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

PARKER NOLAND,

Petitioner and Appellant,

v.

STATE OF MONTANA, et al.,

Defendants and Appellees,

and

EVERGREEN DISPOSAL, INC.,

Appellee-Intervenor.

APPELLEES' RESPONSE BRIEF

On Appeal from the Montana Eleventh Judicial District Court, Cause No. DV 22-1308-CR, Flathead County, The Honorable Amy Eddy, Presiding

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STATEMENT OF THE ISSUES

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2. Did the District Court properly find that Noland's facial constitutional challenge failed because there were constitutional applications of the challenged statutes?

3. Are Noland's arguments about each of his constitutional theories properly before this Court on appeal?

STATEMENT OF THE CASE

The present appeal seeks reversal of the Order Re: Cross Motions for Summary Judgment ("Order") issued by the Honorable Judge Amy Eddy on February 8, 2024. In the Order, the District Court concluded that Appellant Parker Noland ("Noland") lacked standing for all of his as-applied constitutional claims. The District Court held that Noland lacked standing to bring an as-applied constitutional challenge because there were no facts demonstrating how Mont. Code Ann. §§ 69-12-321 and 69-12-323(2) (together "the Provisions") were applied to him. (Doc. 101 at 5). The District Court also found that there were instances where the Provisions were constitutionally applied, so Noland could not prevail on his facial constitutional claims. *Id.* at 6.

The District Court made its decisions on narrow threshold issues, without reaching the specific merits of any of Noland's constitutional theories. Without the District Court providing any discussion of the facts or law required to support his specific constitutional theories, Noland asks that this Court review the merits of his constitutional theories and grant him summary judgment on the merits.

Noland has never clearly identified the provisions of Montana law he is challenging. *See generally* Opening Br. (never defining "challenged provisions"). The State interprets this as a challenge to the constitutionality of the protest procedure, needs requirement, and permissive consideration of competition established in Mont. Code Ann. §§ 69-12-321 and 69-12-323(2). Noland challenges the Provisions on a prospective basis. Opening Br. 15.

STATEMENT OF FACTS

In Montana, an entity interested in hauling garbage must obtain a Certificate of Public Convenience and Necessity ("Certificate") from the Montana Public Service Commission ("Commission") to haul garbage. Mont. Code Ann. § 69-12-314.

In the last ten years, the Commission granted Certificates to 10 out of 24 applicants who applied. (Doc. 101 at 2). Among those, three were granted over protests after a hearing, three were granted with no protest, and four were granted after a protest was withdrawn. *Id*.

In 2021, Noland started his business PBN LLC ("PBN"). (Doc. 101 at 2). In September 2021, with the assistance of retained legal counsel, PBN applied for a Class D Certificate of Public Convenience and Necessity. *Id.* Two incumbent garbage haulers protested PBN's application, triggering the need for a hearing on PBN's application. *Id.* Both protesting incumbents issued data requests.[1] *Id.* Without responding to the data requests, PBN withdrew its application. *See id.;* (Doc. 55 at ¶ 15). Since PBN withdrew, Noland has "pivoted his operations to haul construction and farm equipment and other materials." (Doc. 55 at ¶ 19). The present case is not an appeal from the PBN application for a Class D Certificate. PBN is not a party to this case.

STANDARD OF REVIEW

This Court exercises plenary review of constitutional issues. *State v. Egdorf*, 2003 MT 264, ¶ 12, 317 Mont. 436, 77 P.3d 517. The Court reviews a district court's conclusions of law and interpretations of the constitution for correctness. *State v. Mizenko*, 2006 MT 11, ¶ 8, 330 Mont. 299, 127 P.3d 458. Laws are presumed to be constitutional, and the party challenging any provisions bears the burden to prove beyond a reasonable doubt that they are unconstitutional. *Egdorf,* ¶ 12. "The question of constitutionality is not whether it is possible to condemn, but whether it

[1] Data requests are the primary method of pre-hearing investigation in Commission proceedings and are similar to discovery in civil proceedings. Admin. R. Mont. 38.2.3301.

is possible to uphold the legislative action." *Powder River Cnty. v. State,* 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357. The Court reviews a grant or denial of summary judgment de novo. *Siebken v. Voderberg*, 2012 MT 29, ¶ 16, 367 Mont. 344, 291 P.3d 572.

SUMMARY OF THE ARGUMENT

The District Court correctly held that Noland's as-applied constitutional claims are not justiciable. To make Noland's as-applied challenge justiciable, there must be a factual demonstration of how the application of Mont. Code Ann. §§ 69-12-321 and 69-12-323 violated his constitutional rights. Because PBN, a limited liability corporation, was the applicant in the underlying proceeding before the Commission and withdrew its application before answering discovery, no facts show how the statutes violated Noland's individual constitutional rights. Furthermore, Noland lacks standing because his as-applied constitutional challenges are prospective. Noland can show no facts demonstrating how the Provisions may violate his constitutional rights in the future. The District Court's conclusions of law about the justiciability of Noland's as-applied challenges are correct and must be affirmed.

The District Court properly rejected all of Noland's facial challenges. It is undisputed that many Certificate applications have been granted, over a protest, and with consideration of competition. Because Certificate applications were granted

after the application of the statutes Noland asserts are unconstitutional, the challenged statutes do not amount to an unconstitutional barrier in all cases. Furthermore, many of the statutes Noland challenges as unconstitutional are permissive. The Commission is not required to consider competition in all instances. Also, protests are not required. Therefore, because Noland cannot demonstrate that the Provisions are unconstitutional in all instances, his facial challenges must fail. The portions of the Provisions that are not permissive—Mont. Code Ann. § 69-12-323(2)(a)—have been affirmed on constitutional due process and equal protection grounds. The District Court's conclusion that Noland cannot demonstrate that the Provisions are unconstitutional in all instances must be affirmed.

Noland's arguments concerning the specific theories of the constitutionality of the Provisions are not properly before the Court on appeal. *See* Opening Br. 17–40. The District Court made threshold determinations about Noland's as-applied and facial challenges. (*See* Doc. 101). The District Court did not discuss the merits of any of the specific constitutional theories Noland argued. *Id.* It would be improper for this Court to make a finding on the merits in the first instance on appeal. Therefore, the Court should limit its review on appeal to the decisions the District Court made. However, if the Court reviews the merits of each of Noland's claims, the record demonstrates that he has not met his heavy burden to demonstrate beyond a reasonable doubt that the challenged provisions are unconstitutional. Rational basis

is the proper standard under which to evaluate the Provisions. The Provisions withstand rational basis scrutiny under each of Noland's constitutional theories.

ARGUMENT

This case concerns the Commission's regulation of the motor carriers who haul garbage in Montana. Garbage is broadly defined as "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." Mont. Code Ann. § 69-12-101(10). An entity interested in hauling garbage must obtain a Certificate from the Commission. Mont. Code Ann. § 69-12-314.

To obtain a Certificate, an entity begins by submitting an application to the Commission. *Id.* Upon receipt, the Commission notices the application. Mont. Code Ann. § 69-12-321(1)(a). An application may be protested by any interested party, but not all applications are protested. Mont. Code Ann. § 69-12-321; (Doc 101 at 2). If an application is protested, the Commission must hold a hearing. Mont. Code Ann. § 69-12-321(1)(b). The Commission may hold a hearing even when an application is not protested. *Id.* The Commission evaluates all applications with a four-part test: (1) is the particular service needed; (2) is the existing motor carrier(s) not willing or able to meet the public need; (3) will the applicant harm the incumbent motor carrier such that the public interest is harmed; and (4) is the applicant fit, willing, and able to provide the service. Mont. Code Ann. §§ 69-12-323(2)(a), -415. The Commission

may also evaluate the effect the applicant's proposed service will have on competition. Mont. Code Ann. § 69-12-323(2)(b).

I. THE DISTRICT COURT CORRECTLY CONCLUDED NOLAND LACKS STANDING TO BRING HIS AS-APPLIED CHALLENGE.

"An as-applied challenge alleges that a particular application of a statute is unconstitutional and depends on the facts of a particular case." *City of Missoula v. Mt. Water Co*., 2018 MT 139, ¶ 25, 391 Mont. 422, 419 P.3d 685. Without particular facts, as-applied constitutional claims are speculative. *Broad Reach Power, L.L.C. v. Mont. Dep't of Pub. Serv. Regul.*, 2022 MT 227, ¶ 13, 410 Mont. 450, 520 P.3d 301. "[C]ourts have no jurisdiction to determine matter purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions." *Brisendine v. Dep't of Commerce*, 253 Mont. 361, 365, 833 P.2d 1019, 1021 (1992). A justiciable controversy is required before a court exercises jurisdiction under the Uniform Declaratory Judgments Act ("UDJA"). *Broad Reach,* ¶ 9.

Following *Broad Reach*, the District Court correctly held Noland does not have standing to bring his as-applied constitutional challenges. (Doc. 101 at 5). The constitutional challenge in *Broad Reach* is indistinguishable from Noland's case. In *Broad Reach*, the plaintiffs sought relief under the UDJA, just as Noland seeks relief under the UDJA. *Broad Reach,* ¶ 9; (Doc 1, ¶¶ 53–54). Noland's challenges are

prospective, just like the plaintiffs' challenges in *Broad Reach*. *See Broad Reach,* ¶ 13; (Doc. 101 at 5). And even if they were not prospective, PBN was the entity that applied for a Class D Certificate with the Commission, not Noland.[2] (Doc. 101 at 5). No facts exist about how the Provisions are applied to Noland. *Id*. When as-applied challenges are made without underlying facts, "the declaratory request is speculative and would require issuance of an advisory opinion." *Broad Reach,* ¶ 13. All of Noland's as-applied challenges are nonjusticiable. The District Court must be affirmed.

Noland asserts that his as-applied challenges are justiciable without any particular facts. He relies on *Gryczan v. State* for the proposition that he has standing to bring as-applied constitutional challenges when there is a possibility of future enforcement. Opening Br. 12. *Gryczan* is distinguishable because *Gryczan* concerned a criminal statute. Noland correctly highlights, "declaring the law unconstitutional would have a real effect on plaintiffs' ability to engage in their desired activity without fear of arrest." *Id.* at 14 (citing *Gryczan v. State*, 283 Mont. 433, 442, 942 P.2d 112, (1997)). The *Gryczan* rule does "not require the plaintiff to *suffer arrest* to challenge a *criminal statute*." *Gryzcan*, 283 Mont. at 444 (emphasis added). The Provisions are not criminal statutes and non-compliance with Title 69,

[2] The State maintains that Noland lacks prudential standing to the extent he seeks retroactive relief for PBN. *Sangorin v. Sunrise Heating & Cooling*, *L.L.C.*, 2022 MT 58, ¶ 11, 408 Mont. 119, 506 P.3d 1028.

Chapter 12 of the Montana Code Annotated does not result in arrest. *See* Mont. Code. Ann. § 69-12-108. Instead, the Commission can only seek civil penalties if Noland operates as a Class D motor carrier without a Certificate. *Id.*; (*See also* Doc. 1 ¶ 15) (Noland admitting that "[t]ransporting garbage without a Certificate is punishable by fines," but not criminal prosecution or arrest); Opening Br. 6 fn. 4 ("hauling without a certificate can result in fines and civil penalties"). *Gryczan* requires a threat of arrest to justify circumventing usual standing requirements for as-applied challenges. No such threat exists for Noland.

Next, Noland relies on *City of Chicago v. Atchinson* to argue that he has a justiciable as-applied claim. Opening Br. 14. In *Atchison,* the City of Chicago ("City") adopted an ordinance requiring companies that transfer passengers between railroad lines to acquire a certificate of public convenience and necessity. 357 U.S. 77, 79–80 (1958). A new company—Railroad Transfer Service—began operating without a license. *Id.* at 81. Subsequently, the City threatened to both arrest and fine Railroad Transfer Service's drivers if they operated without a license. *Id.* The Court held that Railroad Transfer Service was not required to apply for a certificate of convenience and necessity. *Id.* at 89. The Court reasoned that the ordinance was "completely invalid" because the City had "no power to decide whether Transfer can operate a motor vehicle service between terminals because this service. . . is subject to regulation under the Interstate Commerce Act." *Id.*

Atchison does not control here. Noland does not assert that the Commission's regulation of motor carriers is "completely invalid." *See* Opening Br. 20 (stating there are "many health, safety, and fitness criteria that he does not challenge"). Nor is this a case concerning the validity of a law that is preempted by the Interstate Commerce Act or any other federal law, like *Atchison*. Finally, *Atchison* is distinguishable because the Commission cannot threaten arrest or criminal prosecution as the City did in *Atchinson*. *See supra* at 8–9.[3]

All cases Noland relies on to assert standing for his as-applied claims are distinguishable and do not control. This Court has a long history of requiring a plaintiff to assert particularized facts to bring an as-applied constitutional challenge. *Brisendine*, 253 Mont. at 365. There are no facts available to this Court concerning how the Provisions are applied to Noland, and for that reason, the Court must affirm the District Court's decision.

II. THE DISTRICT COURT CORRECTLY CONCLUDED AS A THRESHOLD MATTER NOLAND'S FACIAL CHALLENGES CANNOT SUCCEED.

A facial challenge reviews the application of a statute in all circumstances. *Mont. Cannabis Indus. Assn. v. State*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d

[3] Noland also cites *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008) to support the claim that he does not need to apply for a license before bringing as as-applied claim. Opening Br. 14. However, just as in *Atchison* and *Gryczan,* the plaintiff in *Merrifield* faced potential criminal convictions and jail time for non-compliance. 547 F.3d at 980.

1131. ("*MCIA II*"). Facial challenges are disfavored. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449–51 (2008). Facial challenges frustrate the intent of the democratic process and are contrary to the principle of judicial restraint. *Id.* at 451–52. To succeed in a facial constitutional challenge, the challenging party bears a "heavy burden to show that no set of circumstances exists under which the statute would be valid." *Hensley v. Mont. State Fund*, 2020 MT 317, ¶ 17, 402 Mont. 277, 477 P.3d 1065.

The District Court correctly concluded that Noland could not show that no set of circumstances exist under which the statute would be valid. (Doc. 101 at 6). Noland argues the protest procedure and consideration of competition effectively bar him from becoming a Class D garbage hauler. As the undisputed facts above demonstrate, applicants can and have obtained Class D Certificates after protests and the consideration of competition. The Provisions are therefore neither a bar nor a "veto" that prevents the Commission from issuing new Class D Certificates. The District Court properly reasoned that because applicants for Class D Certificates have been granted Certificates over protest, there are circumstances where the Provisions have been constitutionally applied. *Id.* Noland could not meet his "heavy burden to show that no set of circumstances exists" where the Provisions are valid. *See Hensley*, ¶ 17.

A. Noland's Theory Of An "Unconstitutional Obstacle" Is Not Applicable Based On The Facts And Is Not Found In Montana Law.

Noland challenges the District Court's conclusions of law regarding his facial challenges, vaguely asserting the conclusions of law were incorrect. Opening Br. 17–18. Primarily, Noland advances a theory that there is an "unconstitutional obstacle" to obtaining a Certificate and because there is an obstacle, he can overcome the threshold requirements of his facial challenges. *See Id.* The asserted "obstacle" does not apply in every case, because it is undisputed that Certificates have been granted both over protest and without a protest. (Doc. 101 at 2). Also, the theory of an "unconstitutional obstacle" is not found in Montana law. The only non-binding case Noland cites that is even remotely similar to this case is *Bruner*, and *Bruner* is distinguishable. The *Bruner* court only found there was an "unconstitutional obstacle" because "denial is preordained where any protest is received." *Bruner v. Zawacki,* 997 F. Supp. 2d 691, 697 (E.D. Kent. 2014). Based on the factual record here, denial is not preordained. (Doc. 101 at 2). *Bruner* is inapposite, non-binding, and clearly distinguishable from this case.

Noland also asserts that *Ne. Fla. Ch. of the Associated Gen. Contractors of Am.* stands for the proposition that a regulatory barrier can, itself, be unconstitutional. Opening Br. 17. In that case, the plaintiffs challenged a Jacksonville ordinance that required 10% of the amount spent on city contracts to be

set aside for "Minority Business Enterprises." *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville,* 508 U.S. 656, 658 (1993). The plaintiffs in *Ne. Fla.* challenged the ordinance only under the Equal Protection Clause of the U.S. Constitution. *Id*. at 659. When reviewing standing, the Court held that "when the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier to establish standing." *Id.* at 666.

Noland's argument ignores this important context. Through the application of the contested Provisions, the Commission does not erect any barrier that makes it more difficult for one Class D applicant or group of Class D applicants than any other. There are no special groups of Class D applicants that receive special preferences or are subjected to special barriers. All Class D applicants are subject to the same statutes and procedures. The challenged provisions therefore do not present an "unconstitutional obstacle."

The theory of an "unconstitutional obstacle" is not found in Montana law. To the contrary, in the exercise of the police powers of the State, the Montana Legislature constitutionally delegated the responsibility to regulate the use of public highways by motor carriers to the Commission. *Barney v. Board of R.R. Comm'rs,* 93, Mont. 115, 137–138, 17 P.2d 82, 88 (1932). "Liberty is necessarily subordinate

to reasonable restraint and regulation by the state in the exercise of its sovereign prerogative-police powers." *Wiser v. State*, 2006 MT 20, ¶ 24, 331 Mont. 28, 129 P.3d 133. The State has the power to regulate. While any instance of regulation may be viewed as an "obstacle," such regulation is not automatically unconstitutional.

The cases Noland relies on are distinguishable. Using them to forge a new, "unconstitutional obstacle" precedent in Montana would upend regulations rooted in the police powers of the State. Noland's "unconstitutional obstacle" theory does not apply, and this Court should reject the same.

B. This Court Can Affirm The District Court's Decisions On Noland's Facial Challenges For Other Reasons.

If the District Court is not affirmed for the reasons stated in the Order, the State requests that the Court affirm the District Court judgment on other grounds. *Johnson Farms, Inc. v. Halland*, 2012 MT 215, ¶ 11, 366 Mont. 299, 291 P.3d 1096.

Based on the plain language of the Provisions, Noland cannot demonstrate the Provisions are unconstitutional in all instances. The "need" requirements in Mont. Code Ann. § 69-12-323(2)(a) have twice been affirmed as constitutional. *Barney*, 93 Mont. at 124; *Fulmer v. Board of R.R. Comm'rs*, 96 Mont. 22, 30, 28 P.2d 849, 851–82 (1934). The laws challenged as unconstitutional in *Barney* are very similar to the requirements of Mont. Code Ann. § 69-12-323(2)(a). *Compare* Mont. Code Ann. § 69-12-323(2)(a) *with* 1931 Mont. Laws 491 at 498–99.

The 1931 laws upheld in *Barney* stated, "in determining whether or not a certificate should be issued, the board shall give reasonable consideration to the transportation services being furnished or that will be furnished by any railroad, or other existing transportation agency." 1931 Mont. Laws 491 at 498–499. Similarly, Mont. Code Ann. § 69-12-323(2)(a)(i) states that the Commission shall consider "the transportation service being furnished or that will be furnished by any railroad or other existing transportation agency."

Next, the 1931 laws stated that the Commission "shall give due consideration to the likelihood of the proposed service being permanent and continuous throughout twelve months of the year." 1931 Mont. Laws 491 at 499. Similarly, Mont. Code Ann. § 69-12-323(2)(a)(ii) states that the Commission shall consider "the likelihood of the proposed service being permanent and continuous throughout 12 months of the year."

Finally, the 1931 laws stated that the Commission shall consider "the effect which such proposed transportation service may have upon other forms of transportation service which are essential and indispensable to the communities to be affected by such proposed transportation service or that might be affected." 1931 Mont. Laws 491 at 499. Similarly, Mont. Code Ann. § 69-12-323(2)(a)(ii) states that the Commission shall consider "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 by the proposed transportation service or that might be affected by the proposed transportation service."

The "needs" analysis when reviewing Certificate applications has remained nearly identical since 1931 and has been deemed constitutional in both *Barney* and *Fulmer.* The Court should follow those cases and uphold the constitutionality of Mont. Code Ann. § 69-12-323(2)(a).

The remaining two challenged provisions—the protest provision in Mont. Code Ann. § 69-12-321 and the consideration of competition in Mont. Code Ann. § 69-12-323(2)(b)—are not applied in all circumstances. Mont. Code Ann. § 69-12-321(if a protest is filed); Mont. Code Ann. § 69-12-323(2)(b) (the Commission may consider competition). It is impossible for Noland to demonstrate the Provisions are unconstitutional in all instances because of the permissive nature of the statutes. Mont. Code Ann. §§ 69-12-323(2)(b) and 69-12-321. *See Disability Rights Mont. v. State*, 2009 MT 100, ¶¶ 9–10, 28, 350 Mont. 101, 207 P.3d 1092 (discussing how plaintiffs cannot succeed in facial challenges to statutes when the statute requires case-by-case application of the facts). The application of Mont. Code Ann. §§ 69-12-321 and 69-12-323(2)(b) depends on the facts and circumstances of each case. Therefore, Noland cannot demonstrate that these provisions are unconstitutional in all circumstances, and his facial constitutional claims fail as a matter of law. The

District Court's conclusion that Noland cannot demonstrate the Provisions are unconstitutional in all instances must be affirmed.

III. AMICUS ARGUMENTS CONCERNING STANDING DO NOT HELP RESOLVE THIS CASE.

Amicus Goldwater Institute ("Goldwater") attempts to argue that in similar permit and licensing schemes, plaintiffs have standing. Goldwater Br. 3–7. However, the majority of cases Goldwater relies on are First Amendment free speech cases. Goldwater Br. 3–6; *see e.g.*, *Staub v. City of Baxley*, 355 U.S. 313, 325 (1958). In one such case, the Court held that First Amendment cases are unique with regard to pre-enforcement challenges. *Brown v. Kemp*. 86 F.4th 745, 761 (7th Cir. 2023). Noland's case is not a First Amendment challenge, and the case law concerning First Amendment pre-enforcement challenges are non-binding and unpersuasive.

The non-free speech cases are simple repetition of Noland's own unpersuasive and legally incorrect arguments. *See* Goldwater Br. 4 (citing *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008), *Bruner,* 997 F. Supp. 2d 691, and *City of Chicago,* 357 U.S. 77).[4] Similarly, Amicus Cato Institute repeats Noland's "unconstitutional obstacle" theory, which is not based in Montana law. Cato Br. Section I(B)[5]; *Supra* Section II(B).

[4] The State distinguished each case in Sections I, II, and V(d).

[5] Cato did not provide page numbers on its brief.

Finally, Goldwater highlights that a plaintiff must show "a credible threat of injury exists" to bring a pre-enforcement challenge. Goldwater Br. 6. When the U.S. Supreme Court has discussed the credible threat of injury, it has stated that "persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs". *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 2309 (1979). Similarly, "when plaintiffs do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible, they do not allege a dispute susceptible to resolution by a federal court." *Id.* at 298–99. Just like other cases amicus rely on, *Babbit* only concerns pre-enforcement challenges to criminal statutes. *Id.* at 298.

Regardless, Noland's claims are all speculative. His business, which is not a party to this case, has not been threatened with prosecution, rather, only fines. Opening Br. 6 fn. 4. Noland, himself, has never been threatened with prosecution or fines personally. Also, to demonstrate how speculative Noland's claim is, he as an individual could only apply for a Certificate as a sole proprietor. His business, PBN LLC, is not a sole proprietorship. Nothing in the record suggests he has plans to be a sole proprietorship. Also, using Noland's legally incorrect "unconstitutional barrier" theory, his arguments are equally as speculative. Only *if* Noland becomes a sole proprietor, *if* he applies to the Commission for a Certificate, *if* his application is protested, and *if* the Commission considers competition would he potentially face

any barrier at all. Similarly, Noland has many complaints of the cost of applying for a Certificate. Opening Br. 5–6. Those costs are similarly speculative, because as a sole proprietor, Noland would not need to retain an attorney, even if the application were protested. Mont. Admin. R. 38.2.314; *See Sangorin*, ¶ 11. This speculation demonstrates that Noland, as an individual plaintiff, has not suffered past, present, or threatened injury and therefore has no standing to bring his claims.

IV. NOLAND'S ARGUMENTS CONCERNING THE SPECIFIC MERITS OF EACH OF HIS CONSTITUTIONAL CLAIMS ARE NOT PROPERLY BEFORE THE COURT.

Noland argues that the challenged provisions are unconstitutional under the U.S. and Montana Equal Protection Clause, the U.S. and Montana Due Process Clause, the U.S. Privileges and Immunities Clause,[6] and article II, section 3 of the Montana Constitution. Opening Br. 17–40. Noland made nearly identical arguments to the District Court in his motion for summary judgment. However, the District Court did not reach the merits of any of the asserted constitutional claims and made no legal determinations concerning the asserted constitutional claims. (*See generally* Doc. 101). Rather, the District Court found that all of Noland's as-applied and facial constitutional claims fail at threshold requirements to bring such claims. *Id.* at 5–6.

[6] Noland only raised his Privileges and Immunities Clause claim for the purpose of appeal and did not make any substantive arguments. Opening Br. 37, fn. 15. Noland correctly acknowledges his Privileges and Immunities claim fails under *The Slaughter House Cases*. *Id.*

Without legal determinations made by the District Court concerning the merits of any of Noland's specific constitutional claims, there are no legal determinations about the specific constitutional claims for this court to review for correctness. Therefore, Noland's arguments on pages 17–40 of his Opening Brief are improperly before this Court and should be disregarded.

Similarly, this Court's options for disposing of an appeal are limited. M. R. App. P. 19(1). Of importance here, "the supreme court's decision to overturn or modify a decision of the district court constitutes a reversal *of that portion of the judgment or order of the district court* from which the party took the appeal. *Id.* at (1)(b) (emphasis added). Here, Noland requests that the Court reverse the District Court's opinion *and* grant summary judgment in Noland's favor. Opening Br. 41 (emphasis added). Any grant of summary judgment on each of Noland's specific constitutional claims would be improper under Montana Rule of Appellate Procedure 19 because there is not a portion of the order of the District Court discussing Noland's specific constitutional claims.

For both of the above reasons, the State requests that if the District Court is not affirmed on the threshold issues concerning Noland's as-applied and facial challenges, the Court remand this case to the District Court to consider Noland's specific constitutional claims in the first instance.

V. IF THE COURT CONSIDERS THE MERITS OF EACH OF NOLAND'S CONSTITUTIONAL CLAIMS, IT SHOULD UPHOLD THE CHALLENGED STATUTES.

Originally, Noland asserted that Mont. Code Ann. §§ 69-12-321, 69-12-323, and all of Title 38, Chapter 3 of the Montana Administrative Rules were unconstitutional. (*See* Doc 1 at 21). In the Complaint, Noland generally referred to these statutes and rules as the "Competitor's Veto." *See generally* Doc. 1. Similarly, Noland did not define the "challenged provisions" in his Opening Brief before this Court and readily admits that he does not challenge the constitutionality of all the provisions in Mont. Code Ann. §§ 69-12-321, 69-12-323 and Title 38, Chapter 3 of the Montana Administrative rules. *See e.g.,* Opening Br. 17. Noland's pleadings leave both the State and the Court guessing at exactly what regulations he challenges as unconstitutional.

Under Noland's constitutional theories, the Court must decide whether the Provisions were reasonably related to a permissible legislative objective when the legislation was enacted. *Duane C. Kohoutek, Inc. v. State*, 2018 MT 123, ¶ 27, 391 Mont. 345, 417 P.3d 1105. Legislative decisions are "not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Communications*, 508 U.S. 307, 315 (1993); *see also Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 812 (1976). Noland relies heavily on the testimony of a single expert witness about permissible legislative objectives.

See e.g. Opening Br. 9, 25, 27, 28, 31.[7] Noland asserts that Dr. Bailey (Noland's expert) "demonstrated need review laws result in higher costs, lower access to services and lower quality services." Opening Br. 27. Noland also asserts Dr. Bailey demonstrated, in the medical context, need review laws reduce access to services in rural areas. Opening Br. 28. However, Dr. Bailey provided no review of garbage hauling regulations. (*See* Doc. 57). Most importantly, he provides no insight into whether the Provisions were reasonably related to a permissible legislative objective when the Provisions were enacted. Following *Kohoutek* and *Beach Communications*, Dr. Bailey's opinions are irrelevant to any of Noland's constitutional claims and should not be considered.

A. NOLAND'S CONSTITUTIONAL RIGHT TO PURSUE EMPLOYMENT HAS NOT BEEN VIOLATED.

The Montana Constitution protects the fundamental right to pursue employment. *Wadsworth v. State*, 275 Mont. 287, 299–301, 911 P.2d 1165, 1172–73 (1996). In *Wadsworth*, the Court defined what it means to pursue employment. The Court held that a Department of Revenue rule that *precluded* employees from engaging in independent work during off-duty hours violated the plaintiff's constitutional right to pursue employment. *Wadsworth*, 275 Mont. at 292 (emphasis

[7] Citations to Doc. 57.00 in Noland's Opening Brief are citations to Dr. Bailey's declaration.

added). Following *Wadsworth*, only a prohibition from pursuing employment violates an individual's fundamental right to pursue employment.

Nothing precludes Noland from pursuing a Certificate from the Commission. Noland can apply for a Certificate at any time. *See* Mont. Code Ann. §§ 69-12-314, -321. The application process, itself, is the *pursuit* of employment. The facts also show applicants can receive Certificates from the Commission, whether the application is protested or not. (Doc. 101 at 2). Therefore, neither the Provisions themselves, nor the Commission's implementation of the Provisions, preclude Noland from *pursuing* a Certificate. *Wadsworth* is distinguishable from the case before this Court.

Noland also desires to pursue a particular job as the owner of a garbage hauling business. Pursuit of a particular job is not protected by the Montana Constitution. *Wiser*, ¶ 24. Noland may pursue employment in the garbage hauling industry by seeking employment from an existing garbage hauler. Noland can also pursue a Certificate from the Commission. Because nothing precludes Noland from pursuing employment, *Wadsworth* is inapposite.

This Court clarified in *Wiser* that the Montana Constitution does not provide a fundamental right to any particular job or a right to pursue employment free of regulation. *Id*. The Court held the Montana Constitution "granted the fundamental right to pursue employment," but "it also circumscribed that right by subjecting it to

the State's police power to protect the public's health and welfare. Liberty is necessarily subordinate to reasonable restraint and regulation by the state in the exercise of its sovereign prerogative-police powers." *Id*. (internal quotations and citations omitted). This Court has already held that the Provisions are a legitimate exercise of police powers. *Barney,* 93 Mont. at 138. Therefore, following *Wiser*, Noland has no fundamental constitutional right to pursue employment as the owner of a garbage hauling business free of the Provisions that regulate entry into the garbage hauling market. Noland's arguments that "the provisions challenged here violate [Noland's] right to pursue employment by presenting a substantial barrier to him operating a garbage hauling business" directly contradict the holding in *Wiser.* Opening Br. 22. Noland's arguments must be rejected.

Noland's fundamental right to pursue employment has not been implicated, so strict scrutiny analysis is not appropriate. *Wiser*, ¶ 25. Noland has not argued that the Provisions failed rational basis review. He has therefore waived any such argument. *Pilegram v. Greenpoint*, 2013 MT 354, ¶ 20, 373 Mont. 1, 313 P.3d 839. Because Noland has not argued that the Provisions failed rational basis review, the Court can and should deny his claims. *Wiser,* ¶ 25.

B. The Provisions Are Constitutional Under The Due Process Clause.

The due process clause states that "[n]o person shall be deprived of life, liberty or property without due process of law." Mont. Const. art. II § 17; *accord* U.S. Const.

amend. XIV, § 1. Substantive due process claims are evaluated using a two-part test. First, the court determines the legislative purpose of the challenged statutes. *MCIA II,* ¶¶ 21–22. To find the legislative purpose, the Court presumes the statute is constitutional and looks "to any possible legitimate purpose" of the statute. *Satterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, ¶ 34, 353 Mont. 265, 222 P.3d 566. The legislative purpose can be any possible purpose the court can conceive. *MCIA II,* ¶ 22. The Court is obligated to find any conceivable reason to validate the constitutionality of statutes under rational basis scrutiny. *Satterlee*, ¶ 34. Once the Court finds the legislative purpose, the Court asks whether the means chosen by the Legislature to accomplish its objective are reasonably related to the result sought to be attained. *Kohoutek*, ¶ 17. When conducting rational basis review, the Court must decide if the Provisions are reasonably related to a permissible legislative objective at the time when the legislation was enacted. *Id.,* ¶ 27.

The District Court did not make any findings of fact or conclusions of law concerning Noland's due process claims. (*See* Doc. 101) This Court has already found that the needs requirements in Mont. Code Ann. § 69-12-323(2)(a) are constitutional under the due process clause. *Barney*, 93 Mont. at 137–138; *Fulmer*, at 30.

Mont. Code Ann. § 69-12-323(2)(b), however, was not considered in either *Barney* or *Fulmer*. The legislative history of Mont. Code Ann. § 69-12-323(2)(b)

best demonstrates the reasons for the statute at the time it was enacted. The legislative history shows the Provisions were designed to create a robust evidentiary record in Class D proceedings so the Commission could consider all facets of the relationship between motor carriers and the public. (Doc 69.10 at 11–13). One facet that was important to the Legislature was the effect of deleterious competition in markets oversaturated with garbage haulers. (Doc 69.10 at 11–13); *see also* House Business & Industry Committee Meeting on House Bill 73 at 2 (Feb 1, 1983) (Sen. Dover stating there was "a very serious problem" in garbage hauling in Lewistown), Ex. 2 (Rep. James Schulz mentioning the "Lewistown issue" and stating that seldom does the Legislature convene without addressing the "garbage problem"); Senate State Administrative Committee Meeting at 3 (Feb. 15, 1983) (Senator Towe asking a question about a concern that a new garbage hauler comes into business just to run others out of business).[8] In such situations, the Legislature was concerned that no garbage hauling enterprise could be commercially viable. (Doc 69.10 at 11–13). Deleterious competition may leave Montana communities without the services necessary to maintain a sanitary and clean environment. *Id.* The consideration of competition also allows the Commission to evaluate how a new garbage hauler may affect the reliability and stability of all garbage hauling services in a particular

[8] The full legislative history of House Bill 73 (1983) is attached as Appendix A.

service area. *Id.* Importantly, the Commission could also consider the benefits of competition. *See* Appendix A, Senate State Administration Committee Hearing on HB 73 Ex. 3a, (Feb. 15, 1983). By requiring a needs assessment and allowing consideration of competition, the Legislature allows the Commission to consider the unique facts and circumstances presented at the time of each application. The Provisions serve many legitimate purposes.

Step two of due process analysis requires identification of and analysis under the proper level of scrutiny. The Commission's regulations are undoubtedly economic regulations subject to rational basis scrutiny. *See MCIA II*, ¶¶ 26, 31. A statute does not need to be logically consistent with its aims to be found constitutional under rational basis review. *Id.*, ¶ 26. Similarly, the Court cannot find laws unconstitutional just because they do not succeed in bringing the result they seek to accomplish. *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 50 (1966). "In economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to the legislature," because the legislature is in a better position to develop economic regulations. *MCIA II*, ¶ 26. In rational basis review, the Court must evaluate if the statutes are reasonably related to a legitimate government interest at the time of enactment. *Kohoutek,* ¶ 17.

The Provisions are reasonably related to achieving the purpose of allowing the Commission to consider the unique facts and circumstances presented in each

application. Protests allow all interested persons—meaning anyone—to provide facts about the needs in a particular service area. Mont. Code Ann. § 69-12-321(2). Consideration of competition allows the Commission to balance both the benefits and detriments of competition in a particular service area. The needs requirements in Mont. Code Ann. § 69-12-323(2)(a) allow the Commission to consider the effect a proposed service may have on a community and whether that service is necessary. All of these provisions support and are reasonably related to the Commission's obligation to "supervise and regulate motor carriers in *all matters affecting the relationship between motor carriers and the traveling and shipping public.*" Mont. Code. Ann. § 69-12-201 (emphasis added).

Even using Noland's theory that the purpose of the Provisions is the "maintenance of a common carrier motor transportation system" in Montana, the Provisions are reasonably related to the purpose. As this Court has found, the needs requirements in Mont. Code Ann. § 69-12-323(2)(a) are constitutional. *Barney*, 93 Mont. at 137–38. Specifically, "regulation by means of [Certificates] is reasonably devised to protect the public from abusive use of the roads, and from the evils incident to unregulated competition." *Id.* at 129. This conclusion still holds true.

Furthermore, when reviewing a Commission decision regarding the implementation of Mont. Code Ann. § 69-12-323(2)(b), this Court has recognized that there can be "devastating impact[s]" that "garbage company competitors" bring

"upon each other, and consequently the consumer. The consumer reaped the initial benefits of the competition price war by an immediate reduction in rates. However, the consumer ultimately paid for this fleeting benefit with an unstable garbage carrier attempting to provide services to the community without proper maintenance and inventory." *Rozel Corp. v. Dept. Pub. Serv. Regul.,* 226 Mont. 237, 242–243, 735 P.2d 282, 286 (1987). Upon the review of facts in that case, the Court affirmed the Commission's decision and agreed that "the [Commission] properly concluded that renewing this situation by granting Rozel's application was not in the public interest." *Id.* Furthermore, the Court noted that, although the action of the Commission can be considered "anti-competitive," "[t]he state has the power to engage in economic regulation, even if such regulation is adverse to competition." *Id*. at 242–43 (citing *New Motor Vehicle Board of California v. Orrin W. Fox Co.,* 439 U.S. 96, 111, 99 (1978)).

Statutory provisions allowing protests, considering competition, and considering needs all aid in the Commission's maintenance of a common carrier system because they help the Commission consider all circumstances at the time of an application. Such consideration is important to maintain the roads garbage haulers drive on, ensure reliable services that benefit the public welfare, and keep Montana communities garbage-free.

Reviewing a full evidentiary record that demonstrates the needs of a community and how a new business may affect the reliability of services of significant public importance for health and welfare is reasonably related to the maintenance of a common carrier system in Montana. In light of these purposes, the Court must find that the Provisions are constitutional under rational basis scrutiny.

C. THE PROVISIONS ARE CONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE.

The equal protection clause states that "[n]o person shall be denied the equal protection of the laws." Mont. Const. art. II § 4; *accord* U.S. Const. amend. XIV, §1. Equal Protection claims in Montana are reviewed using a three-part test. First, a Court must identify the classes involved and determine if they are similarly situated. *Kohoutek*, ¶ 34. If the classes are not similarly situated, equal protection analysis stops. *Id.* Second, if the classes are similarly situated, the court decides whether the law treats the classes in an unequal manner. *MCIA II*, ¶ 15. Third, if the classes are found to be similarly situated and treated in an unequal manner, the Court must determine if the Legislature's decision to treat the classes differently withstands the proper level of scrutiny—here, rational basis review. *Hensley*, ¶ 18.

Noland asserts two equal protection claims. First, Noland argues Class D applicants are treated differently than other motor carrier applicants. Opening Br. 33–35. This argument fails at step one of equal protection analysis because different classes of motor carriers are not similarly situated. Second, Noland argues that Class

D applicants are treated differently than incumbent Class D haulers. *Id*. at 36. This argument fails at step two because new Class D applicants and incumbent Class D haulers are all treated the same. Each equal protection claim fails as a matter of law.

1. Different Treatment Of The Motor Carrier Classes Does Not Violate Equal Protection.

In analyzing an equal protection claim, the Court first must analyze whether the classes at issue are similarly situated. *Kohoutek,* ¶ 34. The court determines if classes are similarly situated by isolating the factor subject to the allegedly impermissible discrimination. *Hensley*, ¶ 21. A statute's purpose informs whether there is a discriminatory classification. When there are distinguishing factors between two classes, the distinguishing factors constitute a "fundamental distinction." *Id.* When there are fundamental distinctions between classes, classes are not similarly situated under equal protection analysis. *Id.* In *MCIA II*, when reviewing the enforcement of the 2011 Montana Marijuana Act, the Court held that a fundamental distinction existed rendering them dissimilar under step one of equal protection analysis. *MCIA II* ¶¶ 1, 18. The Court held the "regulation of different substances for medical treatment does not create two legitimate classes for an equal protection challenge" because the use of a substance prohibited by federal law is a fundamental difference. *Id.*, ¶ 18. The Court has also found a fundamental distinction in *Wilkes v. Mont. State Fund* because wage loss was a fundamental distinction when evaluating regulations about compensation for permanent partial disability. 2008

MT 29, ¶¶ 11, 20, 26, 341 Mont. 292, 177 P.3d 483. In *Wilkes*, the appellant argued that a law—Mont. Code Ann. § 39-71-703—differentiating between permanent partial disability benefits for individuals with actual wage loss and no wage loss, violated equal protection. *Id.,* ¶ 6. When holding there was a fundamental distinction between individuals who experience actual wage loss and those who do not experience wage loss, the Court reasoned that the Legislature expressed that a wage-loss benefit should bear a reasonable relationship to actual wages lost. *Id.*, ¶ 26.

Similar distinctions exist here between the different motor carrier classes. The Legislature recognized that each class of motor carrier is different and instructed the Commission to recognize the difference between motor carriers. Mont. Code Ann. § 69-12-205. This instruction is similar to *Wilkes*, where the Court recognized the Legislature's intentionally different regulation of two distinct classes and found the classes were not similarly situated. *See Wilkes*, ¶ 26.

Noland misconstrues the statutes at issue when he concludes that the Commission can only consider needs and allow for protests in Class D applications. *See* Opening Br. 35. Currently, the Commission regulates three different classes of motor carriers. Mont. Code Ann. § 69-12-301. Those are garbage haulers (Class D), transportation network carriers such as Uber and Lyft (Class E), and carriers who operate between fixed termini such as shuttle services (Class A). *Id*. Depending on the type of a Class A motor carrier, the Commission issues either a certificate of

public convenience and necessity or a certificate of compliance. Mont. Code Ann. § 69-12-311(1).

Applications for authority to operate as any class of motor carrier can be protested by any interested person. Mont. Code Ann. § 69-12-321. All classes are treated the same with respect to protests. Similarly, the Commission applies the needs requirement when considering applications both Class A and Class D motor carrier certificates of public convenience and necessity. Mont. Code Ann. § 69-12-323. When evaluating Class E and Class A applications for a certificate of compliance, the Commission only can consider if the applicant is fit, willing, and able to provide the proposed service. *Id.* at (5)(a). The Commission can permissively consider competition in Class D motor carrier cases. *Id.* at (2)(b).

Shuttle services, transportation network carriers such as Uber, and garbage haulers provide fundamentally different services that constitute a fundamental distinction for equal protection purposes. The State has demonstrated that the motor carrier classes have fundamental distinctions. (Doc. 84 at 11–12.)

Noland admitted that, without reliable Class D motor carrier services, "improper disposal of solid waste can pose a threat to public health and safety." (Doc. 74 at 2.) That threat is unique to garbage hauling—it is not a risk associated with the other motor carrier classes. Noland readily admits that there are distinctions

between the services that each motor carrier class provides and the vehicles used to provide such services. Opening Br. 34.

Because fundamental distinctions exist between the different classes of motor carriers, the classes of motor carriers are not similarly situated, and Noland's claim fails at step one of equal protection analysis. Noland asserts that the State must justify the differences. *Id.* However, that justification does not occur until step three of equal protection analysis, when the different treatment of classes must be justified under the proper scrutiny. *Hensley*, ¶ 18. Noland's first theory of equal protection fails as a matter of law at step one of equal protection analysis.

If the Court finds that the motor carrier classes are similarly situated and proceeds to the third step of equal protection analysis, it should conclude the Provisions are constitutional under rational basis scrutiny. *Kohoutek,* ¶ 34. Because no suspect classification is involved, the proper level of scrutiny is rational basis. *Powell v. State Compensation Ins. Fund*, 2000 MT 321, ¶¶ 17–19, 302 Mont. 518, 15 P.3d 877. To withstand rational basis scrutiny, the statute must serve a legitimate objective and bear a rational relationship to the classification used by the legislation. *Id.,* ¶ 19.

As discussed above, the Provisions serve many legitimate objectives, including creating robust evidentiary records to allow the Commission to consider the facts at the time of application, mitigate deleterious competition that occurs in

the garbage hauling industry, regulate all matters between garbage haulers and the shipping public, and regulate the highways of Montana, among any other legitimate purpose this Court may find. *Supra* Section IV(B). The legitimate objectives of the Provisions bear a rational relationship to the classification used by the Legislature. The legislative history demonstrates that there are unique problems with garbage haulers (Class D) that do not exist for shuttle service (Class A) or network transportation carriers such as Uber or Lyft (Class E). *Supra* Section IV(B); *see also Rozel Corp.,* 226 Mont. at 242–43. Furthermore, shuttle service providers and transportation network carriers do not have the same effect on public health and welfare as garbage hauling motor carriers. Among motor carriers, garbage hauling has a unique and significant impact on the cleanliness and health of a community. *See* Opening Br. 20; (Doc 74 at 2); *Calif. Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306, 318–19 (1905).

The differences in regulation between the different classes of motor carriers are related to the unique issues that occur in the garbage hauling industry and unique health and safety issues that the garbage hauling industry is meant to address. The different treatment of the different classes is reasonably related to the issues occurring exclusively in the garbage hauling industry. Therefore, the Provisions withstand rational basis and are constitutional.

2. Incumbent Class D Motor Carriers Are Treated The Same As Applicants Seeking Authority To Operate As Class D Motor Carriers.

Step two of equal protection analysis asks if the different classes are treated differently. *MCIA II*, ¶ 15. Incumbent motor carriers and applicants are treated the same when the Commission reviews their applications for authority to haul garbage.

Noland argues that the Provisions treat incumbent garbage haulers and applicants differently. This assertion is contrary to the plain language of the Provisions. For nearly a century, the Commission has considered the public need for new proposed motor carrier services and has allowed for protests. 1931 Mont. Laws Ch. 491 at 498–499. Although the word "protest" was not used, in practice, "any person or corporation concerned" about a proposed service was "declared to be interested parties to such proceedings, and may offer testimony for or against the granting of [a] certificate." *Id.* at 498. Those laws are substantially similar to current laws allowing any interested person to protest a motor carrier application. Mont. Code Ann. § 69-12-321(2). Similarly, the Commission has considered the public needs and competition from 1931 to the present day. *Compare* 1931 Mont. Laws 491 at 498–499 *with* Mont. Code Ann. § 69-12-321(2)(a); *see also In re Rozel Corp.,* Commission Dkt. No. T-8205, Order 5319, ¶¶ 27, 29 (1985) (discussing the Commission's consideration of competition until the District Court in *Mintyala v. Pub. Serv. Comm'n* held the Commission could not consider competition under

Mont. Code Ann. § 69-12-323(2)(a)); Mont. Code Ann. § 69-12-323(2)(b) (express enactment of consideration of competition). Therefore, when the incumbents, themselves, were applicants, the Commission allowed for protests by any interested party and considered the public need. The Commission treats new applicants the same today. When the Commission applies the Provisions, incumbents and applicants are treated equally. Noland's second theory of equal protection therefore fails at step two of equal protection.

D. THE PROVISIONS ARE CONSTITUTIONAL UNDER THE FEDERAL DUE PROCESS AND EQUAL PROTECTION CLAUSES.

The Court reviews state and federal substantive due process claims using the same test. *Kohoutek*, ¶ 17. The Court also reviews state and federal equal protection claims using the same test. *Id*., ¶ 31. The State has demonstrated why the Provisions are constitutional under both equal protection and due process using rational basis scrutiny. *Supra* Sections IV(B) and (C). For the same reasons, the Provisions are constitutional under the equal protection and due process clause of the Fourteenth Amendment.

Noland asserts that his claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment should be reviewed using strict scrutiny. Opening Br. 36–38. In his argument, Noland mischaracterizes the test used in *Dobbs*, where the U.S. Supreme Court used the test from *Wash. v. Glucksberg*. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 237–39 (2022). The *Glucksberg* test

requires that the Court first narrowly define the asserted liberty interest, and second, evaluate whether the asserted liberty interest is deeply rooted in the nation's history. *Wash. v. Glucksberg*, 521 U.S. 702, 721 (1997); *see also Dobbs,* 597 U.S. at 238–40. In *Glucksberg*, the plaintiffs described their liberty interest as the right to die; however, when reviewing the law prohibiting aiding in a suicide, the Court narrowly defined the liberty interest as the right to commit suicide and to receive assistance in doing so. *Glucksberg*, 521 U.S. at 707, 722–723.

Similar to the plaintiffs in *Glucksberg*, Noland's asserted liberty interest is overbroad. Noland asserts that his liberty interest is the "right to earn a living."[9] However, the Provisions only regulate the entry into the business of garbage hauling. Mont. Code. Ann. §§ 69-12-301(3), -321, -323. Because substantive due process cases require a careful formulation of the interest at stake, *Glucksberg*, 521 U.S. at 722, Noland's asserted liberty interest should be narrowed to the right to own a garbage hauling business. Strict scrutiny is inappropriate to analyze any of Noland's Fourteenth Amendment claims.

Noland only relies on persuasive authority to support both of his Fourteenth Amendment claims. Opening Br. 38–40. If the Court relies on this persuasive authority, each case is nonetheless distinguishable. The *Bruner* court found that the

[9] As discussed above, Noland may pursue employment and may earn a living, but regulations to enter a profession are not unconstitutional simply because they add extra steps to be in the profession of one's desire. *See supra* Section IV(A).

state interest was pretextual because incumbents could "veto" competitors' applications. 997 F. Supp. 2d at 700–01. The court made that conclusion because the State never issued a certificate of public convenience and necessity when a competitor protested. *Id.* at 694. The facts in this case show that competitors do not have a "veto" power, and the state's interests are not pretextual. *See supra* Section IV(B). The Commission has issued Certificates over protests from incumbents. (Doc. 101 at 2). Therefore, the facts and reasoning in *Bruner* are distinguishable and should not be followed.

Liebmann is also distinguishable. In *Liebmann*, the Supreme Court struck down certificate laws regulating ice-manufacturing businesses. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 278–280 (1932). When holding that ice manufacturing was not a business that should be treated as a public utility, the Court reasoned that nothing distinguished it from "ordinary manufacture and production[,]" and it is not a category of business charged with a public use. *Id*. at 277, 279. Noland readily admits that some regulation and the requirement of obtaining a Certificate from the Commission are necessary. Opening Br. 17. Also, this Court and the U.S. Supreme Court have affirmed that garbage hauling businesses are charged with a public use that warrants regulation. *See Calif. Reduction Co.,* 199 U.S. at 318–19; *Barney,* 93 Mont. 115 at 137–138. *Liebmann* is therefore inapposite.

Merrifield is also distinguishable. In *Merrifield*, the court concluded that a law discriminating between pesticide pest controllers and non-pesticide pest controllers violated the Equal Protection Clause. *Merrifield*, 547 F.3d. at 992. In *Merrifield,* by eliminating the discrimination between pesticide and non-pesticide pest controls, the two classes would be similarly situated as pest controllers. As discussed above, the classes of motor carriers are not similarly situated because motor carriers who operate Ubers, shuttle services, and garbage services all provide distinct services that provide distinct benefits to communities, using very different equipment. *Supra* Section IV(C). Class E (*e.g.* Uber) carriers operate sporadically and on call, using common commuter vehicles. *See* Mont. Code Ann. § 69-12-301 Class A carriers operate between fixed termini on a regular route transporting people and property. *See Id.* On the other hand, garbage haulers operate heavy vehicles, tow large garbage containers, are not required to operate on fixed routes, and dispose of unsightly and sometimes hazardous waste. A fundamental distinction exists between the classes at issue in this case, unlike *Merrifield.*

Noland also relies on *Craigmiles*, although he does not suggest which of his Fourteenth Amendment claims the case supports. Opening Br. 39–40. In *Craigmiles*, the state argued that the purpose of the regulations was to prevent competition. *Craigmiles v. Giles*, 312 F.3d 220, 224–25 (6th Cir. 2002). The *Craigmiles* court held that preventing competition was not a legitimate objective, and therefore the

regulations failed at step one of rational basis review. *Id.* Here, the State has demonstrated that the Provisions serve many legitimate purposes, including preventing deleterious competition and allowing the Commission to consider all facets of the relationship between garbage haulers and the public. Also, when considering competition, the Commission considers both the benefits and harms of competition, unlike the circumstances in *Craigmiles*.

If this Court agrees with Noland that the Provisions only serve the purpose of economic favoritism like the *Craigmiles* court, circuit courts are split on whether economic favoritism is a legitimate objective. *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 286–287 (2nd Cir. 2015) ("Much of what states do is favor certain groups over others on economic grounds. We call this politics."); *Powers v. Harris*, 379 F.3d 1208, 1221, 1224 (10th Cir. 2004) (holding that economic protectionism is a legitimate state interest under rational basis scrutiny); *Merrifield,* 547 F.3d at 991 fn. 15 ("there might be instances when economic protectionism might be related to a legitimate governmental interest and survive rational basis review"). If the Court finds the purpose of the Provisions to be exclusively economic favoritism, this Court should follow *Sensational Smiles* and *Merrifield,* by concluding that economic favoritism is a legitimate objective in this instance.

The Court should disregard the non-binding, distinguishable case law on which Noland relies. Pursuant to Montana law, the Provisions are clearly constitutional under both the equal protection clause and due process clause.

CONCLUSION

The State respectfully requests that the Court affirm the District Court's Order. Noland's as-applied challenges fail as a matter of law because the statutes have never been applied to him. Noland's facial challenges fail as a matter of law because the Commission has applied the challenged statutes and issued Class D Certificates despite protests from incumbents. Further, the Provisions are not applied in all cases, because the consideration of competition is permissive, and protests are not required. If the Court decides not to affirm the District Court on those grounds, the Court should remand this case back to the District Court for further proceedings consistent with this Court's decision. But if the Court decides to reach the merits of Noland's claims, the State has demonstrated why the Provisions are constitutional under each of Noland's constitutional theories. Noland has not met his burden to demonstrate beyond a reasonable doubt that the Provisions are unconstitutional. This Court should affirm.

DATED this 18th day of November, 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 double-spaced except for quoted, indented material and footnotes; is printed in proportionately spaced Times New Roman font of 14 point; and the word count is 9,591 words excluding Table of Contents, Table of Authorities, Certificate of Compliance, Certificate of Service, and Appendix.

/s/ Alwyn Lansing
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CERTIFICATE OF SERVICE

I, Alwyn T. Lansing, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 11-18-2024:

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Electronically signed by Deborah Bungay on behalf of Alwyn T. Lansing

Dated: 11-18-2024