IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. DA 24-0039

MONTANANS AGAINST IRRESPONSIBLE DENSIFICATION, LLC,

Plaintiff and Appellee,

v.

STATE OF MONTANA,

Defendant and Appellant.

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.*, *Catherine H. Barber Mem'l Shelter, Inc. v. Town of N. Wilkesboro Bd. of Adjustment*, 576 F. Supp. 3d 318 (W.D.N.C. 2021) (town violated federal equal protection clause by imposing arbitrary zoning requirements to force county's only homeless shelter out of town).

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 threatens to 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, modern zoning laws upended the historic right to private property. Zoning codes now dictate minute details about how we can use our property and what we can build on it. Invisible lines on a map control where we can live, where we can work, and where we can 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 become even more intense. 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 of which are before the Court. One requires cities to allow accessory dwelling units (ADUs) on single-family lots, while the other requires cities with more people (and so a greater need for homes) to allow duplexes wherever single-family homes are allowed. Mont. Code Ann. §§ 76-2-345 (codifying SB 528), -304(3) (codifying SB 323). In other words, land that could house only one family can now house two. The zoning 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.

MAID's substantive due process and equal protection challenges are therefore missing the basic building blocks of a constitutional claim. The zoning reforms cannot 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 exactly backwards. *See infra Section* II.

Finally, even if the Court doubts some aspects of the zoning reforms, it should be mindful of the rights of thousands of nonparty Montanans. Any appropriate remedy should involve strengthening rights for as many people as possible, not stripping them from everyone. *See infra* Section III.

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 there is a constitutional right to exclude certain homes from single-family neighborhoods—

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").

The federal and Montana constitutions were instituted to protect this preexisting right. *See Buchanan v. Warley*, 245 U.S. 60, 74 (1917) (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" in Montana is therefore "a fundamental right." *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 dine. Even for harmless uses, if it's not listed, zoning codes probably say it's illegal.

When zoning codes allow us to do something, they continue to 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

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

[2] Joshua Braver & Ilya Somin, *The Constitutional Case Against Exclusionary Zoning* (forthcoming in Texas Law Review) (Apr. 2024) (manuscript at 4), *available at* https://ssrn.com/abstract=4728312.

multifamily homes, height limits, minimum lot sizes, square footage minimums, and parking requirements."[3]

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

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[3] Council of Economic Advisors, *Annual Report* 152 (Mar. 2024), *available at* https://www.whitehouse.gov/wp-content/uploads/2024/03/ERP-2024.pdf [hereinafter "CEA Report"].

[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 prior to zoning).

From the beginning, these new 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 in order to exclude Black and Chinese residents from certain neighborhoods.[7] Just after these codes appeared, the U.S. Supreme Court struck down racial zoning codes. *Buchanan*, 245 U.S. 60. With that option gone, even more cities turned to zoning codes to achieve exclusionary goals (racial, economic, or both).[8]

The U.S. Supreme Court's decision to uphold 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

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[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.

[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.

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 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

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[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.

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

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

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 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

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[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).

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 unprecedented infringement on the fundamental right to build housing 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]

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

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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.

[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.

intergenerational poverty.[17] It exacerbates environmental impacts by forcing people to build housing that uses more energy and requires more driving than they would otherwise choose.[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.

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]

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[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).

[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.

Another city tried to use its zoning code to shut down a single mother's small, home-based daycare. Women have traditionally used their homes to care for their neighbors' children, so why target this small home 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 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]

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[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.

[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-

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 they might have lower-income residents, who would have trouble with "trash pickup" and attract "riff raff" to the area.[24]

And so on. These stories play out in zoning hearings every day around the country. Equipped with vague criteria like "character," local governments have 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.

None of this requires condemning MAID's members or questioning their motives. Many fellow Americans share their views. But whatever

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vista-residents-sue-city-to-keep-their-homes-in-place/article_75c96b95-520f-55a4-89f3-0e46445cde1f.html.

[24] 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).

their motives, the system they advocate is unjust and unwise. Montana's efforts to undo that harm are not only constitutional, they honor the spirit of the Montana Constitution's commitment to protecting inalienable rights.

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

This case lacks the basic building blocks of a constitutional claim. On one hand, the zoning reforms here don't take away anyone's rights—they simply restore historical rights to build homes. That doesn't violate the Montana Constitution because there's no constitutional right to restrict your neighbors' rights. On the other hand, a property owner's private decision about how to use their property in an ordinary, harmless way doesn't infringe anyone's constitutional rights. Either way, MAID's substantive due process and equal protection claims fail as a matter of law.

A. There is no right to ban your neighbors from building ADUs and duplexes.

MAID's substantive due process claim gets the normal inquiry backwards. Ordinarily, "due process challenges to land use regulations" involve a property owner who was denied a permit "or has had some

other restriction placed on his own property." *Gagliardi v. Vill. of Pawling*, 18 F.3d 188, 191–92 (2d Cir. 1994) (no constitutional right to enforce zoning laws against adjoining property). But the zoning reforms here do not restrict how anyone uses their property. Instead, MAID effectively asserts substantive due process in reverse: *restrict* individual rights rather than protect them. That is not how constitutional rights are supposed to work.

MAID tries to invoke its members' right "to own and protect property." Answering Br. 33–34. But it cannot identify any actual *restriction* on that right. When a state's zoning reform "does not restrict the use of [anyone's] property," but "merely lifts restrictions which were previously imposed by local ordinance and permits others to use their property for a broader range of purposes" than the local ordinance would otherwise allow, "no constitutionally protected property right is violated." *Nichols v. Tullahoma Open Door, Inc.*, 640 S.W.2d 13, 17 (Tenn. Ct. App. 1982). The fundamental right of "acquiring, possessing and protecting property" (Mont. Const. art. II, § 3) is important to this case, but it protects the homeowner who wants to build an ADU or

duplex, not the person down the street who prefers that his neighbor refrain from allowing anyone else to live there.

Simply put, there is no constitutional right to restrict your neighbors' property rights. A landowner "has no vested rights in the zoning classification or land uses of his or neighbor, that is, in the land the landowner does not own." *Loch Levan Land Ltd. P'ship v. Bd. of Supervisors of Henrico Cnty.*, 297 Va. 674, 689, 831 S.E.2d 690, 698 (2019). When it comes to restricting someone else's property, "there is no underlying property right for the constitution to protect." *Id.*; *accord Nichols,* 640 S.W.2d at 16–17.[25] Indeed, "numerous courts have similarly rejected the existence of a property right in the enforcement of zoning restrictions on a neighbor's property." *Pamela B. Johnson Tr. ex*

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[25] Of course, statutes may require officials to make decisions according to certain standards and give some parties a legal interest to enforce those standards. *See, e.g.*, *Heffernan v. Missoula City Council*, 2011 MT 91, ¶¶ 35–38, 360 Mont. 207, 222–24, 255 P.3d 80, 92–94 (Mont. Code Ann. § 76-3-625 permitted adjacent landowners with "a specific personal and legal interest, as distinguished from a general interest" to challenge whether subdivision approval complied with § 76-1-605's command that zoning decisions "give consideration to" general growth policy). But an interest in enforcing standards set by a statute is different than a constitutionally protected right to keep the statute itself on the books.

rel. Johnson v. Anderson, No. 315397, 2014 WL 4087967, at *8–10 & n.12 (Mich. Ct. App. Aug. 19, 2014) (collecting cases).[26]

The absence of any constitutional right to continue restricting other people's property rights is especially clear here. The Court has long recognized that the legislature "can give the cities of this state the power" to zone, "and the legislature can take it away." *State ex rel. Thelen v. City of Missoula*, 168 Mont. 375, 380, 543 P.2d 173, 176 (1975). And Montana's unique commitment to avoiding discrimination "on account of … social origin or condition," Mont. Const. art. II, § 4, further counsels against recognizing a constitutional right to exclusionary zoning. *See supra* at pp. 8–12.

The legislature therefore could have repealed the zoning statutes altogether. Instead, it simply restored a traditional right to use one's property in a normal, harmless way: to build ADUs and duplexes.

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[26] *See also Shanks v. Dressel*, 540 F.3d 1082, 1087–88 (9th Cir. 2008) (no substantive due process right to enforce land-use laws to stop neighbor from building duplex); *Horton v. City of Smithville*, 117 F. App'x 345, 347–48 (5th Cir. 2004) (plaintiffs' "property interests in the investment value and the peaceful use and enjoyment of their home" did not give them substantive due process right to enforce zoning restrictions on neighbor); *Gagliardi*, 18 F.3d at 191–92 (no constitutional right to enforce zoning laws against adjoining property).

Restoring that right deprives no one of a constitutionally protected right.

B. Private choices about using property in normal, harmless ways do not violate constitutional rights.

Just as there's no constitutional right to restrict your neighbor's rights, your neighbor's decision about how to use their property in normal, harmless ways is not something that can violate constitutional rights. To the contrary, a neighbor who decides to build an ADU or duplex, or who refuses to enter into a restrictive covenant prohibiting ADUs and duplexes, is exercising their own "fundamental right" to property. *Vaniman*, 264 Mont. at 79. The Court should reject any attempt to suggest that those private choices can violate Montana's constitution.

Montana's due process and equal protection clauses "offer[] protection only against state action." *Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶ 10, 392 Mont. 1, 6, 420 P.3d 528, 533 (equal protection); *see also Montanans for Just. v. State ex rel. McGrath*, 2006 MT 277, ¶ 29, 334 Mont. 237, 247, 146 P.3d 759, 767 (substantive due process).[27]

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[27] The third sentence of Section 4 applies to private action, *Galezka*, ¶ 7, but MAID does not invoke that clause. Nor could it, because reading

Courts are reluctant, however, to find state action where a statute has simply "restored" rights that were "historically exercised." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 54 (1999). If the Court reaches the merits of the claims, it should therefore be careful not to suggest that decisions by individual property owners to use their property in normal, harmless ways might infringe their neighbors' constitutional rights.

The Court should also reject the argument that the zoning reforms are unconstitutional because some people are "fortunate enough" to have restrictive covenants banning ADUs and duplexes, while other people without covenants and their neighbors are now allowed to choose those options. Answering Br. 31–33, 39. Entering a restrictive covenant is a private decision, and nothing prevents MAID's members from agreeing to covenants if their neighbors are willing. Presumably their neighbors are unwilling, so this lawsuit seeks to foist that arrangement

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Montana's constitution to mandate exclusionary zoning contradicts that sentence's ban on discrimination "on account of … social origin or condition." Mont. Const. art. II, § 4.

on the neighbors against their will. That imposition, of course, would invite constitutional scrutiny.

But suggesting that the existence of different contracts between different private parties denies equal protection of the laws has no logical endpoint. It implies that all zoning laws must be at least as restrictive as the most stringent restrictive covenants. Instead of having to show that zoning restrictions are constitutional, governments would have to justify *not* restricting people's rights. This Court should reject this request for jurisprudential havoc. *Cf. Gazelka*, ¶ 23 (rejecting argument that those with a contract were "similarly situated" to "those who have not received the benefit of the contract," because then every such contract "could become the basis for an equal protection challenge").

III. The appropriate remedy for any violations should be to protect more rights, not strip them from thousands of Montanans.

This case is unusual. Rather than deny MAID's property rights, the zoning reforms increased them. And rather than ask the Court to protect its rights, MAID asks the Court to restrict its rights and the rights of thousands of other people. The peculiar nature of that request

should impact the Court's consideration of the appropriate remedy, the public interest, and the balance of equities. Because the zoning reforms impact the property rights of thousands of Montanans, any relief should consider their interests and seek to increase everyone's rights, rather than take them away.

MAID argues, for instance, that the duplex reforms violate equal protection because they only apply to cities with larger populations. Typically, someone burdened by that distinction (someone in a smaller city who wants to build a duplex but can't) would challenge it. And if that challenge were successful, "the proper course" would be the "extension" of the zoning reforms to smaller cities. *Califano v. Westcott*, 443 U.S. 76, 89–90 (1979) (where program violated equal protection by awarding benefits to families with unemployed fathers but not unemployed mothers, remedy was to extend benefits to mothers, not strike down everyone's benefits). Unlike *Califano*, where the plaintiffs challenged a law *denying* them benefits, MAID challenges reforms *granting* them benefits (their rights to build housing have been restored, too). But *Califano* would not have come out differently if the plaintiff had been an unemployed father who received benefits but was

philosophically opposed to welfare. Nor should MAID's status as an unhappy beneficiary of the zoning reforms alter the appropriate remedy here.

MAID's argument that the zoning reforms make arbitrary distinctions further supports protecting the rights of nonparties. Zoning 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). Along West College Street in Bozeman, what non-arbitrary principle allows duplexes west of South 4th Avenue and east of Tracy Avenue, but not the indistinguishable seven blocks in between?[28] If arbitrary distinctions are a problem, the solution is not to introduce even more arbitrary lines.

Finally, broader constitutional values counsel against depriving nonparty Montanans of their property rights. Mere "negative attitudes" about how a property might be used or who might live there "are not permissible bases" for imposing zoning restrictions. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985); *accord Catherine H.*

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[28] See Bozeman, *Zoning*, *available at* https://public-bozeman.opendata.arcgis.com/datasets/23e472f876524bd2b497b4a8cf9e62ac_0/explore.

Barber Mem'l Shelter, Inc. v. Town of N. Wilkesboro Bd. of Adjustment, 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 of an unsubstantiated "dread" that two families might live next door instead of one, Answering Br. 51, raises similar constitutional red flags. As does the unfounded assumption that an ADU or duplex will always clash with a "nice[] and carefully maintained single-family dwelling." *Id.* Or the belief that even a single ADU would irreparably damage the "peace and quiet" of a single-family neighborhood. *Id.* at 47.

These values carry particular weight in Montana, where the constitution expressly forbids discrimination "on account of … social origin or condition." Mont. Const. art. II, § 4. This includes discrimination based on "status of income and standard of living." *Gazelka*, 2018 MT 152, ¶ 26 (quoting Montana Constitutional Convention, Verbatim Transcript, Mar. 7, 1972, p. 1642). Although distinctions "[b]earing some relation to economic status" do not trigger this prohibition, *id.* ¶ 27, exclusionary zoning does much more than that: its goal is to "classify the population and segregate them according

to their income or situation in life." *Ambler Realty Co.*, 297 F. at 316. An appropriate remedy here should have no part of that.

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, all too 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 for ordinary Americans.

Montana's zoning reforms seek to undo some of this damage by allowing people to use their property to build an ADU or duplex. Restoring those preexisting rights cannot infringe anyone's constitutionally protected rights, because there is no constitutional right to restrict your neighbors' rights. The Court should therefore reverse the lower court's order and dissolve the temporary injunction.

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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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