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

MONTANANS AGAINST IRRESPONSIBLE DENSIFICATION, LLC,

Plaintiff and Appellee,

v.

STATE OF MONTANA,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

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

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STATEMENT OF THE ISSUES

1. Did the District Court err in issuing a preliminary injunction when Plaintiff failed to satisfy the elements required for injunctive relief?
2. Did the District Court manifestly abuse its discretion in failing to exercise independent judgment in issuing a preliminary injunction?
3. Did the District Court manifestly abuse its discretion in denying the State a separate evidentiary hearing on the preliminary injunction following the hearing on the temporary restraining order ("TRO")?

STATEMENT OF THE CASE

Plaintiff Montanans Against Irresponsible Densification ("M.A.I.D.") filed its Complaint for Declaratory and Injunctive Relief ("Complaint"/Doc. 1) on December 15, 2023. The Complaint challenged four housing reform laws passed during the 2023 legislative session: Senate Bill ("SB") 323, SB 528, SB 382, and SB 245. M.A.I.D. then filed its First Amended Complaint (Doc. 3) and its Motion for Temporary Restraining Order/Preliminary Injunction ("Motion") on December 19, 2023. (Docs. 4-6.) The Motion sought injunctive relief regarding two laws: SB 323 and SB 528. (*Id.*) The State filed its Brief in Opposition to the Motion on December 27, 2023. (Doc. 11).

The District Court held a hearing on M.A.I.D.'s Motion on December 28, 2023. The next day, on December 29, 2023, the District Court issued an Order

granting a preliminary injunction (not a temporary restraining order) of SB 323 and SB 528. (Doc. 17). The State timely appealed.

STATEMENT OF FACTS

The scope of this appeal is limited to the District Court's preliminary injunction of two of the four challenged laws: SB 323 (relating to duplexes) and SB 528 (relating to alternate dwelling units, or "ADUs"). Thus, although M.A.I.D.'s Brief in Support of its Motion (Doc. 5) and the Order (Doc. 17, **attached as Appendix A**) appear to rely on conflated arguments related to all four laws challenged in this case, the State focuses its Opening Brief on the two laws that were actually the subject of M.A.I.D.'s Motion (*see* Docs. 4-5) and preliminarily enjoined by the District Court: SB 323 and SB 528. (*See* Doc. 17 at 17.)

To that end, SB 323 provides in relevant part: "In a city with a population of at least 5,000 residents, duplex housing must be allowed as a permitted use on a lot where single-family residence is a permitted use…" (SB 323, **attached as Appendix B**, at 1). SB 528 provides in relevant part: "A municipality shall adopt regulations…that allow a minimum of one accessory dwelling unit by right on a lot or parcel that contains a single-family dwelling." (SB 528, **attached as Appendix C**, at 1.)

M.A.I.D. argued that SB 323 and SB 528 created two different classes, those protected by restrictive covenants and those not so protected who will be "largely

unaffected by these legislative measures." (Doc. 5 at 9). M.A.I.D. further argued that that these laws are "so arbitrary that they deny Equal Protection and Due Process for the citizenry and they drastically reduce the ability of the public to participate in governmental decision making…and they attempt to arrogate to the State powers constitutionally reserved for local governments." (Doc. 5 at 3). The only evidence M.A.I.D. provided in support of its motion for preliminary injunction of SB 323 and SB 528 was an affidavit that did not address any of these specific claims, nor any upcoming project planned as a result of SB 323 and SB 528, but rather articulated generalized fears about potential future developments of duplexes or ADUs. *See generally,* Doc. 6.

For example, M.A.I.D. complains: "The consequences to the members of the Plaintiff LLC are serious and irreparable because, once a duplex ADU is established in a neighborhood, that's it. There is no going back." (Doc. 5 at 5.) But M.A.I.D. points to no specific ongoing or imminent project or development that will actually affect it or its members. M.A.I.D. relied on an affidavit that merely repeats these generalized concerns and speculation. (See Doc. 6 at ¶ 8 ("If such development aimed at increasing density in my neighborhood happens, I believe it will seriously and adversely affect the economic value of my property. More important than economic value is the moral, aesthetic neighborhood values that my wife and I share with the neighbors, all of which will be adversely affected if my neighborhood is

impacted by development which is more dense.").) But the affidavit did not point to any development of a duplex or ADU—or any development at all—that is scheduled to take place and potentially harm Plaintiff without an injunction.

The District Court ultimately found that SB 323 and SB 528 were likely unconstitutional because "[i]t appears that the disparity in treatment between those protected by restrictive covenants and those not so protected, and the chaotic, uncoordinated, and arbitrary applicability requirements in these various new laws are so arbitrary and capricious and so unrelated to a legitimate governmental purpose that they likely constitute a denial of Plaintiff's rights to Due Process of Law." (Doc. 17 at 14).

STANDARD OF REVIEW

This Court reviews a District Court's grant or denial of a preliminary injunction for a manifest abuse of discretion. *Planned Parenthood of Mont. v. State*, 2022 MT 157, ¶ 5, 409 Mont. 378, 515 P.3d 301 (citation omitted); *Driscoll v. Stapleton*, 2020 MT 247, ¶ 12, 401 Mont. 405, 473 P.3d 386 (citation omitted); A court abuses its discretion when it acts "arbitrarily, without employment of conscientious judgment, or exceeds the bound of reason resulting in substantial injustice." *Id.* at ¶ 5 (citation omitted). "A manifest abuse of discretion is one that

is 'obvious, evident, or unmistakable.'" *Driscoll*, ¶ 12 (citing *Weems v. State*, 2019 MT 98, ¶ 7, 395 Mont. 350, 440 P.3d 4 ("*Weems I*") (quotation omitted).[1]

If a preliminary injunction decision was based on legal conclusions, however, this Court reviews those conclusions de novo. *Planned Parenthood of Mont.*, ¶ 5 (citing *Driscoll*, ¶ 12) The Court reviews the District Court's legal conclusions to determine if its interpretation of the law is correct. *Driscoll*, ¶ 12 (citation omitted). "Issues of justiciability, such as standing and ripeness, also are questions of law, for which [this Court's] review is de novo." *Id.* (citation omitted).

Review of constitutional questions is plenary. *Weems v. State*, 2023 MT 82, ¶ 33, 412 Mont. 132, 529 P.3d 798 ("Weems II") (citation omitted). "A district court's resolution of an issue involving a question of constitutional law is a conclusion of law which [this Court] review[s] to determine whether the conclusion is correct." *Id.* (quotation omitted). Montana courts presume that enacted laws are constitutional. *Powder River Cnty. v. State*, 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357. This is not a meaningless presumption: "[t]he constitutionality of a legislative enactment is prima facie presumed," and "[e]very possible presumption must be indulged in

[1] Montana's new conjunctive preliminary injunction standard is intended to "mirror the federal preliminary injunction standard," and its "interpretation and application" is intended to "closely follow United States supreme court case law." Mont. Code Ann. § 27-19-201(4) (2023). It therefore appears that the normal "abuse of discretion" standard rather than the "manifest abuse of discretion" standard should apply here. *See McCreary County v. ACLU*, 545 U.S. 844, 867 (2005). Nonetheless, this Court should reverse under either standard.

favor of the constitutionality of a legislative act." *Id.* at ¶¶ 73–74. The question for a reviewing court is not whether it is possible to condemn, but whether it is possible to uphold the statutes. *Satterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, ¶ 10, 353 Mont. 265, 222 P.3d 566. Plaintiffs must prove unconstitutionality beyond a reasonable doubt. *Id.*

"Analysis of a facial challenge to a statute differs from that of an as-applied challenge." *Mont. Cannabis Indus. Assn. v. State*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131 ("*MCIA*"). Parties presenting a facial challenge must demonstrate that "no set of circumstances exists under which the [challenged sections] would be valid." *Id.* (internal citations and quotations omitted). "The crux of a facial challenge is that the statute is unconstitutional in all its applications." *Advocates for Sch. Trust Lands v. State*, 2022 MT 46, ¶ 29, 408 Mont. 39, 505 P.3d 825. If any constitutional application is shown, the facial challenge fails. *Id.* at ¶ 29. If any doubt exists, it must be resolved in favor of the statute. *MCIA*, ¶ 12. The party challenging the constitutionality of the statute bears the burden of proof. *Id.*

SUMMARY OF THE ARGUMENT

The District Court erred in issuing the preliminary injunction of SB 323 and SB 528 for several reasons, each of which justifies reversal.

As an initial matter, M.A.I.D. lacks standing because it failed to demonstrate any actual or threatened injury such as an approved proposed development that

would potentially implicate its rights. M.A.I.D. also failed to satisfy the required elements for injunctive relief: (1) likelihood of success on the merits, (2) irreparable harm without injunctive relief, and (3) the balance of the equities and public interest tip in its favor.

On the merits, M.A.I.D.'s claim seeking declaratory judgment that SB 323 and SB 528 do not displace private, more restrictive covenants fails as a matter of law. The plain language of these bills does not purport to displace private restrictive covenants, and the enforceability and waiver of restrictive covenants is a statutorily required, fact-intensive inquiry that must be undertaken for each restrictive covenant, making facial declaratory relief inappropriate. M.A.I.D.'s equal protection claim is likewise meritless because it fails to identify similarly situated classes, and its argument leads to absurd results. M.A.I.D.'s due process claim also fails because it does not recognize that local zoning power derives from and is subject to modification by the State. The District Court also failed to afford these laws the presumption of constitutionality to which they are entitled. Because it has not shown even a threatened injury, and it delayed seven months in bringing its Motion, M.A.I.D. has not shown irreparable harm. And the balance of the equities and the public interest weigh in favor of the State and allowing these laws to go into effect to create more affordable housing to address the housing crisis Montana currently

faces. The District Court erred in granting the preliminary injunction because M.A.I.D. failed to satisfy any one of the requisite factors.

The District Court also manifestly abused its discretion because did not exercise independent judgment in issuing the preliminary injunction. Its Order simply adopts M.A.I.D.'s arguments (nearly verbatim), and it does not engage in any further substantive analysis or explanation. It does not meaningfully address the State's legal arguments, and it incorrectly accepted arguments of M.A.I.D.'s counsel as evidence. The District Court's failure to exercise independent judgment in this context was reversible error as well.

Finally, the District Court manifestly abused its discretion by granting the preliminary injunction without a separate evidentiary hearing on the preliminary injunction. The only hearing that was held addressed M.A.I.D.'s request for a TRO, and the District Court acknowledged as much at the hearing (*see, infra,* Section II.B.). Nevertheless, the District Court's Order granted the preliminary injunction based on the TRO hearing, resulting in unfair prejudice to the State's ability to defend the challenged laws. This was fundamentally unfair and a manifest abuse of discretion that further warrants reversal.

ARGUMENT

I. THE DISTRICT COURT ERRED IN ISSUING A PRELIMINARY INJUNCTION.

A. M.A.I.D. IS NOT LIKELY TO SUCCEED ON THE MERITS.

The first prong of the preliminary injunction standard requires a party to demonstrate "a likelihood of success on the merits." *Munaf v. Geren*, 553 U.S. 674, 690 (S. Ct. 2008) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)). While satisfaction of this prong has been approached on a case-by-case basis, federal courts have held that a clear showing of a likelihood to succeed on the merits is "the irreducible minimum requirement to granting any equitable and extraordinary relief." *City & Cnty. of San Francisco*, 944 F.3d 773, 789 (9th Cir. 2019) (citation omitted). The analysis ends if the moving party fails to show a likelihood of success on the merits of its claims. *Id.* at 790 (citation omitted).

1. M.A.I.D. Does Not Have Standing Because It Showed No Threatened Injury, Just Speculation.

The District Court erred by relieving M.A.I.D. of its burden to demonstrate sufficient injury for purposes of standing. In this context, applicable precedent requires a threatened injury—usually owners of property adjacent to an approved proposed development alleging specific harms. But the District Court simply accepted M.A.I.D.'s vague speculation and fears about potential future

developments that might occur someday. The District Court was mistaken in doing so.

Montana courts may decide only justiciable cases—that is, "cases or controversies (case-or-controversy standing) within judicially created prudential limitations (prudential standing)." *Bullock v. Fox*, 2019 MT 50, ¶ 28, 395 Mont. 35, 435 P.3d 1187. Justiciability is a threshold jurisdictional issue—"without it [courts] cannot adjudicate a dispute." *Broad Reach Power, LLC v. Mont. Dept. of Pub. Serv. Regul., Pub. Serv. Commn.*, 2022 MT 227, ¶ 10, 410 Mont. 450, 520 P.3d 301; *see also Bullock*, ¶ 28 (standing is a threshold jurisdictional requirement); *cf. Larson*, ¶ 18 (justiciability is a *mandatory prerequisite* to initial and continued exercise of subject matter jurisdiction"). It limits Montana courts to deciding only actual, redressable controversies. *Bullock*, ¶ 28. To establish standing, a plaintiff must demonstrate a past, present, or threatened injury to a property or civil right that would be alleviated by successfully maintaining the action." *Mont. Immigrant Justice All. v. Bullock*, 2016 MT 104, ¶ 19, 383 Mont. 318, 371 P.3d 430. "The alleged injury must be concrete, meaning actual or imminent, and not abstract, conjectural, or hypothetical; redressable; and distinguishable from injury to the public generally." *Bullock*, ¶ 31 (citations omitted).

Here, the District Court's Order glosses over standing, reciting general principles instead of engaging with M.A.I.D.'s vague claims of injury or threatened

injury. It concludes with little analysis: "For these reasons, this Court determines, solely on an interim basis and for purposes of deciding the issue of an interim injunctive relief, that Plaintiff has standing to bring this action." (Doc. 17 at 6.) M.A.I.D. and the District Court rely on *Heffernan v. Missoula City Council*, 2011 MT 91, 360 Mont. 207, 255 P.3d 80, so the facts of that case are worth discussing.

Heffernan involved the Missoula City Council's approval of zoning and a preliminary plat for the 37-lot subdivision, Sonata Park, which neighbors challenged as arbitrary and capricious. *Id.*, ¶ 1. The district court agreed and set aside the approval, and this Court affirmed. *Id.* This Court discussed standing at length, including where threatened injury may be sufficient for standing. *Id.*, ¶¶ 27-47. Notably, the Court highlighted Heffernan's affidavit filed in response to the City's motion to dismiss, where she stated that the western boundary of her property shares the northeastern boundary of Sonata Park. *Id.*, ¶ 37. The Court emphasized the impacts Heffernan noted were likely from the new subdivision, including an estimated 259 to 370 additional vehicle trips per day for 37 new homes, as well as increased noise, more pets, and less wildlife. *Id.*, ¶ 38. The Court held "that these averments are sufficient to establish that Heffernan has a specific personal and legal interest and is likely to be specially and injuriously affected by the subdivision." *Id.* Carey, another neighbor of the proposed subdivision found to have standing, had a property within 150 feet of Sonata Park, adjacent to the sole access road to the

subdivision and, as a result, would be directly affected by the increased traffic. *Id.*, ¶ 39. This Court also discussed Harmon, another neighbor whose property was "within 600 feet of Sonata Park…lies along the access road and, thus, will be directly affected by the increased traffic" and who alleged "that allowing Sonata Park's density of development will create "light pollution" and greatly increase the danger to pedestrians and bicyclists using the neighborhood streets, which do not have sidewalks, curbs, or designated bike lanes." *Id.*, ¶ 40. The Court found that Heffernan, Carey, and Harmon demonstrated "a specific personal and legal interest" and have "been or [are] likely to be specially and injuriously affected by the decision [of the governing body]" and accordingly established the existence of a case or controversy, as well as constitutional standing. *Id.*, ¶ 41 (citing Mont. Code Ann. § 76-3-625(4)).

In stark contrast to *Heffernan*, where threatened injury conferred standing upon the neighbors to the proposed subdivision, M.A.I.D. has demonstrated no such threatened injury. There is no proposed subdivision. Presumably, if there were, M.A.I.D. would have raised it. But instead, M.A.I.D. offered only generalized fears and speculation about the effects of SB 323 and SB 528 as reflected in its First Amended Complaint (Doc. 3), its Motion for Preliminary Injunction and Brief in Support (Docs. 4, 5), and the Affidavit of Glenn Monahan (Doc. 6).

For example, M.A.I.D. complains: "The consequences to the members of the Plaintiff LLC are serious and irreparable because, once a duplex ADU is established in a neighborhood, that's it. There is no going back." (Doc. 5 at 5.) But M.A.I.D. points to no specific ongoing or imminent project or development that will actually affect it or its members. M.A.I.D. relied on an affidavit that merely repeats these generalized concerns and speculation. (*See* Doc. 6 at ¶ 8 ("If such development aimed at increasing density in my neighborhood happens, I believe it will seriously and adversely affect the economic value of my property. More important than economic value is the moral, aesthetic neighborhood values that my wife and I share with the neighbors, all of which will be adversely affected if my neighborhood is impacted by development which is more dense.").) While M.A.I.D.'s members may not want housing developments to block their views, lawful development of neighboring properties is not a legal harm sufficient to confer standing, especially where M.A.I.D. points to no actual, imminent housing projects affecting its members. This is exactly the type of speculation rejected by this Court's standing jurisprudence.

Also unlike *Heffernan,* M.A.I.D. cannot identify any proposed subdivision or other project that has been approved and stands to potentially interfere with its members' rights. Cases addressing similar issues where this Court has found standing based on threatened injury involve parties whose property borders or is

close to an approved proposed development. *See*, *e.g.*, *Aspen Trails Ranch, LLC v. Simmons,* 2010 MT 79, ¶¶ 41-43, 356 Mont. 41, 230 P.3d 808 (contiguous landowner to proposed subdivision had standing to challenge city commission's approval of subdivision based on potential flooding, effect on water supply, wildlife habitat, wetlands, noise, traffic, and light pollution); *Little v. Bd. Of County Commrs.,* 193 Mont. 334, 355, 631 P.2d 1282, 1294 (1981) (adjacent landowners to proposed mall development had standing to challenge the permit based on increased traffic and other factors).

M.A.I.D. has not alleged or shown any concrete harm caused by SB 323 or SB 528, and it lacks standing, accordingly. This threshold issue is fatal to M.A.I.D.'s claims, and it is therefore not likely to succeed on the merits. This Court should reverse.

2. M.A.I.D. Is Not Likely to Succeed on Its Claim Regarding Restrictive Covenants.

M.A.I.D. is not likely to succeed on the merits of its claim seeking declaratory judgment that SB 323 and SB 528 do not displace, supplant, or otherwise preempt private covenants that are more restrictive for two reasons. First, SB 323 and SB 528 do not preempt more restrictive covenants by their plain language. In fact, SB 528 explicitly states that it will *not* interfere with restrictive covenants. (*See* App. C at 1-2 ("A municipality may not…require a restrictive covenant concerning an accessory dwelling unit on a parcel zoned for residential use by a single-family dwelling. This

subsection (2)(i) may not be construed to prohibit restrictive covenants concerning accessory dwelling units entered into between private parties, but the municipality may not condition a permit, license, or use of an accessory dwelling unit on the adoption or implementation of a restrictive covenant entered into between private parties.”).) Nor does SB 323, anywhere in its text, purport to displace or affect private covenants. (*See*, *generally*, App. B.) The District Court therefore erred to the extent its Order relies on statutory interpretation that ignores SB 323 and SB 528’s plain language. *See* Mont. Code Ann. § 1-2-101 (“In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.”)

Second, such a declaratory judgment would be improper because whether a restrictive covenant is valid and enforceable or waived under Mont. Code Ann. § 70-17-210 (the statute regarding covenant enforceability and abandonment) is a case-specific, fact-intensive inquiry that does not logically comport with a facial challenge. Mont. Code Ann. § 70-17-210 provides:

> (1) Only the governing body of a development or a parcel owner within a development can initiate a legal action to enforce covenants, conditions, or restrictions;
>
> (2) A covenant, condition, or restriction is deemed abandoned for purposes of enforcement if no enforcement action has been undertaken for the prescribed period in 27-2-202. Once a covenant, condition, or restriction is abandoned pursuant to this section, the

> governing body is precluded from undertaking a different interpretation or enforcement action against a similarly situated parcel owner in the same development.
>
> (3) When the governing body formed within covenants, conditions, or restrictions has not met for a period of 15 years, it constitutes substantial noncompliance, and the governing body is prohibited from taking any enforcement action regarding the covenants, conditions, or restrictions recorded against the land to the extent the covenants, conditions, or restrictions are not otherwise necessary to comply with applicable federal, state, and local laws, ordinances, and regulations.

This statute raises numerous questions of fact in this context, indicating that M.A.I.D.'s facial claim is inappropriate for declaratory judgment. The purpose of an action under the Uniform Declaratory Judgments Act ("UDJA") is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." *Broad Reach Power, LLC v. Mont. Dept. of Pub. Serv. Regul., Pub. Serv. Commn.,* 2022 MT 227, ¶ 9, 410 Mont. 450, 520 P.3d 301 (quoting Mont. Code Ann. § 27-8-102). Any interested party may seek a declaratory judgment to determine questions about their rights, status, or other relations regarding their interests. *Id.* (quoting Mont. Code Ann. § 27-8-202). While the UDJA is construed liberally to effectuate these purposes, its use is "tempered by the necessity that a *justiciable controversy* exist before courts exercise jurisdiction." *Id.* (quoting *Northfield Ins. Co. v. Mont. Assn. of Counties,* 2000 MT 256, ¶ 10, 301 Mont. 472, 10 P.3d 813).

Here, M.A.I.D. has not presented any evidence that SB 323 or SB 528 has resulted in some development that allegedly infringes on a restrictive covenant affecting it or its members. Even then, the restrictive covenant at issue would need to be enforceable and not waived, in addition to satisfying Mont. Code Ann. § 70-17-210's other requirements. It is a fact-intensive inquiry that is case-specific and improper for declaratory judgment on a facial claim. The District Court got this wrong as a matter of law, stating: "…Plaintiff will likely obtain a declaratory judgment simply stating that, whatever these new zoning laws say regarding municipal zoning, they do not displace private covenants that are more restrictive." (Doc. 17 at 10.) M.A.I.D. cannot obtain such declaratory judgment because in every case where a restrictive covenant is implicated, there must be a fact-intensive inquiry to determine whether the restrictive covenant is enforceable or waived. M.A.I.D. failed to make this showing and therefore is not likely to succeed on the merits of this claim.

3. M.A.I.D. Is Not Likely to Succeed on Its Equal Protection Claim.

M.A.I.D. is not likely to succeed on its equal protection claim because it fails to identify or establish similarly situated classes. Courts evaluate equal protection claims under a three-step analysis. The Court "must first identify the classes involved and determine whether they are similarly situated." *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 16, 325 Mont. 148, 104 P.3d 445. Second, the Court

must determine the appropriate level of scrutiny to apply to the challenged statute. *Id.*, ¶ 17. Finally, the Court applies the appropriate level of scrutiny to the statute. *Id.*

Showing "that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner" is a prerequisite to pleading a cognizable equal protection violation in *Montana. Vision Net, Inc. v. State*, 2019 MT 205, ¶ 16, 397 Mont. 118, 447 P.3d 1034. "[T]wo groups are similarly situated if they are equivalent in all relevant respects other than the factor constituting the alleged discrimination." *Id.* "If the classes are not similarly situated, then it is not necessary for us to analyze the challenge further." *Id.* (cleaned up). Only if M.A.I.D. survives that step do courts proceed to determining the appropriate level of scrutiny. *Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶ 15, 392 Mont. 1, 420 P.3d 528.

Here, M.A.I.D. dooms its equal protection claim at the first step by failing to properly identify a similarly situated class, simply alleging that SB 323 and SB 528 create "two classifications, one protected by restrictive covenants, the other not so protected." (Doc. 5 at 10.) These are not suspect classes, and M.A.I.D. provided no authority otherwise. By definition, those who live in neighborhoods with restrictive covenants and those who live in neighborhoods without restrictive covenants are not similarly situated. M.A.I.D. contradicts itself in seeking declaratory judgment that "these new zoning changes do not preempt or otherwise supplant more restrictive

covenants" (*Id.* at 6), while also asserting that "[t]hose who are fortunate enough to live in areas protected by restrictive covenants will be largely unaffected by these legislative measures" (*Id.* at 9) and "that new regime applies only to persons who are not protected by the covenants that are more restrictive than the new zoning." (*Id.* at 10.) Not even M.A.I.D. appears to be convinced that SB 323 and SB 528 affect it or its members.

M.A.I.D. nonetheless claims that strict scrutiny should apply because "Plaintiff has asserted fundamental rights protected by the Montana Constitution's Declaration of Rights." (Doc. 5 at 10.) But it doesn't identify a suspect class or explain how SB 323 and SB 528 infringe on these fundamental rights. It doesn't allege any injury from ongoing construction or even an approved proposed development. M.A.I.D. relies only on a 33-year-old law review article authored by its own counsel. (Doc. 5 at 10–11.) M.A.I.D. contradicts itself, initially claiming that restrictive covenants are invaded by SB 323 and SB 528, and later arguing that restrictive covenants protect one class from the ills of SB 323 and SB 528. This scattershot argument does not meet the mark for an equal protection violation, nor does it warrant the application of strict scrutiny to the laws.

Under rational basis review, the appropriate level of scrutiny,[2] SB 323 and SB 528 easily survive: the State's legitimate—indeed, laudable—objective of addressing the housing affordability crisis is addressed by modifying zoning laws to allow for more affordable types of housing such as duplexes and ADUs. SB 323 and SB 528 are rationally related to the State's legitimate objective of addressing the lack of affordable housing in many parts of Montana because they expand the opportunity for more multi-family dwellings and to maximize the use of properties in the city. The District Court, however, engaged in perfunctory analysis, summarizing M.A.I.D.'s argument and concluding:

> This Court need not, at this interim stage, resolve which standard of review applies. Suffice it to say, that by any of these equal protection scrutiny standards, there is at least a probability that Plaintiff will prevail on the merits. The result of the new laws is that two different sets of people, one protected by restrictive covenants, the other not, results in an arbitrary application of Montana law which is unrelated to any legitimate governmental purpose.

(Doc. 17 at 11). Not only does this show a lack of independent judgment by the District Court (*see, infra,* Section II.A.), but it also fails to articulate a cognizable equal protection violation.

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[2] Under rational basis review, "the government must illustrate that the objective of the statute is legitimate and such objective is rationally related to the classification used by the Legislature." *Jaksha v. Butte-Silver Bow County,* 2009 MT 263, ¶ 17, 352 Mont. 46, 214 P.3d 1248 (internal citations omitted).

Indeed, were this Court to adopt M.A.I.D.'s and the District Court's equal protection argument, absurd results would follow. Because someone will always live under a restrictive covenant while someone else will not, practically every instance of zoning could be an equal protection violation. This is clearly not the case. *See, infra,* Section I.A.4. The District Court followed M.A.I.D. down this rabbit hole, accepting these two "classes." (Doc. 17 at 10.) This is incorrect as a matter of law, and the District Court erred in adopting M.A.I.D.'s argument that effectively renders any zoning regulation an equal protection violation. The reality is that M.A.I.D. is not likely to succeed on the merits, and this Court should reverse.

4. M.A.I.D. Is Not Likely to Succeed on Its Due Process Claim.

M.A.I.D. also is not likely to succeed on the merits of its due process claim because the State is the source of local zoning power, so the State can modify local zoning power at any time. The District Court, like M.A.I.D., did not acknowledge the source of zoning power and instead summarily concluded that the housing reform provisions were a due process violation.

Zoning ordinances must find their justification in some aspect of the police power, asserted for the public welfare. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926). Contrary to M.A.I.D.'s claims (*see generally* Docs. 3, 5), the State is not encroaching on local zoning power—municipalities derive their zoning authority from the State. This Court has explained that "[t]here is no principle of law better

established than that a city has no power, except such as is conferred upon it by Legislative grant, either directly or by necessary implication." *Billings v. Herold*, 130 Mont. 138, 142-143, 296 P.2d 263, 265 (1956) (quoting *Stephens v. City of Great Falls*, 119 Mont. 368, 371, 175 P.2d 408, 410 (1946)). The U.S. Supreme Court has similarly opined that "[p]olitical subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." *Reynolds v. Sims*, 377 U.S. 533, 575 (1964). *See also Herold*, 130 Mont. at 142, 296 P.2d 263 at 265 ("While the state delegates authority over the city streets to the cities yet it may, at any time, take away or revoke a part or all of the authority which it may have theretofore delegated to the cities.") (citing *Bidlingmeyer v. Deer Lodge*, 128 Mont. 292, 274 P.2d 821 (1954)).

For example, Montana Code Annotated § 76-2-301 explains that zoning power is conferred on the city or town council:

> For the purpose of promoting health, safety, morals, or the general welfare of the community, the city or town council or other legislative body of cities and incorporated towns *is hereby empowered to regulate and restrict* the height, number of stories, and size of buildings and other structures; the percentage of lot that may be occupied; the size of yards, courts, and other open spaces; the density of population; and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.

Id. (emphasis added). Section 76-2-201(1) similarly confers such power on counties:

> For the purposes of promoting the public health, safety, morals, and general welfare, a board of county commissioners that has adopted a growth policy pursuant to chapter 1 *is authorized to adopt zoning regulations* for all or parts of the jurisdictional area in accordance with the provisions of this part.

Id. (emphasis added).

A prevailing theme of M.A.I.D.'s arguments is that the State is improperly taking away municipalities' power. (*See generally* Docs. 3, 5.) But this ignores that the source of local power is the State, and M.A.I.D. and the District Court fail to articulate any due process violation by simply concluding as much. (*See*, *e.g.*, Doc. 10 at 15 ("The disparity in treatment between those protected by restrictive covenants and those not so protected, and the chaotic, uncoordinated, and arbitrary applicability requirements in these various new laws are so arbitrary and capricious and so unrelated to a legitimate governmental purpose that they constitute a denial of Plaintiffs' rights to Due Process of Law.").) The District Court again regurgitated M.A.I.D.'s argument, declining to engage with the State's argument relating to the source of zoning power, concluding in a perfunctory manner (and in the exact words of M.A.I.D.'s Brief and Proposed Order, *see, infra* Section II.A.): "It appears that the disparity in treatment between those protected by restrictive covenants and those not so protected, and the chaotic, uncoordinated, and arbitrary applicability requirements in these various new laws are so arbitrary and capricious and so unrelated to a legitimate governmental purpose that they likely constitute a denial of

Plaintiff's rights to Due Process of Law." (Doc. 17 at 14; *compare id. with* Doc. 10 at 15.)

M.A.I.D.'s and the District Court's characterization of SB 323 and SB 528[3] as "arbitrary and capricious" only distracts from the reality that the State can modify power that it delegates to municipalities. That is what the State did in this case with the zoning laws modified by SB 323 and SB 528. This is a simple case of the State exercising its police power for the public welfare—addressing the housing crisis—and modifying some of the power delegated to municipalities in the process. There is no due process violation, and the District Court erred in finding M.A.I.D. likely to succeed on the merits of that claim.

B. M.A.I.D. DID NOT SHOW IT WOULD SUFFER IRREPARABLE HARM.

With defects similar to those in its standing argument, M.A.I.D. fails to demonstrate irreparable harm. M.A.I.D. must show more than a possibility of future harm; it is required "to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008) (emphasis in the original) (citing *Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983); *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 441 (1974); *O'Shea v. Littleton*, 414 U.S.

[3] As previously noted, despite the Order's conflation of all four challenged laws (based on M.A.I.D.'s argument), this appeal focuses only on the two laws that were preliminarily enjoined: SB 323 and SB 528.

488, 502 (1974); 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1, 139 (2d ed. 1995) ("Wright & Miller") (applicant must demonstrate that in the absence of a preliminary injunction, "the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered"); Wright & Miller at 154–155 ("A preliminary injunction will not be issued simply to prevent the possibility of some remote future injury").

Further, M.A.I.D.'s inexplicable delay of *seven months* in bringing the lawsuit and seeking a preliminary injunction seriously calls into question the likelihood of its "irreparable harm." Courts look with disfavor on plaintiffs who engage in unexplained delay prior to seeking a preliminary injunction. The Ninth Circuit has made clear that a "long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm." *Oakland Tribune, Inc. v. Chronicle Pub. Co.,* 762 F.2d 1374, 1377 (9th Cir. 1985); *see also Lydo Enters. v. City of Las Vegas*, 745 F.2d 1211, 1213–14 (9th Cir. 1984) ("A delay in seeking a preliminary injunction is a factor to be considered in weighing the propriety of relief."); *Playboy Enters., Inc. v. Netscape Communications Corp.*, 55 F. Supp. 2d 1070, 1090 (C.D. Cal.) (five-month delay in seeking injunctive relief demonstrated lack of irreparable harm), *aff'd*, 202 F.3d 278 (9th Cir. 1999); *Valeo Intellectual Prop. v. Data Depth Corp.*, 368 F. Supp. 2d 1121, 1128 (W.D. Wash. 2005) (three-month delay in seeking injunctive relief was inconsistent with irreparable harm). Here, M.A.I.D. waited until

12 days before the end of the year to file its "emergency" Motion (Docs. 4, 5) to block the enforcement of SB 528 and SB 323, but any emergency was manufactured by and is a result of M.A.I.D.'s dilatory conduct.

It is not clear what harm at all, let alone irreparable harm, could come to M.A.I.D., who does not identify a single development slated to take place and affect its interests. The District Court held M.A.I.D. to a lower standard for irreparable harm than it should have, allowing speculation to be substituted for actual likelihood of irreparable harm:

> In essence, Plaintiff is concerned that, should these challenged measures not be enjoined, they could wake up one morning to find that, without any notice at all, a new duplex or ADU ("Accessory Dwelling Unit") is going up next door in their previously peaceful and well-maintained single-family neighborhood…This threatened injury is sufficient to establish the probability of irreparable injury for purposes of issuing interim injunctive relief.

(Doc. 17 at 6). This is wrong as a matter of law.

As discussed above relating to standing, *see, supra* Section I.A.1, this Court's precedent reveals that threatened injury usually involves an adjacent property owner to an approved proposed development who stands to suffer concrete harms such as impacts on traffic, noise, or wildlife as a result of the development. Here, M.A.I.D. resorts to speculation without pointing to a single proposed development that might actually result in some harm. This is woefully insufficient to articulate even a threatened injury sufficient for standing, much less irreparable harm for purposes of

a preliminary injunction. The District Court therefore erred in finding that M.A.I.D. was likely to suffer irreparable harm absent injunctive relief.

C. THE BALANCE OF THE EQUITIES AND PUBLIC INTEREST WEIGH IN FAVOR OF THE STATE.

The balance of the equities and the public interest favor the State, not M.A.I.D. A preliminary injunction movant must show that "the balance of equities tips in his favor." *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (citing *Winter*, 555 U.S. at 20). Courts should consider whether a preliminary injunction would be in the public interest if "the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences." *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1023 (9th Cir. 2016) (quoting *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138–39 (9th Cir. 2009)). "When the reach of an injunction is narrow, limited only to the parties, and has no impact on non-parties, the public interest will be 'at most a neutral factor in the analysis rather than one that favor[s] [granting or] denying the preliminary injunction.'" *Stormans, Inc.*, 586 F.3d at 1139 (quotation omitted). "If, however, the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences, the public interest will be relevant to whether the district court grants the preliminary injunction." *Id.* (citation omitted). When an injunction is sought that will adversely affect a public interest, a court may in the public interest withhold relief until a final determination on the merits, even if the postponement is burdensome to the plaintiff.

Id. (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312–13 (1982)). In fact, courts "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* (quoting *Weinberger*, 456 U.S. at 312).

SB 323 and SB 528 were passed to address and help mitigate Montana's current housing crisis. M.A.I.D. (and the District Court) were incorrect to assert that "[i]f the preliminary injunction is issued, little harm is done to the State" (Doc. 17 at 15.) To be sure, the State has a compelling interest in addressing the housing shortage in Montana, which SB 323 and SB 528 address by allowing (not forcing) the construction of more affordable housing such as ADUs and duplexes. The District Court repeats verbatim M.A.I.D.'s claim that "[t]hey dread waking up in the morning, with no notice, and a new, more dense building is being erected in their family neighborhood." (Doc. 17 at 15; *compare id. with* Doc. 5 at 16 ("They dread waking up in the morning, with no notice, and a new, more dense building is being erected in their "family neighborhood.").) M.A.I.D. cannot credibly argue that stymieing legitimate efforts to solve the housing crisis is somehow in the public's interest.

Ultimately, the balance of the equities and public interest weigh heavily in favor of the State. M.A.I.D.'s failure to satisfy this element is yet another reason the preliminary injunction was issued in error. This Court should reverse for this reason as well.

II. THE DISTRICT COURT'S ISSUANCE OF A PRELIMINARY INJUNCTION WAS A MANIFEST ABUSE OF DISCRETION.

A. THE DISTRICT COURT DEMONSTRATED A LACK OF INDEPENDENT JUDGMENT.

The District Court repeated verbatim significant portions of perfunctory, conclusory statements from M.A.I.D.'s Brief and Proposed Order, without giving any apparent consideration to the State's arguments or analysis beyond M.A.I.D.'s conclusory statements. This demonstrates a lack of independent judgment. This Court has expressed its dissatisfaction—if not outright disapproval—of verbatim adoption of proposed findings of fact. *Tomaskie v. Tomaskie*, 191 Mont. 508, 510–12, 625 P.2d 536, 538–39 (1981); *In re Marriage of Hunter*, 196 Mont. 235, 245–46, 639 P.2d 489, 495 (1982); *In re Marriage of Wolfe*, 202 Mont. 454, 457–458, 659 P.2d 259, 261–62 (1983); *In re Marriage of Merry*, 213 Mont. 141, 149, 689 P.2d 1250, 1254 (1984); *Eaton v. Morse*, 212 Mont. 233, 243–44, 687 P.2d 1004, 1009–10 (1984).

> It is wise practice for the trial court to prepare and file its own findings and conclusions. Only in that fashion can the parties know that the trial court has carefully considered all the relevant facts and issues involved. This is not to say, however, that the trial court shouldn't have guidance from the lawyers on both sides. But guidance in an adversary system is always such that the findings and conclusions may not indicate a thorough treatment of the facts and law to be applied. But proposed findings and conclusions give the trial judge good insight as to just what factors and what law the parties deem to be important. It is then up to the trial court to translate its own judgment and conclusions into appropriate findings and conclusions. It is becoming increasingly apparent to this Court, however, that the trial courts rely too heavily on

> the proposed findings and conclusions submitted by the winning party. That is wrong!

Tomaskie, 191 Mont. at 512, 625 P.2d at 538–39 (citation omitted). A judge relies "too heavily" upon proposed findings when they are used "to the exclusion of a consideration of the facts and the exercise of his own judgment." *In re Marriage of Wolfe*, 202 Mont. at 457, 689 P.2d at 261 (citing *In re Marriage of Hunter*, 196 Mont. at 245, 639 P.2d at 495). "We have time and time again paid lip service to the oft-stated but usually ignored rule that, while not error per se, district courts should not adopt verbatim the findings of fact and conclusions of law of the prevailing party." *In re Marriage of Davies*, 266 Mont. 466, 480, 880 P.2d 1368, 1377 (1994) (Nelson, J. concurring) (citations omitted). "[E]rror occurs when the court accepts one party's proposed findings of fact without proper consideration of the facts and where there is a lack of independent judgment by the court." *Id.*, 880 P.2d at 1377 (citations omitted).

As noted above, *see, supra,* Sections I.A.1, I.A.2, and I.A.3, the District Court parroted M.A.I.D.'s assertions throughout its merits analysis, sometimes using verbatim quotes from M.A.I.D.'s brief (and Proposed Order). Perhaps the most glaring example is its repetition of the exact language M.A.I.D. uses to sum up its due process argument with very little analysis:

> It appears that the disparity in treatment between those protected by restrictive covenants and those not so protected, and the chaotic, uncoordinated, and arbitrary applicability requirements in these various

> new laws are so arbitrary and capricious and so unrelated to a legitimate governmental purpose that they likely constitute a denial of Plaintiff's rights to Due Process of Law.

(Doc. 17 at 14; *compare id. with* Doc. 10 at 15 and App. D at 14). The District Court also made no effort to elaborate on *what* exactly about SB 323 and SB 528 was "so arbitrary and capricious…and so unrelated to a legitimate governmental purpose" to rise to the level of a due process violation. Such broad, sweeping statements devoid of substantive analysis, especially verbatim adoption of M.A.I.D.'s conclusory statements, strongly indicate a lack of independent judgment here.

Another example is the District Court's conclusion that "Plaintiff will likely obtain a declaratory judgment simply stating that, whatever these new zoning laws say regarding municipal zoning, they do not displace private restrictive covenants that are more restrictive." (Doc. 17 at 10.) This, too, is a verbatim quote lifted from M.A.I.D.'s Proposed Order. (*Compare* Doc. 17 at 10 *with* App D at 10.) The District Court made no effort to elaborate on the substance of SB 323 and SB 528, raising the question of whether it appreciated the actual effects of these laws or merely repeated M.A.I.D.'s line that "whatever these new zoning laws say regarding municipal zoning," it is likely to succeed on the restrictive covenant claim. The District Court also repeats yet another line from M.A.I.D.'s Proposed Order verbatim: "This Court need not, at this interim stage, resolve which standard of review applies. Suffice it to say, that by any of these equal protection scrutiny

standards there is at least a probability that Plaintiff will prevail on the merits." (Doc. 17 at 11; *compare id. with* App. D at 11). Such cursory statements indicate that the District Court did not give due consideration to the State's position and arguments, instead adopting M.A.I.D.'s legal conclusions wholesale.

The District Court's repetition of M.A.I.D.'s inappropriate admonishment that "[t]he pause of a preliminary injunction may well give the State an opportunity to revisit and revise these measures to eliminate their internal contradictions" is yet another indication of the absence of independent judgment here. (Doc. 17 at 15; *compare id. with* App. D at 15). To be sure, this statement relates to none of the factors for injunctive relief.

Moreover, the District Court manifestly abused its discretion by treating arguments of M.A.I.D.'s counsel as evidence in support of its Order. Mere arguments of counsel are not evidence and do not establish the existence of the matters that are argued. *McKenzie v. Scheeler*, 285 Mont. 500, 508, 949 P.2d 1168 (1997). *See* Doc. 17 at 8 ("Although the delay may be a factor to be considered, any 'delay' here was, as explained by Plaintiff's counsel, largely due to the extreme complexity of the issues presented by the four challenged measures"). This was improper, and the District Court should not have treated M.A.I.D.'s counsel's argument as evidence to justify the long delay, severely undercutting M.A.I.D.'s claim of irreparable harm.

This Court's opinion in *In re A.R.*, 2005 MT 23, 326 Mont. 7, 107 P.3d 457, provides a notable example of a district court whose decision stands in stark contrast to the decision at issue in this case. There, the district court "did not fail to exercise independent judgment, nor did it adopt the [proposed] findings verbatim." *Id.*, ¶ 30. This Court found that "[t]he District Court's findings of March 12, 2003, differ substantially from those originally proposed…on February 12, 2002" and that "[t]he District Court further exercised its independent judgment by making numerous other changes to the [party's] findings as originally proposed[.]" *Id.* Such changes included removing a proposed reference to a deposition, "which the District Court did not consider in making its determination." *Id.* The Court also cited the district court's substantial expansion of a proposed finding to include evidence presented by the other party. *Id.*

Accordingly, for this Court to find that the District Court exercised independent judgment here, it would be necessary to see further analysis or additional evidence discussed that influenced the District Court's ultimate decision. Instead, the Order is replete with M.A.I.D.'s unaltered conclusions without further explanation. This demonstrates a clear failure of the District Court to exercise independent judgment in issuing its Order, and this Court should reverse for this reason as well.

B. THE DISTRICT COURT DID NOT ALLOW A SEPARATE HEARING ON THE PRELIMINARY INJUNCTION, TO WHICH THE STATE IS ENTITLED.

It was also a manifest abuse of discretion for the District Court to deny the State the opportunity to present its case at a separate evidentiary hearing on the preliminary injunction, instead granting the preliminary injunction based on the hearing on M.A.I.D.'s request for a TRO. This is particularly salient considering the District Court's failure to acknowledge the self-contradictory nature of M.A.I.D.'s argument regarding irreparable harm. On one hand, M.A.I.D.'s counsel insisted that the four challenged laws were *so* complicated that it took him seven months (until the week before Christmas and less than two weeks before SB 323 and SB 528's effective date) to understand the laws and put the case together. (*See* Tr. at 9:24-25, 10:1-5 ("I can assure Your Honor that we have not been wasting our time. As you know, Your Honor, reading this file, this is a very complicated set of measures, very complicated issues, there's – it's just recently been codified. So I was walking back and forth trying to figure out which is which, and so it's – and we brought this as quickly as we could").) But on the other hand, M.A.I.D.'s counsel insisted that a week's notice to pull together the defense and witnesses for a hearing, the week of Christmas, was adequate time for the State to marshal its evidence and fully mount its defense. (Tr. at 58: 19-25) ("I think this should be – we've had the hearing. There's notice, so we should call it a preliminary injunction. I covered both because

I wasn't sure we could get a judge, and might have to make an ex parte application with what notice we could give, but I think this is a preliminary injunction hearing"). The District Court then echoed M.A.I.D.'s opposition to the State's request for a separate evidentiary hearing on the preliminary injunction. (*See* Doc. 17 at 3-5) ("Accordingly, because there was a hearing, this Court deems this matter suitable for consideration of the issuance of a preliminary injunction, as opposed to a temporary restraining order").

It can't be both ways. The expedited schedule, driven by M.A.I.D.'s blatant gamesmanship, unfairly prejudiced the State by depriving it of the opportunity to put on evidence at a preliminary injunction hearing. The State preserved this argument at the TRO hearing. (Tr. at 60: 2-5 ("…but that's my understanding, is this should be a TRO with the opportunity for a preliminary injunction, where at that time we may present witnesses and evidence.").) And at the hearing, it seemed that the District Court also recognized the State's entitlement to a separate hearing:

> I mean, I've had cases where I've issued TRO's and then have set it for a hearing within the ten days, and then either continued it or dissolved it, whatever. I've always continued, then it went to a hearing on the preliminary injunction. I think the standards are a little different.

(Tr. at 60: 6-11). But instead of allowing the State that separate hearing, the District Court issued a hasty Order denying the State this opportunity.

The District Court should have set a separate hearing on the preliminary injunction following the hearing on the TRO and its failure to do so was a manifest

abuse of discretion. A temporary restraining order and a preliminary injunction are two different things, and "…a hearing on a motion for preliminary injunction is required before a district court may issue its decision." *Flying T Ranch, LLC v. Catlin Ranch, LP,* 2020 MT 99, ¶ 11, 400 Mont. 1, 462 P.3d 218. "A TRO, if issued, "generally precedes an injunction and is intended to last only until a hearing is held and a decision made on the injunction application." *Id.*, ¶ 14 (quoting *Mktg. Specialists v. Service Mktg.,* 214 Mont. 377, 388, 693 P.2d 540, 546 (1985)).

In *Flying T Ranch*, this Court found that the District Court's error in functionally denying Flying T's motion for a preliminary injunction without holding a hearing in this case is "obvious, evident, [and] unmistakable." (*Id.,* ¶ 15) (internal citations omitted). That district court therefore committed a manifest abuse of discretion by denying Flying T's motion without first holding a hearing because Flying T was entitled under Montana law to a hearing on its motion before the district court could determine whether or not a preliminary injunction should issue. *Id.*

It follows, then, that it is also a manifest abuse of discretion for a district court to grant a preliminary injunction without first holding a hearing or merging the preliminary injunction with the TRO hearing. *See also* Mont. Code Ann. § 27-19-303(1) ("The injunction order may be granted after the hearing at any time before judgment."); § 27-19-303(2) ("Upon the hearing each party may present affidavits or oral testimony. An injunction order may not be granted on affidavits unless: (a)

they are duly verified; and (b) the material allegations in the affidavits setting forth the grounds for the order are made positively and not upon information and belief."); § 27-19-105 ("An order granting an injunction or a restraining order shall: (1) set forth the reasons for its issuance; (2) be specific in its terms; (3) describe in reasonable detail, and not by reference to the complaint or any other document, the act or acts sought to be restrained; and (4) be binding only upon the parties to the action; their officers, agents, employees, and attorneys; and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.").

Critically, here, there was no hearing on the preliminary injunction—only a hearing on the TRO. The State did not have the opportunity to present evidence as the law requires. And M.A.I.D. cannot credibly claim that the State had a meaningful opportunity to gather its evidence and witnesses and bring them to a hearing, the week before Christmas, when briefing and the hearing, from the time M.A.I.D. filed its Motion for Preliminary Injunction to when the TRO hearing took place, spanned a total of nine days. This is a clear-cut example of unfair prejudice.

Counsel for the State was clear at the TRO hearing that a separate evidentiary hearing was required under these circumstances. The State even suggested that a TRO could be put in place until the District Court could set a hearing on the preliminary injunction as soon as possible. (Tr. at 60: 19-23). But the District Court

decided otherwise, manifestly abusing its discretion by denying the State a separate, full evidentiary hearing on the preliminary injunction.

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court and vacate the preliminary injunction.

DATED this 18th day of March, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with proportionately-spaced, 14-point Times New Roman font; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word is 9,244 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, and appendix.

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