IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 24-0369

PARKER NOLAND,

Appellant,

v.

STATE OF MONTANA, et al.,

Appellees,

EVERGREEN DISPOSAL, INC.,

Appellee-Intervenor.

APPELLANT'S OPENING BRIEF

Appeal from the Montana Eleventh District Court, Flathead County
No. DV-15-2022-0001308-CR, Honorable Judge Amy Eddy

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INTRODUCTION

Parker Noland, a young entrepreneur, started a business hauling construction debris in Flathead County. The Montana Public Service Commission ordered him to cease operations because his company lacked a Certificate of Public Convenience and Necessity (PCN) to haul garbage commercially. When he submitted an application for a PCN, existing garbage company competitors protested the application. Unable to afford the costly fight, Mr. Noland withdrew the application.

Thereafter, he brought this civil rights lawsuit challenging two aspects of Montana's PCN process. First, he challenges the requirement that a new garbage hauler must prove its services are "needed." Second, he challenges the provision allowing existing garbage companies to protest and block competition from new haulers. These procedures do nothing to assess an applicant's qualifications; they simply allow existing companies to veto potential competitors. Accordingly, they violate Mr. Noland's rights under both the state and federal Constitutions.

Mr. Noland is exactly the type of person the Montana Declaration of Rights is meant to protect. The right to "pursue life's basic necessities" includes the pursuit of employment through entrepreneurship, and the government can only infringe that right if it satisfies strict scrutiny. *Wadsworth v. State*, 275 Mont. 287, 299 (1996). In turn, state and federal guarantees of due process and equal protection mean that the State cannot arbitrarily prevent Mr. Noland from making a living in his chosen field.

The challenged anticompetitive provisions cannot withstand even rational basis scrutiny.

The district court, however, ruled that Mr. Noland lacks standing to bring an as-applied challenge because he has not completed the application process. It also held that the challenged provisions are not facially unconstitutional because other applicants have obtained certificates after proving "need" and overcoming protests.

Both aspects of the district court's decision should be overturned. First, Mr. Noland has standing to bring an as-applied challenge because he challenges aspects of the PCN process itself, not its outcome. Whether he completed the process is irrelevant, as plaintiffs may bring pre-enforcement challenges where the government has not disavowed future enforcement. The district court's stance would force a plaintiff to endure an unconstitutional process before challenging it, a position long rejected by both Montana and federal courts.

Second, the district court erred in holding that the challenged provisions are not facially unconstitutional because some applicants have successfully navigated the process. The constitutional issue is not whether it is possible to obtain a certificate or whether requiring Mr. Noland to get a certificate is constitutional, but whether the barriers imposed by the challenged provisions are constitutional. A barrier that can be overcome is still a barrier, and is unconstitutional if its justification rings hollow. Here, the challenged barriers violate Mr. Noland's

constitutional rights and cannot survive even deferential rational basis review, let alone the strict scrutiny demanded by the Montana Constitution. This Court should reverse the district court decision and grant summary judgment in Mr. Noland's favor.

STATEMENT OF THE ISSUES

1. Whether Mr. Noland has standing to bring an as-applied constitutional challenge to aspects of Montana's PCN process.
2. Whether the challenged provisions are unconstitutional under Article II, sections 3, 4, and 17, of the Montana Constitution and section 1 of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Mr. Noland brought this civil rights lawsuit against the State, the Commission, and the Commission members under sections 3 (right to pursue life's basic necessities), 17 (due process), and 4 (equal protection) of Article II of the Montana Constitution, as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution. An existing garbage company, Evergreen Disposal, was allowed to intervene on the side of the defendants. Doc. 34.00 at 4.

The parties conducted extensive discovery, after which Defendants and Mr. Noland filed competing motions for summary judgment and Evergreen filed a

motion to dismiss. The district court held a hearing, at which all parties agreed there are no genuine disputes of material fact. Transcript of Summ. J. Hearing at 35–36. On February 8, 2024, the district court granted Defendants' motion for summary judgment and denied Mr. Noland's.[2] *See* Doc. 101.00 at 2. It held that (1) Mr. Noland lacked standing to bring an as-applied challenge because he has not completed an application and (2) the challenged statutes are not facially unconstitutional because other applicants have been allowed to enter the garbage hauling industry in the past. Doc. 101.00 at 3–6. The court entered a final judgment on April 29, 2024. Doc. 108. Mr. Noland timely appealed.

STATEMENT OF FACTS

I. Plaintiff Parker Noland

Parker Noland is 23 years old and a resident of Kalispell. Doc. 55.00 ¶ 1. After he was medically discharged from the Army, he began working construction, during which he saw that debris pickups were often late, leaving it to pile up in dumpsters. Doc. 55.00 ¶ 3; Doc. 71.00, Ex. D at 109:1–10; *see also id.* at 109:11–110:13. Seeing a niche that was not adequately being filled, he began offering construction debris hauling services through his company, PBN LLC. Doc. 55.00 ¶ 3. Shortly after he

[2] The court partially granted Evergreen's motion to dismiss, treating it as a motion for summary judgment. Doc. 101.00 at 2.

started operating, the Commission ordered him to cease operations because he lacked a Class D[3] PCN Certificate. *Id.* ¶ 11–12.

Mr. Noland then submitted an application on behalf of his company. *Id.* ¶ 12. Soon after, he faced a significant obstacle—the ability of existing certificate holders to protest applications. *Id.* ¶ 13. Because he sought to haul "garbage" (broadly defined to include construction debris), subsidiaries of two large garbage companies protested, claiming that his company would conflict with their existing services. *Id.*; *see also* Doc. 56.10, Ex. 5 at DEF 253−58; Doc 56.10, Ex. 4 at 45:24–46:4. They also served intrusive discovery requests seeking information about his company's tax returns, finances, insurance, and rates—information no business would be eager to share with competitors. Doc. 55.00 ¶ 14; Doc. 56.10, Ex. 9 at EVG 48−61, 99−109.

Mr. Noland paid an attorney over a thousand dollars to represent him in the legal proceeding triggered by the protests. He soon realized he would have to spend thousands more to have any hope of obtaining a certificate—an expense he could not afford. Doc. 55.00 ¶ 15. And even if he obtained a favorable ruling from the Commission, the protestors could seek judicial review, increasing the cost and

[3] Motor carriers who haul garbage are "Class D" carriers. Mont. Code Ann. § 69-12-301(3). Other motor carriers include Class A (bus companies) and Class E (network carriers such as Uber and Lyft). *Id.* § 69-12-301(2).

delaying resolution of the application. *Id.* ¶ 16. Unable to afford the cost of these barriers, Mr. Noland withdrew the application. *Id.* ¶ 17.

Mr. Noland still wants to achieve his dream of offering debris hauling services in the Flathead Valley—he believes there is need for such services and that he is qualified to provide them. *Id.* ¶¶ 8, 21–22. Were it not for the barriers posed by the regulatory scheme challenged here—requiring the Commission to consider "need" and allowing incumbents to protest applications to prevent competition—he would apply for a certificate. *Id.* ¶¶ 9, 19–22.

II. The Challenged Need Requirement and Protest Procedure

Montana regulates commercial garbage haulers as "Class D motor carriers." Mont. Code Ann. § 69-12-301(3). "Garbage" includes "ashes, trash, waste, refuse, rubbish, organic or inorganic matter that is transported to a licensed transfer station, licensed landfill, licensed municipal solid waste incinerator, or licensed disposal well," and thus includes the construction debris that Mr. Noland wishes to haul. *Id.* § 69-12-101(10).

Class D carriers must obtain a PCN certificate before beginning operations.[4] To obtain one, an applicant must prove "public need" for their services, a requirement derived from the statutory requirement that the Commission consider

[4] Commercial garbage hauling without a certificate can result in fines and civil penalties. Mont. Code Ann. § 69-12-108.

"the transportation service being furnished . . . by any . . . existing transportation agency" and "the effect that the proposed transportation service may have on other forms of transportation service that are essential and indispensable to the communities to be affected." Mont. Code Ann. § 69-12-323(2)(a)(i), (iii);[5] Doc 58.00 ¶¶ 7–10 (Koopman declaration).[6] These factors are unrelated to applicant fitness—instead, they require the Commission to consider whether existing companies are meeting the public need and whether competition from the applicant would harm those companies. *See* Doc 58.00 ¶¶ 7–10; Doc. 56.10, Ex. 1 at 51:24−54:9. The Commission can reject (and has rejected) applicants solely based on whether they might compete with an existing provider. *See, e.g.*, Doc. 56.10, Ex. 6 at DEF 7101−24.

Aggravating the harm posed by this regulatory scheme, the challenged provisions give existing providers—who have a financial incentive to exclude competitors—significant influence over the process. Mont. Code Ann. § 69-12-321; Doc. 58.00 ¶¶ 5, 11–14. Existing companies are "interested parties" that must be

[5] Mr. Noland does not challenge the provision that "a determination of public convenience and necessity may include a consideration of competition," Mont. Code Ann. § 69-12-323(2)(b), because the legislative history shows the purpose of that language is to enable the Commission to consider the "*benefits* of competition" and "*need* for competition," not to deny certificates to prevent competition. Doc. 69.10, Ex. B at 4, 13 (emphases added).

[6] Roger Koopman served two terms as a Commissioner on the Montana Public Service Commission, during which he observed the "unreasonable and illogical obstacle course" for applicants created by the challenged provisions. Doc 58.00 ¶ 5.

notified of any new application. Mont. Code Ann. § 69-12-321(1)–(2). They may then file protests with the Commission, identifying the geographical areas in which they believe there is a service conflict. Mont. Code Ann. § 69-12-321(1)−(2); Mont. Admin. R. 38.3.405. Protests need not address applicant fitness or public health and safety concerns. *See* Doc. 54.00 at 5. In fact, the protest form provided by the Commission *only* offers space to protest because of a service conflict. *See* Doc. 54.00 at 5; Doc. 56.00 ¶ 6. Unsurprisingly, no protest from the past decade—all of which were filed by existing garbage companies—has raised any other reason for protesting. Doc. 56.00 ¶ 6.

Protests make the process more expensive and burdensome for applicants. Doc. 58.00 ¶¶ 11–14. If there is a protest, the Commission must schedule a hearing, which otherwise is not required. Mont. Code Ann.§ 69-12-321(1). The protestor can propound burdensome discovery on applicants, including "data requests," depositions, interrogatories, requests for production, physical and mental examinations, and requests for admission. Mont. R. Civ. P. 26(a); *see also* Mont. Admin. R. 38.2.3301. The protestor may testify at the hearing regarding the "need" for a new company. *See* Mont. Code Ann. § 69-12-321(2); Doc. 58.00 ¶ 12; Doc. 56.10, Ex. 1 at 50:24−54:19. Given the hurdle that protests pose, it is hardly surprising that a protest is the strongest predictor for an application being denied or withdrawn. Of the 24 applications in the last decade, 12 were withdrawn, 2 were

denied, and 10 were granted. *See* 56.00 ¶ 6. All 12 withdrawals and both denials came after a protest. *Id.* Only 3 of the 10 granted applications were granted over a protest. *Id.* The remaining 7 were either granted with no protest or after the protest was withdrawn. *Id.*

The requirements that the Commission consider the "need" for a new company and allow existing companies to file anticompetitive protests are mandated by statute and thus will be enforced in all future applications. Mont. Code Ann. §§ 69-12-321, -323; Doc. 56.10, Ex. 1 at 50:24−54:19.

III. Mr. Noland's Expert, Dr. James Bailey

Mr. Noland produced expert testimony from Dr. James Bailey, an economist and Associate Professor at Providence College. *See generally* Doc. 57.00. Dr. Bailey demonstrated using basic economic theory and a review of surveys in other industries that laws like Montana's (1) reduce access to services, (2) increase costs, and (3) lead to lower quality services. Doc. 57.00, Ex. 1 at 4–30. This was the consistent finding in both the medical industry, where need review laws are most common, and the trucking industry, which is analogous to the garbage hauling industry. Id. at 17–30; Doc. 56.10, Ex. 2 at 19:8−15, 23:21–24:7, 26:1−8. By contrast, Dr. Bailey found that eliminating need review laws did not harm—and even improved—access to services, particularly in rural areas, while also reducing costs and improving quality. Doc. 57.00, Ex. 1 at 17–30.

STANDARD OF REVIEW

This Court's review of a grant or denial of summary judgment is *de novo*. *Nunez v. Watchtower Bible and Tract Society of N.Y., Inc.*, 2020 MT 3, ¶ 9. Summary judgment is appropriate when the record demonstrates that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* "[D]enial, speculation, or conclusory statements" are insufficient to defeat summary judgment. *Peterson v. Eichhorn*, 2008 MT 250, ¶ 13. This Court must also determine the correctness of the district court's legal conclusions, including concerning the constitutionality of a statute. *Williams v. Bd. of Cnty. Comm'rs of Missoula Cnty.*, 2013 MT 243, ¶ 23.

SUMMARY OF ARGUMENT

The district court ruling that Mr. Noland lacks standing to bring an as-applied challenge is incorrect as a matter of law. As this Court has held, individuals have standing to bring as-applied challenges where there is a possibility of a law being enforced against them in the future, unless that fear is "imaginary" or "wholly speculative." *Gryczan v. State*, 283 Mont. 433, 445 (1997) (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979)). Numerous federal courts have come to similar conclusions. *See, e.g.*, *Ne. Fla. Ch. of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993); *Merrifield v. Lockyer*, 547 F.3d 978, 980 n.1 (9th Cir. 2008); *United Food & Com. Workers Int'l*

Union v. IBP, Inc., 857 F.2d 422, 427–28 (8th Cir.1988); *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 697 (E.D. Ky. 2014). Here, the procedures Mr. Noland challenges will be enforced in any future application he files. That is not "imaginary" or "wholly speculative," but mandated by statute. The Commission enforces those statues as to all applications and has acknowledged that it will continue to do so.

The district court also erred in holding that the challenged statutes are not facially unconstitutional because others have successfully overcome the barrier they pose to working as a garbage hauler. In a challenge to a government-imposed barrier, the constitutional violation is caused by the challenged barrier itself, not the inability to overcome that barrier. *See, e.g.*, *Ne. Fla. Ch. of the Associated Gen. Contractors of Am.*, 508 U.S. at 666. Here, the barrier posed by Montana's PCN scheme violates Mr. Noland's constitutional rights to pursue employment and earn a living under Article II, sections 3, 4, and 17 of the Montana Constitution, and under the Fourteenth Amendment. It is unconstitutional both facially and as applied to him, and is so disconnected from any legitimate government interest that it cannot survive even rational basis review, let alone the strict scrutiny Article II, section 3, requires. Based on the record in this case, there are no circumstances in which requiring a vague showing of "need" is constitutional. Similarly, the evidence shows that allowing existing companies to protect themselves from competition through

protesting applications serves no legitimate governmental interest. This Court should reverse the trial court's ruling and grant summary judgment to Mr. Noland.

ARGUMENT

I. Mr. Noland Has Standing to Bring His As-Applied Challenge

A plaintiff has standing to raise a claim if he can satisfy two criteria: "(1) the claim is based on an alleged wrong or illegality that has in fact caused, or is likely to cause, the plaintiff to personally suffer specific, definite, and direct harm," to the exercise of a right and "(2) the alleged harm is of a type that available legal relief can effectively alleviate, remedy, or prevent." *Larson v. State ex rel. Stapleton*, 2019 MT 28, ¶ 46. An as-applied constitutional challenge argues that "the statute is unconstitutional as applied to the facts of a particular situation." *State v. Knudson*, 2007 MT 324, ¶ 16.[7]

This Court has long recognized that under these criteria, plaintiffs have standing to bring as-applied constitutional challenges where there is a realistic possibility of future enforcement, unless fear of enforcement is "imaginary" or

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[7] The district court's ruling that Mr. Noland lacks standing to bring an as-applied challenge also lacks support in caselaw because

> the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. The distinction is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint.

Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 331 (2010).

"wholly speculative." *Gryczan*, 283 Mont. at 445. In fact, it has suggested that "nothing short of an express unconditional statement that the law will not be enforced will bar plaintiffs from challenging a law." *Id.* (citing *United Food & Com. Workers*, 857 F.2d at 427–28).

In *Gryczan*, plaintiffs challenged a Montana statute criminalizing consensual sex between adults of the same sex. 283 Mont. at 441. The State claimed that the plaintiffs lacked standing because they had not been arrested or prosecuted for violating the statute and there was no credible threat of enforcement because no one had ever been arrested under the statute. *Id.* This Court disagreed. *Id.* at 442–46. It recognized that the plaintiffs had standing for three reasons.

First, the statute burdened conduct that the plaintiffs wanted to engage in. *Id.* at 442–43. The Court observed that although the statute had not been enforced against the plaintiffs, it had been amended recently, and the Montana legislature had declined multiple times to repeal it. *Id.* at 443–44. The Court also noted that the plaintiffs were the type of individuals the statute was designed to impact, and the State had not disavowed enforcement. *Id.* at 444–45. Second, "[t]he controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument invoking a purely political, administrative, philosophical or academic conclusion . . . ." *Id.* at 442. Declaring the law unconstitutional would have a real effect on plaintiffs' ability to engage in their

desired activity without fear of arrest. *Id.* Third, the court's judgment would finally determine the plaintiffs' rights by determining the constitutionality of the statute. *See id.* The Court thus concluded that the plaintiffs had standing.

Federal courts have reached similar conclusions, including in as-applied challenges to barriers to entering an occupation.[8] The U.S. Supreme Court held in a challenge to a need review law that the plaintiff "was not obligated to apply for a certificate of convenience and necessity and submit to the [application procedures] before bringing [an] action" because the law was "completely invalid insofar as it applie[d]" to the plaintiff. *City of Chicago v. Atchison, Topeka & Santa Fe Ry. Co.*, 357 U.S. 77, 89 (1958). Similarly, the Ninth Circuit held in *Merrifield* that the plaintiff had standing to challenge a statute governing pest control licenses even though he never applied for a license because he could not "engage in his trade unless he first satisfie[d] the current licensing requirement or receive[d] an exemption." 547 F.3d at 980 n.1. And a federal district court held in *Bruner* that plaintiffs challenging a need review law that was nearly identical to the one in this case had standing even though they never applied for a certificate, "not because [they] would automatically be granted a Certificate [if they prevailed], but because the unconstitutional obstacle would be removed from their path." 997 F. Supp. 2d at 696–97.

[8] The federal criteria for standing are substantively identical to Montana's. *See Larson*, 2019 MT 28, ¶ 46.

Here, Mr. Noland has standing to bring a pre-enforcement as-applied challenge to Montana's need review law because Defendants will enforce it in any application he files. The challenged provisions harm Mr. Noland by burdening his rights to pursue employment and earn a living in the occupation of his choice. There is no dispute that he wants to pursue a garbage hauling business in Flathead County that is subject to the need requirement and protest procedures. Doc. 55.00 ¶¶ 10–11, 19. His injury will be redressed if he is successful in this lawsuit, not because he will be granted a certificate, but because his application will be considered without the barrier of a competitor's veto. As in *Gryczan*, the challenged provisions burden his ability to engage in desired conduct, the controversy is one upon which the Court's judgment may effectively operate, and the Court's judgment will have final effect because it will determine whether the challenged barrier is unconstitutional. 283 Mont. at 443.

Mr. Noland has an even stronger claim to standing than did the plaintiffs in *Gryczan*. There, the statute had never been enforced against consenting adults, whereas here, Defendants enforced the challenged provisions in every application for the past ten years—including the one filled out by Mr. Noland—and insist that they will continue to do so. *See, e.g.*, Doc. 56.00 ¶ 6; Doc. 84.00 at 10. And as in *Gryczan*, the legislature has repeatedly declined to repeal the challenged provisions despite multiple invitations to do so. 283 Mont. at 443–44; H.B. 338, 67th Leg., Reg.

Sess. (Mont. 2021) (not passed);[9] H.B. 191, 68th Leg., Reg. Sess. (Mont. 2023) (same).[10] Mr. Noland's belief that he will face unconstitutional hurdles is not "imaginary" or "wholly speculative"—it is guaranteed by continued enforcement despite multiple repeal attempts. *Gryczan*, 283 Mont. at 443–44. He therefore has standing to seek to remove this unconstitutional obstacle. *Bruner*, 997 F. Supp. 2d at 697.

The district court erroneously relied on *Broad Reach Power, LLC v. Montana Department of Public Service Regulation*, 2022 MT 227. Doc. 101 at 5. There, plaintiffs challenged the Commission's discovery procedures, but because they sought summary judgment "[w]ithout engaging in discovery," there was no record of how the Commission applied those procedures. *Broad Reach Power*, 2022 MT 227, ¶¶ 5, 13. The evidence showed only that the Commission "may" use certain hearing procedures, which the appellants contended could be constitutional in some circumstances and unconstitutional in others. *Id.* ¶ 4–5, 12–13. Here, by contrast, Mr. Noland challenges the continued enforcement of procedures that are mandated in every application. And unlike in *Broad Reach Power*, the parties here conducted ample discovery, so there is extensive evidence of how the Commission applies the challenged regulatory scheme. Mont. Code Ann. §§ 69-12-321(1)–(2), -323(2)(a);

[9] https://legiscan.com/MT/bill/HB338/2021.
[10] https://legiscan.com/MT/bill/HB191/2023.

Doc. 56.00 ¶ 6. There is no "factual vacuum" because the challenged statutes give the Commission no discretion—it *must* consider "need" and *must* allow anticompetitive protests in all applications. Mr. Noland thus has standing to challenge these procedures as applied to him and his desired hauling activities.

II. The Challenged Provisions Are Unconstitutional

In a facial constitutional challenge, the plaintiff needs to "show that no set of circumstances exists under which the statute would be valid or that the statute lacks any plainly legitimate sweep." *In re S.M.*, 2017 MT 244, ¶ 10*; see also Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 14 ("*Mont. Cannabis II*"). The district court erred in holding that this standard is not satisfied because other applicants have been granted Certificates in the past. Doc. 101 at 5–6. Mr. Noland does not challenge the requirement that he obtain a Certificate—he challenges only: (1) the requirement that he demonstrate that there is a "need" for a new garbage hauler; and (2) the ability of incumbents to file anticompetitive protests. Doc. 55 ¶¶ 20–22.

These provisions impose a barrier on every applicant for a Class D Certificate—whether they are ultimately successful in obtaining a Certificate or not. *See, e.g.*, *Ne. Fla. Ch. of the Associated Gen. Contractors of Am.*, 508 U.S. at 666 (the constitutional violation is the "imposition of the barrier, not the ultimate inability to obtain the benefit"); *see also Bruner*, 997 F. Supp. 2d at 696−701 (because they presented an "unconstitutional obstacle," the statute's "notice, protest,

and hearing procedures . . . violate" the Constitution). They are thus unconstitutional, both as-applied and facially. They are unconstitutional as applied to Mr. Noland because they continue to be enforced against him and his desired business activities—and will be enforced in any future application he files. *See*, *e.g.*, *Knudson*, 2007 MT 324, ¶ 16. They are facially unconstitutional because there is no set of circumstances in which allowing anticompetitive protests and requiring a showing of "public need" based on protecting incumbents is constitutional. *See, e.g.*, *Mont. Cannabis II*, 2016 MT 44, ¶ 14.

As described below, the barrier set up by the challenged provisions violates Article II, sections 3, 4, and 17 of the Montana Constitution, as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment. It cannot survive rational basis review, let alone strict scrutiny.

A. The challenged provisions violate Article II, section 3, of the Montana Constitution

Montana's Constitution provides that all people have an inalienable right to "pursu[e] life's basic necessities." Mont. Const. art. II, § 3. Because "it is primarily through work and employment that one exercises and enjoys this . . . fundamental constitutional right," it includes the right to pursue employment—otherwise, "the right to pursue life's basic necessities would have little meaning." *Wadsworth*, 275 Mont. at 299, 301. Because this right is fundamental, restrictions on it must withstand strict scrutiny, meaning that Defendants must prove a compelling state

interest that is narrowly tailored, using the least restrictive means to achieve that interest. *Id.* For an interest to be compelling, the harms the State means to address must be real—they may not be conjectural or speculative. *See, e.g.*, *id.* at 303 ("[D]emonstrating a compelling interest entails something more than simply saying it is."). And a government act is not narrowly tailored to achieve an interest if it contradicts or fails to advance that interest. *See, e.g.*, *Reed v. Town of Gilbert*, 576 U.S. 155, 171–72 (2015).

In *Wadsworth*, this Court recognized that barriers to operating a business that are not narrowly tailored to achieve a compelling interest violate the right to pursue employment. 275 Mont. at 292. A Department of Revenue rule prohibited the Department's real estate appraisers from engaging in independent appraisals outside of work. *Id.* The plaintiff, a Department appraiser, was ordered to close his independent appraisal business or face termination. *Id.* at 293. He challenged the Department's rule as violating his constitutional right to pursue employment. *Id.* at 293–94. This Court agreed, applying strict scrutiny and noting that although the right to pursue employment does not provide a right to a particular job, the plaintiff was not asserting a right to a specific job with the Department, but a right to pursue employment through an independent business. *Id.* at 301. The State's asserted interest in preventing the appearance of impropriety was not compelling because it was purely speculative—there had been no complaints about any appearance of

impropriety when Department appraisers engaged in outside appraisals. *Id.* at 303−04.

Like in *Wadsworth*, the provisions challenged here violate Mr. Noland's right to pursue employment because they pose a barrier to him pursuing employment through a debris hauling business. He is not asserting a right to a particular job, such as a position with an existing business or government body. 275 Mont. at 301. Nor is he asking the courts to grant him a certificate—that is for the Commission to decide based on the many health, safety, and fitness criteria that he does not challenge. Doc. 55.00 ¶ 20. He simply wants to be able to pursue employment as a garbage hauler without having to overcome an anticompetitive and unconstitutional barrier. Because the challenged requirements interfere with that right, they are subject to strict scrutiny, which they cannot survive.

Neither Defendants nor Evergreen argued below that any of the State's asserted interests are compelling or that the challenged provisions are narrowly tailored to achieve those interests. Doc. 60.00 at 12–13; Doc. 69.10 at 6–8; Doc. 76.00 at 17; Doc. 84.00 at 7–8. They have therefore waived any such argument. *See, e.g.*, *Pilegram v. Greenpoint*, 2013 MT 354 ¶ 20 ("[W]e do not consider new arguments or legal theories for the first time on appeal."). If strict scrutiny applies under Article II, section 3, then Mr. Noland must prevail, and the Court need not

even address the interests that Defendants assert for purposes of rational basis review.

Instead of asserting that strict scrutiny is satisfied, Defendants argued only that the right to pursue employment is not implicated and that Mr. Noland's claims should be subject to rational basis review. Doc. 60.00 at 12–13; Doc. 69.10 at 6–7; Doc. 84.00 at 7–8. They are mistaken for two main reasons.

First, Defendants mischaracterize Mr. Noland's argument as saying that he should be allowed to operate free of any regulation, an argument rejected in *Wiser v. State*, 2006 MT 20 ¶ 24. *See* Doc. 60.00 at 12–13; Doc. 69.10 at 6–7; Doc. 84.00 at 7–8. To the contrary, Mr. Noland does not challenge most regulation of garbage hauling, including any valid public health or safety regulation. Doc. 55.00 ¶¶ 20–22. Unlike in *Wiser*, where the plaintiffs sought to "practice denturity free of all regulation," *Wiser* at ¶ 22, he challenges only the narrow provisions requiring that he demonstrate need and allowing anticompetitive protests. Doc. 55.00 ¶¶ 20–22.

Second, Defendants argue Mr. Noland's right to pursue employment is not implicated because he is "free to pursue [garbage hauling] work generally," either by seeking employment at an existing hauler or using the limited exceptions[11] to the

[11] No certificate is required for hauling garbage "in a city, town, or village with a population of less than 500 persons," "carrying junk vehicles from a collection point to a motor vehicle wrecking facility or a motor vehicle graveyard," or hauling garbage "under an agreement between a motor carrier and an office or agency of the United States government." Mont. Code Ann. § 69-12-102(1)(c), (e), (j).

requirement that he obtain a Certificate. Doc. 69.10 at 6–7; Doc. 76.00 at 18; *Wiser*, 2006 MT 20 ¶ 23. That argument is contrary to *Wadsworth*, where the plaintiff also had alternative ways of pursuing appraisal work—he could have kept his appraisal job at the Department had he surrendered his appraisal business. *See* 275 Mont. at 301. This Court nonetheless recognized that his right to pursue employment was implicated because the challenged rule hindered his ability to conduct independent appraisals. *Id.* at 301−04. Likewise, the provisions challenged here violate Mr. Noland's right to pursue employment by presenting a substantial barrier to him operating a garbage hauling business. The existence of other, less-attractive alternatives, even in the same industry, does not change that fact.

B. The challenged provisions violate Article II, section 17, of the Montana Constitution

Under the Montana Constitution's Due Process provision, "[n]o person shall be deprived of life, liberty, or property without due process of law." Mont. Const. art. II, § 17. An economic regulation that burdens a plaintiff's right to earn a living violates this provision if it is not "reasonably related to a permissible legislative objective." *Mont. Cannabis II*, 2016 MT 44, ¶ 21. Under this review, the Court looks to the legislature's purpose, whether expressly stated or otherwise, to determine the "legislative objective." *Id.* ¶ 22. It will "not surmise possible purposes for the legislation" where the legislation's purpose is explicit. *Id.* ¶ 23. If a provision is not reasonably related to the legislative purpose, it is unconstitutional. *Id.* ¶¶ 51−56; *see*

also Heller v. Doe, 509 U.S. 312, 321 (1993) (a rational basis "must find some footing in the realities of the subject addressed by the legislation"); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) (regulation fails rational basis review where its "relationship to an asserted goal is so attenuated as to render [it] arbitrary or irrational").

This Court has applied rational basis review to strike down laws that lacked a reasonable relationship to a permissible objective or were otherwise irrational. *Mont. Cannabis II*, 2016 MT 44, ¶ 56 (law banning remuneration to providers of marijuana products); *Oberg v. City of Billings*, 207 Mont. 277, 281−85 (1983) (law singling out law enforcement employees for polygraph test requirements); *Godfrey v. Mont. State Fish & Game Comm'n*, 193 Mont. 304, 307−10 (1981) (laws restricting licensing of nonresident outfitters); *State v. Jack*, 167 Mont. 456, 463 (1975) (requirement that nonresident hunter be accompanied by a resident guide). It should do so again here.

1. The challenged statutes are not rationally related to the explicit purposes of Montana's motor carrier laws

The purposes of Montana's motor carrier laws are explicitly stated in statute: (1) to "fully secure adequate motor transportation facilities for all users of such service and to secure the public advantages thereof," and (2) to "encourage a system of common carrier motor transportation within the state for the convenience of the shipping public." Mont. Code Ann. § 69-12-202. Put simply, the "public purpose"

of Montana's motor carrier laws is the "maintenance of a common carrier motor transportation system." *Id.*

Mr. Noland does not dispute that ensuring adequate motor carrier services is a permissible government objective.[12] However, the challenged provisions are not reasonably related to that objective. Instead, they *undermine* it. Forcing new market entrants to prove "need" and allowing existing competitors to dispute it through "protests" can only inhibit adequate motor carrier service because they make it harder for fit applicants to haul garbage. In fact, incumbents who are providing inadequate services can protest the application of a fit applicant, since "need" for a new business is not determined until long after protests have taken place. *See* Mont. Code Ann. §§ 69-12-321(1)(b), -322(1), -323(2)(a).; Doc. 56.10, Ex. 5 at DEF 514–20, 586–90. The challenged provisions thus enable unfit incumbents to undermine the adequacy of motor carrier services. Because they actively undermine the stated purpose of the law, they are irrational. *Mont. Cannabis II*, 2016 MT 44, ¶ 56; *see also U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 538 (1973) (food stamp eligibility

[12] While the State has discretion to regulate highways, courts are correctly "suspicious of a legislature's circuitous path to legitimate ends when a direct path is available." *Craigmiles*, 312 F.3d 220, 226 (6th Cir. 2002) (citing *City of Cleburne*, 473 U.S. 432). Here, the challenged provisions have little to do with regulating highways, and the State can regulate them through other, less circuitous means. *See Cleburne*, 473 U.S. at 439; *Craigmiles*, 312 F.3d at 227.

requirements irrational where they prevented people who most needed assistance from receiving it).

Aside from the obvious irrationality of making it harder for fit applicants to provide waste control services, Defendants have offered no evidence to dispute the findings of Plaintiff's expert that need review laws like those challenged here harm the availability and quality of services. Doc. 57.00, Ex. 1 at 6−30. Instead, they rely on a Commission order from nearly half a century ago to claim that need review laws are necessary to ensure adequate motor carrier services. *See* Doc. 56.10, Ex. 1 at 98:18−99:9, 100:5−20; 104:6−11; *see also* Doc. 56.10, Ex. 6 at DEF 7101–24. But that order just begs the question and highlights how irrational the challenged statutes are. In it, the Commission denied an application by the Rozel Corporation based not on a lack of fitness, but because competition would supposedly harm existing companies by making the market "unstable." Doc. 56.10, Ex. 6 at DEF 7121 ¶ 52. In the Commission's view, past competition led to "severe financial difficulties for the companies involved and resulted in the ultimate failure of each of those companies." *Id.* The Commission accepted the protestor's claims that new competition would cut into its profits and leave it unable to maintain equipment. *See id.* at DEF 7109 ¶¶ 20−21, 7120 ¶ 49, 7122 ¶¶ 53−54.

Relying on the *Rozel* denial is just the same as accepting Defendants' *ipse dixit*. The Commission's past assertion that a statute serves a legitimate purpose does

not make it so. Protecting incumbents from competition for their economic benefit is not a legitimate governmental interest. *See, e.g.*, *Merrifield*, 547 F.3d at 991 n.15 (9th Cir. 2008) ("[M]ere economic protectionism . . . is irrational . . . ."); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir. 2013) ("[N]either precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose[.]"); *Craigmiles*, 312 F.3d at 224 ("[P]rotecting a discrete interest group from economic competition is not a legitimate governmental purpose."). Yet that is what the Commission did in *Rozel*.

Furthermore, reliance on that order is irrational because the Commission's conclusion was self-contradictory. The antiquated order recognized that every time an incumbent failed, a new hauler stepped in and maintained services, so competition never actually resulted in consumers being underserved. Doc. 56.10, Ex. 6 at DEF 7120 ¶ 49. Later events would also highlight the arbitrariness and irrationality of denying the application based on potential harms to the incumbent. The Commission ultimately granted a new Rozel application a decade later. *See Waste Mgmt. Partners of Bozeman, Ltd. v. Mont. Dep't of Pub. Serv. Reg.*, 284 Mont. 245, 249 (1997). Predictably, during the period the Commission shielded the incumbent from competition, "there was substantial unmet consumer need for additional service" and the incumbent provided "spotty and unreliable" services, "charged customers

dramatic rate increases," and "treated the public with disdain," because it did not need to face competition. *Id.* at 249, 254–55.

2. The challenged statutes are not rationally related to any other legitimate governmental purpose

Defendants incorrectly claim that Mr. Noland must negate every conceivable justification to establish that the challenged provisions violate due process. *See* Doc. 69.10 at 8. That's not true under Montana law. Although "the legislation's purpose does not have to appear on the face of the legislation or in the legislative history," *Mont. Cannabis II*, 2016 MT 44, ¶ 22 (citation omitted), the Court "need not surmise possible purposes for the legislation" where "the Act makes explicit several purposes on its face." *Id.* ¶ 23. As discussed above, the challenged provisions do not rationally support the explicit statutory purposes. Even if this Court were to look beyond the statute, however, the challenged provisions are not rationally related to any legitimate purpose. Each of Defendants' asserted interests are addressed below.

First. Defendants' purported interests in "suiting the needs of Montana" and "upholding state statutes" are too vague to be comprehensible and therefore cannot survive rational basis review. As Plaintiff's expert demonstrated, need review laws result in higher costs, lower access to services, and lower quality services, Doc. 57.00 at ¶¶ 6–19, and Defendants have not shown otherwise. Moreover, if an interest in complying with statutes were enough, Doc. 56.10, Ex. 1 at 95:11−18, 105:13−107:17, every statute would be automatically upheld, regardless of whether

it is in fact achieving a legitimate purpose. *See Mont. Cannabis II*, 2016 MT 44, ¶¶ 51−56. That asserted interest begs the question and is insufficient.

Second. Defendants' interest in ensuring that rural areas are not underserved fails because the challenged provisions make it more—not less—likely that rural areas will be underserved. As Plaintiff's expert found, need review laws reduce access to services in rural areas in particular. Doc. 57.00 ¶¶ 10–11, 19; Doc. 57.00, Ex. 1 at 16−19, 29−30. In the medical context, there are more rural hospitals in states without need review than in states with it, and eliminating need review in trucking did not harm and even improved service to remote areas. *Id.* at 18, 29–30. Moreover, in the few instances in which a Montana garbage hauling application was granted over a protest, the Commission found that the incumbent was unwilling or unable to provide services to everyone in its area—which did not stop the incumbent from protesting to prevent a new company from picking up its slack. Doc. 56.10, Ex. 5 at DEF 515−17, 586−87.

Third. Defendants assert an interest in "protecting the constitutional right to participate in agency decisions that are of significant interest to the public." Doc 54.00 at 14.[13] But opportunities for citizen participation can be satisfied by much less circuitous means. The Commission allows the public to submit comments

[13] The Commission could not identify the source of this right, Doc. 56.10, Ex. 1 at 107:18−112:3, although it presumably refers to the right to "reasonable opportunity for citizen participation in the operation of the agencies." Mont. Const. art. II, § 8.

and attend Commission meetings, a far more direct and less onerous way of protecting access than allowing anticompetitive protests and requiring the Commission to consider potential harm to incumbents. Doc. 54.00 at 14. There is ample evidence that the challenged provisions are not intended to benefit the public, but to protect incumbents from competition. Like in *Bruner*, "[n]o member of the general public has ever filed a protest," 997 F. Supp. 2d at 700—only incumbents have done so. The protest form even assumes that the protestor is an incumbent protesting a competitor. Doc. 56.00 ¶ 6; Doc. 54.00 at 21. If the challenged provisions were truly intended to promote citizen participation, they are irrationally misaligned with that objective.

Fourth. Defendants' claimed interest in creating a "robust evidentiary record" also fails. Doc. 69.10 at 9. The Commission is required to assure an applicant's fitness before granting an application, even if there is no protest. Mont. Code Ann. § 69-12-415. The only evidence obtained through the challenged provisions is evidence the Constitution forbids it from considering; namely, whether there is a "need" or whether an existing company doesn't want the competition. Thus, the only "evidentiary record" provided by the protest procedure is that "no new competition is wanted." *Bruner*, 997 F. Supp. 2d at 700.

Fifth. Defendants next assert that the challenged provisions further interests in waste control, controlling traffic, and road maintenance. Doc. 69.10 at 10. But the

supposed relationship between these interests and the challenged statutes is nonsensical. *See, e.g.*, Doc. 86.00 at 9–10; Doc. 74.00 at 16–20. Defendants state that "the garbage industry serves an important public purpose by controlling the accumulation of waste." Doc. 69.10 at 1. True enough, but this lawsuit does not threaten "the garbage industry" or its regulation—it challenges specific provisions that *undercut* the State's interest in waste control by excluding fit applicants and ensconcing incumbents who may not be providing adequate services. *See* Doc. 56.10, Ex. 5 at DEF 515−17, 586−87 (fit applicants facing anticompetitive protests); Doc. 55.00 ¶¶ 20–22.

As for traffic and road maintenance, the challenged provisions are a similarly irrational fit. Excluding competitors does not limit the number of large vehicles on the highways or avoid wear and tear on public roads and facilities. Rather, it allows large incumbents that use many trucks to continue to operate while excluding new small businesses with one truck, like Mr. Noland's. *See* Doc. 55.00 ¶¶ 5–6, 10. The challenged provisions are "so far removed from these particular justifications [that it is] impossible to credit them." *Romer v. Evans*, 517 U.S. 620, 635 (1996); *see also Clayton v. Steinagel*, 885 F. Supp. 2d 1212, 1215−16 (D. Utah 2012) ("[T]o premise [the plaintiff's] right to earn a living . . . on that scheme is wholly irrational."); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1118 (S.D. Cal. 1999) (statute rested on grounds irrelevant to claimed interests).

Sixth. The challenged provisions do not reasonably relate to any interest in reducing costs. On their face, they are not concerned with controlling costs—and the Commission does not regulate garbage haulers' rates. Doc. 56.10, Ex. 1 at 83:15−18; *Mont. Cannabis II*, 2016 MT 44, ¶ 56. As Dr. Bailey demonstrated, basic economic theory and evidence from the medical and trucking industries show that need review laws without price controls lead to increased costs. Doc. 57.00 ¶ 9, 18–19; Doc. 57.00, Ex. 1 at 3−9. The challenged provisions here raise costs for Montanans because existing companies can increase rates without fear of competition. *See Waste Mgmt. Partners of Bozeman*, 284 Mont. at 255 (incumbent "charged customers dramatic rate increases" after competitor's application was denied).

Seventh. The challenged provisions do nothing to ensure quality service. Incumbents may protest regardless of the quality of the services they are offering, *See* Doc. 56.10, Ex. 5 at DEF 514–20, 586–90, and applications may be denied regardless of the applicant's ability to provide quality service. Mont. Code Ann. § 69-12-323; Doc. 56.10, Ex. 6 at DEF 7122 ¶ 54. Plaintiff's expert concluded that need review laws lead to lower quality services, a finding confirmed by the Federal Trade Commission and U.S. Department of Justice. Doc. 54.00 at 22–23; Doc. 57.00, Ex. 1 at 19, 27−30. That is also supported by Montana's experience—enforcement of the challenged provisions led to "spotty and unreliable" service, customers who are "treated rudely and with a take-it-or-leave-it attitude," and

incumbents that feel free to "treat[] the public with disdain" because they make it harder for new companies to offer something better. *Waste Mgmt. Partners of Bozeman*, 284 Mont. at 255.

Eighth. Finally, Defendants admit the *actual* purpose of the challenged provisions when they claim an interest in ensuring that existing haulers remain in business. Doc. 69.10 at 10. It is certainly true that the challenged provisions likely support that interest. But "protecting a discrete interest group from economic competition is not a legitimate governmental purpose," *Craigmiles*, 312 F.3d at 224, and Defendants cannot it make it legitimate simply by saying so. *See supra* at 27.

C. The challenged provisions violate Article II, section 4, of the Montana Constitution

The Montana Constitution's Equal Protection Clause commands that "[n]o person shall be denied the equal protection of the laws." Mont. Const. art. II, § 4. "The basic rule of equal protection is that persons similarly situated with respect to a legitimate governmental purpose of the law must receive like treatment." *Goble v. Mont. State Fund*, 2014 MT 99, ¶ 28. In equal protection cases, this Court follows a three-step analysis: "(1) identify the classes involved and determine if they are similarly situated; (2) determine the appropriate level of scrutiny to apply to the challenged legislation; and (3) apply the appropriate level of scrutiny to the challenged statute." *Id.* Where there is no suspect classification, courts apply rational basis review, asking whether the challenged statute irrationally treats the plaintiff

differently than others similarly situated. *See, e.g.*, *Oberg*, 207 Mont. at 281−82. "A classification is not reasonable if it . . . imposes peculiar disabilities upon [a] class of persons arbitrarily selected from a larger number of persons, all of whom stand in the same relation to privileges conferred or disabilities imposed." *Mont. Cannabis II*, 2016 MT 44, ¶ 55 (cleaned up).

Here, the challenged provisions violate Montana's Equal Protection Clause in two ways. First, they irrationally distinguish between Class D garbage haulers and other classes of motor carriers. Second, they irrationally distinguish between Class D applicants and incumbent Class D carriers.

1. The challenged provisions create an irrational distinction between Class D applicants and other motor carrier applicants

"[T]wo groups are similarly situated if they are equivalent in all relevant respects other than the factor constituting the alleged discrimination." *Goble*, 2014 MT 99, ¶ 29. In *Oberg*, this Court held that requiring law enforcement personnel, but not other public employees, to take a polygraph test was unconstitutional because there was no rational basis for singling out law enforcement. 207 Mont. at 281−82. The defendant argued that the provision was necessary to ensure law enforcement agencies met a high standard of integrity, but the Court concluded that the same concern applies to all government agencies. *Id.* at 282.

Here, Montana's different classes of motor carriers are similarly situated because they "operat[e] motor vehicles upon a public highway in this state for the

transportation of passengers, household goods, or garbage for hire on a commercial basis." Mont. Code Ann. § 69-12-101(12). Defendants claim there are "fundamental distinctions between the services that each class provides, and the vehicles used to provide such services." Doc. 69.10 at 16. That's true, of course. But on what basis do those fundamental differences dictate that garbage haulers ought to be subjected to anticompetitive protests, but Uber drivers are not? Defendants never say. Just stating they are different without stating why those differences support the different procedures is fatal to Defendants' argument. *See Oberg*, 207 Mont. at 281−82; *see also Merrifield*, 547 F.3d at 990–92 (pest controller licensing violated equal protection by treating different classes of pest controller unequally, though they controlled different pests using different equipment).

As with due process, in an equal protection case "the purpose of the legislation is of vital concern" in determining whether a classification is rational. *Ober*g, 207 Mont. at 281−82. The requirement in *Oberg* failed rational basis review because there was no justification for singling out law enforcement. Similarly, in *Montana Cannabis II*, this Court held that statutes prohibiting remuneration to providers of marijuana products ran afoul of the Equal Protection Clause because they "impose[d] a peculiar disability upon those unable to provide for themselves" and "arbitrarily set[] apart the patient who is unable to produce a medical marijuana product for her own use." *Mont. Cannabis II*, 2016 MT 44, ¶¶ 55–56.

Here, the challenged provisions arbitrarily subject garbage haulers to requirements that do not apply to other motor carriers. For example, unlike with garbage haulers, affected parties can only protest applications to be a Class E "transportation network carrier" for reasons of fitness, not to avoid competition. Mont. Code Ann. § 69-12-321(1)(c).[14] And other motor carriers, such as moving companies and taxis, do not require Commission approval at all. *See id.* § 69-12-301(1). Put simply, if Mr. Noland sought to haul anything else—people, groceries, household goods—he would not face anticompetitive protests. That is an equal protection violation unless the government can justify the differential treatment.

They cannot. This singling out is not justified by any legitimate government interest, including any interest suggested by Defendants. An interest in "adequate" motor carrier facilities is no less important for any other class of motor carrier than for garbage haulers. *See id.* § 69-12-202. Carrier fitness is likewise equally important for all classes of motor carrier, but only garbage haulers are subject to considerations of "need" and anticompetitive protests. Mont. Code Ann. §§ 69-12-321(1)–(2), -323(2)(a). Nor does an interest in road maintenance or traffic control justify singling out garbage haulers, since other classes of motor carrier can have multiple drivers, operate large vehicles, or drive regular routes. Doc. 74.00 at 17–19. Applying the challenged requirements only to garbage hauling applicants is irrational.

[14] *See also* Mont. Code Ann. §§ 69-12-323(5), -415.

2. The challenged provisions create an irrational distinction between Class D applicants and incumbent Class D haulers

The challenged provisions create a separate irrational class distinction, between incumbent garbage haulers and applicants. *Cf. Bruner*, 997 F. Supp. 2d at 697−701 ("[T]he statutes run afoul of equal protection rights by favoring existing moving companies over new applicants."). Incumbents and applicants are similarly situated in that both wish to provide garbage hauling services. But incumbents can haul garbage while those without certificates cannot, even if they are equally fit and able. Mont. Code Ann. § 69-12-314. The requirement that an applicant prove "need" and the ability of incumbents to file anticompetitive protests protect incumbents and create a presumption against new applicants, regardless of fitness. This "umbrella of protection for preferred private businesses while blocking others from competing, even if they satisfy all other regulatory requirements" is irrational. *Bruner*, 997 F. Supp. 2d at 698−700. Privileged treatment "designed to favor economically certain constituents at the expense of others similarly situated" violates equal protection. *Merrifield*, 547 F.3d at 991.

D. The challenged provisions violate the Fourteenth Amendment

The challenged scheme violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment by infringing on a fundamental right: the right to earn a living in the occupation of one's choice without unreasonable interference. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 238–39 (2022) (describing

the standard for identifying fundamental rights). Yet even if that right is not considered fundamental, Mr. Noland is entitled to summary judgment on his Fourteenth Amendment claims because the challenged provisions lack a rational relationship to a legitimate government interest.[15]

1. The right to earn a living is fundamental and should receive strict scrutiny

The right to earn a living is a fundamental right because it is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Dobbs*, 597 U.S. at 231 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). This right enjoys a pedigree dating back to English and early American common law. From the Elizabethan Era onward, the right to pursue a lawful occupation against arbitrary restraint was recognized as one enjoying meaningful protection. *See, e.g.*, 1 William Blackstone, *Commentaries on the Laws of England* 415 ("At common law every man might use what trade he pleased."); *The Case of the Tailors of Ipswich*, 77 Eng. Rep. 1218, 1219 (K.B. 1615); *Darcy v. Allein (The Case of Monopolies)*, 11 Co. Rep. 84 (Q.B. 1602). The Founders shared a similar distaste for economic protectionism, with James Madison recognizing that it "is not

[15] Mr. Noland also asserted claims under the Fourteenth Amendment's Privileges or Immunities Clause. Doc. 1.00 ¶¶ 117–120. The U.S. Supreme Court has limited the protections of that clause. *See The Slaughter-House Cases*, 83 U.S. 36 (1872). Mr. Noland believes that *Slaughter-House* was wrongly decided and raises the issue to preserve it for potential further review. Doc. 54.00 at 30 n.22; Doc. 74.00 at 25.

a just government . . . where arbitrary restrictions . . . deny to part of its citizens . . . the free choice of their occupations." James Madison, *Property*, National Gazette (Mar. 27, 1792).

Respect for the right to earn a living would later be enshrined in the Fourteenth Amendment; as its primary author argued, "our own American constitutional liberty . . . is the liberty . . . to work an honest calling." Congressional Globe, 42nd Cong., 1st Sess. App. 86 (1871) (statement of Rep. Bingham); *see also Truax v. Raich*, 239 U.S. 33, 41 (1915); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (the right "to engage in any of the common occupations of life" is protected). Given this history, Judge Ho of the Fifth Circuit correctly recognized that "the right to engage in productive labors is essential to ensuring the ability of the average American citizen to exercise most of their other rights" and that "scholars have determined that the right to earn a living is deeply rooted in our Nation's history and tradition—and should thus be protected under our jurisprudence of unenumerated rights." *Golden Glow Tanning Salon, Inc. v. City of Columbus*, 52 F.4th 974, 984 (5th Cir. 2022) (Ho, J., concurring). Restrictions on that right are subject to strict scrutiny, a standard that Defendants have failed to satisfy.

2. The challenged statutes fail rational basis review

Even if the right to earn a living were not fundamental, the challenged provisions cannot survive rational basis review under the federal Due Process or

Equal Protection Clauses. *See, e.g.*, *St. Joseph Abbey*, 712 F.3d at 221−27; *Merrifield*, 547 F.3d at 989; *Craigmiles*, 312 F.3d at 227−29. Federal rational basis review assumes a presumption of constitutionality but is "not toothless." *See, e.g.*, *Craigmiles*, 312 F.3d at 229. If a law is not rationally connected to legitimate ends, it violates the Fourteenth Amendment. *Id.*

Federal courts have struck down numerous regulations that lacked a rational relationship to a legitimate end. For example, the Ninth Circuit held in *Merrifield* that a licensing law that discriminated between different types of pest controllers violated the Equal Protection Clause because it did "not logically follow . . . that removing the licensing requirement for non-pesticide control of less common pests . . .would pose a lesser risk to public welfare." 547 F.3d at 988, 991. Similarly, the Fifth and Sixth Circuits have struck down laws prohibiting anyone but licensed funeral directors from selling caskets. *St. Joseph Abbey*, 712 F.3d at 223−27 ("[T]he great deference due state economic regulation does not demand judicial blindness"; "nor does it require courts to accept nonsensical explanations for regulation."); *Craigmiles*, 312 F.3d at 225, 227−29 (defendants' attempts to justify the law struck with "the force of a five-week-old, unrefrigerated dead fish," and the law "was nothing more than an attempt to prevent economic competition").

Need review laws like those challenged here have also failed rational basis review. In *New State Ice Co. v. Liebmann*, the U.S. Supreme Court held that a need

review law violated the Fourteenth Amendment because asserted rationales for the law were pretextual and thus denied the right to engage in a lawful business—"[s]tated succinctly, a private corporation here [sought] to prevent a competitor from entering the business of making and selling ice." 285 U.S. 262, 278–80 (1932). Meanwhile, in *Bruner*, the district court struck down a law that required certificate applicants to prove "need" for their services and enabled incumbents to file protests. 997 F. Supp. 2d at 693−95, 701. The court concluded that interests in preventing incumbents from cutting costs and endangering public safety were pretextual—"an existing moving company c[ould] essentially 'veto' competitors from entering the moving business for any reason at all, completely unrelated to safety or societal costs." *Id.* at 700–01.

Here too, there is ample evidence that Montana's challenged regulatory scheme lacks any rational connection to a legitimate end. "No sophisticated economic analysis is required" for this Court to hold that the challenged statutes fail the rational basis test with respect to Mr. Noland's Fourteenth Amendment claims. *Bruner*, 997 F. Supp. 2d at 701 (quoting *Craigmiles*, 312 F.3d at 229); *see also Merrifield*, 547 F.3d at 991 n.15; *St. Joseph Abbey*, 712 F.3d at 222.

CONCLUSION

The Court should conclude that Mr. Noland has standing and that the challenged provisions violate the Montana and U.S. Constitutions. It should reverse the district court's opinion and grant summary judgment in Mr. Noland's favor.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced New Times Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,820, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendix.

DATED: August 19, 2024.

/s/ Ethan W. Blevins
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