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

PARKER NOLAND,

Appellant,

v.

STATE OF MONTANA, et al.,

Appellees,

EVERGREEN DISPOSAL, INC.,

Appellee-Intervenor.

APPELLANT'S REPLY BRIEF

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

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INTRODUCTION

Parker Noland wants to start a business hauling construction debris in Flathead County. The Montana and U.S. Constitutions protect his right to do so free from undue interference. But Appellees—government Defendants ("Defs. Resp.") and Intervenor Evergreen Disposal ("Int. Resp.")—insist that he cannot challenge the constitutionality of the garbage hauling application process unless he first fully subjects himself to the process he contends is unconstitutional. That is not the law.

Appellees also ask this Court to depart from precedent and apply a review standard that is little more than a judicial rubber stamp for an unconstitutional regulatory scheme. This Court has held, and Appellees concede, that the right to pursue employment is fundamental in Montana. Infringements on that right should receive strict scrutiny. Appellees' arguments seek to undermine not only that fundamental right, but also the rational basis standard this Court has established under the Constitution's due process and equal protection clauses. They would "sever 'rational' from 'rational basis.'" *Patel v. Tex. Dep't of Licensing and Reg.*, 469 S.W.3d 69, 99 (Tex. 2015) (Willett, J., concurring).

ARGUMENT

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

Defendants claim that Mr. Noland cannot bring an as-applied challenge because there are no facts regarding how the challenged provisions apply to him. Defs. Resp. at 8. But the record shows that those provisions create a barrier to

pursuing employment in his chosen field, as they did when he first applied for a Class D certificate in 2021.[2] Mr. Noland would again apply for a certificate were it not for the provisions, which place him between (1) the Scylla of complying with an unconstitutional process and (2) the Charybdis of foregoing business opportunities to avoid becoming enmeshed in that process. Doc. 55.00, ¶ 19; *Gryczan v. State*, 283 Mont. 433, 445 (1997); *see also Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 192–96 (2023) (plaintiff not required to submit to administrative process before challenging constitutionality of agency powers).

Defendants' reliance on *Broad Reach Power* is misplaced. In that case, the plaintiffs sought summary judgment "[w]ithout engaging in discovery." *Broad Reach Power, LLC v. Mont. Dep't of Pub. Serv. Regul.*, 2022 MT 227, ¶¶ 5, 13. There was thus no record of how the Commission's practices were applied. Here, the parties conducted extensive discovery that revealed how the Commission implements the challenged provisions. *See* Doc. 54.00 at 4–5; Doc. 56.10, Ex. 1 at 51:24−54:9. It showed that (1) the Commission requires all applicants to prove "need," (2) it allows anticompetitive protests for every application (though not every

[2] Mr. Noland has been clear throughout this litigation as to which provisions he challenges. *See, e.g.*, Doc. 54.00 at 4–5 (identifying the protest procedures in Mont. Code Ann. § 69-12-321 and the need requirement in Mont. Code Ann. § 69-12-323(2)(a) as provisions violating his rights); Doc. 74.00 at 1; Doc. 86.00 at 7; Appellant's Opening Br. at 6–7. The district court clearly understood the nature of Mr. Noland's claims. *See* Doc. 101.00 at 3 ("Noland challenges the constitutionality of the protest procedure and need requirement …").

application is protested), and (3) these burdensome procedures apply to *every* Class D applicant and therefore pose a barrier to Mr. Noland operating a garbage hauling business. Doc. 54.00 at 4–5. No further factual development is needed to support his as-applied challenge. *See Merrifield v. Lockyer*, 547 F.3d 978, 980 n.1 (9th Cir. 2008); *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 697 (E.D. Ky. 2014); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1108, 1110, 1115 (S.D. Cal. 1999).

Defendants' attempt to distinguish *Gryczan* is unpersuasive. Even if the Motor Carrier Act is not a "criminal statute," Defs. Resp. at 8, Mr. Noland faces criminal punishment if he hauls garbage without first going through the PCN process. *See* Mont. Code Ann. § 69-12-108(2) (violators are "subject, upon conviction in a justice's court, to a fine …"); *see also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (a person facing potential criminal punishment has standing). Moreover, Defendants cannot so easily dismiss the *civil* penalties that apply to unlicensed garbage haulers. Mont. Code Ann. § 69-12-108(1). Criminal penalties, civil fines, or any similar deterrence from exercising a constitutional right are sufficient to support standing. *See Peace Ranch, LLC v. Bonta*, 93 F.4th 482, 487 (9th Cir. 2024) ("For pre-enforcement plaintiffs, the injury is the anticipated enforcement of the challenged statute in the future. … This principle applies equally

in the civil context.");[3] *Bland v. Fessler*, 88 F.3d 729, 737 n.11 (9th Cir. 1996) (plaintiffs had standing because "although [they] do not face criminal penalties, they do face grave consequences for violations of the civil statute, including civil fines").

Evergreen argues that Mr. Noland can only bring a challenge if he applies for a certificate and "believes his constitutional rights are violated during the [application] process." Int. Resp. at 19. But the same could be said of the plaintiffs in *Gryczan*: they could have engaged in the prohibited conduct and then challenged the statute if they were prosecuted. That was not required. *Gryczan*, 283 Mont. at 444. Montana's standing doctrine simply requires that a plaintiff "clearly allege a past, present, or threatened injury to a property or civil right," and that the injury is "one that would be alleviated by successfully maintaining the action." *Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶ 55. This standard is met where the government creates a barrier to obtaining a benefit or exercising a right.[4] *See Gazelka v. St. Peter's Hosp.*, 2015 MT 127, ¶¶ 14–15 (quoting *Ne. Fla. Chapter of Associated*

[3] Defendants incorrectly argue that pre-enforcement challenges are only appropriate in First Amendment cases. Defs. Resp. at 17. *Peace Ranch* involved a pre-enforcement challenge to a rent control statute under the Equal Protection clause and other constitutional provisions. 93 F.4th at 484–86.

[4] Appellees suggest that Mr. Noland's discussion of the costs inherent in the application process are speculative because he can object to discovery requests and would not need an attorney if he applied as a sole proprietor. Defs. Resp. at 19; Int. Resp. at 19. But even having to object to discovery requests imposes a burden, and applicants proceeding *pro se* are not excused from costly protests, discovery requests, Commission hearings, or judicial review of the Commission's decision.

Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993)). That is true here.

Finally, Defendants claim that *City of Chicago v. Atchison, Topeka & Santa Fe Railway Co.*, 357 U.S. 77 (1958), is inapplicable because Mr. Noland does not claim that all regulation of motor carriers is "completely invalid." Defs. Resp. at 9–10. But the plaintiff in *Atchison* did not challenge all regulation of railroads, only the requirement to secure a certificate of public convenience and necessity. This case is no different—Mr. Noland asserts that the requirements that he prove need and face anticompetitive protests to obtain a certificate are "completely invalid."

Nor does prudential standing bar Mr. Noland's claims. *See* Defs. Resp. at 8 n.2; Int. Resp. at 16–17. Mr. Noland does not assert retrospective claims premised on the prior denial of a Certificate to his company, but a prospective challenge to the ongoing barrier the provisions pose to the exercise of his rights. Prudential considerations do not require him to pass through an unconstitutional process before he can challenge that process. *See Reichert*, ¶ 56; *Merrifield*, 547 F.3d at 980 n.1.[5]

[5] Although ownership of Mr. Noland's company is irrelevant to his claims, Evergreen is incorrect in asserting (Int. Resp. at 1) that he only *partially* owns his company. *See* Doc. 88.00, Ex. B at PLTF 000011 (listing Mr. Noland as the sole owner); Doc. 88.00, Ex. A at 107:4–108:3 (Mr. Noland's deposition testimony).

II. Mr. Noland's Facial Challenge Is Proper

A. A facial challenge is proper even though some Class D applicants have succeeded

Defendants misunderstand Mr. Noland's facial claims. He does not challenge the requirement that garbage haulers obtain a license, but the unconstitutional application procedures that the Commission uses to decide who can get one. Contrary to Defendants' assertion, Defs. Resp. at 11, Mr. Noland does not argue that the challenged provisions are an absolute *bar* to obtaining a Class D license, but rather an unconstitutional *barrier*. That some applicants have had the patience and resources to overcome this barrier does not make it constitutional. Just as a racial barrier violates the Equal Protection Clause even if some individuals successfully overcome the discrimination, *see Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023) (policies discriminated against Asian-Americans even though some Asian-Americans were admitted), so too can Montana's unconstitutional barrier be challenged facially even though some applicants have overcome it.

Montana case law recognizes that barriers and obstacles to obtaining a benefit or exercising a right can support standing for a facial challenge, and this Court "often looks to federal courts for guidance in applying Montana's standing requirements." *See Gazelka*, ¶¶ 14–15 (quoting *City of Jacksonville*, 508 U.S. at 666); *see also Larson v. State ex rel. Stapleton*, 2019 MT 28, ¶ 46; *Heffernan v. Missoula City*

Council, 2011 MT 91, ¶¶ 32–33. Federal cases directly support standing in this context. *See* Opening Br. 17–18 (citing cases); *City of Jacksonville*, 508 U.S. at 666; *Bruner*, 997 F. Supp. 2d at 698–700. Defendants mischaracterize *Bruner* as holding only that an application process can be facially unconstitutional if denial was preordained. *See* Defs. Resp. at 12. To the contrary, *Bruner* held that a need review law posed an "unconstitutional obstacle" to operating a moving company and that this injury supported standing even though "the Plaintiffs would [not] automatically be granted a Certificate" absent the obstacle. *Bruner*, 997 F. Supp. 2d at 697. The same is true of Montana's process.

B. This Court's past cases did not resolve the challenged provisions' constitutionality

Appellees incorrectly claim that Mr. Noland's facial challenge is improper because this Court has already upheld the constitutionality of the challenged provisions. Defs. Resp. at 14–16; Int. Resp. at 5–13. To the contrary, as discussed below, all the cases they rely on were either decided decades before Montana started regulating Class D motor carriers or did not hold what Appellees claim.

Interstate Transit Co. v. Derr, 71 Mont. 222 (1924), *acknowledges* the arbitrariness of procedures nearly identical to those challenged here. The government had acted "most arbitrarily" in denying a license because "its only justification … was that the issuance of such permit would injuriously affect others

licensed to operate," and thus "[t]he reasons … for denial … [we]re wholly inadequate." *Id.* at 627–28. The provisions here are equally arbitrary.

At issue in *State v. Johnson*, 75 Mont. 240 (1926), was whether it was constitutional to delegate to the Board of Railroad Commissioners authority to regulate motor carriers. But Mr. Noland does not challenge the delegation of power to the Commission or its ability to regulate motor carriers. Nor does he assert the right to use the public highways without the State's consent, as did the plaintiff in *Willis v. Buck*, 81 Mont. 472 (1928). He instead challenges specific, statutorily mandated procedures that pose a barrier to obtaining a Certificate.

Meanwhile, *Barney v. Board of Railroad Commissioners*, 17 P.2d 82 (Mont. 1932), and *Fulmer v. Board of Railroad Commissioners*, 28 P.2d 849 (Mont. 1934), do not undermine Mr. Noland's claims. First, and most glaring, the right to pursue life's basic necessities clause in Article II, section 3, was not added to the Montana Constitution until 1972, four decades after *Barney* and *Fulmer* were decided. That provision changed the constitutional landscape and forms the basis of Mr. Noland's claims. Second, neither of those cases addressed the Class D provisions challenged here, since the State did not start regulating Class D carriers under the PCN system until 1977. *See* 1977 Mont. Laws Ch. 138.

Finally, even if those cases were applicable, in *Barney* and *Fulmer* the plaintiffs did not introduce evidence of the challenged statutes' irrationality. Yet

Barney acknowledged that a statute fails rational basis review if it is "essentially arbitrary" and that an asserted relation to a government interest can be "overthrown by facts of record." *Barney*, 17 P.2d at 84. Here, Mr. Noland introduced evidence demonstrating the irrationality of the challenged provisions, including an expert report showing that such laws lead to increased costs and decreased service availability and quality. Doc. 57.00, Ex. 1 at 2, 19, 27–30. The disconnect between the challenged provisions and an applicant's fitness (regulated under a separate statute) also makes these statutes irrational. *See* Doc. 54.00 at 5; Doc. 56.00, ¶ 6. What might have been rational to ensure that railroads were preserved in the 1930s, *see Barney*, 17 P.2d at 87–88, *Fulmer*, 28 P.2d at 854, has little bearing on whether a different regulation applied to garbage haulers many decades later is rational today.

Furthermore, more recent caselaw recognizes that rational basis review does not require blind deference to government's asserted interests. *See, e.g.*, *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 23 (*Mont. Cannabis II*) (a court "need not surmise possible purposes for the legislation because the Act makes explicit several purposes on its face"); *Oberg v. City of Billings*, 207 Mont. 277, 281−85 (1983) (law requiring only law enforcement employees to get polygraph tests failed rational basis); *Godfrey v. State Fish & Game Comm'n*, 193 Mont. 304, 307−10 (1981) (statutes restricting licensing of nonresident outfitters failed rational basis).

To the extent *Barney* and *Fulmer* conflict with the principles later espoused by this Court, they should be considered overruled.

This Court's later cases addressing Class D carriers do not help Appellees, and Evergreen mischaracterizes the holding in *Rozel Corp. v. Department of Public Service Regulation*, 226 Mont. 237 (1987). *Rozel* did not address *any* constitutional issues on the merits, let alone the ones raised here. *Id.* at 243.[6] It addressed only whether the Commission has *statutory* authority to deny a Class D application based on need and the potential adverse effect of a new garbage carrier, not whether the statutes are constitutional. *Id.* Later cases likewise failed to address the constitutionality of the challenged provisions—although those cases did highlight the provisions' irrationality, since they showed that incumbents who were not meeting customer needs were nonetheless able to assert anticompetitive protests against fit applicants. *See Waste Mgmt. Partners of Bozeman v. Dep't of Pub. Serv. Reg.*, 284 Mont. 245, 254–55 (1997) (protest allowed even though evidence of protestor's "inadequate service … was overwhelming"); *McGree Corp. v. Mont. Pub. Serv. Comm'n*, 2019 MT 75, ¶¶ 23–30 (protestors were providing poor service, but delayed resolution of an application by protesting).

[6] Thus, *Rozel* does not demonstrate the provisions' relationship to maintaining a motor carrier system, contra Defendants. Defs.' Resp. at 28–29.

C. A facial challenge is proper because Montana requires proof of need and allows anticompetitive protests with every application

Appellees mischaracterize not only precedent but also the challenged provisions. Evergreen incorrectly claims that the Commission is not required to allow anticompetitive protests, Int. Resp. at 21, and Defendants similarly argue that the challenged provisions may not always be applied, Defs. Resp. at 16. To the contrary, the challenged provisions require proof of need and allow protests for every application, *see* Mont. Code Ann. §§ 69-12-321, -323(2)(a), as the Commission has conceded. *See* Doc. 54.00 at 4–5 (applicants must prove that existing motor carriers cannot meet the public need and will not be harmed by a new competitor); Doc. 56.10, Ex. 1 at 51:24−54:9 (deposition testimony). Although Defendants are correct that not every application garners a protest, Defs. Resp. at 16, the point is that the Commission is required to notify competitors and *allow* anticompetitive protests to every application. Mont. Code Ann. § 69-12-321.[7] That the competitors might decide not to protest does not make this injury speculative, or the statute constitutional.

[7] Mr. Noland does not challenge the constitutionality of Mont. Code Ann. § 69-12-323(2)(b), except to the extent that it allows the Commission to base its decision on whether there is a need for a new carrier or potential harms to incumbents. The proper reading of that section is that it allows the Commission to consider the *beneficial* effects of competition, as demonstrated by the legislative history of HB 73. *See infra* at 24.

Finally, Evergreen claims that the Commission's consideration of public convenience and necessity does not require an applicant to prove need, but merely involves an "inquiry into all relevant circumstances" of an application. Int. Resp. at 5. Not so. The factors that constitute "public convenience and necessity" are enumerated by statute and include consideration of whether there is a need for a new company and whether the applicant's business will harm incumbents. Mont. Code Ann. § 69-12-323(2)(a); Doc. 56.10, Ex. 1 at 51:24–54:9.

III. This Court Should Address the Merits of Mr. Noland's Constitutional Claims

Defendants argue that Montana's Appellate Rules require that if this Court reverses the decision below, it should remand rather than reach the merits of Mr. Noland's claims. *See* Defs. Resp. at 19–20. To the contrary, Rule 19 empowers the Court to reverse a district court's denial of summary judgment. *See* Mont. R. App. P. 19(1)(b). And by statute, the Court may "affirm, reverse, or modify any judgment or order appealed from and may direct the proper judgment or order to be entered." Mont. Code Ann. § 3-2-204(1). The Court has also long recognized that "[w]here all of the facts bearing on the resolution of the legal issues are before us … [it] has the power to reverse a district court's grant of summary judgment and direct it to enter summary judgment in favor of the other party." *Jarrett v. Valley Park, Inc.*, 277 Mont. 333, 346 (1996), *overruled on other grounds*, *Shammel v. Canyon*

Resources Corp., 319 Mont. 132 (2003); *see also Duensing v. Traveler's Cos.*, 257 Mont. 376, 386 (1993); *In re Estate of Langendorf*, 262 Mont. 123, 128 (1993).

Here, the district court improperly denied Mr. Noland's request for summary judgment after reviewing a full factual record. *See* Notice of Appeal; Doc. 101.00 at 2, 6; Tr. of Jan. 8, 2024 Oral Arg. at 8:2–12. Mr. Noland asks for that order to be reversed, and it falls well within this Court's power to do so. Even though the district court did not rule on the merits of Mr. Noland's claims, this Court should do so where all relevant facts are before it. *See City of Roundup v. Liebetrau*, 134 Mont. 114, 124 (1958) (trial court's non-merits judgment was reversed, so "we must now consider the evidence to determine whether … this court should direct the entry of judgment" in favor of the other party); *Alley v. Butte & Western Mining Co.*, 251 P. 517, 524 (1926) (where record contained all facts, "it is … the duty of this court to direct entry of a judgment in favor of the plaintiff and thus finally dispose of the matter on its merits").

This Court has all the facts before it. All parties agree that there are no disputed issues of material fact. *See* Tr. of Jan. 8, 2024, Oral Arg. at 35:23–36:12. They also agree that this Court's review of the district court's summary judgment order is *de novo*. Defs. Resp. at 4; Int. Resp. at 1. Accordingly, this Court should not only reverse the district court's decision as to standing, but also address the merits of Mr. Noland's constitutional challenges and direct entry of judgment in his favor.

IV. The Challenged Provisions Are Unconstitutional

Defendants incorrectly claim that the challenged provisions need only rationally relate to whatever hypothetical interest they dream up. Defs. Resp. at 21–22. Instead, because the provisions infringe Mr. Noland's right to pursue employment, they are subject to strict scrutiny. *See Wadsworth v. State*, 275 Mont. 287, 302 (1996). Even under Montana's due process and equal protection guarantees, the provisions must be rationally related to the explicit purpose of Montana's motor carrier laws, not any hypothetical interest. *Mont. Cannabis II*, ¶¶ 22–23. Here, the provisions do not satisfy either standard. Nor can they even satisfy the rational basis standard applied by federal courts to economic regulations.

A. The challenged provisions violate Mr. Noland's right to pursue employment

As Defendants acknowledge, "[t]he Montana Constitution protects the fundamental right to pursue employment." Defs. Resp. at 22 (quoting *Wadsworth*, 275 Mont. at 299–301). Because this right is fundamental, any interference with it must satisfy strict scrutiny. *Wadsworth*, 275 Mont. at 302–03. Defendants do not even argue that they can satisfy that standard here. *See Planned Parenthood of Mont. v. State*, 2024 MT 228, ¶ 27 ("[W]e are not obligated to develop arguments on behalf of parties to an appeal, nor are we to guess a party's precise position, or develop legal analysis that may lend support to his position.") (quoting *McCulley v. Am. Land Title Co.*, 2013 MT 89, ¶ 20).

Instead, Appellees argue that the right to pursue employment is not implicated because it only applies to restrictions that entirely preclude someone from obtaining a job. Defs. Resp. at 22–23; Int. Resp. at 22–25. But *Wadsworth* held that strict scrutiny is required where a statute "*interferes* with the exercise of a fundamental right." *Wadsworth*, 275 Mont. at 302 (emphasis added). Wadsworth was not banned from operating a tax appraisal business, and had he resigned or accepted termination from his government position, he could have done so without restriction. *Id.* at 293. Even with those available alternatives, the challenged rule violated his fundamental right to pursue employment because it interfered with its exercise. *Id.* at 301.[8]

Defendants mischaracterize this right, claiming that as long as Mr. Noland can submit an application, he can "pursue" employment. Defs. Resp. at 23. That facile argument ignores that *Wadsworth* described a right to pursue employment *through an independent business*. 275 Mont. at 301. It is not enough to say that Mr. Noland can file an application when the application process improperly interferes with his ability to pursue his desired occupation.

Although Article II, section 3, does not grant a "right to a particular job," *id.* at 300, it protects the right to pursue one's preferred occupation, contra Defendants. *See* Defs. Resp. at 23. *Wadsworth* confirmed that there is a right to pursue

[8] Thus, Evergreen's suggestion that Mr. Noland has alternatives to pursuing his own garbage hauling business, *see* Int. Resp. at 23, cannot shield the provisions here from strict scrutiny.

employment via operating an independent business and did not dismiss Wadsworth's claims because he could have pursued some other job. Likewise, Mr. Noland is not asserting a right to a particular job, but a right to try to establish a business in his preferred industry. Nor does the fact that Mr. Noland could pursue a business in another transportation field, *see* Int. Resp. at 22–23, save the challenged provisions. The rule in *Wadsworth* did not completely prohibit Wadsworth from working in the tax appraisal industry (where he was already working via his position in the government), but interfered with his right to pursue an independent business in that field. 275 Mont. at 301. The same is true here: the challenged provisions interfere with Mr. Noland's right to pursue employment through starting a debris hauling business.[9]

Montana Cannabis Industry Ass'n v. State, 2012 MT 201 ("*Mont. Cannabis I*") does not undermine Mr. Noland's claim. *See* Int. Resp. at 22–24. Not only were those plaintiffs asserting a right to a particular job and seeking "employment free of state regulation," *Mont. Cannabis I*, ¶¶ 20–21, but that case dealt with "a Schedule I controlled substance, illegal for all purposes, under federal law"—and thus the plaintiffs were not pursuing employment in a lawful business. *Mont. Cannabis II*, ¶ 28.

[9] *Wiser v. State*, 2006 MT 20, is distinguishable because Mr. Noland does not seek employment free of all regulation. *Id.* ¶¶ 23–24.

Finally, Defendants' assertion that the right to pursue employment is circumscribed by the police power, Defs. Resp. at 23–24, does not hold water. In fact, the reverse is true. The police power is not a free pass to violate the Constitution, and any exercise of that power is subject to constitutional constraints. The Court should hold that the challenged restrictions are subject to strict scrutiny and that they fail this standard.

B. The challenged provisions violate Montana's due process protections

This Court should reject Defendants' attempt to invent possible rationales for the challenged provisions, since their purpose is explicit in statute: (1) to "fully secure adequate motor transportation facilities" and (2) maintain "a common carrier motor transportation system." Mont. Code Ann. § 69-12-202; *see also Mont. Cannabis II*, ¶¶ 22–23 (in evaluating due process, this Court "examine[s] the legislation's purpose" and "need not surmise possible purposes for the legislation [where its purpose is] explicit").[10] The challenged provisions are not rationally related to this purpose, and instead undermine it by making it harder for fit applicants to provide services even where the existing provider is failing to do so. *See, e.g.*, *Waste Mgmt. Partners*, 284 Mont. at 254–55; *McGree*, ¶¶ 23–30. Shielding

[10] *Satterlee v. Lumberman's Mutual Casualty Co.* is not contrary, since there the challenged law did not list an explicit purpose. 2009 MT 368, ¶¶ 21–22.

incumbents who may be providing inadequate services from competition is not a rational way to ensure a functioning motor carrier system.[11]

Defendants assert that protests assist the Commission in obtaining relevant evidence. Defs. Resp. at 27–28. But leaving the creation of a factual record (or not) in the hands of protestors is irrational. The Commission also must evaluate applicant fitness regardless of whether there is a protest, so the challenged provisions are unnecessary to ensure consideration of an applicant's ability to do the job and meet health and safety requirements. Mont. Code Ann. § 69-12-415.[12] At most, the challenged provisions facilitate the creation of a record regarding whether new competition may harm incumbents. But protecting incumbents from competition is

[11] Amicus MSWC claims that protecting incumbents from competition can benefit rural customers, but relies on speculation from the owner of a garbage service that rural areas will not be served unless incumbents are protected from competitors. MSWC Br. 1–7, 10–12. Economists have long rejected this rationale for need review laws. *See* Doc. 57.00, Ex.1 at 18.

[12] The expert testimony of Dr. James Bailey provides strong empirical evidence that need review laws reduce access to services, increase costs, and lead to poorer quality, and that the provisions challenged here likely do the same. Doc. 57.00, Ex. 1 at 2, 19, 27–30. Defendants offer no contrary expert evidence or any basis for concluding that garbage hauling is exempt from economic principles that apply to need review in analogous industries. Although MSWC claims that the medical industry is different from garbage hauling, it does not explain how any purported differences immunize the garbage industry from the laws of supply and demand. *See* MSWC Br. 10–11. As Dr. Bailey observed, the case for need review is weaker for garbage hauling than for health care, including in rural access. Doc. 57.00, Ex. 1 at 20–25. Far from calling for a "government monopoly on garbage hauling," MSWC Br. 11 n.1, he concluded that government policy should promote increasing the number of haulers by reducing barriers to entry. Doc. 57.00, Ex. 1 at 11.

not a legitimate interest. *See, e.g.*, *Craigmiles v. Giles*, 312 F.3d 220, 224 (2002); *Bruner*, 997 F. Supp. 2d at 700. The only evidentiary record provided by protests is that "no new competition is wanted." *Bruner*, 997 F. Supp. 2d at 700.[13]

The challenged provisions also are not rationally related to ensuring fitness. *See* Int. Resp. at 31–32. Evergreen offers no record support for its claim that "the PSC does not have the time or resources" to fulfill its statutory mandate to review applicants' fitness. Int. Resp. at 31. Moreover, anticompetitive protests are not a rational way to ensure fitness. Every protest from at least the past ten years was to prevent competition, not to contest fitness, and the provisions' "relationship to [fitness] is so attenuated as to render [them] arbitrary or irrational." *City of Cleburne v. Cleburn Living Ctr.*, 473 U.S. 432, 446 (1985); *see also Heller v. Doe*, 509 U.S. 312, 321 (1993) ("[E]ven the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation."). The challenged provisions allow protests to prevent competition and, in practice, *only* provide for anticompetitive protests.[14]

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[13] Evergreen claims that Mr. Noland's counsel agreed that incumbents should be allowed to file anticompetitive protests. Int. Resp. at 30–31. To the contrary, the cited statement was that Mr. Noland does not oppose the ability of the general public (including employees of garbage companies) to raise concerns about an applicant's fitness, which does not require a protest. *See* Tr. of Jan. 8, 2024 Oral Arg. at 36:13–37:14; Doc. 54.00 at 14.

[14] For the first time in this litigation, Evergreen's response cites a Commission docket purportedly showing that entities other than incumbents have filed protests

Evergreen incorrectly claims that a certificate is a property right and that incumbents have a due process right to protest applications. Int. Resp. at 32–33. Not only does this Court take "a dim view of the notion" that there is a property right in a government-issued license, *Kafka v. Montana Department of Fish, Wildlife and Parks*, 2008 MT 460, ¶ 41, but the cases Evergreen cites say no such thing. The "valuable property right" described in *Wilson v. Department of Public Service Regulation* was not a certificate itself, but "[t]he right to carry on a lawful business," such that due process is implicated when a holder's certificate is *revoked*. 260 Mont. 167, 171 (1993).[15] In *Allied Waste Services of North America, LLC v. Montana*

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in the past. Int. Resp. at 30 n.4 (citing *In re Application of Browning-Ferris of Montana, Inc.*, Montana PSC Dkt. T-6500). That docket is not part of the record, and Mr. Noland's counsel has been unable to locate it using the search function on the Commission's website. *See* Mont. Pub. Serv. Comm'n, *PSC Public Portal: Docket & Filings Search*, https://psc.mt.gov/ (click "Documents & Proceedings," then "Search Documents," using search parameters Filed On/Before 1/29/2025 and Docket Number T-6500). It is too late for Evergreen to introduce new facts. *See State v. Passmore*, 2014 MT 249, ¶ 16 ("We do not consider evidence that is not in the record on appeal" (internal citation omitted)). In any event, even if a non-incumbent protested an application over a decade ago, that has little relevance to how the statutes are enforced today.

[15] MSWC incorrectly suggests *Wilson* held that "Montana law incentivizes haulers to make large capital investments by limiting market entry on the front end, creating a valuable property right in a haulers Class D certificate." MSWC Br. at 3. To the contrary, this Court has long recognized that any expectations that license holders have in their licenses must be tempered by the reality that regulations are subject to change. *See Kafka*, ¶ 89. MSWC also cites *Montana Power Co. v. Public Service Commission*, *see* MSWC Br. at 8, but that case has nothing to do with the challenged provisions and involved the Commission prohibiting a power company from forming a new corporation. 206 Mont. 359, 364–71 (1983).

Department of Public Service Regulation, 2019 MT 199, the question was not whether incumbents have a property right in protesting applicants, but whether the Commission could engage in *ex parte* communications with counsel. *Id.* ¶ 17. And *Wells Fargo Armored Service Corp. v. Georgia Public Service Commission*, 547 F.2d 938 (5th Cir. 1977), contradicts the notion that incumbents are deprived of a property right if they lose the ability to protest. Due process concerns may arise "where licenses are revoked," but was not violated in that case because "Georgia has not terminated [the incumbent's] motor carrier certificate" but "simply given [it] a competitor." *Id.* at 941; *see also id.* ("The mere entry of another motor carrier into [the incumbent's] territory is too insubstantial an injury" to violate due process.).[16] Here, if the provisions are enjoined, existing carriers will not lose their certificates and can continue to carry on their lawful business—the same right Evergreen wishes to deny Mr. Noland.

[16] *See also, e.g.*, *Newark Cab Ass'n v. City of Newark*, 901 F.3d 146, 155 (3d Cir. 2018) ("plaintiffs do not have a legally cognizable property interest in the value of their taxi medallions"); *Ill. Transp. Trade Ass'n v. City of Chicago*, 839 F.3d 594, 596 (7th Cir. 2016) ("'Property' does not include a right to be free from competition."); *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 274 (5th Cir. 2012) ("[W]hatever interest Plaintiffs hold in their [licenses] is the product of a regulatory scheme that also vests the City with broad discretion to alter or extinguish that interest."); *Minneapolis Taxi Owners Coalition, Inc. v. City of Minneapolis*, 572 F.3d 502, 508–10 (8th Cir. 2009) (because "taxicab licenses themselves do not carry an inherent property interest guaranteeing the[ir] economic benefits," allowing competitors "does not implicate the holders' property interests or … their due process rights").

C. The challenged provisions violate Mr. Noland's right to equal protection

1. The PCN scheme irrationally distinguishes between Class D and other motor carrier applicants

"[T]wo groups are similarly situated if they are equivalent in all *relevant* respects other than the factor constituting the alleged discrimination." *Goble v. Mont. State Fund*, 2014 MT 99, ¶ 29 (emphasis added) All motor carrier classes are similarly situated because they "operat[e] motor vehicles upon a public highway in this state for the transportation … for hire on a commercial basis." Mont. Code Ann. § 69-12-101(12). Appellees highlight differences between the motor carrier classes but fail to explain why those differences are relevant. Defs. Resp. at 30–35; Int. Resp. at 34–35. This case is unlike *Wilkes v. Mont. State Fund*, 2008 MT 29, relied upon by Defendants. *See* Defs. Resp. at 31–32. In *Wilkes*, wage loss was a fundamental distinction between the proposed classes because wage loss is relevant to compensation for disability—a wage-loss benefit should be related to actual wages lost. *Wilkes*, ¶ 26. Instead, this case is akin to *Merrifield*, where a pest controller licensing scheme violated equal protection by treating different classes of pest controller unequally, even though the classes addressed different pests using different equipment, because the distinction was not rationally related to a legitimate interest. 547 F.3d at 990–92. Any differences between motor carrier classes do not

justify subjecting garbage hauler applicants to anticompetitive protests and need requirements that do not apply to other kinds of applicants.

Defendants claim that Montana does not single out Class D applicants, but the Commission's practices say otherwise. Commission documents and enforcement show that the Commission only considers need in the case of Class D applicants. According to the Commission, Class C and D carriers must obtain a PCN certificate, while Class A carriers need only obtain a certificate of compliance. *See* Mont. Pub. Serv. Comm'n, *Line-By-Line Instructions For Application For Certificate Of Public Convenience & Necessity (PC&N)* at 1 (Sept. 2022);[17] Mont. Pub. Serv. Comm'n, *Line-By-Line Instructions For Application For A Class A Or B Certificate Of Compliance* (June 2015).[18] Defendants admit that when evaluating Class E and Class A applications, the Commission only considers whether the applicant is fit, willing, and able to provide services. Defs. Resp. at 33; Mont. Code Ann. § 69-12-323(5)(a).[19] That the different classes carry different cargo does not make this differential treatment rational. *See Goble*, ¶ 29; *Merrifield*, 547 F.3d at 990–92.

[17] https://psc.mt.gov/_docs/Transportation/pdf/PCN-instructions-2015.pdf.
[18] https://psc.mt.gov/_docs/Transportation/pdf/COC-instructions-2015classA-B.pdf.
[19] Even if Defendants are correct that some Class A carriers are subject to a need requirement and anticompetitive protests, *see* Defs. Resp. at 32–33 (citing Mont. Code Ann. § 69-12-311(1)), that simply highlights that those Class A applicants, like Class D applicants, are treated unfairly.

Defendants' assertion that improper disposal of solid waste can threaten public safety is not relevant. Defs. Resp. at 33–34. Mr. Noland does not challenge any statutes or regulations governing disposal, nor does he challenge provisions governing applicant fitness, insurance requirements, or any other public health and safety regulations. Other kinds of carriers and cargo can threaten the public if safety protocols are not followed, so Defendants' claims do not justify differential treatment of Class D carriers.

As for the legislative history of HB 73, that history shows that it was enacted to allow the Commission to consider "free enterprise" and the *beneficial effects* of competition in deciding whether to grant a certificate. Defs. Resp. App. at 11.[20] The "unique problems" with garbage haulers cited by legislators were caused by the very provisions that Mr. Noland challenges: protests and the denial of applications based on "need" were making it harder for fit applicants to operate. *Id.* at 11, 16–19. In any event, the challenged provisions do not promote, but instead *undermine* the State's interest in ensuring proper disposal by making it harder for fit applicants to obtain a certificate over the objections of potentially unfit haulers. *See, e.g.*, *Waste Mgmt. Partners*, 284 Mont. at 254–55, *McGree*, ¶¶ 23–30.

[20] Defendants' Appendix to Response Brief does not include page numbers. Page numbers are based on the number of pages in the PDF, with the caption page as page 1.

2. The challenged provisions treat Class D applicants differently from Class D incumbents

Appellees claim that there is no inequality between Class D applicants and incumbents because today's incumbents were at one time subject to the same application process. Defs. Resp. at 37; *see also* Int. Resp. at 36–37. But the question is not whether incumbents were treated differently when they applied, but whether they are treated differently from applicants today. *See Bruner*, 997 F. Supp. 2d at 698−700.[21] Montana effectively applies a presumption against new applicants, thereby protecting potentially unfit incumbents for reasons unrelated to quality, reputation, cleanliness, or other public health or welfare considerations. Unlike an applicant, an incumbent does not have to continue to show "need," and its certificate cannot be protested by competitors. This privileged treatment is not rationally related to any legitimate government interest. It instead "favor[s] economically certain constituents at the expense of others similarly situated." *Merrifield*, 547 F.3d at 991.

D. The challenged provisions violate the Fourteenth Amendment

Appellees claim that Mr. Noland does not assert a right to make a living, but only a narrow right to own a garbage hauling business. Defs. Resp. at 37–38. But the right at issue has never been construed so narrowly; English and early American

[21] Some existing haulers did not face protests to their PCN applications. *See, e.g.*, Doc. 56.10, Ex. 5 at DEF 287–90 (application of Allied Waste Services of North America, LLC), 460–61 (Evergreen's application).

common law recognized the right to earn a living in one's chosen lawful occupation, whatever that may be. *See Golden Glow Tanning Salon, Inc. v. City of Columbus*, 52 F.4th 974, 984 (5th Cir. 2022) (Ho, J., concurring). And even though infringements of the right to make a living have in the past received rational basis review, *see* Defs. Resp. at 37–38; Int. Resp. at 37–39, recent Supreme Court precedent shows it should be evaluated as a fundamental right, subject to strict scrutiny, because it is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).[22]

Even under the so-called rational basis test, this Court should direct judgment in Mr. Noland's favor as to his Fourteenth Amendment claims because the challenged provisions do not rationally relate to a legitimate interest. As in *Bruner*, "providing an umbrella of protection for preferred private businesses while blocking others from competing" is neither rational nor constitutional. 997 F. Supp. 2d at 699. None of Appellees' attempts to distinguish federal precedent have merit.

First, Defendants attempt to distinguish *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), noting that ice manufacturing "was not a business that should be

[22] Whether the right to earn a living in a lawful occupation is fundamental "is for the [U.S.] Supreme Court to determine." *Golden Glow*, 52 F.4th at 984 (Ho, J., concurring). Mr. Noland wishes to preserve this argument for potential appeal.

treated as a public utility." Defs. Resp. at 39. But neither is garbage hauling. Unlike public utilities, the Commission does not regulate rates that garbage companies may charge. Doc. 56.10, Ex. 1 at 83:15–18 (the Commission lacks the power to regulate motor carrier rates). Solid waste collection "is not the case of a natural monopoly, or … dependent upon the grant of public privileges." *Liebmann*, 285 U.S. at 279; *see also* Doc. 57.00, Ex. 1 at 8–9. While the industry is subject to regulation, the specific provisions that Mr. Noland challenges have no rational relationship to a legitimate purpose.

Second, Defendants endeavor to distinguish *Merrifield* because the classes there were all pest controllers. Defs. Resp. at 40. Yet the classes at issue here are "all motor carriers," and Defendants' asserted differences are not relevant for equal protection purposes. Different motor carrier classes offer "distinct benefits … using very different equipment," *id.*, but the same is true of the pest controllers in *Merrifield*, 547 F.3d at 981–82. The Ninth Circuit found this rationale "so weak that it undercuts the principle of non-contradiction." *Id.* at 991. A line drawn "based on what kinds of pests the business exterminates," *id.*, is no more reasonable than a line based on the cargo hauled by the motor carrier.

Third, Defendants argue that *Craigmiles v. Giles* is distinguishable because the legislation in that case was intended to "prevent competition." Defs. Resp. at 40–41 (quoting *Craigmiles*, 312 F.3d at 225). But that is no distinction at all—

Defendants have repeatedly conceded that the provisions are intended to "prevent[] deleterious competition" and that the Commission "considers … the … harms of competition" in deciding whether to grant a Certificate. Defs. Resp. at 26–27, 34–35, 41. In *Craigmiles*, giving funeral directors a monopoly over casket sales was only tangentially related to any asserted interests in public health or consumer protection. 312 F.3d at 225–39. Likewise, Defendants' supposed interest in "preventing deleterious competition" is nothing more than economic protectionism. Their attempts to justify this scheme strike with "the force of a five-week-old, unrefrigerated dead fish." *Craigmiles*, 312 F.3d at 225 (citation omitted).

Finally, recognizing the true purpose of the provisions, Defendants urge this Court to follow *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281 (2nd Cir. 2015), and *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004), and to hold that bare economic protectionism is a legitimate government interest. Defs. Resp. at 41. For at least two reasons, this Court should instead hold that economic protectionism, "regardless of its relation to the common good, [is not] … a legitimate government interest." *Merrifield*, 547 F.3d at 991 n.15; *see also Craigmiles*, 312 F.3d at 229; *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (2015). First, the Second and Tenth Circuit decisions contradict U.S. Supreme Court precedent. *See Tennessee Wine and Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 519 n.5 (2019) (the police power is "not understood to authorize purely protectionist measures with no bona fide relation

to public health or safety."); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985) (an Alabama law "designed only to favor domestic industry" "constitute[d] the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent"); *Liebmann*, 285 U.S. at 279. Second, Defendants' argument would undermine the rule of law by favoring private advantage and burdening the politically disfavored at the expense of furthering a public purpose. "[N]aked economic preferences are impermissible to the extent that they harm consumers." *Greater Houston Small Taxicab Co. Owners Ass'n v. City of Houston*, 660 F.3d 235, 240 (5th Cir. 2011). The record shows that the challenged provisions make it harder for fit applicants to enter the marketplace and provide the benefits of lower prices, greater access, and higher quality to consumers. It is irrational to instead protect incumbents who may be unable or unwilling to provide adequate service.

CONCLUSION

This Court should reverse the district court and direct entry of judgment in Mr. Noland's favor.

DATED January 31, 2025.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure and this Court's [pending]Order on Appellant's Motion to File an Overlength Brief, I certify that this reply brief is printed with a proportionately spaced New Times Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 7,465, excluding Table of Contents, Table of Authorities, and Certificate of Compliance.

DATED: January 31, 2025.

/s/ Ethan W. Blevins
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