IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 24-0039

MONTANANS AGAINST IRRESPONSIBLE DENSIFICATION, LLC,

Plaintiff and Appellee,

v.

THE STATE OF MONTANA,

Defendant and Appellant.

On Appeal from the Eighteenth Judicial District Court
Gallatin County, Case No. DV-16-2023-1248
The Hon. Michael Salvagni, Presiding

BRIEF OF *AMICI CURIAE* MONTANA LEGISLATORS

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II. INTEREST OF THE *AMICI CURIAE*

This brief is filed in support of vacating the District Court's preliminary injunction. *Amici* are individual legislators who hold leadership positions in the Montana Legislature or were involved in the creation and enactment of the challenged bills.

Amici have an interest in this case because the District Court's decision granting the preliminary injunction violates separation of powers. The District Court relied on unsupported or contested factual claims and speculative opinions regarding density and housing affordability to reject decisions within the province of the Legislature. Appellee "Montanans Against Irresponsible Densification ("MAID")" was a non-entity during the legislative session. Post session, special interest stakeholders whose lobbying failed during session picked a name and formulated a lawsuit in order to pursue in court their desired policy choices distinct from those the legislature adopted. *Amici* legislators heard from many diverse stakeholders with unique interests from those espoused by MAID, which may not be discredited here judicially.

Appellee's dissatisfaction with the policy choices of the Legislature does not form a legitimate constitutional challenge to unwind the work the legislators were elected to do. As this Court stated in *N Bar N Land & Livestock Co. v. Taylor*, "[n]o doubt the operation of the statute may occasionally work hardship; but the

wisdom or unwisdom of the law is for the legislative body, not for us, to decide." 94 Mont. 350, 22, P. 2d 313, 314 (1933).

III. STATEMENT OF THE CASE

The 2023 Legislature passed several bills on housing supply and affordability. Appellee MAID filed a Complaint for Declaratory and Injunctive Relief on December 15, 2023. The complaint challenged four of these newly adopted laws. MAID first filed a Motion for Temporary Restraining Order/Preliminary Injunction seeking to block two of the laws (SB 323 "Allow for Duplex Housing in City Zoning") and SB 528 ("Revise Zoning Laws for ADUs") from going into effect. The District Court issued a preliminary injunction granting the Motion. The State appealed.

IV. STANDARD OF REVIEW

The parties and other *amici* have provided the Court with the standard of review for preliminary injunctions. *Amici* legislators draw the Court's attention to the deference afforded them in any judicial review of their legislation:

> 'An act of the legislature is presumed to be valid; every intendment is in favor of upholding its constitutionality; it will not be condemned unless its invalidity is shown beyond a reasonable doubt'... 'Unless there is a clear and palpable abuse of power a court will not substitute judgment for legislative discretion.'

Billings Properties, Inc. v. Yellowstone Cnty., 144 Mont. 25, 30, 394 P. 2d 182, 185 (1964) (citations omitted).

V. SUMMARY OF THE ARGUMENT

Appellee makes clear its interests conflict with the Legislature's approach on housing affordability, and the undesirability of those policy choices to them is the root of their case.[1] Therefore by granting the preliminary injunction, the District Court inappropriately weighed in on the policy debate, violating the separation of powers doctrine found in the Montana Constitution Article III, Section 1.

VI. ARGUMENT

A. Separation of Powers and Judicial Second Guessing

The Montana Constitution provides:

> [t]he power of the government of this state is divided into three distinct branches - legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

[1] The core of Appellee's argument (that there was no "abuse of discretion regarding the four-factor test for issuance of a preliminary injunction") is reliant on its rejection of the Legislature's findings regarding affordability. *See* Appellee's Response Brief at 24 ("Zoning reform, as a solution to housing affordability, is a chimera"); *id.* at 35 (claiming the District Court "did not manifestly abuse its discretion in finding a likelihood of success regarding a violation of equal protection" because the statutes "are utterly arbitrary and capricious in relation to the professed governmental objective of facilitating affordable housing."). Appellee's argument rests largely on unsupported claims on these factual issues. *See id.* at 24 ("Of these available tools, zoning reform is one with little promise."); *id.* at 25 ("MAID's concern is that the new measures will amount to a windfall to developers who will engage in random teardowns in historic neighborhoods.").

Mont. Const. art. III, § 1. The Legislature has plenary power in the enactment of legislation, the Constitution being the sole guidepost. *Mills v. State Board of Equalization*, 97 Mont. 13, 33 P. 2d 563, 567 (1934). Montana's Supreme Court long ago forbade judicial intermeddling with the legislative branch in an action to invalidate legislation. *State v. Erickson*, 39 Mont. 280, 102 P. 336, 339 (1909) ("The enrolled bill is conclusive upon the courts."); *Vaughn & Ragsdale Co., v. State Board of Equalization,* 109 Mont. 52, 96 P. 2d 420, 421 (1939), (*citing McTaggart v. Middleton*, 94 Mont. 607, 28 P. 2d 186, 187 (1933); *Woodward v. Moulton*, 57 Mont. 414, 423-24, 189 P. 59, 63 (1920)).

This Court has repeatedly warned that the courts are not the place for "second-guessing" the "wisdom" of the Legislature. *See, e.g., State Bar of Montana v. Krivec*, 193 Mont. 477, 481, 632 P. 2d 707, 710 (1981); *N Bar N Land & Livestock Co. v. Taylor*, 94 Mont. 350, 22 P. 2d 313, 314 (1933).

The Court has recognized the temptation to question legislative judgment, stating "[t]he task of deciding whether a statute is constitutional or not is not an easy one, due to the fact that the ultimate question of its constitutionality is oft times clouded by opinions as to the wisdom of the legislation." *Billings Properties, Inc. v. Yellowstone Cnty.*, 144 Mont. 25, 30, 394 P.2d 182, 185 (1964). It is for this reason that an act of the legislature is presumed to be valid. *Id*.

As in *Billings Properties*, this case involves a determination "upon which the Legislature predicate[d] its action." *Id.* at 188. Such a determination "is within the province of that body and will not be disturbed by the judiciary unless the evidence to the contrary preponderates against it." *Id.* The issue of how best to address housing affordability is a debated one and the evidence presented by Appellee on the question surely cannot be found to "preponderate" against the contrary legislative finding. (*See* discussion *infra* 11–12).

This case is also similar to other cases on the issue of separation of powers. The question of housing affordability is one of economics. "Economic… considerations are for the Legislature," stated this Court in *Trumper v. School District No. 55 of Musselshell County*, 55 Mont. 90, 173 P. 946, 947 (1918). And in a case also dealing with use of private property, it was noted "[n]or is the court 'a tribunal for relief from the crudities and inequities of complicated experimental economic legislation.'" *Moe v. Wesen*, 172 F. Supp. 259, 262 (D. Mont. 1959) (citation omitted).

Part of Appellee's argument is that implementation of the laws will cause severe hardship to its members. This Court has recognized that "the operation of [a] statute may occasionally work hardship." *N Bar N Land & Livestock* at 314. However, "the wisdom or unwisdom of the law is for the legislative body, not for us, to decide." *Id.*

B. Citizens Like Those Behind MAID Were Represented in the Process

Appellee has also claimed that individuals like its members (those "representing quiet, graceful residential neighborhoods") were not included in the process of developing these bills. To make this argument, Appellee focuses on an alleged lack of representation on the Governor's Housing Task Force. However, this case deals with legislation, not the composition of the Task Force. While recommendations from the Task Force were influential, there was a complete, deliberative legislative process that crafted the bills at issue.

The legislators involved in that process, including *amici*, represent their constituents, including those residing in "graceful" neighborhoods. And as this Court stated in *Billings Properties*, "[l]ocal authorities are presumed to be familiar with local conditions and to know the needs of the community." *Billings Properties* at 185. Additionally, Appellee's stakeholders were also free to participate directly in the legislative process, and indeed, the Senate and House committees heard from many opponents on both bills.

C. Legislative History of SB 323 and SB 528 Demonstrates the Responsiveness of the Legislature

The legislative history of these bills demonstrates the responsiveness of the Legislature in crafting them. For example, the initial version of SB 323 called not just for duplex housing by right, but also triplex and fourplex. Mont. S., SB 323,

68th Sess. (as introduced by Sen. Trebas, February 10, 2023). In versions three and four that became duplex only. Mont. S., SB 323, 68th Sess. (as amended by H. Loc. Gov't Comm., April 24, 2023; as enacted May 4, 2023).

Likewise, amendments to SB 528 reflect the careful process of consideration. After concerns were raised that ADUs would be bought up for short-term rentals (*Revise Zoning Laws for ADUs: Hearing on SB 528 Before the S. Comm. on Loc. Gov't*, 68th Sess. (2023) (statement of Kelly Lynch, Executive Director, Montana League of Cities and Towns), a section was added to the bill clarifying that "[n]othing in this section prohibits a municipality from regulating short-term rentals." Mont. S., SB 528, 68th Sess. (as enacted May 17, 2023). Additionally, the final version of that bill acknowledges concerns about impacts on city services with two different provisions: before development, the owner must obtain a will-serve letter from municipal water and sewer services; and, the owner must pay for any damages caused to public streets by construction.

D. Legislative History Demonstrates the Support These Bills Received from Diverse Participants

The other significant evidence in the legislative history is the support these bills received from very diverse participants. For example, in the Senate committee hearing on SB 323, proponents included the Frontier Institute (a free-market think tank), Forward Montana (whose goals include environmental protection and

LGBTQ2+ equality), the Blackfeet Tribe (speaking on homelessness on the Flathead reservation) and the Associated Students of the University of Montana.

The bipartisan nature of these bills also reflects their diverse support. For example, the minority vice chair of the Senate Local Government committee supported SB 323 because of its impact on housing affordability. *Allow for Duplex, Triplex, and Fourplex Housing in City Zoning: Second Reading in the Senate*, 68th Sess. (2023) (statement of Sen. Mary Ann Dunwell). That bill passed 72–26 in the House and 35–14 in the Senate. SB 528 passed 85–14 in the House and 48–1 in the Senate, with amendments worked on by the Montana League of Cities and Towns, who opposed the bill.

The broad support for these bills is not surprising, considering the goals enunciated by the sponsor of SB 323:

- Encouraging a safe, adequate and diverse supply of housing and fair housing opportunities;
- Promoting a wide and diverse supply of housing for all members of the community;
- Strengthening the sense of community by respecting others; and
- Being open to new, innovative solutions and problem-solving.

Allow for Duplex, Triplex, and Fourplex Housing in City Zoning: Hearing on SB 323 Before the S. Comm. on Loc. Gov't, 68th Sess. (2023) (statement of Sen. Jeremy Trebas).

E. MAID'S Unsupported or Contested Opinion that Density Does Not Affect Housing Affordability

Contrary to Appellee's claim that housing density does not affect affordability (*see* citations *supra* 5, n.1), the Senate committee heard testimony from multiple participants on how the bills would increase affordability. One proponent cited data from the U.S. Census' American Housing Survey showing small multi-family dwellings are less expensive than both single family homes and larger developments. *Hearing on SB 323* (statement of Izzy Filch, Senior Organizing Manager, Forward Montana Foundation); *see American Housing Survey: Data*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/ahs/data.html (last visited June 21, 2024).

Another participant observed that studies from the Pew Charitable Trusts have consistently shown small-scale, multi-family housing has the lowest rent and another noted that the Journal of the American Planning Association argues for bills like SB 323. *Hearing on SB 323* (statements of Danny Tenenbaum, resident of Missoula, and Chris Chitty, Missoula developer); *see Montana Housing Shortage*, THE PEW CHARITABLE TRUSTS, https://deq.mt.gov/files/About/Housing/2021_Montana_Housing%20Report_PEW.pdf (last visited June 21, 2024) (updated numbers available at *Outcome of Housing*

Policy Changes, THE PEW CHARITABLE TRUSTS, https://www.legis.state.pa.us/WU01/LI/TR/Transcripts/2024_0662_0001_TSTMNY.pdf (last visited June 21, 2024)); C.J. Gabbe, *Changing Residential Land Use Regulations to Address High Housing Prices*, 82 J. Am. Planning Ass'n 152 (2019).

It is wholly inappropriate to declare legislative policies ineffective and therefore inoperable in advance of carrying out those policies. Furthermore, if the policy choices prove ineffective once implemented, the Legislature may revisit those choices next session or in any session where stakeholders prevail upon the body to so act. The Legislature and the people may not be denied the knowledge that will come from implementing their policy choices simply because a special interest desires a distinct approach.

VII. CONCLUSION

MAID has no legitimate constitutional challenge because MAID was not elected to decide what housing policies best serve Montana. Amici were elected to make those decisions and did so constitutionally. The speculative opinions about how effective the legislation may prove to be has no judicial remedy because no judge may substitute his or her personal judgment for that of the legislature. As one citizen put it "[s]ome neighborhoods have had dramatic, and sometimes traumatic, change and others practically none. This bill spreads out the pressures of

development. No neighborhood will be completely insulated from change." *Hearing on SB 323* (statement of Chris Chitty).

The District Court failed to exercise the requisite judicial restraint and deference to its co-equal branch, weighing in on policy choices using unsupported or contested factual assertions and speculative opinions. Additionally, the preliminary injunction seriously interferes with a legislative process that addressed pressing economic issues through a well-established, bipartisan process that included a diversity of participants and opinions. The Court should reverse the District Court and vacate the preliminary injunction.

CERTIFICATION

I, Joan K. Mell, certify that this brief meets the requirements for *amicus curiae* briefs, Mont. R. App. P. 11(4)(a). It is double-spaced, proportionally spaced, Times New Roman font, 14 point, and 2,260 words.

DATED this 21st day of June, 2024.

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