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 REPLY BRIEF

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

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INTRODUCTION

The District Court demonstrated a complete lack of independent judgment in granting M.A.I.D.'s motion for preliminary injunction after depriving the State of the required procedure for hearing motions for injunctive relief. M.A.I.D. also failed to meet the required elements for a preliminary injunction, and the District Court's issuance of the preliminary injunction was a manifest abuse of discretion. Offers to compromise are inadmissible, and M.A.I.D.'s reliance on them should be disregarded. M.A.I.D.'s dilatory conduct and gamesmanship in bringing its case and emergency motion around the holidays also does not excuse the District Court's lack of independent judgment, which was apparent in its Order that bears uncanny resemblance to M.A.I.D.'s proposed order and briefing below. Because M.A.I.D. did not satisfy the elements for injunctive relief, and the process was rife with gamesmanship and procedural defects that unfairly prejudiced the State, the District

Court manifestly abused its discretion in granting the motion for preliminary injunction and should be reversed.[1]

ARGUMENT

I. OFFERS TO COMPROMISE ARE INADMISSIBLE, AND THE STATE WAS UNDER NO OBLIGATION TO AGREE TO A TRO BASED ON THE URGENCY MANUFACTURED BY M.A.I.D.'S GAMESMANSHIP.

The hearing to which M.A.I.D. refers in its Response Brief ("Resp.Br.") was a hearing on its request for a temporary restraining order ("TRO"), not its request for a preliminary injunction. The State was entitled to a separate evidentiary hearing on the preliminary injunction motion. (*See* Appellant's Opening Brief ("Op.Br.") at 34-38). The District Court appeared to agree (at least at the TRO hearing) before issuing its Order.

[1] At the outset, the State reiterates that, while four laws are challenged in the underlying lawsuit, only two of those laws—SB 323 and SB 528—are the subject of the preliminary injunction and this appeal. M.A.I.D. improperly invites this Court to broaden its review on appeal to include other laws in the case. (Resp.Br. at 16) ("SB 382, although not enjoined, should be considered by this Court in conjunction with the two measures that were enjoined. In reviewing the district court's preliminary injunction for a manifest abuse of discretion, this Court should examine the district court's ruling through the prism of the district court's perspective at the time of issuance of the preliminary injunction"). "The mere reference to arguments and authorities presented in district court proceedings is no substitute for developing and presenting appellate arguments." *Barrett v. State*, 2024 MT 86, n.4, (citing *State v. Ferguson*, 2005 MT 343, ¶ 41, 330 Mont. 103, 126 P.3d 463). SB 382 and SB 245 are not properly within the scope of this appeal, and this Court should not consider the laws or any arguments about them.

> 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).

M.A.I.D. improperly raises what it calls a "meet and confer" letter that its counsel sent to the Attorney General's Office on December 18, 2023. (Resp.Br. at 21). M.A.I.D. specifically refers to "a stipulation to avoid the time pressure." (Resp.Br. at 21). However, that letter was an inadmissible offer to compromise pursuant to Mont. R. Evid. 408. This Court should disregard M.A.I.D.'s reference to that letter.

In any event, the State was under no obligation to stipulate to a TRO simply because M.A.I.D. needlessly waited until late December to bring a motion for preliminary injunction for laws slated to go into effect at the beginning of January. M.A.I.D. disingenuously argues, "[t]hat pressure was not only on the State, but also on MAID and on the Court." (Resp.Br. at 20). M.A.I.D.—not the Court or the State—created this time pressure with its delay and gamesmanship. A plaintiff is the master of his own case. M.A.I.D. decided to wait for seven months after the subject laws had been passed to challenge them and seek injunctive relief at the very end of the year, just before the laws were to take effect. This should have had no effect on the State's entitlement to the proper procedure, including a separate preliminary

injunction hearing. The District Court erred in depriving the State of this procedure, and this Court should vacate the preliminary injunction for this reason alone.

II. M.A.I.D.'S GAMESMANSHIP, WHICH CAUSED THE TIGHT TIMELINE, DOES NOT MITIGATE THE DISTRICT COURT'S ERROR.

M.A.I.D. cannot credibly argue that the tight timeline it imposed during the holidays did not pose a challenge for the State to gather witnesses for an evidentiary hearing (*see* Resp.Br. at 21-22), while simultaneously claiming that this manufactured urgency justified the District Court's verbatim adoption of most of M.A.I.D.'s proposed order. M.A.I.D. insists:

> Here, Judge Salvagni was called into the case only one day before the hearing. The complaint and the briefing were complicated, and the hearing, on December 28, was on a Thursday afternoon, with the January 1, 2024, looming deadline occurring on a Monday (New Years Day). Thus, the Court had fewer than 24 hours (i.e., till late Friday afternoon, December 29), to decide on the preliminary injunction.

(Resp.Br. at 24, fn. 5). It is plain to see that M.A.I.D.'s glaring gamesmanship forced the District Court's hand, leading to the lack of independent judgment. M.A.I.D. concedes that verbatim adoption of proposed filings from one party is not optimal. (Resp.Br. at 24, fn. 5).

Citing the transcript, M.A.I.D. argues that the District Court "had read the briefs, was prepared, and was actively engaged, asking a number of pointed and intelligent questions." (Resp.Br. at 24, fn. 5). But M.A.I.D. does not attempt to grapple with how the verbatim adoption of its proposed order,

with no evidence presented at the hearing in support of that order, does not demonstrate a lack of independent judgment by the District Court.

Indeed, it is telling that M.A.I.D. buried its response to the State's argument about the District Court's lack of independent judgment in a footnote on page 24 of its brief—an apparent effort to disguise the obvious abuse of discretion that led to the wholesale adoption of M.A.I.D.'s arguments. M.A.I.D.'s passing acknowledgment of that glaring problem is dismissive at best. The near verbatim adoption of M.A.I.D.'s proposed order, combined with the contrived urgency stemming from M.A.I.D.'s clear gamesmanship, is stark evidence of a lack of independent judgment by the District Court. This was a manifest abuse of discretion that warrants reversal.

III. M.A.I.D. DID NOT DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS.

M.A.I.D. advances yet another contradictory argument with respect to the merits of the case. First, M.A.I.D. claims that substantive issues of law should not be resolved at the preliminary injunction stage (*see* Resp.Br. at 23), but this ignores the likelihood of success on the merits prong of the test for injunctive relief. In 2023, the Montana Legislature amended Mont. Code Ann. § 27-19-201, which governs the circumstances in which courts can grant injunctive relief. *See* SB 191 (2023). The Legislature mirrored the federal standard, which allows for a preliminary injunction to be granted only when the applicant establishes that: a) the applicant is likely to

succeed on the merits; b) the applicant is likely to suffer irreparable harm in the absence of preliminary relief; c) the balance of equities tips in the applicant's favor; and d) an injunction is in the public interest. *Id.* This test is conjunctive, meaning the applicant must satisfy not just one element, but all elements, of the test. *Id.*

Later in its brief, however, M.A.I.D.'s apprehension about deciding the merits mysteriously resolves as it argues that the District Court correctly found that M.A.I.D. was likely to succeed on the merits. (Resp.Br. at 26). While true that a preliminary injunction is just that—preliminary—and the District Court's holding at that stage is not necessarily dispositive of the case, the likelihood of success of a claim on the merits is a necessary element that the District Court was required to consider in deciding whether to grant a preliminary injunction. M.A.I.D. failed to satisfy that element. (*See* Op.Br. at 9-24). The District Court also failed to exercise independent judgment in analyzing the claims, instead uncritically adopting M.A.I.D.'s arguments. M.A.I.D.'s failure to demonstrate a likelihood of success on the merits, alone, should have defeated its motion for preliminary injunction. But M.A.I.D. also failed to meet the other elements for injunctive relief. The District Court manifestly abused its discretion in issuing its preliminary injunction.

IV. M.A.I.D.'S DILATORY BEHAVIOR DEMONSTRATES A LACK OF IRREPARABLE HARM.

In its Response Brief, M.A.I.D. fails to even acknowledge the District Court's error in treating arguments of counsel as evidence. This major evidentiary flaw in

the record is fatal to M.A.I.D.'s irreparable harm argument. 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").)

M.A.I.D. fails to explain in any meaningful way its significant delay of *seven months* before bringing its lawsuit and seeking a preliminary injunction. The reality is that M.A.I.D. was not likely to suffer irreparable harm in the absence of injunctive relief. Courts look with disfavor on plaintiffs who engage in unexplained delay prior to seeking a preliminary injunction—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. 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. 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. Any such "emergency" was clearly manufactured by and is a result of M.A.I.D.'s dilatory conduct. M.A.I.D. did not demonstrate that it would suffer irreparable harm absent injunctive relief. This is yet another separate and distinct basis that should have resulted in the District Court's denial of M.A.I.D.'s motion. Ultimately, M.A.I.D. did not carry its burden to demonstrate that it would suffer irreparable harm absent a preliminary injunction, and the District Court's treatment of arguments of counsel as evidence of irreparable harm was a manifest abuse of discretion. This Court should reverse for this reason as well.

CONCLUSION

For the foregoing reasons, and the reasons discussed in the State's Opening Brief, the Court should reverse the District Court and vacate the preliminary injunction.

DATED this 10th day of May, 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 1,867 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, and appendix.

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