

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

PARKER NOLAND,
Plaintiff and Appellant

vs.

STATE OF MONTANA, et al.,
Defendants and Appellees

EVERGREEN DISPOSAL, INC.
Intervenor and Appellee

APPELLEE EVERGREEN DISPOSAL, INC.'S RESPONSE BRIEF

On Appeal from Eleventh Judicial District Court, Flathead County
Case No. DV-15-2022-0001308-CR
Hon. Amy Eddy, District Court Judge Presiding

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STATEMENT OF THE ISSUES

Evergreen agrees with the Statement of Issues presented in Noland's Opening Brief.

STANDARD OF REVIEW

Evergreen agrees with the Standard of Review presented in Noland's Opening Brief.

STATEMENT OF THE CASE

Noland seeks to overturn a century of precedent concerning how motor carriers are regulated in Montana. Since 1923, state law has required a certificate from the Montana Public Service Commission ("PSC"), or its predecessor, to operate and the PSC must consider the "public convenience and necessity" before issuing a new certificate.

In 2021, PBN LLC ("PBN"), a company partially owned by Noland, filed an application with the PSC for a Class D Certificate of Public Convenience and Necessity ("Class D Certificate"), which would have allowed PBN to transport solid waste for hire. Dkt. # 101 at 2. Two existing garbage haulers protested PBN's application, triggering the need for a hearing on PBN's application. *Id.* Both protesting parties served discovery requests (in PSC parlance, data requests) on PBN. Rather than responding to the data requests, PBN withdrew its application. *Id.*

In November 2022, Noland sued the State of Montana, the PSC, and the members of the PSC (collectively, “the State”) asserting that certain provisions of Montana’s motor carrier laws were unconstitutional. Dkt. # 1. Although Noland’s Complaint relied heavily on events related to PBN’s application, Noland has clarified that “[h]e is not asserting claims on behalf of [PBN] based on its past application . . .” Dkt # 73 at 7. Instead, Noland’s lawsuit is a “prospective challenge to enforcement of the [public convenience and necessity] scheme, not a claim for retrospective relief . . .” *Id.* at 8. Evergreen intervened in the lawsuit, over Noland’s opposition, to protect its interests as an existing Class D Certificate holder. Dkt. # 24.

The parties engaged in extensive discovery, and then filed dispositive motions. In January 2024, the District Court held oral argument on the pending motions. Dkt. # 99. The District Court granted Evergreen’s and the State’s Motions for Summary Judgment and dismissed Noland’s Complaint. Dkt. # 101 (“Final Order,” App. A to Noland’s Brief).

STATEMENT OF FACTS

Since Noland’s lawsuit “is a prospective challenge to enforcement of the PCN scheme, not a claim for retrospective relief” Dkt. # 73 at 8, the only material

facts are the history of motor carrier regulation in Montana and the regulation of Class D carriers, which are discussed in Section I below.¹

SUMMARY OF ARGUMENT

The District Court should be affirmed because Noland lacks standing to bring an as-applied challenge, and his facial challenge fails because the challenged provisions of the Motor Carrier Act are not unconstitutional in all circumstances.

Substantively, Noland’s claim that his right “to pursue employment” has been violated fails because the challenged provisions do not deny him the right to apply for a Class D Certificate. Noland has “the opportunity to pursue employment” as a garbage hauling business, *Wadsworth v. State*, 275 Mont. 287, 911 P.2d 1165, 1173 (1996), but he has never submitted the application necessary to do so.

Noland’s due process rights have not been violated because there is a rational basis for the PSC to consider if public convenience and necessity supports granting a new Class D Certificate and to allow members of the public, including incumbent carriers, to file protests. Both procedures are rationally related to ensuring that the public receives safe, reliable, and stable garbage services.

Noland’s equal protection claim fails because he has not identified similarly situated classes. The various classes of motor carriers are not similarly situated,

¹ Evergreen contests many of the “factual” assertions made by Noland; however, none of the “facts” listed by Noland are material to the issues presented for review.

and the state may adopt different laws for different classes of motor carriers without violating the equal protection clause. Likewise, applicants and incumbent Class D carriers are not similarly situated, and it is not an equal protection violation to require Noland to obtain a Class D Certificate.

Noland’s final argument asks the Court to ignore U.S. Supreme Court precedent on the standard of review for a claim under the Fourteenth Amendment and this Court’s precedent that the Motor Carrier Act is “not to be condemned under the provisions of the Fourteenth Amendment to the Constitution of the United States . . .” *Barney v. Bd. of R.R. Comm’rs*, 93 Mont. 115, 17 P.2d 82, 88 (1932).

ARGUMENT

To put Noland’s constitutional challenge to the regulation of Class D carriers in Montana in perspective, it is necessary to consider the history of “limited entry” laws in Montana and this Court’s prior decision affirming the constitutionality of the PSC considering all factors related to “public convenience and necessity,” including the positive and negative impacts of competition on the public, before issuing a new Certificate.

I. Background regarding motor carrier regulation in Montana.

Across the nation, certain classes of businesses are subject to so-called “limited entry” laws that require a person to obtain permission from the government before starting a new business. Montana has limited entry laws for

livestock markets, liquor licenses, and motor carriers. That means a state agency considers if “public convenience and necessity” supports granting a new livestock market certificate (Mont. Code Ann. § 81-8-251), liquor license (Mont. Code Ann. § 16-4-203), or motor carrier certificate (Mont. Code Ann. § 68-12-323). Under Montana law, the consideration of “public convenience and necessity” is a holistic inquiry into all relevant circumstances. Sometimes public convenience and necessity weighs in favor of the application and sometimes it weighs against the application. This is opposed to “certificate of need” or “CON” laws in other states that require the applicant to prove there is a need for the proposed service. As explained below, Montana does not have CON laws — despite the claims made by Noland and his supporting amici to the contrary.

A. The history of the regulation of public convenience and necessity for motor carriers.

The first motor vehicle in Montana was registered with the Secretary of State’s Office in 1913.² Ten years later the Legislature adopted a law that prohibited motor carriers, which included “any motor vehicle,” from operating within the state for profit without a certificate issued by the Board of Railroad Commissioners (predecessor to the PSC). 1923 Mont. Laws Ch. 154. The law allowed the Commission to “attach to the exercise of the rights granted by said certificate such terms and conditions as in its judgment the public convenience and

² <https://mhs.mt.gov/Research/Compass/Facts#firsts>

necessity may require.” In *Interstate Transit Co. v. Derr*, 71 Mont. 222, 228 P. 624 (1924), the Court rejected a challenge to the 1923 law:

[I]t is within the province of the Board of Railroad Commissioners, to whom the Legislature has delegated authority, to administer the act and impose reasonable and impartial regulations in the use of our highways by persons engaged in or purposing to engage in the transportation of passengers and freight by automobile as a common carrier.

228 P. at 627. In *State v. Johnson*, 75 Mont. 240, 243 P. 1073 (1926), the Court affirmed the constitutionality of the 1923 law:

[The law does not] violate section 3 or section 14 of article 3 of the state Constitution, nor the Fourteenth Amendment to the Constitution of the United States, securing to the people the right of acquiring, possessing, and enjoying property, and prohibiting the taking of private property for public use or without due process of law, for, while a citizen has the right to travel upon the public highways and to transport his property thereon, that right does not extend to the use of the highways, either in whole or in part, as a place of business for private gain. For the latter purpose no person has a vested right in the use of the highways of the state, but is a privilege or license which the Legislature may grant or withhold in its discretion, or which it may grant upon such conditions as it may see fit to impose, provided the imposition applies impartially.

243 P. at 1078. In *Willis v. Buck*, 81 Mont. 472, 263 P. 982 (1928) the Court once again upheld the 1923 law:

There is no inherent right to use a public highway in the conduct of the business of a common carrier for private gain without the consent of the state, especially in view of the state’s assertion of right to regulate the subject, and therefore ***no constitutional right of the defendants was impaired by denying them a permit or license . . .***

263 P. at 984 (citation omitted, emphasis added).

In 1931, Montana adopted a new law that established three classes of motor carriers (Classes A, B, and C) and required the Board of Railroad Commissioners to consider if “a certificate that public convenience and necessity require such operation” before issuing a new certificate. 1931 Mont. Laws, Ch. 184. The 1931 law, as amended, is known as the Motor Carrier Act.

The constitutionality of the Motor Carrier Act was challenged in *Barney* and the Court rejected a challenge remarkably similar to the claims in Noland’s lawsuit. The Court held that “[r]egulation by means of [certificates of public convenience and necessity] is reasonably devised to protect the public from abusive use of the roads, and from the evils incident to unregulated competition.” *Barney*, 17 P.2d at 85. “In its proprietorship of public highways the state may withhold permission to use them, and equally it has power to prescribe the conditions under which they may be used.” *Id.* The Court noted that *even if* the purpose of a law was “to favor transportation by railroad as against transportation by motor trucks . . . it does not follow that the classification as made in this case would be invalid.” *Id.* (quoting *Sproles v. Binford*, 286 U.S. 374, 394 (1932)).

Ultimately, the Court held:

The requirement of securing a certificate of public convenience and necessity for doing business on the public highways may be reasonably applied to private carriers for compensation for the privilege of transporting for hire on the public roads of this state, in the exercise of the police power and to conserve the proper use of the highways, and ***therefore the plaintiff is deprived of no constitutional right by requiring him as a condition to his operations as a private or contract carrier over the public highways to first apply for and***

obtain a certificate of public necessity and convenience from the Board of Railroad Commissioners as required by the statute.

In our opinion the act constitutes a proper exercise of the police power of the state in the regulation of the use of the public highways by contract carriers, and is not to be condemned under the provisions of the Fourteenth Amendment to the Constitution of the United States, or like provisions embodied in [the due process clause] of the Constitution of the state of Montana. The plaintiff is not denied the equal protection of the law or the right of contract, nor is he deprived of his property without due process of law.

Barney, 17 P.2d at 89 (emphasis added). The holding in *Barney* largely disposes of the arguments in Noland’s appeal.

There was a vigorous dissent in *Barney* that echoed many of Noland’s arguments. *Id.* at 91 (Angstman, J., dissenting) (the Legislature “has no right to deny, or unreasonably curtail, the right to engage in a lawful private business”; “the requirement that a private carrier must obtain a certificate of public convenience and necessity before being permitted to use the public highways of the state not being a regulation of the use of the highways, but a prohibition of competition”). Those arguments failed in 1932, and they fail here.

In *Fulmer v. Bd. of R.R. Comm’rs*, 96 Mont. 22, 28 P.2d 849 (1934), the Court reaffirmed the validity of the holding in *Barney* and the constitutionality of the Motor Carrier Act. 28 P.2d at 851 (“It is not necessary to enter into a lengthy discussion of authorities for the purpose of determining the constitutionality of chapter 184, Laws 1931. That question was decided by this court in the case of *Barney*”).

The Court's decisions in *Interstate Transit, Willis, Johnson, Barney, and Fulmer* remain good law in Montana and they are binding in this case under the doctrine of stare decisis.

B. The history of regulation of garbage companies as Class D carriers.

In 1977, the State amended the Motor Carrier Act to establish a fourth class of motor carriers, Class D, to regulate the transportation of garbage. 1977 Mont. Laws Ch. 138. In 1983, the Motor Carrier Act was again amended to allow the PSC to include “a consideration of competition” when deciding if to grant or deny an application for a Class D Certificate. 1983 House Bill 73 (codified at Mont. Code Ann. § 69-12-323(2)(b)). As the State notes in its Appellee Brief, the Legislative history for House Bill 73 reveals the amendment was intended to address both “deleterious competition” and the need for increased competition. Even Noland acknowledges the “legislative history shows the purpose of [House Bill 73 and Mont. Code Ann. § 69-12-323(2)(b)] is to enable the Commission to consider the ‘*benefits* of competition’ and ‘*need* for competition,’ not to deny certificates to prevent competition.” Opening Brief at 7, n. 5 (italics in original).

In 1987, the first challenge to the regulation of Class D carriers reached the Court in *Rozel Corp. v. PSC*, 226 Mont. 237, 735 P.2d 282 (1987). In *Rozel*, Rozel Corporation applied for a Class D Certificate covering Gallatin County and the Big Sky area in Madison County. The application was met with a protest from an incumbent carrier, Three Rivers Disposal. The PSC held a hearing on the

application and, based on the evidence presented, the agency found that when it had granted new certificates for the applied-for area, doing so

led to severe financial difficulties for the companies involved and resulted in the ultimate failure of each of those companies. Customers in the area have benefited from periods of competition and relatively low rates; perhaps even below cost at times. However, they have also been subjected to a very unstable and unhealthy industry.

Rozel, 735 P.2d at 283-84 (quoting the PSC’s decision). Based on the evidentiary record, the PSC denied Rozel’s application, but it warned “[t]his is not to say that the public should be prepared to tolerate unmet demand or inadequate service or unreasonable rates should they occur in the future. The existing carrier remains on notice that the Commission retains the power to reexamine the situation and grant a new authority should the circumstances merit it.” *Id.*

On appeal, this Court affirmed the PSC’s decision and rejected Rozel’s argument that the regulation of Class D carriers was unconstitutional.

The evidence offered to the PSC in this case established the devastating impact which past garbage company competitors brought upon each other, and consequently the consumer. The consumer reaped the initial benefits of the competition price war by an immediate reduction in garbage 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. The PSC properly concluded that renewing this situation by granting Rozel’s application was not in the public interest.

Although the action of the PSC can be deemed anti-competitive in nature, its authority to take such action was conferred upon it by the legislature in Title 69. The state has the power to engage in economic regulation, even if such regulation is adverse to competition. *New*

Motor Vehicle Board of California v. Orrin W. Fox Co. (1978), 439 U.S. 96, 111, 99 S.Ct. 403, 412, 58 L.Ed.2d 361.

Id. at 286.

Rozel was persistent, however, and in 1994 it filed another application for a Class D Certificate. Three Rivers Disposal (which became Waste Management Partners of Bozeman) protested the application, and the PSC held a second hearing. Based on the evidence presented at that hearing, including evidence of the increased need for garbage services in Gallatin County and the Big Sky area, the PSC found “there was substantial unmet consumer need for additional service” and the existing carrier provided “spotty and unreliable” services and “charged customers dramatic rate increases.” *Waste Mgmt. Partners of Bozeman v. PSC*, 284 Mont. 245, 255, 944 P.2d 210, 216 (1997). The PSC granted Rozel’s application based on the finding that “competition in this case will promote the public interest in improving services and perhaps rates, and filling consumer needs that Three Rivers has failed to meet.” *Id.* at 216-17. On appeal, the Court affirmed the PSC’s decision based on the factual record, which established that increased “competition would be beneficial to the public interest.” *Id.* at 218.

In 2015, L&L Site Services applied for yet another Class D Certificate covering Gallatin and Madison Counties, which was protested by the existing service providers. After a hearing, the PSC granted L&L’s application for all of Gallatin County and the Big Sky area. *McGree Corp. v. PSC*, 2019 MT 75, ¶ 5, 395 Mont. 229, 438 P.3d 326. On appeal, this Court affirmed the PSC’s decision.

In *McGree*, the Court set forth the applicable standard for issuing a new Class D Certificate that is currently applied by the PSC to all new applications.

Section 69-12-323(2)(a), MCA, requires the Commission to issue a Class D certificate to an applicant if “public convenience and necessity require the authorization of the service proposed or any part of the service proposed.” In determining whether to issue a permit, the Commission must consider:

- (i) the transportation service being furnished or that will be furnished by any railroad or other existing transportation agency;
- (ii) the likelihood of the proposed service being permanent and continuous throughout 12 months of the year; and
- (iii) 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.

Section 69-12-323(2)(a), MCA. . . . The Commission uses the three-part framework from the Interstate Commerce Commission’s decision in *In re Pan-American Bus Lines Operation*, 1 M.C.C. 190, 203 (I.C.C. 1936), as a guide in determining public convenience and necessity. *Waste Mgmt. Partners*, 284 Mont. at 254, 944 P.2d at 216. That framework asks: (1) “whether the new operation or service will serve a useful public purpose, responsive to a public demand or need”; (2) whether existing carriers “can and will” serve that public purpose without the new operation or service; and (3) whether the new operation or service can serve that useful public purpose “without endangering or impairing the operations of existing carriers contrary to the public interest.” *Waste Mgmt. Partners*, 284 Mont. at 254, 944 P.2d at 216 (quoting *In re Pan-Am. Bus Lines Operation*, 1 M.C.C. at 203).

McGree, ¶¶ 14-15.

The Court’s decisions in *Rozel*, *Waste Mgmt. Partners*, and *McGree* establish that the PSC will consider the evidence supporting and opposing an application for a Class D Certificate, including evidence about positive and negative impact of increased competition, and make a reasoned decision of whether public convenience and necessity support the application. This history is directly contrary to Noland’s claim that the Class D regulatory scheme is “anticompetitive” and unfairly favors incumbent carriers.

The District Court correctly held Montana’s regulation of Class D carriers is not anticompetitive based on the recent history of the PSC only denying 2 applications in the last decade.

In the last 10 years, there were 24 Class D Certificate applications submitted to the Commission. Of those applications, 12 were withdrawn, 2 were denied, and 10 were granted. All of the applications that were denied or withdrawn occurred after there was a protest submitted by an existing garbage company. Of the 10 granted applications, 3 were granted over a protest, 3 were granted with no protest, and 4 were granted after a protesting garbage hauler withdrew its protest.

Final Order at 2 (citations omitted). Thus, Noland’s claim that Class D regulation “allow[s] existing companies to veto potential competitors,” Opening Brief at 1, has no basis in fact.

C. the Legislature’s reaffirmation of the need to regulate class D carriers.

During the 2021 and 2023 Montana legislative sessions, bills were introduced to deregulate garbage hauling, but the proposals were rejected. *See*

2021 House Bill 338; 2023 House Bill 191; 2023 House Bill 723. During the 2023 session, there was a robust debate on the merits of deregulating Class D carriers. Noland and his counsel testified in support of House Bill 723, and they offered the same arguments in support of deregulation that they make in this appeal to support Noland’s position that the challenged provisions are unconstitutional. *See* recording of the January 23, 2023, House Energy, Technology, and Federal Relations Committee Hearing on HB 191.³

That is not to say the Montana Legislature has been unresponsive to concerns about the regulation of motor carriers. In 2015, the Legislature created a new class of motor carrier, Class E, to cover Uber and similar ridesharing companies. 2015 Mont. Laws Ch. 456. In 2021, the Legislature passed a law deregulating Class B motor carriers, which covered taxi companies. 2021 Mont. Laws Ch. 512. In 2023, the Legislature passed a law deregulating Class C motor carriers, which covered moving companies. 2023 Mont. Laws Ch. 422. The Court should respect the Legislature’s decisions and reject Noland’s attempt to deregulate Class D carriers through the courts after failing to persuade the Legislature to do so. *Mont. Cannabis Indus. Assn. v. State*, 2016 MT 44, ¶ 31, 382 Mont. 256, 368 P.3d. 1131 (“*MClA II*”) (“In economic regulation cases, there are

³ Available at <https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/48351?agendaId=257386>

good reasons for judicial self-restraint if not judicial deference to legislative judgment.” (quotation omitted)).

II. Noland lacks standing to bring an as-applied challenge.

The District Court held that “Noland lacks standing to challenge the statutes as applied to him but has standing to challenge the statutes on their face.” Final Order at 5. On appeal, Noland challenges this holding and asserts he has standing to assert an as-applied challenge.

Standing is one of several justiciability doctrines that limit Montana courts to deciding only cases and controversies. *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 29, 360 Mont. 207, 255 P.3d 80. “To meet the case-or-controversy requirement, the plaintiff must show, at an irreducible minimum, that he or she has suffered a past, present, or threatened injury to a property or civil right, and that the injury would be alleviated by successfully maintaining the action.” *Sagorin v. Sunrise Heating & Cooling, LLC*, 2022 MT 58, ¶ 8, 408 Mont. 119, 506 P.3d 1028 (quotations omitted).

It is undisputed that Noland has not suffered a *past* or *present* injury because he has never applied for a Class D Certificate. Noland, instead, explains “this is a prospective challenge to enforcement of the PCN scheme, not a claim for retrospective relief . . .” Dkt. # 73 at 8. On appeal Noland reframes his challenge as “a pre-enforcement as-applied challenge . . .” Opening Brief at 12. Thus, the question for the Court to decide is whether Noland may bring an as-applied

challenge to certain provisions of the Motor Carrier Act based on the possibility that he might file an application in the future and, if he does so, the application *may* receive a protest and the PSC *may* apply the law that he considers to be unconstitutional.

“An as-applied challenge alleges that a particular application of a statute is unconstitutional and thus depends on the facts of a particular case.” *Bd. Of Regents of Higher Educ. v. State by & through Knudsen*, 2022 MT 128, ¶ 10, 409 Mont. 96, 512 P.3d 748. The factual basis for an as-applied challenge is relevant to whether the claim is ripe for consideration as a prudential matter. “The prudential component [of standing] involves a weighing of the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” *Reichert v. State*, 2012 MT 111, ¶ 56, 365 Mont. 92, 278 P.3d 455 (citations omitted). “The principal consideration under the fitness inquiry is whether there is a *factually* adequate record upon which to base effective review.” *Id.* (emphasis added). “The more the question presented is purely one of law, and the less that additional facts will aid the court in its inquiry, the more likely the issue is to be ripe, and vice-versa.” *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 20, 333 Mont. 331, 142 P.3d 864; *State v. Avista Corp.*, 2023 MT 6, ¶ 12, 411 Mont. 192, 523 P.3d 44 (“the prudential component is met when, on balance, the issue is fit for judicial review, and the parties would face severe hardship if the court withholds consideration”). A court lacks standing to consider a claim when doing so would result in “an advisory opinion about ‘what the law would be upon a

hypothetical state of facts [and] upon an abstract proposition’ regarding potential actions the PSC may take in a potential future case before it.” *In re Big Foot Dumpsters & Containers, LLC*, 2022 MT 67, ¶ 13, 408 Mont. 187, 507 P.3d 169.

In *Broad Reach Power, LLC v. PSC*, 2022 MT 227, ¶ 13, 410 Mont. 450, 520 P.3d 301, the Court held that a plaintiff may not bring an “as-applied challenge in a vacuum.” The Court explained just because “the PSC ‘may’ employ certain hearing actions pursuant to the statute” and has applied the statute in an allegedly unconstitutional manner in prior cases, that “do[es] not establish application of the statute by the PSC to [a particular party].” *Id.* at ¶ 13. Without a record of how the PSC applies a statute to a particular party, the party may not bring an as-applied constitutional challenge based on allegations of past constitutional violations and speculation that the PSC will continue its course of conduct in the future. *Id.* (“the declaratory request is speculative, and would require issuance of an advisory opinion.”).

Here, Noland claims he “has standing to bring a pre-enforcement as-applied challenge” because the PSC “will enforce [the Motor Carrier Act] in any application he files.” Opening Brief 15. While it is true the PSC has a duty to enforce the Motor Carrier Act, this is not a sufficient factual basis to bring an as-applied challenge. Accepting Noland’s logic, any plaintiff could bring a pre-enforcement as-applied challenge against any provision of Montana law that regulates public conduct. Such a holding would make the requirement for a “factually adequate record upon which to base effective review,” *Reichert*, ¶ 56, an

illusory standard. In reality, Noland’s “prospective challenge to enforcement of the PCN scheme” is a facial challenge and should be analyzed as such.

This Court rejected a similar argument in *Broad Reach Power* when it held that just because the PSC “may” take certain actions that were permitted by the statute, the possibility that the PSC may apply the statute in an unconstitutional manner was not a sufficient basis for an as-applied claim. Although Noland must apply for a Class D Certificate, there is only a *possibility* that the PSC would apply the Motor Carrier Act in a way that Noland believes is unconstitutional. Noland’s primary concern is that the law “allow[s] existing companies to file anticompetitive protests,” Opening Brief at 9. However, of the 10 new Certificates issued in the last decade, 30% of the applications were granted with no protest, Final Order at 2; therefore, there is a real possibility that if Noland were to file an application, his application would not be subject to “anticompetitive protests.”

Noland claims he “has an even stronger claim to standing than did the plaintiffs in *Gryczan* [*v. State*, 283 Mont. 433, 942 P.2d 112 (1997)].” Opening Brief at 15. This overlooks that the challenged statute in *Gryczan* made it a felony criminal offense for consenting adults to engage in same-sex sexual conduct. The Court noted “that a plaintiff need not suffer arrest to challenge a criminal statute.” *Gryczan*, 942 P.2d at 119. Noland, on the other hand, is only subject to a fine or injunctive relief for violating the Motor Carrier Act and there is no possibility of criminal charges. Mont. Code Ann. § 69-12-108.

A further distinguishing fact is that in *Gryczan* no one had been prosecuted under the statute, but the law remained on the books. Thus, consensual same-sex sexual conduct was a felony in Montana, but there was no mechanism to challenge the constitutionality of the law through an as-applied challenge. As Noland points out, however, every application for a Class D Certificate is subject to the provisions of the Motor Carrier Act that Noland seeks to overturn. All Noland has to do is apply for a Certificate and, if he believes his constitutional rights are violated during the process, he could bring an as-applied challenge.

The Court must also “weigh[] [] the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” *Reichert*, ¶ 56. There would be little or no hardship to Noland if the Court were to require Noland to go through the application process before bringing an as-applied challenge. The application fee for a Class D certificate is only \$500 and the PSC must make a decision within 180 days of an application being filed. Mont. Code Ann. § 69-12-323(1).

Noland also complains that if a protest is filed, he would be required to answer “burdensome discovery” requests. The PSC has specific rules that an applicant can follow if it believes the discovery is too burdensome. Admin. R. Mont. 38.2.3301(4). Noland’s complaint also mentions attorney fees, but if Noland were to file an application in his own name, he could proceed *pro se*. Admin. R. Mont. 38.2.314(1). Thus the “hardship” to Noland of requiring him to go through the application process before bringing an as-applied challenge is minimal and

requiring him to do so would ensure there is an adequate factual record to consider his constitutional challenge.

No party has appealed the District Court's finding that Noland has standing to bring a facial challenge, but there is not sufficient basis for his "pre-enforcement as-applied challenge." The Court should affirm the District Court's holding that Noland lacks standing to bring a pre-enforcement as-applied challenge and only consider the merits of his facial challenge.

III. The challenged statutes are not facially unconstitutional.

After finding that Noland had standing to bring a facial challenge, the District Court held the challenged provisions were not facially unconstitutional. A facial challenge reviews the application of a statute in all circumstances. *MCIA II*, ¶ 14. 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 reasoned that, because several applications for Class D Certificates have been granted over protests, there are circumstances where the challenged provisions have been constitutionally applied. Final Order at 6 ("Although not every application is granted, there are applicants who have been able to pursue employment and earn a living as a garbage hauler in Montana even after their application was protested and competition was considered."). Noland

admits this reality, but he argues the constitutional rights of “every applicant for a Class D Certificate—whether they are ultimately successful in obtaining a Certificate or not” — are violated because the challenged provisions pose an “unconstitutional obstacle” to obtaining a Certificate. Opening Brief at 17. Noland claims the provisions “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.” *Id.* at 18.

As explained below, Noland’s argument that the challenged provision only allows for “anticompetitive protests” and requires “a showing of ‘public need’” are classic strawman arguments that have no basis in the text of the challenged provisions or how the PSC applies the Motor Carrier Act. Given that any interested person may file a protest and that the PSC may deny an application if doing so is in the public interest, the challenges provisions are not facially unconstitutional.

IV. The challenged provisions do not prevent Noland from pursuing life’s basic necessities.

The first substantive argument in Noland’s Opening Brief is that the challenged provisions violate his right under Article II, Section 3 of the Montana Constitution to “pursu[e] life’s basic necessities.” Noland’s argument is based on *Wadsworth*, and he ignores the Court’s more recent decisions clarifying the scope of the constitutional right to pursue employment.

In *Wadsworth*, the Court held a state employee’s right to seek employment was violated when he was forbidden from pursuing certain types of employment

outside of his state job. 911 P.2d at 1174. The specific right the Court recognized was “the opportunity to pursue employment,” but it did not establish a right to “any *particular* job or employment.” *Id.* at 1173 (emphasis in original).

Wadsworth was the highwater mark for a constitutional right to pursue employment, and the Court subsequently “clarified the boundaries of the right to pursue employment in *Wiser v. State*, 2006 MT 20, 331 Mont. 28, 129 P.3d 133.” *Mont. Cannabis Indus. Ass’n v. State*, 2012 MT 201, ¶ 19, 366 Mont. 224, 286 P.3d 1161 (“*MCI A I*”). In *Wiser*, the Court clarified that “the idea that the right to pursue employment and life’s other ‘basic necessities’ is limited by the State’s police power is imbedded in the plain language of the Constitution.” *Wiser*, ¶ 24.

While [the Constitution] granted the fundamental right to pursue employment, it also circumscribed that right by subjecting it to the State’s police power to protect the public’s health and welfare. “[L]iberty is necessarily subordinate to reasonable restraint and regulation by the state in the exercise of its sovereign prerogative — police power.” *State v. Safeway Stores* (1938), 106 Mont. 182, 203, 76 P.2d 81, 86. Accordingly, while one does have the fundamental right to pursue employment, ***one does not have the fundamental right to practice his or her profession free of state regulation promulgated to protect the public’s welfare.***

Id. (emphasis added).

In *MCI A I*, the Court further clarified what it means to “pursue employment” in a given profession. The Medical Marijuana Act “prohibit[ed] employment as a medical marijuana provider,” and the district court found this violated the right to pursue employment. *MCI A I*, ¶ 21. The Court, however, reached the opposite conclusion because medical marijuana providers “are ultimately horticulturists,”

and since they “remain free to pursue horticulture work generally, and further, are not proscribed from practicing the art of horticulture — including hydroponic horticulture — for profit,” the Medical Marijuana Act did “not implicate the fundamental right to employment . . .” *Id.*

Here, Noland acknowledges that the challenged provisions do not *prohibit* him from pursuing employment in the solid waste transportation industry and he “is free to pursue garbage hauling work generally, either by seeking employment at an existing hauler or using the limited exceptions to the requirement that he obtain a Certificate.” Opening Brief at 21-22 (quotation, alteration, and footnote omitted). Noland is also free to acquire a company that already holds a Class D Certificate. Since Noland has “the opportunity to pursue employment” as a Class D carrier, his rights under Article II, Section 3 are not being violated. *Wadsworth*, 911 P.2d at 1174.

Noland’s concern is not that the challenged provisions deny him the *opportunity* to pursue employment, but that they “present[] a substantial barrier to him operating a garbage hauling business.” *Id.* at 22. Overcoming barriers is part of starting a new business in a highly regulated industry, such as solid waste management. Just as this Court may set the passing score for the Montana Bar exam so high that passing the test “present[s] a substantial barrier” to becoming an attorney, the State may impose barriers to obtaining a Class D Certificate without violating an applicant’s right “to pursue employment,” as long as the “barriers” apply equally to all applicants and do not act as a complete prohibition. The Court

has long recognized that the Montana Legislature has “certified a policy of limited entry into the garbage transportation business” *Rozel*, 735 P.2d at 285. Since several applicants have successfully obtained new Class D Certificates, the policy of limited entry does not violate the right “to pursue employment.”

Moreover, the challenged provisions do not limit Noland’s ability to seek employment in his chosen profession. During his Deposition, Noland was asked what he considered his profession to be, and he answered, “Transportation.” *See* Transcript attached as Exhibit A to Dkt. 77 at 75:14-17. At the time of the deposition, Noland was self-employed in the transportation industry. *Id.* at 7:2-16. (“Primarily trucking, just logistics, getting things from A to B.”). Noland, however, opposes some requirements necessary “get a Class D motor carrier license” and he believes the requirements are “preventing me from pursuing that aspect of [the transportation industry], because right now I’m transporting tractors and equipment with flatbed trailers and not pursuing further garbage hauling.” *Id.* at 75:17-76:10.

Just as the medical marijuana providers in *MCIA I*, Noland’s chosen profession is “transportation,” and while there are certain restrictions on operating as a Class D carrier, even if Noland is unable to haul garbage, he “remain[s] free to pursue [transportation] work generally” and he is “not proscribed from [providing transportation services] for profit.” *MCIA I*, ¶ 21. Thus, the challenged provisions of the Motor Carrier Act, “do[] not implicate the fundamental right to employment . . .” *Id.*

Since the challenged laws do not prevent Noland from pursuing employment, he has not made a *prima facie* case for a violation of his rights under Article II, Section 3. Therefore, Noland’s challenge under Article II, Section 3 fails. *Netzer L. Off., P.C. v. State by & Through Knudsen*, 2022 MT 234, ¶ 34, 410 Mont. 513, 520 P.3d 335 (“The government need not demonstrate that a law survives strict scrutiny or any level of scrutiny where the movant fails to make out a *prima facie* case of a violation of its constitutional rights.”).

V. The challenged provisions do not violate Noland’s due process rights.

Noland argues the “challenged provisions” violate his rights under the due process clause of the Montana Constitution. Opening Brief at 22. “[The Court] analyze[s] substantive due process claims by examining (1) whether the legislation in question is related to a legitimate governmental concern; and (2) whether the means chosen by the Legislature to accomplish its objective are reasonably related to the result sought to be attained *MCIA II*, ¶ 21. “In determining whether the statute’s objective is legitimate, [the Court] examine[s] the legislation’s purpose, whether expressly stated or otherwise.” *Id.* at ¶ 22. “The question under rational basis review . . . is not whether the provision is necessary, but whether the provision is arbitrary or whether it has a reasonable relation to some permitted end of governmental action.” *Id.* at ¶ 38 (quotation and ellipsis omitted).

The Court has already held that the requirement to “apply for and obtain a certificate of public necessity and convenience” before a person may operate as a

motor carrier “constitutes a proper exercise of the police power of the state in the regulation of the use of the public highways by contract carriers, and is not to be condemned under [the due process clause] of the Constitution of the state of Montana.” *Barney*, 17 P.2d at 89. Noland may consider the holding in *Barney* to be “antiquated,” but the remains still good law in Montana. The Court need not consider Noland’s due process challenge further than reaffirming that *Barney* is controlling and disposes of Noland’s claims.

Even if the Court reaches the merits of Noland’s due process challenge, it should reject the challenge as there is a rational basis for how the Legislature has chosen to regulate Class D carriers, and “[i]n economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment.” *MCLA II*, ¶ 31.

Specifically, Noland asserts that two provisions violate the due process clause: “(1) the requirement that he demonstrate there is a ‘need’ for a new garbage hauler; and (2) the ability of incumbents to file anticompetitive protests.” Opening Brief at 17. As explained below, there is a rational basis for each provision.

A. There is a rational basis for the PSC to consider if public convenience and necessity supports granting a new Class D Certificate.

Noland argues “the requirement that he demonstrate that there is a ‘need’ for a new garbage hauler” is irrational and thus violates his right to due process. On 15 occasions in his Opening Brief, Noland places the term “need” in quotes (pages 2,

6, 8, 9, 11, 17, 21, 24, 29, 35, 36, 40), and he argues “[t]he requirements that the Commission consider the ‘need’ for a new company and allow existing companies to file anticompetitive protests are mandated by statute . . .” Opening Brief at 9. This is an odious strawman argument. Montana law does not require the PSC to consider if there is a “need” for a new garbage company; it requires the PSC to determine whether “public convenience and necessity require the authorization of the service proposed . . .” Mont. Code Ann. § 69-12-323(2)(a). In *McGree*, the Court explained that consideration of whether the proposed service is “responsive to a public demand or need” is just a small portion of determining whether public convenience and necessity supports an application. *McGree*, ¶¶ 14-15. And unlike Noland, “[t]his Court has recognized that public need is not simply unmet demand, but also includes a need for reasonable pricing and better customer service.” *McGree*, ¶ 25. Thus, the consideration of “public convenience and necessity” is directly related to “ensuring adequate motor carrier services,” which Noland himself acknowledges “is a permissible government objective.” Opening Brief at 24. Since there is a rational basis for the portion of the Motor Carrier Act allowing the PSC to consider “public convenience and necessity” before granting a new Class D Certificate, Noland’s due process claim fails.

Moreover, despite his emphatic claims that Montana’s regulation of Class D carriers violates his due process rights because the process is “anticompetitive,” Noland fails to appreciate that an anticompetitive decision to deny an application may be in the public interest. Noland acknowledges the “legislative history shows

the purpose of [Mont. Code Ann. § 69-12-323(2)(b)] is to enable the Commission to consider the ‘*benefits of competition*’ and ‘*need for competition,*’ not to deny certificates to prevent competition.” Opening Brief at 7, n. 5 (italics in original). And while “Noland does not challenge” the constitutionality of Mont. Code Ann. § 69-12-323(2)(b), *id.*, that does not mean he is free *ignore* the statute to argue that consideration of competition is unconstitutional because it is anticompetitive. The “[c]onsideration of competition may be beneficial in some cases, although certainly not in all cases.” *Waste Mgmt. Partners of Bozeman*, 944 P.2d at 214, 216.

Noland fails to acknowledge that when the PSC makes an “anticompetitive” decision to deny an application due to concerns about increased competition, such as in *Rozel*, the decision to deny an application is “in the public interest.” *Rozel*, 735 P.2d at 286 (“Although the action of the PSC can be deemed anti-competitive in nature, its authority to take such action was conferred upon it by the legislature in Title 69. The state has the power to engage in economic regulation, even if such regulation is adverse to competition.”). Noland, instead, argues that the PSC’s decision in *Rozel* was intended to “[p]rotect[] incumbents from competition for their economic benefit . . . which is not a legitimate governmental interest.” Opening Brief at 26. This ignores the factual record in *Rozel* which established increased competition would be contrary to the public interest and that ““what the area really needs at this time is a period of stability.”” *Rozel*, 735 P.2d at 284 (quoting the PSC’s final order in the *Rozel* case). There was a rational basis for the

PSC to favor “a period of stability” over increased competition at that time. Nor was this a static policy, as the PSC granted Rozel’s renewed application a decade later when it found there was a need for increased competition. *Waste Mgmt. Partners of Bozeman*, 944 P.2d at 216.

In short, the PSC’s decision in *Rozel* was not an act of “mere economic protectionism,” which courts have found to be irrational. *Merrifield v. Lockyer*, 547 F.3d 978, 980 n. 15 (9th Cir. 2008). It was a rational decision to regulate competition to ensure that the public received safe, reliable, and stable service and did not suffer the “devastating impact[s]” that prior competitors had “brought upon each other, and consequently the consumer.” *Rozel*, 735 P.2d at 286.

There is a rational basis for the PSC to consider the pros and cons of increased competition on the public interest, and Noland’s arguments to the contrary should be rejected.

B. There is a rational basis to allow members of the public, including incumbent carriers, to file protests.

The second issue raised by Noland is “the ability of incumbents to file anticompetitive protests.” Opening Brief at 17. Montana law, of course, does not limit protests to incumbent motor carriers, nor does it provide that protests can be filed only for anticompetitive reasons. In reality, Montana law states that “[i]f a protest or a request for hearing is received, the commission shall fix a time and place for a hearing on the application.” Mont. Code Ann. § 69-12-321(1)(b). The statute does not define or restrict who may file a protest or request a hearing,

however. That means a protest may be filed by anyone and when the PSC holds a hearing on the protest, “any person or corporation concerned are interested parties to the proceedings and may offer testimony for or against the granting of the certificate.” *Id.* at (2).

There is nothing anticompetitive or irrational about this process; it is open to everyone and any interested party “may offer testimony for or against the granting of the certificate.” There is a rational basis to allow interested parties to offer testimony, since doing so provides the PSC with the factual record necessary to determine whether public convenience and necessity supports the application. In fact, it would be *irrational* to only allow interested parties to offer testimony in support of an application and to prohibit interested parties from offering testimony opposing an application.

Rather than challenging the law as written, Noland asserts that, in practice, only existing certificate holders file protests.⁴ Noland argues that since only existing certificate holders file protests, his due process rights are violated. Even if the law only allowed incumbent carriers to file protests — which is false — the law would survive rational basis review.

As an initial matter, Noland acknowledges that existing certificate holders should have some role in the hearing process. During the oral argument, the

⁴ Of note this is not accurate in any case. Contrary to Noland’s assertion, both a county and a concerned individual have protested a Class D application. *See In re Application of Browning - Ferris of Montana, Inc.* Montana PSC Dkt. T-6500.

District Court asked Noland’s counsel to address whether existing carriers should “have an opportunity to be able to participate in a hearing before the PSC when additional Class D certificates are potentially being granted. Do you believe that they have the ability or should have the ability to participate in that process?” To which Noland’s counsel answered, “We do, Your Honor.” Transcript of the January 8, 2024 Oral Argument at 36:13-22.

Allowing existing certificate holders to file protests is rationally related to ensuring that an applicant for a Class D Certificate is fit, willing, and able to provide the applied-for services because it subjects an application to the truth-seeking function of the adversary process. “A certificate may not be issued . . . unless the certificate holder is fit, willing, and able to perform the authorized service,” Mont. Code Ann. § 69-12-415, but the PSC does not have the time or resources to thoroughly review each Class D application. Parties with a self-interest to oppose a new Class D application, such as existing carriers, however, have the time, resources, and incentives to thoroughly review each application and to file a protest if there is a basis to challenge the application. By allowing existing carriers to file protests, it shifts the financial burden of reviewing applications and opposing applications that do not satisfy the statutory criteria from the PSC to third parties, which is a rational basis for the law.

Allowing parties with an incentive to oppose an application also ensures that the evidence in support of an application is tested through the adversarial process. Without a party with a self-interest to oppose an application, the applicant’s

witness would not be subject to thorough cross-examination and the applicant's evidence would not be subject to objections that the information is irrelevant, misleading, or otherwise inadmissible. Noland, of course, believes that an applicant should be able to offer witnesses and evidence in support of an application, but that it is unconstitutional for existing carriers to cross-examine the applicant's witnesses or to present contrary evidence. Considerations of due process are intended to ensure that parties are treated fairly, not to guarantee that a party can apply for a Class D certificate without facing opposition. Allowing existing carriers to file protests is rationally related to ensuring that an application is thoroughly vetted through the adversarial process while also decreasing the burden on the PSC to thoroughly review each application.

The second reason there is a rational basis to allow existing carriers to file protests is that this Court has established that a Class D Certificate is a "valuable property right." *Wilson v. PSC*, 260 Mont. 167, 171, 858 P.2d 368, 371 (1993); *Wells Fargo Armored Serv.*, 547 F.2d 938, 941 (5th Cir. 1977) ("[motor carrier] certificates . . . now do qualify as property interests for purposes of procedural due process."). Since a Class D Certificate is a constitutionally protected property right, a Class D carrier is "entitled to procedural due process" before the PSC may take an action that could affect the value of a Class D Certificate. *Wilson*, 858 P.2d at 371; *Allied Waste Servs. of N. Am v. PSC*, 2019 MT 199, ¶ 14, 397 Mont. 85, 447 P.3d 463 ("the PSC is not exempt from the constitutional restraints of due process requirements and must ensure that all litigants [including existing carriers that file

protests] receive a fair and open hearing as guaranteed by the Fourteenth Amendment.” (quotation omitted)).

Due process mandates that existing Class D Certificate holders receive notice and have the right to be heard before the PSC issues a new Certificate that may decrease the value of an existing certificate. That is not to say that existing certificate holders have a “competitor’s veto” as Noland has suggested; only that a certificate holder has a due process right to be heard. Allowing Certificate holders to file protests is rationally related to protecting the due process rights of existing motor carriers.

Since there is a rational basis for both challenged provisions, Noland’s due process claims fail as a matter of law.

VI. Noland’s rights under the equal protection clause have not been violated.

Noland’s next argument is that the challenged provisions violate his rights under the due process clause in Article II, Section 4, of the Montana Constitution. The equal protection clause provides that “[n]o person shall be denied the equal protection of the laws.” Mont. Const. art. II, § 4. The purpose of equal protection is to “ensure that Montana’s citizens are not subject to arbitrary and discriminatory state action.” *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 16, 302 Mont. 518, 15 P.3d 877. When presented with an equal protection challenge, this Court follows a three-step analysis: (1) identify the classes involved and determine whether 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 legislation. *Goble v. Mont. State Fund*, 2014 MT 99, ¶ 28, 374 Mont. 453, 325 P.3d 1211. The first step requires “a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.” *Powell*, ¶ 22. “[T]wo groups are similarly situated if they are equivalent in all relevant respects other than the factor constituting the alleged discrimination.” *Goble*, ¶ 29.

Specifically, Noland argues “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.” Opening Brief at 33. As explained below, the different classes of motor carriers are not similarly situated, nor are applicants and incumbent carriers similarly situated. Noland’s equal protection claim, therefore, fails.

A. The various classifications of motor carriers set forth in the Motor Carrier Act are not similarly situated.

The first basis for Noland’s equal protection challenge is that Montana law “distinguishes between Class D garbage haulers and other classes of motor carriers.” Opening Brief at 33. “The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.” *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

Noland argues that “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.’” Opening Brief at 33-34 (quoting the definition of a “motor carrier” in Mont. Code Ann. § 69-12-101(12)). While there are some similarities between the classes of motor carrier — such as operating on public highways for a commercial purpose — there are material distinctions between each class of carrier, and they are not “equivalent in all relevant respects other than the factor constituting the alleged discrimination.” *Goble*, ¶ 29.

Montana law currently regulates Class A carriers that operate on a fixed and a regular route transporting people and property, Class D carriers that transport garbage, and Class E carriers, known as “transportation network carriers,” that use a smartphone application to connect members of the public with a “transportation network carrier driver who provides prearranged rides to the rider in the driver’s personal vehicle between points chosen by the rider.” Mont. Code Ann. § 69-12-101(22). Noland acknowledges there are “fundamental distinctions between the services that each class provides, and the vehicles used to provide such services.” Opening Brief at 34 (quotation omitted) (“That’s true, of course.”). Noland also acknowledges that “improper disposal of solid waste can pose a threat to public health and safety,” Doc. 74 at 2, a risk that is not present with Class A and E carriers. The “fundamental distinctions” between Class A, D, and E carriers means the classes are not similarly situated.

Just as the State may adopt different laws for motorcycles and cars without violating the equal protection clause, the State may adopt different laws for different classes of motor carriers. Noland may question why “garbage haulers ought to be subjected to anticompetitive protests, but Uber drivers are not?” Opening Brief at 33. Given the difference in the nature of the services provided, the State may adopt different laws for garbage haulers and Uber drivers without violating the equal protection clause. Therefore, Noland’s equal protection challenge lacks merit. *MCIA II*, ¶ 15 (“to state a meritorious equal protection claim, [a] [p]laintiff[] must demonstrate that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.” (quotation omitted)).

B. Applicants and incumbent Class D carriers are not similarly situated.

Next, Noland argues that “[t]he challenged provisions create a separate irrational class distinction, between incumbent garbage haulers and applicants.” Opening Brief at 36. The substance of Noland’s argument is that “[i]ncumbents 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.” Opening Brief at 36. A person without a valid driver’s license may “wish” to drive a car and be “fit and able” to do so, yet the State may require a person to apply for and obtain a driver’s license without violating the equal protection clause.

Since “Noland does not challenge the requirement that he obtain a Certificate,” Opening Brief at 17, the requirement to obtain a Certificate fundamentally distinguishes applicants and incumbents that is unrelated to the challenged provisions.

C. There is a rational basis for the challenged provisions.

Even if the Court accepts Noland’s argument that all classes of motor carriers are similarly situated and/or that incumbents and applicants are similarly situated, there is a rational basis for the challenged provisions.

Under the second and third steps of an equal protection challenge, the Court must “(2) determine the appropriate level of scrutiny to apply to the challenged legislation; and (3) apply the appropriate level of scrutiny to the challenged legislation.” *Goble*, ¶ 28. Under the second step, Noland acknowledges the Court should apply rational basis review. Opening Brief at 32.

Given that the rational basis standard applies to Noland’s equal protection and due process claims, for the same reasons that Noland’s due process claims fail, his equal protection claims fail and were properly dismissed by the District Court.

VII. The challenged provisions do not violate the Fourteenth Amendment.

Noland’s final argument is that “[t]he 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.” Opening Brief at 36.

Noland’s initial argument related to the Fourteenth Amendment is that “[t]he right to earn a living is fundamental and should receive strict scrutiny.” Opening Brief at 36. In support of this argument, Noland cites a concurring opinion in *Golden Glow Tanning Salon, Inc. v. City of Columbus*, 52 F.4th 974 (5th Cir. 2022) (Ho, J., concurring). The majority in *Golden Glow Tanning Salon* correctly noted “[t]he Supreme Court does not now recognize a fundamental right to work and has consistently applied rational basis review ‘to state legislation restricting the availability of employment opportunities.’” *Golden Glow Tanning Salon*, 52 F.4th at 979 (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)). Judge Ho’s concurring opinion agreed that overturning precedent “is for the Supreme Court to determine.” *Id.* at 984. The Court is also bound by the U.S. Supreme Court precedent applying rational basis review to a “right to earn a living” challenge under the Fourteenth Amendment.

Recognizing that rational basis is the applicable standard, Noland argues “the challenged provisions cannot survive rational basis review under the federal Due Process or Equal Protection Clauses.” Opening Brief at 38-39.

As an initial matter, in *Barney* the Court held that the 1931 version of the Motor Carrier Act was “not to be condemned under the provisions of the Fourteenth Amendment to the Constitution of the United States . . .” *Barney*, 17 P.2d at 88. The challenged provisions in Noland’s lawsuit are substantially similar to the 1931 law, and the Court should reach the same conclusion here.

Second, Noland argues that other “[n]eed review laws like those challenged here have also failed rational basis review” under the Fourteenth Amendment. However, the challenged provisions are not part of a “need review law.” Rather than asking if there is a need for a new garbage company, the Motor Carrier Act asks if public convenience and necessity supports granting a new certificate. This is not the “naked economic preference[.]” noted in *Taxicab Co. Owners Ass’n v. City of Houston*, 660 F.3d 235, 240 (5th Cir. 2011); it is good policy that achieves the dual goal of protecting the public from harmful competition and encouraging beneficial competition.

Based on precedent and the nature of Montana’s motor carrier laws, Noland’s challenge under the Fourteenth Amendment fails.

CONCLUSION

For the reasons above, the Court should affirm the District Court’s decision to dismiss Noland’s lawsuit.

Dated this 18th day of December 2024.

DONEY CROWLEY P.C.

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(d), I certify this brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count, calculated by Microsoft Word is 9,997 words, excluding the Table of Contents, Table of Authorities, and the Certificate of Compliance.

Dated this 18th day of December 2024.

/s/ Jack G. Connors

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