district court, MAID contended MLUPA "is discriminatory treatment and a denial of equal protection" because now *certain cities* have different regulations depending on size and geographic location. (Doc. 94 at 16.) But MAID's tune has changed. Now it argues "[t]he rights of *citizens* of certain cities … are curtailed [by MLUPA]." (MAID Br. at 55) (emphasis added). So, which is it? The ever-shifting argument is telling. Still, under either purported classification, the classes are not similarly situated. Residents in cities of a certain size, or the cities themselves, differ greatly because of the county in which they are located. Whitefish, a city of around 8,000 in a county of over 100,000 is different from Havre, a city of around 9,500 in a county of just over 16,000. MLUPA did not create these differences.

MAID cannot meet its burden of negating "every conceivable basis which might justify the classification." *See Mont. Med. Ass'n v. Knudsen*, 119 F.4th 618, 630 (9th Cir. 2024). Instead, MAID complains that the district court pointed out MAID's failure to provide any analysis to support this claim. Yet here again MAID perfunctorily asserts that it meets the three-step equal protection test without performing any analysis to back up the claim. The district court, settling the MLUPA controversy on other grounds, did not reach the question of whether MLUPA violates equal protection. That question is not properly on appeal, and this Court should not address it. But alternatively, if the Court finds it necessary to address that question, MLUPA does not violate equal protection.

## IV. Rational Basis is the Correct Standard of Review for the Housing Reform Provisions as Economic Regulations that do not Implicate Fundamental Rights.

Because MAID failed at the first step of equal protection analysis—demonstrating that there are two similarly situated classes—the Court did not need to determine the correct standard of review. However, the correct standard to apply to the Housing Reform Provisions is rational basis review because the laws are economic regulations and do not implicate a fundamental right or suspect class.

Because MAID did not demonstrate that the laws implicate a fundamental right, rational basis applies. This review asks whether the challenged laws "bear a rational relationship to a legitimate governmental interest." *Stand Up Mont. v.*

*Missoula Cnty. Pub. Schs.*, 2022 MT 153, ¶ 19, 409 Mont. 330, 514 P.3d 1062 (quoting *Satterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, ¶ 18, 353 Mont. 265, 222 P.3d 566). Neither strict nor middle-tier scrutiny applies. *See Powell*, ¶¶ 17–19. None of the challenges laws infringe a fundamental right. Nor do they affect a suspect class. Instead, they merely alter the existing zoning laws to expand landowner's property rights, making rational basis review the appropriate level of scrutiny. Rational basis review requires this Court to give the greatest amount of deference to the Legislature, such deference requires this Court to allow legislation to stand if the Court can even conceive of a reason to justify the statute. *Reesor v. Mont. State Fund* (Rice, J., dissenting), 2004 MT 370, ¶¶ 29–30, 325 Mont. 1, 103 P.3d 1019.

Strict scrutiny applies "when a law affects a suspect class or threatens a fundamental right." *Jaksha*, ¶ 17 (citation and quotations omitted). Middle-tier scrutiny applies when the law affects a right conferred by the Montana Constitution but is not found in the Constitution's Declaration of Rights. *Id.*; *see also Meech v. Hillhaven W.*, 238 Mont. 21, 44–45, 776 P.2d 488, 502 (1989) (stating middle tier scrutiny applies "only where specific directives in the Montana Constitution protected interests in education and welfare").

MAID half-heartedly contends that a heightened level of scrutiny should apply here but fails to explain why. (MAID Br. at 71–73.) Instead, MAID

conclusively asserts that fundamental property rights, somehow, are affected—absent any analysis of how that is the case. *Id.* Under the Housing Reform Provisions, Montanans are *more free* to enjoy or protect their property.[2] They in fact afford Montanans *more* property rights by loosening restrictions on how they can use and enjoy their property. MAID's reliance on *Robinson Twp. v. Commonwealth*, 623 Pa. 564, 83 A.3d 901 (2013) is inapt here as the Pennsylvania Supreme Court explicitly stated that it "offer[s] no opinion on the issue" of whether the rationally-related test or heightened scrutiny applies. *Robinson,* at n.22.

Mid-tier scrutiny is also inappropriate because the Housing Reform Provisions do not affect other constitutionally conferred rights. Equally problematic is MAID's alternative argument, claiming mid-tier scrutiny also applies but, again, not identifying with specificity any basis in the Montana Constitution. Therefore, Rational basis is the correct standard of review only if this Court determines MAID has identified similarly situated classes.

The Housing Reform Provisions create opportunities to increase Montana's housing supply. This is a bipartisan objective that benefits all Montanans. These laws

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[2] Other courts have emphasized that the right to use property is subject to the valid exercise of police power and does not invoke strict scrutiny. *Napleton v. Vill. of Hinsdale*, 229 Ill. 2d 296, 314, 891 N.E.2d 839, 850 (2008). Additionally, *Strauss v. City of Chicago*, 2021 IL App (1st) 191977, ¶ 39, 180 N.E.3d 832 (Mar. 5, 2021), reaffirmed that zoning ordinances affecting property use are subject to rational basis review, as property owners cannot reasonably rely on the indefinite continuation of zoning classifications. *Id.*

easily clear deferential rational basis: "whether there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Mont. Med. Ass'n*, 119 F.4th at 630 (cleaned up); *see also Arneson v. State by & Through its Dep't of Admin. Teachers' Retirement Div.*, 262 Mont. 269, 273, 864 P.2d 1245 ("[T]he rational basis test [] determines whether the classification is rationally related to furthering a legitimate state purpose.").

MAID does not "negate 'every conceivable basis which might justify the classification." *Mont. Med. Ass'n*, 119 F.4th at 630. "And [the] state has 'no obligation to produce evidence to sustain the rationality of a statutory classification." *Id.* at 630 (quoting *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993)) (internal quotation marks omitted).

No one disputes that addressing the current housing shortage threatening Montanans is a legitimate state purpose. Indeed, MAID even suggests that state regulation can be proper here. (Doc. 176 at 18–21.) Under rational basis and applying the required presumptions of constitutionality and legislative good faith, in a facial challenge, the Housing Reform Provisions easily survive MAID's challenge. The district court and this Court need not second guess the policy decisions of the Legislature. "The legislature is simply in a better position to develop the direction of economic regulation, social and health issues." *Caldwell*, ¶ 62 (Baker, J., dissenting) (quoting *Stratemeyer v. Lincoln Cnty.*, 259 Mont. 147, 153, 855 P.2d

506, 510 (1993)). And MAID's argument flounders because it fails to recognize the historical relationship between zoning laws and private restrictive covenants. This Court bars zoning laws from overriding or altering the terms of restrictive covenants. *See State ex rel. Region II Child & Fam. Servs. v. Dist. Court, 18*7 Mont. 126, 130, 609 P.2d 245, 247–48 (1980). This Court need only identify a single reason—easily met here—to rationally relate the Housing Reform Provisions to a legitimate government interest for the laws to meet equal protection. Because MAID has failed to negate every conceivable basis for the Housing Reform Provisions, the laws survive.

## CONCLUSION

This Court should affirm the district court's judgment that the Housing Reform Provisions do not violate equal protection. Whether MLUPA violates equal protection is not before the Court on appeal, as the district court properly exercised judicial restraint and constitutional avoidance in not reaching that claim where MLUPA was resolved on public participation grounds. Alternatively, if the Court finds it necessary to reach that issue, MLUPA's geographic distinctions reflect permissible legislative judgments tailored to regional population and infrastructure realities. MAID has identified no similarly situated classes subject to differential treatment under the Housing Reform Provisions. The laws are economic regulations that do not burden a constitutional right. Nor did the challenged laws create the

classifications with which MAID takes issue. The Housing Reform Provisions easily pass rational basis review. These laws are rationally related to the State's legitimate interest in addressing Montana's housing shortage crisis. This Court should affirm the district court.

DATED this 6th day of August 2025.

Austin Knudsen
*Montana Attorney General*

/s/ *Alwyn Lansing*
Alwyn Lansing
Michael D. Russell
Thane Johnson
Michael Noonan
*Assistant Attorneys General*
MONTANA DEPARTMENT OF JUSTICE

*Attorneys for Defendant/Cross-Appellee*

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 6,659 words, excluding certificate of service and certificate of compliance.

/s/ *Alwyn Lansing*
Alwyn Lansing

## CERTIFICATE OF SERVICE

I, Alwyn T. Lansing, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-06-2025:

Ethan Winfred Blevins (Attorney)
839 W 3600 S
Bountiful UT 84010
Representing: Clarence Kenck, David Kuhnle
Service Method: eService

Scott Michael Svee (Attorney)
203 N Ewing
Helena MT 59601
Representing: Montana League of Cities and Towns
Service Method: eService

Murry Warhank (Attorney)
203 North Ewing Street
Helena MT 59601
Representing: Montana League of Cities and Towns
Service Method: eService

James H. Goetz (Attorney)
PO Box 6580
Bozeman MT 59771-6580
Representing: Montanans Against Irresponsible Densification, LLC
Service Method: eService

Henry Tesar (Attorney)
35 North Grand
Bozeman MT 59715
Representing: Montanans Against Irresponsible Densification, LLC
Service Method: eService

Brian K. Gallik (Attorney)
777 E. Main St., Ste. 203
PO Box 70
Bozeman MT 59771
Representing: Montanans Against Irresponsible Densification, LLC
Service Method: eService

Jesse C. Kodadek (Attorney)
Parsons Behle & Latimer
127 East Main Street
Suite 301
Missoula MT 59802
Representing: Shelter WF, Inc.
Service Method: eService

Michael D. Russell (Govt Attorney)
215 N Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Thane P. Johnson (Govt Attorney)
215 N SANDERS ST
P.O. Box 201401
HELENA MT 59620-1401
Representing: State of Montana
Service Method: eService

Michael Noonan (Govt Attorney)
215 N SANDERS ST
HELENA MT 59601-4522
Representing: State of Montana
Service Method: eService

Brian F Close (Attorney)
P.O. Box 5212
Bozeman MT 59717
Representing: Better Bozeman Coalition
Service Method: eService

Michelle Tafoya Weinberg (Attorney)
PO Box 1417
Missoua MT 59801
Representing: Flathead Families for Responsible Growth
Service Method: eService

Alan F. McCormick (Attorney)
PO Box 7909
350 Ryman St.

Missoula MT 59807
Representing: American Planning Association
Service Method: eService

David Francis Knobel (Attorney)
490 N. 31st St., Ste 500
Billings MT 59101
Representing: Institute for Justice
Service Method: eService

David C McDonald (Attorney)
3100 Claredon Blvd, Suite 1000
Arlington VA 22201
Representing: Clarence Kenck, David Kuhnle
Service Method: E-mail Delivery

Ari S Bargil (Attorney)
2 South Biscayne Blvd., Suite 3180
Miami FL 33131
Representing: Institute for Justice
Service Method: E-mail Delivery

Joseph R Gay (Attorney)
901 N. Glebe Rd., Suite 900
Arlington VA 22203
Representing: Institute for Justice
Service Method: E-mail Delivery

Mark Miller (Attorney)
4440 PGA Blvd, Suite 307
Palm Beach Gardens FL 33410
Representing: Clarence Kenck, David Kuhnle
Service Method: E-mail Delivery

Andrew L.W. Peters (Attorney)
950 17th Street, Suite 1600
Denver CO 80202
Representing: Montanans Against Irresponsible Densification, LLC
Service Method: E-mail Delivery

Electronically signed by Rochell Standish on behalf of Alwyn T. Lansing
Dated: 08-06-2025