In the Supreme Court of the State of Montana
No. DA 19-0613

STATE OF MONTANA,

Plaintiff and Appellee,

v.

RYAN MORRIS and TROY NELSON,

Defendants and Appellants.

ACLU of Montana Foundation, Inc.
BRIEF OF *AMICUS CURIAE*

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INTRODUCTION

> A fair measure of a civilized society is how its institutions behave in the space between what it may have the power to do and what it should do. The shaming component of the sentence in this case fails that test. When one shames another person, the goal is to degrade the object of shame, to place him lower in the chain of being, to dehumanize him.

U.S. v. Gementera, 379 F.3d 596, 612 (9th Cir. 2004) (Hawkins, J., dissenting) (citation and internal quotations omitted).

It is not enough to say that the district court's shaming punishments of Appellants Ryan Morris and Troy Nelson fail this test, or that forcing them to wear a signboard stating they "stole valor" or "dishonored all veterans" was not reasonably related to their rehabilitation. That much is plain. *State v. Muhammad*, 2002 MT 47, ¶ 37, 309 Mont. 1, 43 P.3d 318 (signboard punishments are "unduly severe and punitive" and are unrelated to rehabilitation or the protection of society).

The Court should instead eliminate the *notion* that a person's dignity is violable, that a person's worth might be less depending on their actions. Despite *Muhammad*, the district court still felt empowered to publicly shame and dehumanize Morris and Nelson because doing so was not *constitutionally* forbidden.

The Court should erase any doubt and recognize that Article II, Section 4's guarantee of individual dignity prohibits intentionally degrading and demeaning shaming punishments. The Court should likewise affirm that Article II, Section 7's right to free speech safeguards the fundamental right not to speak at all. To be sure, Morris and Nelson lied and tried to cheat. But our constitution does not condone judicially sanctioned punishments that strip them of their human dignity, even if their behavior was potentially offensive. The Court should accordingly strike as unconstitutional the public shaming facets of Morris and Nelson's sentences.

STATEMENT OF INTEREST

The ACLU of Montana Foundation, Inc. (Amicus) is the state affiliate of the American Civil Liberties Union. Amicus is a non-profit, nonpartisan corporation, whose mission is to support and protect civil liberties in Montana. Amicus has a long history of advocating for the rights of individuals caught in the criminal justice system. Amicus also often weighs in on cases implicating the right to free speech and the right to individual dignity. Amicus support the position of Appellants Ryan Morris and Troy Nelson.[3]

[3] Counsel for Amicus, Kyle Nelson, is not related, by blood or marriage, to Appellant Troy Nelson.

SUMMARY OF ARGUMENT

The district court used the broad discretion afforded by § 46-18-202, MCA to humiliate and shame Morris and Nelson. Those punishments violate their constitutional rights to dignity and free speech. Indeed, the lack of a *constitutional* pronouncement prohibiting shaming sanctions—or, stated in the terms of Article II, Sections 4 and 7, a pronouncement *protecting* an accused's fundamental right to dignity and free speech—emboldened the district court to disregard those protections.[4]

The Court should ensure that no Montana court may consider imposing shaming sanctions again and declare that the inviolate right to human dignity and the fundamental right prohibiting compelled speech forbid punishments that are meant to degrade, humiliate and shame criminal defendants.

[4] The district court drew inspiration for its shaming punishments from the Stolen Valor Act of 2005 (which criminalized falsely representing receipt of any U.S. military decoration or medal), even borrowing, though not citing, portions from the dissent in *Alvarez*, *infra*, during Morris and Nelson's sentencing hearing. *See* Appellants' Appendix B (Disposition Hr'g Tr. at 13:21–14:3). The majority in *U.S. v. Alvarez*, however, held that the Stolen Valor Act violated the Free Speech Clause of the First Amendment. 567 U.S. 709, 730 (2012). This Court should likewise hold that shaming punishments premised on so-called acts of stolen valor are forbidden by Montana's Constitution.

FACTUAL BACKGROUND

Ryan Morris and Troy Nelson appeared before the district court after the State filed petitions to revoke their suspended sentences for not following probation conditions. Both had previously applied to the Cascade County Veterans Treatment Court despite not having any documentation demonstrating that they had served in the military.

During sentencing, the district court made the two men sit together and admonished them that they were disloyal, disrespectful, selfish and dishonorable. It then imposed as an additional condition to their suspended sentences that they must wear a placard announcing: "I AM A LIAR. I AM NOT A VETERAN. I STOLE VALOR. I DISHONORED ALL VETERANS." The placard is to be worn every Memorial Day and Veterans Day at the Montana Veterans Memorial in Great Falls for the duration of the suspended terms.

Prior to adding these shaming punishments to Morris and Nelson's sentences, the district court engaged in an extended colloquy about the United States Military and the ways that their conduct offended the sensibilities of the sentencing judge. The district court said: "[t]here is no integrity whatsoever in either of you." App. B, 18:18–19.

ARGUMENT

I. The degrading and humiliating punishments imposed by the district court violate Morris and Nelson's fundamental right to human dignity.

A. The Dignity Clause of the Montana Constitution expressly protects Morris and Nelson's fundamental right to individual dignity.

Article II, Section 4 of the Montana Constitution provides a "guarantee" of individual dignity. *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 63, 325 Mont. 148, 104 P.3d 445 (Nelson, J., concurring). The Dignity Clause declares that: "[t]he dignity of the human being is inviolable." Mont. Const. art. II, § 4.

This constitutional safeguard is a "fundamental" right. *Armstrong v. State*, 1999 MT 261, ¶¶ 34, 72, 296 Mont. 361, 989 P.2d 364. The "highest level of scrutiny, and, thus, the highest level of protection by the courts," *Walker v. State*, 2003 MT 134, ¶ 74, 316 Mont. 103, 68 P.3d 872, is triggered when state action "interferes with the exercise of a fundamental right." *Gulbrandson v. Carey*, 272 Mont. 494, 502, 901 P.2d 573, 579 (1995). The "unique" protection of the Dignity Clause, *see Snetsinger*, *supra*, however, offers more protection and "commands that the intrinsic worth and the basic humanity of persons may not be violated" for any

reason. *Walker*, ¶ 82.[5]

That constitutional protection is particularly vital when the individual dignity of the accused or the condemned is infringed. When a person is under state supervision for, among other things, the commission of a crime, "the humanity we presume to lie at the core of every person prohibits treatment which is demeaning, debasing, or degrading[.]" Matthew O. Clifford & Thomas P. Huff, *Some Thoughts on the Meaning and Scope of the Montana Constitution's "Dignity" Clause with Possible Applications*, 61 Mont. L. Rev. 301, 331 (2000).

Morris and Nelson are entitled to this same protection. There is no doubt that they lied about military service to secure preferential placement into the district court's Veterans Treatment Court program. *See*, *e.g.*, Appellants' Appendix C (Nelson J., p. 6). The district court observed that their conduct was "offensive to the 20 million . . . veterans that have served in the U.S. military." Appellants' Appendix D (Disposition Hr'g Tr. 29:18–24); App. B, 14: 24–15:1.

[5] Because Article II, Section 4 declares that individual dignity is "inviolable"—meaning "incapable of being violated"—the Dignity Clause carries an "absolute prohibition" that human dignity may not be violated—"no exceptions." *Snetsinger*, ¶ 77 (Nelson, J. concurring); *see also Baxter v. State*, 2009 MT 449, ¶ 92, 354 Mont. 234, 224 P.3d 1211 (Nelson, J., concurring) (noting that the "right of dignity is absolute" and that not even a "compelling" state interest permits infringement of it).

Their misdeeds, however, do not operate as a license to strip from them their dignity or self-worth. The Dignity Clause guarantees as much:

> Dignity belongs, intrinsically, to our species—to each of us—as a natural right from birth to death. It permeates each person *regardless of who that person is or what he does. It cannot be abrogated because of one's status or condition*. . . . [Every] individual *always* retains his right of human dignity . . . [and] the right to demand of the State that his dignity as a human being be respected despite the government's sometimes necessary interference in his life.

Baxter, ¶ 86 (Nelson, J., concurring) (emphasis added).

B. The shaming punishments intentionally designed by the district court to degrade and demean Morris and Nelson violate their fundamental right to human dignity.

The Dignity Clause "forbids correctional practices which . . . disregard the innate dignity of human beings." *Walker*, ¶ 82. As recognized in *Walker*, the Dignity Clause demands that state punishment may never be designed to degrade a "prisoner['s]" dignity:

> The reformation and prevention functions of punishment both express the community's disrespect for the actions of the criminal, *but the processes of punishment must never disrespect the core humanity of the prisoner*. . . . Part of what [Article II, Sections 22 and 28] proscribe and mandate should be informed by the complementary application of the dignity clause. *However we punish, whatever means we use to reform, we must not punish or reform in a way that degrades the humanity, the dignity, of the prisoner*.

Id., ¶ 81 (quoting *Clifford & Huff*, 61 Mont. L. Rev. at 331–32) (emphasis added).[6]

As such, "treatment which degrades or demeans persons, that is, treatment which deliberately reduces the value of persons, and which fails to acknowledge their worth as persons, *directly violates their dignity*." *State v. Kingman*, 2011 MT 269, ¶ 58, 362 Mont. 330, 264 P.3d 1104 (emphasis added); *Walker*, ¶ 81 (same).

Like the cruel treatment of the mentally ill prisoner in *Walker*,[7] public shaming as a condition *to release* an offender is also repugnant to the constitutional right to human dignity:

> The inherent repugnance of [a signboard punishment as a condition of a deferred sentence] to the right to privacy *and human dignity* places a heavy burden upon the State to justify it as a legitimate rehabilitation tool under the statute. . . . Releasing an offender to live in a community, but at the same time making him or her a public spectacle, *is an affront to our constitutional principles*.

Muhammad, ¶ 60 (Rice, J., concurring) (emphasis added). Indeed, as the dissenting judge in *Gementera* recognized, "whatever legal justification may be marshaled in

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[6] Article II, Section 22 of the Montana Constitution prohibits "cruel and unusual punishment," while Section 28 mandates that the "[l]aws for the punishment of crime shall be founded on the principles of prevention [and] reformation," among others.

[7] The prisoner in *Walker* was subjected to behavior management plans at Montana State Prison that exacerbated his mental health condition. *See*, *e.g.*, *Walker*, ¶¶ 66–67.

support of sentences involving public humiliation, they simply have no place in the majesty of an Article III courtroom." *Gementera*, 379 F.3d at 611 (Hawkins, J., dissenting).

Article II, Section 4's constitutional "guarantee of inviolable human dignity" goes even further: In Montana, "[h]uman dignity may not be violated—no exceptions." *Snetsinger*, ¶¶ 63, 77 (Nelson, J., concurring). Shaming punishments accordingly have no place in *any* Montana court, for any reason. *See Muhammad*, ¶ 60 (Rice, J., concurring).

There is no doubt that the signboard punishments were deliberately designed to shame and humiliate Morris and Nelson and not, as the district court found, to "rehabilitate" them. *See*, *e.g.*, App. B, 25:3. The "rehabilitative" nexus in *Gementera*—the authority relied upon by the district court[8]—was premised on its conclusion that "public acknowledgment *of one's offense*" was necessary for the defendant's "rehabilitation." 379 F.3d at 604 (emphasis added). That rationale does not apply to Morris or Nelson's punishments because neither were charged with any *criminal offense* for lying about military service. What is left then is the

[8] In *Gementera*, the district court imposed a sentencing condition requiring the defendant (who was convicted for mail theft) to spend a day standing outside a post office wearing a signboard stating that he stole mail. *Gementera*, 379 F.3d at 598–599.

core purpose of shaming sanctions: degradation and humiliation. *See* Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. Chi. L. Rev. 733, 757–58 (1998) (noting that the objections to shaming penalties as "cruel, degrading, demeaning, humiliating, or otherwise generally inhumane" can be safely reduced to "the basic idea that shaming penalties violate an offender's dignity, which no morally decent state should do").

The district court's punishment was intentionally designed to disrespect Morris and Nelson's "core humanity." *Walker*, ¶ 81. It did so specifically because, as Justice Rice's concurrence in *Muhammad* feared, the broad sentencing authority afforded to district courts by § 46-18-202, MCA "arguably" allowed it. *Muhammad*, ¶ 59 (Rice, J., concurring). Indeed, the lack of a *constitutional* declaration prohibiting shaming sanctions—or, stated in the terms of Article II, Section 4, a pronouncement *protecting* an accused's fundamental right to dignity—emboldened the district court to disregard Morris and Nelson's dignity.

Perhaps this is why the district court felt compelled to turn to the federal courts' interpretation of the Eighth Amendment for justification, *see*, *e.g.*, Appellants' Appendix A (Morris J., p. 12), even though Montana's corollary, Article II, Section 22, provides "Montana citizens greater protections from cruel

and unusual punishment than . . . the federal constitution" *precisely because* of Montana's express "right to human dignity." *Walker*, ¶ 73.

The Court should now put to rest any *notion* that punishments intentionally designed to shame, humiliate, degrade, or demean a person have any place "in the majesty of [a Montana] courtroom." *Gementera*, 379 F.3d at 611 (Hawkins, J., dissenting). The Court should instead call them what they are: a violation of an individual's fundamental, and "inviolable," right to human dignity. *See Walker*, ¶¶ 81, 82; *see also Armstrong*, ¶ 72. Morris and Nelson—despite their conduct—deserve no less.

II. The district court violated Morris and Nelson's constitutional right to free speech when it required them to wear a signboard stating "I am a liar. I am not a veteran. I engaged in stolen valor, and I have dishonored all veterans."

Forcing Morris and Nelson to publicly wear a signboard with court-ordered language on their bodies constitutes compelled speech and is prohibited by the right to free speech under the Montana Constitution. Mont. Const. art. II, § 7. The right to free speech includes not only the freedom of expression, but also the right to refrain from speaking. "Shaming penalties" and "scarlet letter" punishments, like those imposed by the district court, constitute unconstitutional compelled speech.

A. Morris and Nelson preserved the issue for appeal.

Even though Morris and Nelson's attorneys did not explicitly object to the shaming sanctions on the basis of the right to free speech, by raising general constitutional objections the issue has been preserved for appeal. In *State v. Ellis*, for instance, this Court considered a constitutional claim for the first time on appeal after a convicted defendant objected to his sentence on constitutional grounds at the sentencing hearing, albeit under a different constitutional theory. 2007 MT 210, ¶ 7, 339 Mont. 14, 167 P.3d 896. *Ellis* determined that it could consider the appellant′s equal protection challenge even though the defendant did not object on equal protection grounds at sentencing because this Court reviews "sentences for alleged unconstitutionality even absent objection on constitutional grounds in the district court." *Id.*, ¶ 7.

Ellis affirmed the approach taken in *State v. Brister*, where this Court held that "even if a defendant fails to contemporaneously object to his sentence at sentencing, the appellate court will accept jurisdiction of an appeal that has been timely filed which alleges that a sentence is illegal or exceeds statutory authority." 2002 MT 13, ¶ 16, 308 Mont. 154, 41 P.3d 314, *overruled on other grounds by State v. Tirey*, 2010 MT 283, 358 Mont. 510, 247 P.3d 701; *see also State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979) (an appellate court can "review any

sentence imposed in a criminal case, if it is alleged that such sentence is illegal or exceeds statutory mandates, even if no objection is made at the time of sentencing").

As in *Ellis*, Morris made a timely and specific objection to preserve a constitutional challenge on appeal. Nelson's attorney also made a timely general objection, which was preserved for appeal. App. D, 41:5,6. Morris and Nelson have accordingly preserved a challenge that the district court's sentencing conditions violate their constitutional rights to free speech.

B. Forcing Morris and Nelson to publicly wear a humiliating sign around their necks is compelled speech prohibited by Article II, Section 7.

1. The district court's shaming punishments serve no compelling state interest.

If probation conditions diminish constitutionally protected rights, they are tested by their necessity for making probation effective. § 46-18-201(4)(p), MCA; *U.S. v. Pierce*, 561 F.2d 735, 739 (1977); *U.S. v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (1975). "Conditions that unquestionably restrict otherwise inviolable constitutional rights may properly be subject to special scrutiny to determine whether the limitation does in fact serve the dual objectives of rehabilitation and public safety." *Id.*

Whether in the context of probation conditions or otherwise, Montana law

requires a compelling state interest to justify governmental action that infringes fundamental constitutional rights. *W. Tradition P'ship v. Att'y Gen.*, 2011 MT 328, ¶ 35, 363 Mont. 220, 271 P.3d 1; *State v. Pastos*, 269 Mont. 43, 47, 887 P.2d 199, 202 (1994). The probation condition to publicly wear a signboard with judicially imposed speech does not serve a compelling state interest, particularly in light of the extremely comprehensive nature of the other punishments, rehabilitative measures, and parole conditions. Given the breadth of those punishments and rehabilitative measures, there is no state interest, let alone a compelling one, that would additionally justify publicly shaming Morris and Nelson, whose nonviolent crimes were the direct result of their struggles with addiction.

2. Requiring Morris and Nelson to publicly wear degrading signboards is unconstitutional compelled speech.

Under both federal and state constitutional protections for free speech and expression, no person may be constitutionally compelled to engage in speech or expression when she or he does not desire or choose to do so. U.S. Const. amend. I; Mont. Const. art. II, § 7. That principle has been upheld by the U.S. Supreme Court in numerous landmark cases. *See*, *e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (New Hampshire statute criminalizing the obstruction of the words "Live Free or Die" on state license plates was unconstitutional because the state could not "constitutionally require an individual to participate in the dissemination of an

ideological message by displaying it . . . in a manner and for the express purpose that it be observed and read by the public").

This "compelled speech doctrine" was first articulated in *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). *Barnette* struck down a requirement that students salute the flag. The court reasoned that a constitution that protects a person's right to free speech likewise forbids compelled speech:

> To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.

Id. at 634. *Barnette* accordingly concluded that "compelling the flag salute transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment of our Constitution to reserve from *all official control*." *Id*. at 642 (emphasis added).

The compelled speech doctrine can therefore take several forms. It prevents the imposition of speech upon a person, *Wooley*, *supra*, but it also allows a person to abstain from engaging in speech or expression. *Barnette*, *supra*. "The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all." *Barnette*, 319 U.S. at 645.

The wide variety of cases holding compelled speech to be unconstitutional

illustrate that protections against government compelled speech are broad and have been employed time and again, even in situations with state interests far more compelling than shaming and humiliating those "at the bottom of the social heap." *See Walker*, ¶ 71. The largest body of these cases recognize that employees operating in unionized environments cannot be forced to pay union dues in support of union activities with which they disagree. *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448, 2459, 60 (2018); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990). They have also been successful in cases as varied as allowing parade organizers to choose which messages to promote, *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995), and preventing pregnancy crisis centers from being forced to recite government speech. *Nat'l Inst. of Fam. & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).[9]

The signboards prescribed by the district court are unconstitutional for the

[9] Conversely, compelled speech challenges have been unsuccessful in so-called "government speech" cases where the only speaker was a governmental entity. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005) (government has a First Amendment right to promote its own message regarding beef). Requiring the accused or the condemned (like Morris and Nelson) to amplify the district court's sentiment about the sanctity of military service, particularly without a compelling state interest, is not at all similar to permitting the government to speak in the public sphere.

same reasons as those articulated in *Wooley* and *Barnette*: to use Morris and Nelson's own bodies to disseminate an ideological message for the express purpose that it be observed and read by the public.

The Court should conclude that the probation condition requiring Morris and Nelson to publicly wear a humiliating and degrading signboard, shouting the virtues of the district court, was an unconstitutional violation of their rights to free speech and expression. Many may view Morris and Nelson as unsympathetic, and their opportunism as offensive. But that is no reason, let alone a compelling one, to deprive them of their fundamental rights to free speech and compel them to "utter what is not in [their] mind[s]." *Barnette*, 319 U.S. at 634. The district court's shaming punishments accordingly constitutes compelled speech in violation of Article II, Section 7.

CONCLUSION

Morris and Nelson's dishonesty did not grant the district court license to treat them as sub-humans or force them to espouse the district court's views on the sanctity of military service in plain view of Montana veterans and their families attending Veterans and Memorial Day ceremonies. Montana's constitutional rights to human dignity and free speech *protect* Morris and Nelson *despite* what they did.

Amicus respectfully requests that the Court enforce those constitutional safeguards and strike the district court's unconstitutional shaming punishments.

DATED this 5th day of October, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of October, 2020, I caused to be served a true and correct copy of the foregoing document to the following:

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11, I certify that this *Brief of Amicus Curiae* is printed with a proportionately spaced Equity Text A text typeface of 14 points; is double-spaced except for footnotes and for quoted indented material; and the word count calculated by Microsoft Word for Windows is 3,804 words, excluding the caption, the table of contents, certificate of service and certificate of compliance.

By: */s/ Kyle W. Nelson*