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MONTANA ELEVENTH JUDICIAL DISTRICT COURT
FLATHEAD COUNTY

PARKER NOLAND, Plaintiff, v. STATE OF MONTANA, et al., Defendants, EVERGREEN DISPOSAL, INC., Intervenor.	Cause No. DV-15-2022-0001308-CR Hon. Amy Eddy **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Plaintiff Parker Noland is a 22-year-old entrepreneur who started a business in 2020 hauling construction debris in Flathead County. But he was soon ordered to cease and desist by the Montana Public Service Commission, which informed him that, under state law, he needed a Certificate of Public Convenience and Necessity (PCN) to haul garbage commercially. So he filled out a PCN application, only to have his application protested by two of the largest garbage companies in the country. After incurring thousands of dollars in attorney fees and recognizing the futility of fighting two massive corporations under a process that favors incumbents, Mr. Noland withdrew his application.

Mr. Noland now challenges certain aspects of Montana's PCN system as a violation of his constitutional right to pursue employment and make a living. He is not challenging health or safety regulations governing motor carriers, nor is he asking this Court to grant him a PCN Certificate. He is not even challenging the requirement that garbage haulers obtain a Certificate. He simply wants the opportunity to apply for one without facing two unconstitutional barriers: the ability of existing businesses to veto his application by filing protests and the Commission's consideration of what effect his business will have on his competitors.

Specifically, Mr. Noland challenges the protest procedure and need requirement established in Mont. Code Ann. §§ 69-12-321, 69-12-323, and Title 38, chapter 3, of the Montana Administrative Rules (referred to herein as the "PCN scheme") as violations of his right to pursue life's basic necessities under Article II, Section 3 of the Montana Constitution, as well as his rights to due process, equal protection, and privilege and immunities under the Montana and United States Constitutions. *See* Compl. ¶¶ 3−4. The challenged provisions, which act as a "competitor's veto" shielding existing garbage companies from competition, cannot survive rational basis review—much less the strict scrutiny demanded by Article II, Section 3.

STATEMENT OF UNDISPUTED FACTS

I. Plaintiff Parker Noland's background and attempt to obtain a PCN Certificate

After Parker Noland was medically discharged from the United States Army in 2020, he set out to start his next chapter. Noland Decl. ¶ 2. While working construction, he saw an unmet demand for debris hauling services in Flathead and Lake Counties, so he started his company, PBN LLC. *Id*. ¶¶ 3, 9. As a construction worker, he had seen that garbage pickups were frequently late, leaving debris to pile up in dumpsters on construction sites. *Id.* ¶ 3. Some of Mr. Noland's contacts in the construction industry also told him that they were frustrated with existing garbage companies in the area, who were not meeting demand. *Id.* ¶ 4. And several residents of unincorporated Kila, Montana, told him that existing providers were not willing to provide services in Kila because it was too remote. *Id.* ¶ 7.

Mr. Noland started offering debris hauling services through PBN LLC in 2021. *Id.* ¶ 9. But in September 2021, the Montana Public Service Commission ordered him to stop operating because he lacked a PCN Certificate. *Id.* ¶¶ 10–11. That was the first he had heard of Montana's PCN requirement. *Id.* ¶ 11. He accordingly applied for a PCN Certificate on behalf of his company in September 2021. *Id*. ¶ 12.

Mr. Noland soon ran into a major hurdle—the ability of incumbent companies to protest PCN applications. *Id.* ¶ 13. Because his application sought to haul garbage (broadly defined) in their service areas, two providers—Republic Services and Evergreen Disposal (the Intervenor in this case)—filed protests, claiming that his application would create a service conflict. *Id.*; *see also* Brown Decl. Ex. 5 at DEF 253−58 (the protests); Brown Decl. Ex. 4 (Evergreen Depo.)[1] at 45:24–

[1] For simplicity, after their first citation, this brief cites the deposition excerpts that are Exhibits 1–4 to the Brown declaration and the discovery responses that are Exhibits 5−9 to the Brown declaration without reference to the Brown declaration.

46:5, 51:6−12 (stating that Evergreen protested PBN LLC's application because it offered services that Evergreen also offered in its service area).

The incumbent providers also served numerous intrusive data requests on Mr. Noland, seeking information that no one would be eager to share with competitors—such as PBN LLC's tax returns, financial information, insurance, and rate schedules. Noland Decl. ¶ 14; *see also* Brown Decl. Ex. 9 at EVG 48−61, 99−109 (Republic Services' and Evergreen's data requests). Mr. Noland paid a lawyer several thousand dollars to guide him through the process and soon realized that he would need to spend thousands more, which he could not afford, to continue fighting for a PCN. Noland Decl. ¶ 15. Even then—because of the protests—his chances of getting a PCN were slim. The cost of responding to data requests and navigating a contested hearing before the Commission was compounded by the willingness of incumbent companies to seek judicial review and appeal—delaying the resolution of some applications by months or years. *Id.* ¶ 16.[2] Mr. Noland recognized that he could not pursue a Certificate due to the difficulty, time, and expense involved. *Id.* ¶ 17. With a heavy heart, he withdrew the PCN application. *Id.*

Mr. Noland still wants to offer construction debris hauling in Flathead and Lake Counties and believes there is an ongoing need for such services. *Id.* ¶¶ 8, 21–22. He further believes that he can effectively provide those services; all he wants is the chance to prove that he can run a successful business. *Id.* ¶ 21. He owns the necessary equipment, including trucks and dumpsters, and but for the ability of incumbent companies to protest applications and the requirement that the

[2] *See, e.g.*, *Matter of Big Foot Dumpsters & Containers, LLC*, 2022 MT 67, ¶ 3−6; Brown Decl. Ex. 5 at DEF 80−84 (Big Foot applied for a PCN in January 2018, and after a protest, judicial review, and appeal, withdrew its application in June 2022); *McGree Corp. v. Mont. Pub. Serv. Comm'n*, 2019 MT 75, ¶¶ 2−5 (L&L Site Services applied in July 2015 and was granted a Certificate in March 2016, after which incumbent garbage haulers sought judicial review).

Commission consider the effects of a new business on competitors, he would apply to be a Class D motor carrier. *Id.* ¶¶ 9, 19–22.

II. Montana's PCN requirement and protest procedure

The State of Montana regulates commercial motor carriers. Mont. Code Ann. § 69-12-101(12). A motor carrier who wishes to haul garbage is designated a "Class D" carrier. *Id.* § 69-12-301(4). "Garbage" is broadly defined to mean "ashes, trash, waste, refuse, rubbish, organic or inorganic matter that is transported to a licensed transfer station, licensed landfill, licensed municipal solid waste incinerator, or licensed disposal well." *Id.* § 69-12-101(10).

Class D carriers are required to operate under a PCN issued by the Commission. *Id.* § 69-12-314(1). To get a PCN, an applicant must prove that there is a "public need" for their services, a determination that is not related to the applicant's fitness or any legitimate health and safety concern, but instead based on whether existing companies are providing adequate services. *Id.* § 69-12-323(2)(a); Koopman Decl. ¶¶ 7–10.[3] Specifically, the Commission is required to consider "the transportation service being furnished . . . by any . . . other existing transportation agency" and "the effect that the proposed transportation service may have on other forms of transportation service that are essential and indispensable to the communities to be affected . . . or that might be affected by the proposed transportation service." Mont. Code Ann. § 69-12-323(2)(a). These factors are not related to an applicant's fitness, but instead to whether the applicant will compete with an existing business. *See* Koopman Decl. ¶¶ 7–10. According to the Commission's 30(b)(6) witness, an applicant must "prove that existing motor carriers cannot or will not meet the public need," and that "existing transportation services (including motor carriers) will not be harmed by the grant of authority." Brown Decl. Ex. 1 (Pub. Serv. Comm'n Depo.) at 51:24−54:9; *see also*

[3] Roger Koopman is a former Commission member who saw the PCN scheme and its effects firsthand. Koopman Decl. ¶¶ 4–5.

Koopman Decl. ¶¶ 7−9.[4] The Commission can and does reject applicants without considering their fitness, solely because the competition might harm an existing provider. *See, e.g.*, Brown Decl. Ex. 6 at DEF 7101−24 (Commission final order denying Rozel Corporation's PCN application).[5]

To make matters worse, incumbent companies—who have a strong incentive to prevent new applicants from entering the industry—can and do influence the process. Mont. Code Ann. § 69-12-321; Koopman Decl. ¶¶ 5, 11–14. Established garbage companies are considered "interested parties" who must be notified of any new application. Mont. Code Ann. § 69-12-321(1)−(2). They may then file a "protest" with the Commission. *Id.* Protests must include a statement identifying the service areas in which the established motor carrier believes there is a service conflict and a "statement of the protesting motor carrier's annual revenues" for those service areas. Mont. Admin. R. 38.3.405. Protests do not need to address applicant fitness or public health and safety, and the protest form provided by the Commission only offers space to protest because of a service conflict, not for other reasons.[6] Unsurprisingly, not a single protest from the last ten years raised any reason for protesting other than a service area conflict—and all were filed by incumbent garbage companies. *See* Brown Decl. ¶ 6.

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[4] *See also* Mont. Pub. Serv. Comm'n, *A Guide to Assist Applicants When Applying for a Certificate of Public Convenience and Necessity (PC&N) to Transport Household Goods or Garbage* 2, https://tinyurl.com/2s3syv47 (last visited Sept. 15, 2023) ("*Applicant Guide*") (explaining that the Commission reviews applications to see whether the applicant has proven a "public need" for its service, that "existing carriers cannot or will not meet the public need," and that "existing transportation services (including motor carriers) will not be harmed by the grant of authority").

[5] The process also favors incumbent providers in other ways. Not only does the Commission reject applicants it thinks could harm existing providers, but it also considers "experience" when considering whether to grant a PCN—experience that is difficult to obtain when one needs a PCN to operate. *Applicant Guide* at 2. And unlike protesting companies, which get a full refund of the $500 protest fee if an application is withdrawn, applicants only get back $300 of the $500 application fee if they withdraw. Mont. Admin. R. 38.3.402.

[6] *See Protest to Application for Intrastate Certificate of Public Convenience and Necessity*, Mont. Dep't of Pub. Serv. Reg. 1, *available at* https://tinyurl.com/3acaxhdh (last visited Sept. 15, 2023).

Protests make the application process significantly more difficult and expensive for applicants. Koopman Decl. ¶¶ 11–14. If a protest is filed, the Commission must schedule a hearing, which is not generally required. Mont. Code Ann.§ 69-12-321(1). Protesting companies inflict significant costs on applicants by propounding extensive discovery, including "data requests," as well as depositions, written interrogatories, requests for production of documents, physical and mental examinations, and requests for admission. Mont. R. Civ. P. 26(a); *see also* Mont. Admin. R. 38.2.3301.[7] Protesting companies also testify at the hearing regarding whether they think a new business is "needed"—which, of course, they have a strong incentive to dispute. *See* Mont. Code Ann. § 69-12-321(2); Koopman Decl. ¶ 12.

An application being protested is the strongest predictor for it being denied or withdrawn. Of the 24 PCN applications over the last 10 years (for which a result was provided in discovery), 12 were withdrawn, 2 were denied, and 10 were granted. *See* Brown Decl. ¶ 6. *All* 14 applications that were withdrawn or denied were withdrawn or denied after a protest. *Id.* Of the 10 that were granted, three—including that of the Intervenor in this case—were granted with no protest. *Id.* Four were granted after the protesting company withdrew its protest.[8] *Id.* And only three applications in the past decade were granted over a protest. *Id.*

III. Dr. Bailey's expert analysis of need review laws

Plaintiff's expert economist, Dr. James Bailey, has a doctorate in economics and is an Associate Professor of Economics at Providence College. Bailey Decl. ¶¶ 1, 3. He submitted an expert report finding that need review laws like those challenged here (1) reduce access to services,

[7] For example, see the extensive data requests served on Mr. Noland by Republic Services and Intervenor Evergreen Disposal. Brown Decl. Ex. 9 at EVG 48−61, 99−109.

[8] Applicants in three of those four made a concession before the protestor withdrew—two applicants amended their applications to reduce their proposed service area, and one amended the application to apply only for temporary authority. Brown Decl. ¶ 6. In only one application did a protestor withdraw where the applicant was granted the full authority for which they applied. *Id.*

(2) increase costs and prices, and (3) lead to lower service quality. Bailey Decl. Ex. 1 (Bailey Report). Based on his review of the relevant economic literature, Dr. Bailey found that laws requiring proof of "need" before a business can operate reduce access to services. Bailey Report at 16−18, 29. This is hardly surprising—need laws are designed to limit entry into an industry. Brown Decl. Ex. 2 (Ghosh Depo.) at 19:8−15, 23:21–24:7, 26:1−8 (conceding that Montana's need laws create a barrier to entry). But based on his literature review, Dr. Bailey also found empirical evidence that need laws reduced access to services in two other industries: the medical industry, where these types of laws are most common, and the trucking industry, which bears strong similarities to the garbage industry in function and equipment.[9]

Need review laws reduce access to medical services by making it difficult to build and expand new medical facilities. Bailey Report at 17. The evidence also suggests that need laws reduce access to services in rural areas—as shown by research finding that there are more rural hospitals and ambulatory surgical centers per capita in states without need laws than in states with them. *Id.* at 18.

More closely analogous to Montana's PCN scheme, the research shows similar findings in the trucking industry. Despite claims from the American Trucking Associations that making it easier to obtain a certificate of public convenience and necessity would cause service to decline and small communities to not be served at all, deregulation in 1980 either *improved* service to small cities and remote areas or had no negative effect. *Id.* at 29−30. That deregulation also coincided with a large increase in trucking firms, further evidence of an increase in access. *See id.* at 30.

[9] There appear to have not been any economic studies done directly on Montana's garbage hauling industry. Bailey Decl. ¶ 7; Bailey Report at 12.

Dr. Bailey's review of the research on need review laws also showed that need review led to increases in costs and spending in the medical industry. *Id.* at 15−16. Similarly, barriers to entry in the trucking industry led to increases in trucking rates, and elimination of need review led to lower rates. *Id.* at 28−30. Thus, the evidence shows that need review laws like those challenged in this case drive up costs and reduce access.

Finally, Dr. Bailey's review of the literature showed that need review laws like Montana's PCN scheme reduce service quality. *Id.* at 19, 27–30. In the medical industry, need laws increased mortality rates. *Id.* at 19. And in the trucking industry, removal of need review led to improvements in service quality, productivity improvements, and the willingness of firms to go off-route to pick up and deliver freight, as well as reductions in shipper complaints. *Id.* at 27–30. As in those industries, Dr. Bailey concluded that the need requirement here likely reduces the availability and quality of garbage services in Montana. *Id.* at 2, 19, 27–30.

LEGAL STANDARD

A party is entitled to summary judgment when no genuine issue of material fact exists and the party is entitled to judgment as a matter of law. *Mont. Sports Shooting Ass'n, Inc. v. State, Mont. Dep't of Fish, Wildlife, and Parks*, 2008 MT 190, ¶ 8. If the moving party establishes the absence of genuine factual issues, "the opposing party must present material and substantial evidence, rather than mere conclusory or speculative statements, to raise a genuine issue of material fact." *Motarie v. N. Mont. Joint Refuse Disposal Dist.*, 274 Mont. 239, 242 (1995). "[D]enial, speculation, or conclusory statements" are not enough to defeat summary judgment. *Peterson v. Eichhorn*, 2008 MT 250, ¶ 13. "Summary judgment is proper when a non-moving party fails to make a showing sufficient to establish the existence of an essential element of its case on which it bears the burden of proof . . . ." *Blacktail Mt. Ranch Co. v. State, Dep't of Nat. Resources Conservation*, 2009 MT 345, ¶ 7.

ARGUMENT

I. The PCN scheme deprives Mr. Noland of the right to pursue employment under Article II, Section 3 of the Montana Constitution.

Under Article II, Section 3 of the Montana Constitution, all persons have an inalienable right to "pursu[e] life's basic necessities." Mont. Const. art. II, § 3. The Montana Supreme Court has held that this includes the right to pursue employment; otherwise, "the right to pursue life's basic necessities would have little meaning, because it is primarily through work and employment that one exercises and enjoys this latter fundamental constitutional right." *Wadsworth v. State*, 275 Mont. 287, 299, 301 (1996). This right is fundamental, meaning that restrictions on it are subject to strict scrutiny. *Id.* at 302. Strict scrutiny requires the government to demonstrate a compelling state interest for its restriction that is narrowly tailored to effectuate that interest, using the least restrictive means possible. *Id.* For a government interest to be compelling, the harms the government intends to address must be real, not conjectural. *See, e.g.*, *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). And even if a governmental interest is compelling, a law is not narrowly tailored to achieve that end where it does not advance, or even contradicts, that end. *See, e.g.*, *Reed v. Town of Gilbert*, 576 U.S. 155, 171–72 (2015).

In *Wadsworth*, the Montana Supreme Court reviewed a Department of Revenue rule prohibiting the Department's real-estate appraisers from engaging in independent fee appraisals during their off-duty hours. 275 Mont. at 292. Applying strict scrutiny, the Court held the rule unconstitutional. *Id.* at 304. Although the right to pursue employment does not provide a right to a particular job, the plaintiff was not asserting a right to be employed by the Department, but a

right to pursue employment as an outside appraiser. *Id.* at 301.[10] The Court further held that the rationale advanced by the State—avoiding the appearance of impropriety—was not compelling because there had been no complaints about any appearance of impropriety when Department appraisers conducted outside appraisals. *Id.* at 303−04. The rule therefore failed strict scrutiny. *Id.* at 304.

Here, like in *Wadsworth*, Mr. Noland seeks to vindicate his fundamental right to pursue employment in his chosen profession of garbage hauling, free of unconstitutional interference. *Id.* at 293, 301; Noland Decl. ¶ 21. Like in *Wadsworth*, he is not asserting a right to or property interest in a particular job. 275 Mont. at 301. Nor is he asking this Court to order that he be given a Certificate to operate as a Class D motor carrier—that issue will ultimately be for the Commission to decide based on legitimate health, safety, and fitness criteria that he does not challenge here. Noland Decl. ¶ 20. He is instead asserting the right to pursue employment in the garbage hauling industry and to succeed or fail on his own merits—unburdened by anticompetitive laws that fail strict scrutiny. *Id.* ¶ 21.

The case of *Wiser v. State*, 2006 MT 20, provides a useful contrast. There, plaintiff denturists challenged a rule requiring that they refer certain patients to dentists; the plaintiffs claimed that they had a "fundamental right to practice denturity free of regulation." *Id.* ¶ 21. The Court rejected the challenge, concluding that there is no such fundamental right and emphasizing that, under the challenged rule, "denturists remain free to pursue denture work generally." *Id.* ¶ 23. In contrast, under the PCN scheme Mr. Noland is not "free to pursue [garbage hauling] work

[10] *See also* Thomas J. Bourguignon, *Montana Cannabis Industry Association v. State of Montana and the Constitutionality of Medical Marijuana*, 75 Mont. L. Rev. 166, 187 (2014) (observing that *Wadsworth* framed the scope of employment narrowly and held that the right to pursue employment is profession-specific).

generally." He needs a PCN Certificate to operate a garbage hauling business at all, and he can only obtain one by being subjected to the PCN scheme. Mont. Code Ann. §§ 69-12-314 to -323.[11] Also in contrast to *Wiser* (and contrary to Intervenor's claims), Mr. Noland does not seek to haul garbage "free of all regulation." *See* Evergreen Br. in Supp. of Mot. to Intervene at 8 (quoting *Wiser*). His constitutional challenge is directed only to specific anticompetitive provisions, not to every regulation governing garbage hauling. Noland Decl. ¶¶ 20–21. If his claim succeeds, he will still be subject to all legitimate health and safety statutes and regulations—such as those governing driving, commercial hauling, and proper business practices. What is at issue here is the protection of incumbent garbage companies from market competition by otherwise fit applicants.

The PCN scheme burdens Mr. Noland's right to pursue employment, as it creates a barrier to entry that carries a risk of penalties and fees if not complied with. *See* Mont. Code Ann. § 69-12-108 (listing penalties for violations). And, as described below, it does not satisfy strict scrutiny, as Defendants have not established that it furthers any compelling state interests, instead preferring to shelter in their argument that the laws are constitutional under rational basis review.[12]

Defendants assert that the anticompetitive procedures challenged here serve four State interests: (1) "ensuring the motor carrier system suits the needs of Montana," (2) "ensuring that deleterious competition does not result in rural Montana being underserved," (3) "ensuring an

[11] Although there is a limited exemption from Montana's motor carrier laws for "a city, town, or village with a population of less than 500 persons," Mont. Code Ann. § 69-12-102(1)(c), Plaintiff is not free to pursue garbage hauling work "generally" if he must confine his operations to tiny geographic areas, with no ability to grow his business. Moreover, Plaintiff risks protests and penalties even if he were to try to use this exemption, as protesting companies have in the past claimed that applicants were operating illegally when those applicants, in good faith, believed they were taking advantage of this exemption. *See* Brown Decl. Ex. 5 at DEF 511−12. And although the Commission can also grant temporary authority where "there is an immediate and urgent need," Mont. Code Ann. § 69-12-207(1), not only is such authority limited in scope, but it can be for no longer than 90 days. Mont. Code Ann. § 69-12-207(2).

[12] As discussed below, *infra* at Part II, the PCN scheme also does not survive rational basis review.

outcome that complies with state statutes," and (4) "protecting the constitutional right to participate in agency decisions that are of significant interest to the public." Brown Decl. Ex. 7 (Defs.' First Disc. Resp.) at 5. Defendants offer no evidence that the PCN scheme promotes them, even if they could be compelling. There are also less restrictive means of achieving those goals.

First, "suit[ing] the needs of Montana" is far too vague to satisfy strict scrutiny. *See Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141, 2167 (2023) (rejecting generic interest in "student body diversity" as not sufficiently compelling because it was "inescapably imponderable" and too vague to be "subjected to meaningful review"); *Rankin v. Indep. Sch. Dist. No. I-3, Noble Cnty., Okla.*, 876 F.2d 838, 840 (10th Cir. 1989) (statute failed strict scrutiny where defendants "suggested no specific state interest, compelling or otherwise, beyond a general reference to . . . fairness"). Even considering Defendants' later claim that the PCN scheme "suit[s] the needs of Montana by encouraging motor carrier operators in both rural and populated areas," Defs.' First Disc. Resp. at 11, the PCN scheme does not "encourage" motor carrier operators, it *dis*courages them. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995) (alcohol labeling law failed in part because some provisions "directly undermine and counteract" the law's aims). Incumbent garbage companies can and do protest applicants that are fit, and the Commission has denied applications because they would harm the business of existing haulers. Facing a protest is the strongest predictor of an application being denied or withdrawn—in the last ten years, all denials or withdrawals came after a protest, while applications are rarely granted over a protest. *See* Brown Decl. ¶ 6.

Defendants also provide no evidence to rebut the findings of Plaintiff's expert economist that need review laws like the PCN scheme not only *reduce* the supply of services, including in rural areas, but also increase prices and harm service quality. Bailey Decl. ¶¶ 8−19; Bailey Report

at 2, 6−30. And even assuming that encouraging motor carrier services is a compelling interest, Defendants could use less restrictive—not to mention noncontradictory—means to achieve this goal, such as by eliminating the requirement that Class D carriers receive a Certificate, providing subsidies to Class D operators, providing tax incentives to start a garbage hauling business, or actively supervising to ensure Class D operators are meeting demand.

Second, the claim that the PCN scheme ensures that "deleterious competition does not result in rural Montana being underserved" lacks evidence beyond conclusory statements by the Commission's witnesses. *See Turner Broadcasting*, 512 U.S. at 664 (to demonstrate that its asserted interests are important, let alone compelling, the government "must do more than posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural"). Defendants have produced no empirical studies demonstrating that the PCN scheme is necessary to ensure access to rural areas, or even that it *helps* access to rural areas. Defs.' First Disc. Resp. at 5, 13. And again, Defendants have no response to Dr. Bailey's finding that these types of laws actually *harm* the supply of services in rural areas. Bailey Decl. ¶¶ 10−11, 19; Bailey Report at 18. Where a statute works at cross-purposes with its alleged goal, it is not narrowly tailored. *Reed*, 576 U.S. at 172. There are also less restrictive means available to promote service in rural Montana, such as eliminating the requirement that Class D carriers receive a Certificate, subsidizing carriers in rural areas, actively supervising rural Class D operators to ensure that they are meeting demand, requiring carriers to serve all customers in their service area as a condition for receiving a Certificate (as the state already does), and preventing rural customers from being priced out of garbage hauling services by requiring carriers to charge rural and urban customers similarly.

Third, the claim that the PCN scheme "ensure[s] an outcome that complies with statutes"

is pure question-begging, and not a sufficient interest to survive strict scrutiny. The State cannot sidestep the Constitution by claiming that it has a compelling interest in complying with the very laws that are being challenged.

Fourth, the PCN scheme's protest provisions do not promote a "constitutional right to participate in agency decisions that are of significant interest to the public." Defendants' 30(b)(6) witness could not identify what constitutional provision is at issue, Pub. Serv. Comm'n Depo. at 107:18−112:3, but presumably it refers to the Montana Constitution's declaration that the "public has the right to expect governmental agencies to afford . . . reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision." Mont. Const. art. II, § 8. However, a "reasonable opportunity for citizen participation" can be satisfied by much less restrictive means than allowing incumbent companies to protest applications in what amounts to a competitor's veto. In fact, soliciting protests from existing companies may undermine participation by the general public—citizens may be discouraged from participating, fearing retaliation, if the only garbage company in their area is protesting an applicant. Furthermore, the Commission allows members of the public to submit comments and attend Commission meetings, a far less burdensome way of protecting public access than allowing incumbent companies to insert themselves into an adversarial process and requiring the Commission to base its decision on how a new competitor will affect those businesses.[13]

II. The PCN scheme deprives Mr. Noland of due process of law in violation of Article II, Section 17 of the Montana Constitution.

Montana's Constitution states that "[n]o person shall be deprived of life, liberty, or property without due process of law." Mont. Const. art. II, § 17. A restriction violates the substantive

[13] *See Public Participation*, Mont. Pub. Serv. Comm'n, https://psc.mt.gov/Documents-Proceedings/Public-Participation (last visited Sept. 5, 2023).

protections of this clause if it is not "reasonably related to a permissible legislative objective." *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 21. In determining the "legislative objective," Montana courts look to the legislature's purpose, whether expressly stated or otherwise. *Id.* ¶ 22. They do not "surmise possible purposes for the legislation" where the law makes explicit its purpose. *Id.* ¶ 23. And if legislation is not reasonably related to this purpose, then it represents a deprivation of liberty without due process of law. *Id.* ¶¶ 51−56.

Under this analysis, the Montana Supreme Court has struck down statutes and regulations that lacked a genuine fit between their means and ends or were otherwise irrational. *Id.* ¶ 56 (law prohibiting remuneration to providers of marijuana products); *Oberg v. City of Billings*, 207 Mont. 277, 281−85 (1983) (law requiring only law enforcement employees, not all state employees, to get polygraph tests); *Godfrey v. Mont. State Fish & Game Comm'n*, 193 Mont. 304, 307−10 (1981) (statutes restricting licensing of nonresident outfitters); *State v. Jack*, 167 Mont. 456, 463 (1975) (statute requiring a nonresident hunter to be accompanied by a resident guide).

A. The PCN scheme is not rationally related to the purposes of Montana's motor carrier laws.

The dual purposes of Montana's motor carrier laws are expressed in statute. Those laws exist (1) to "fully secure adequate motor transportation facilities for all users of such service and to secure the public advantages thereof," and (2) to "encourage a system of common carrier motor transportation within the state for the convenience of the shipping public." Mont. Code Ann. § 69-12-202. The legislature's express "public purpose" is the "maintenance of a common carrier motor transportation system within Montana." *Id.*

These are legitimate purposes, but the PCN scheme is not reasonably related to them; rather, it is at odds with them. The Commission does not determine whether "public convenience and necessity" supports an application—which includes evaluating the "adequacy" of existing

carriers—until it issues a final order granting or denying it. Mont. Code Ann. § 69-12-323(2)(a).[14] But the protests happen long before the Commission makes that determination. *Id.* §§ 69-12-321(1)(b), -322(1), -323(2)(a). Thus, a fit applicant who wants to operate in an area where incumbent companies are providing *in*adequate services could nonetheless face a protest from an incumbent. *Id*.; *see also* Brown Decl. Ex. 5 at DEF 514–20, 586–90. Because incumbents can protest regardless of the applicant's fitness or the incumbent's own adequacy, the protest provision enables existing companies to ensure that motor carrier services are less adequate than they otherwise would be. Where, as here, a statute on its face is at odds with its legislative purpose, it is, by definition, irrational. *Mont. Cannabis Indus. Ass'n*, ¶ 56; *see also U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528, 538 (1973) (food stamp eligibility requirements were irrational where their "practical operation" was to prevent the people who needed assistance the most from receiving it).

Furthermore, Defendants have offered no evidence to contradict the findings of Plaintiff's expert economist that this type of law degrades the availability and quality of services. Bailey Report at 6−30. Neither Defendants nor Intervenor have supplied any contrary empirical evidence. Instead, they rely on a Commission order from over 40 years ago denying the Rozel Corporation's PCN application, claiming that this order proves that the PCN scheme is necessary to protect the adequacy of motor carrier services in Montana. *See* Pub. Serv. Comm'n Depo. at 98:18−99:9, 100:5−20; 104:6−11, 145:10−16; *see also* Brown Decl. Ex. 6 at DEF 7101–24.

[14] Because these procedures are mandated by statute, and the Commission has no choice but to consider the impacts of new businesses on existing providers and allow protests, Defendants' asserted defense of quasi-judicial immunity does not apply. *See Nelson v. State*, 346 Mont. 206, 210−14 (2008) (no quasi-judicial immunity where an administrative function is mandated by statute and thus ministerial in nature). Quasi-judicial immunity is also inapposite because the Commissioners are being sued in their official, not individual, capacities. *See VanHorn v. Oelschlager*, 502 F.3d 775, 779 (8th Cir. 2007) ("[Q]uasi-judicial immunity only extends to claims against defendants sued in their individual—not official—capacities.").

Rozel does not help Defendants—in fact, it demonstrates just how irrational and arbitrary the PCN scheme is. There, the Commission denied an application not based on the applicant's lack of fitness—which it did not consider—but because more competition would supposedly make the industry more "unstable." Brown Decl. Ex. 6 at DEF 7121 ¶ 52. The Commission's basis for this view was that in the past, competition had led to "severe financial difficulties for the companies involved and resulted in the ultimate failure of each of those companies." *Id.* Because these previous companies had failed to maintain and replace equipment, the Commission felt that this justified denying Rozel's application because the protestor, Three Rivers Disposal, suggested that competition from Rozel would harm its profits and leave it similarly unable to maintain equipment. *See id.* at DEF 7109 ¶¶ 20−21, 7120 ¶ 49, 7122 ¶¶ 53−54.

Reliance on the Commission's *Rozel* decision, however, once again begs the question. The Commission's prior statement that the statute serves its purpose is not evidence that it does so. And courts have explicitly rejected the rationale applied in *Rozel. See, e.g.*, *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008) ("[M]ere economic protectionism . . . is irrational . . . ."); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir. 2013) ("[N]either precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose[.]"); *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) ("[P]rotecting a discrete interest group from economic competition is not a legitimate governmental purpose.").

Moreover, the Commission's fear that competition would lead the area at issue in *Rozel* to be underserved was untethered from reality. The Commission acknowledged in the order that each time a previous company began to fail, a new company stepped in and maintained services. Brown Decl. Ex. 6 at DEF 7120 ¶ 49. Thus, competition never created a scenario in which customers were underserved, and the Commission arbitrarily and irrationally denied Rozel's application because

of what it speculated *might* happen with more competition, not what actually *had* happened. To the contrary, competition ensured that new companies replaced inadequate ones.[15]

The Commission's concern with the unprofitability of motor carriers leading to equipment not being maintained also reveals the irrationality of the PCN scheme. Montana law requires that motor carriers be "fit, willing, and able to perform the authorized service" for their Certificates to remain in force. Mont. Code Ann. § 69-12-415. If a carrier fails to maintain its equipment, it becomes unfit and unable to provide services, as the Commission's "hybrid witness" Will Rosquist acknowledged. *See* Brown Decl. Ex. 3 (Rosquist Depo.) at 40:16−43:5. Carriers who are unable to simultaneously make a profit and maintain their equipment shouldn't be operating in the first place—not only does it leave them unable to haul garbage effectively, but it could create safety hazards. *See* Mont. Code Ann. § 69-12-415. But the rationale applied in *Rozel* would shield those very same unfit carriers from competition by a potentially superior alternative. Thus, in *Rozel* the Commission acted out of concern for potentially unfit carriers—which is not a rational way to "fully secure adequate motor transportation facilities for all users of such service and to secure the public advantages thereof." *Id.* § 69-12-202.

B. The PCN scheme is not rationally related to Defendants' asserted interests.

Because the statute is explicit about its purposes, this Court need not address Defendants' other asserted justifications for the PCN scheme in evaluating Plaintiff's state due process claim. *See Mont. Cannabis Indus. Ass'n*, ¶ 23 (courts "need not surmise possible purposes for the legislation" where the law makes explicit its purpose). But the PCN scheme is also irrational under

[15] Defendants' reliance on *Rozel* is also inapt given that the Commission granted a new application by the Rozel Corporation a decade later—because, predictably, "there was substantial unmet consumer need for additional service" during the period that the Commission shielded the incumbent from competition. *Waste Mgmt. Partners of Bozeman, Ltd. v. Mont. Dep't of Pub. Serv. Reg.*, 284 Mont. 245, 249 (1997).

Defendants' four purported justifications, discussed above. *See* Defs.' First Disc. Resp. at 5; *see also* Part I, *supra*. Defendants have not offered evidence that the challenged PCN requirements promote any of these interests—they simply claim that the law self-evidently ensures that Montana's needs are met and that it prevents deleterious competition that would result in rural Montana being underserved. As discussed below, none of the four asserted interests are sufficient.

First, as with strict scrutiny, "suiting the needs" of Montana is too vague to satisfy even rational basis review. Moreover, Defendants have offered no evidence that the PCN scheme "encourage[es] motor carrier operators in both rural and populated areas of the state" or meets any other "need." Defs.' First Disc. Resp. at 11. When asked if she had any reason to believe that the PCN scheme achieved any legitimate government interests, the Commission's 30(b)(6) representative suggested that the very fact that the laws were on the books showed that they were achieving a legitimate goal. Pub. Serv. Comm'n Depo. at 95:11−18, 105:13−107:17 ("[I]nsofar as the PCN requirement complies with the state statutes, upholding those state statutes suits the needs of Montana."). But as discussed above, the PCN scheme discourages motor carrier operators in the State. Nor does the Commission's final order in *Rozel*, discussed above, support this claim. And Defendants have offered no empirical evidence that the PCN scheme has a rational relationship to ensuring access to service or any other legitimate interest.

Second, it is the PCN scheme, not "deleterious competition," that puts rural areas at risk of being underserved. The PCN scheme *reduces* access to garbage hauling services, whether in rural or urban areas, as discussed in Dr. Bailey's expert report. Bailey Decl. ¶¶ 10–11, 19; Bailey Report at 16−19, 29−30. He found that studies examining the effect of need review laws showed that they reduced access to services in the medical industry by making it more difficult to build and expand new medical facilities. Bailey Report at 17. The research also showed that there were

more rural hospitals and ambulatory surgical centers in states without need laws than in states with them—showing that need laws likely reduced access to health care. *Id.* at 18. Of particular relevance, the research showed similar findings in the trucking industry, the type of service most analogous to garbage hauling. *Id.* at 29−30. Eliminating need review in the trucking industry improved service to small cities and remote areas, or at least had no negative or harmful effect. *Id.* at 29−30.

Defendants know, or at least should know, that need review harms access. Defendants' witness Alexandra Ghosh acknowledged that it is a regulatory barrier to entry in the Montana garbage industry and suggested that such barriers reduce the supply of goods and services where existing providers are not fully providing goods and services. Ghosh Depo. at 26:1−8, 26:21−25, 28:4−29:1. And on the rare occasions in which the Commission granted an application over a protest, it found that the existing company was unwilling or unable to provide services to everyone in its area. Brown Decl. Ex. 5 at DEF 515−17, 586−87. The Commission's order in *Rozel* also offers no proof that the PCN scheme protects access—every time an incumbent company failed, a new company was able to provide services. Brown Decl. Ex. 6 at DEF 7120 ¶ 49.

Third, Defendants' interest in "compl[ying] with state statutes" cannot support the PCN scheme. Defs.' First Disc. Resp. at 5. As Defendants' 30(b)(6) witness admitted, this refers to Mont. Code Ann. § 69-12-323, the constitutionality of which is challenged in this case. Pub. Serv. Comm'n Depo. at 95:11−18, 105:13−107:17; *see also* Defs.' First Disc. Resp. at 11. But this begs the very question that the Due Process Clause demands be answered—whether the challenged statutes bear a rational relationship to a legitimate state interest. *See, e.g.*, *Mont. Cannabis Indus. Ass'n*, ¶¶ 51−56; *St. Joseph Abbey*, 712 F.3d at 226; *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 700 (E.D. Ky. 2014). Mere question begging cannot survive rational basis review.

Fourth, Defendants claim that the PCN scheme promotes an interest in "protecting the constitutional right to participate in agency decisions that are of significant interest to the public." As noted above, Defendants' 30(b)(6) witness could not identify what constitutional provision this refers to, though presumably it is the right to "reasonable opportunity for citizen participation in the operation of the agencies." Mont. Const. art. II, § 8. For the same reasons discussed above in Part I, this interest does not suffice. The PCN scheme does not exist for the benefit of the general public, but to protect incumbent garbage companies from competition. *Cf. Bruner*, 997 F. Supp. 2d at 700 (need review law for moving companies failed rational basis review because existing moving companies were the intended beneficiaries of the power to protest, as evidenced by all protests in the prior five years being filed by those companies). The Commission's protest form even assumes that the protestant is an established garbage company protesting competition.[16] Like in *Bruner*, "[n]o member of the general public has ever filed a protest"—all protests in the past decade were by incumbents protesting a service conflict, and Defendants have offered no evidence that any member of the public has ever done so. *Bruner*, 997 F. Supp. 2d at 700; *see also,* Brown Decl. ¶ 6. As an "opportunity for citizen participation," the PCN scheme's means are severely misaligned with its ends.

C. No other legitimate interests justify the PCN scheme.

Defendants do not claim that the PCN scheme controls costs and spending or improves service quality, and this Court need not consider those potential justifications. But even if they were to make that claim, it is unsupportable. On the face of the law, it is unrelated to costs, and the Commission does not regulate rates that may be charged by motor carriers. Pub. Serv. Comm'n Depo. at 83:15−18; *Mont. Cannabis Indus. Ass'n*, ¶ 56. Basic economic theory and evidence from

[16] *See Protest to Application for Intrastate Certificate of Public Convenience and Necessity*, Mont. Dep't of Pub. Serv. Reg. 1, *available at* https://tinyurl.com/3acaxhdh (last visited Sept. 15, 2023).

other industries shows that restricting competition tends to *increase*, not decrease, costs, and neither Defendants nor Intervenor have done anything to contradict this conclusion. Bailey Decl. ¶ 9, 18–19; Bailey Report at 3−9; *see also* Ghosh Depo. at 28:14−21 (acknowledging her belief that "competition is good for prices, for consumers, for efficiency, for improvements in technological advancements"). Even if further evidence were needed, Dr. Bailey's review of the research on need review laws demonstrates that need review is not a rational means of controlling costs or prices. Need review led to *increases* in costs and spending in the medical industry. Bailey Report at 15−16. Similarly, barriers to entry in the trucking industry led to increases in trucking rates and elimination of need review led to lower rates. *Id.* at 28−30. All the available evidence shows that need review laws drive up costs.

Nor is the PCN scheme rationally related to improving quality. On its face, it has nothing to do with quality—incumbents can protest applications regardless of the quality of the services they or the applicants are offering, or their or applicants' adherence to health and safety standards. *See* Brown Decl. Ex. 5 at DEF 514–20, 586–90. And applications can be denied notwithstanding the applicants' qualifications. Mont. Code Ann. § 69-12-323; Brown Decl. Ex. 6 at DEF 7122 ¶ 54. The Commission regulates service quality under a separate statute, not challenged here. *See* Mont. Code Ann. § 69-12-415 (carriers must be fit, willing, and able to provide the authorized services). Defendants have suggested that, with competition, incumbent companies will have lower profits, which could lead to them failing to maintain equipment and resulting in poorer-quality services. *See* Pub. Serv. Comm'n Depo. at 98:18−99:9, 100:5−20; 104:6−11, 145:10−16. To the contrary, the Federal Trade Commission and Department of Justice have observed that need review laws limit the "entry of firms that could provide *higher* quality services than incumbents"

and "shield[] incumbents from the need to offer improved or innovative services."[17] The PCN scheme can be expected to reduce quality, not increase it. And Dr. Bailey's report demonstrates that need review laws lead to lower-quality services. Bailey Report at 19, 27−30.

Intervenor Evergreen Disposal offers a different justification for the PCN scheme: that it promotes public health and safety by "minimizing the number of heavy trucks on the roadways" and "minimizing wear and tear to public facilities." Brown Decl. Ex. 8 (Int's. Resp. to Pl's. First Interrogs.) at 6.[18] But a regulation cannot survive rational basis review where its "relationship to an asserted goal is so attenuated as to render [it] arbitrary or irrational." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985); *see also Zobel v. Williams*, 457 U.S. 55, 61−63 (1982) (discrimination against newer residents was not rationally related to its goals of creating a financial incentive for individuals to establish and maintain in-state residence and assuring prudent management of state resources); *Moreno*, 413 U.S. at 535−36 ("[E]ven if we were to accept as rational the Government's wholly unsubstantiated assumptions . . . we still could not agree with the Government's conclusion that [the challenged regulation] constitutes a rational effort to deal with these concerns."). Here, the relationship between the challenged PCN scheme and the goals of maintaining roads and other public facilities is nonexistent. The PCN scheme has nothing to do with public maintenance. It places no limits on the number of trucks that existing companies can use, and those companies can protest new applicants that are small businesses unlikely to cause

[17] FTC and U.S. Dep't of J., *Improving Health Care: A Dose of Competition* 4−6 (July 2004) https://tinyurl.com/y7edc745 (emphasis added). Empirical studies on need review led Congress to repeal federal incentives for states to enact such laws. *Id.* at 1.

[18] Intervenor also claims that "regulation of garbage . . . promotes safety and accountability by requiring that haulers meet insurance requirements." Int's. Resp. to Pl's. First Interrogs. at 6. But Mr. Noland is not challenging insurance requirements, nor is he challenging general "regulation of garbage." The State can require that motor carriers have valid insurance without the provisions challenged in this case.

damage, such as Mr. Noland's. *Id.* There is also no evidence to substantiate the claim that eliminating the unconstitutional barrier to entry in the PCN scheme will increase damage to roads or other facilities. There is simply no congruity between the goal of public maintenance and the PCN scheme, such that "to premise [Mr. Noland's] right to earn a living . . . on that scheme is wholly irrational and a violation of [his] constitutionally protected rights." *Clayton v. Steinagel*, 885 F. Supp. 2d 1212, 1215−16 (D. Utah 2012); *see also Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1118 (S.D. Cal. 1999) ("Even given due deference, the Act and regulations as applied to [the plaintiff] fail[ed] to pass constitutional muster" because they rested on grounds irrelevant to achievement of the asserted government interests).[19]

III. The PCN scheme deprives Mr. Noland of equal protection of the laws in violation of Article II, Section 4 of the Montana Constitution.

The Montana Constitution requires that "[n]o person shall be denied the equal protection of the laws." Mont. Const. art. II, § 4. Where, as here, there is no suspect classification involved, courts ask whether the challenged statute irrationally treats the plaintiff differently than others similarly situated. *See, e.g.*, *Oberg*, 207 Mont. at 281−82. "A classification is not reasonable if it . . . 'imposes peculiar disabilities upon [a] class of persons arbitrarily selected from a larger number of persons, all of whom stand in the same relation to privileges conferred or disabilities imposed.'" *Mont. Cannabis Indus. Ass'n*, ¶ 55 (quoting *Kottel v. State*, 2002 MT 278, ¶ 55) (cleaned up).

[19] The PCN scheme similarly lacks congruity with Intervenor's claimed interests in "promot[ing] environmental protection" and "promot[ing] public right to know by ensuring that the public has access to hauler information." Int's. Resp. to Pl's. First Interrogs. at 6. The PCN scheme on its face has nothing to do with environmental protection or providing public information about garbage haulers. Mr. Noland is not challenging any environmental regulations, only those enabling the competitor's veto—which existing companies can currently exercise regardless of their or applicants' environmental footprints. And eliminating the PCN scheme would not stop the Commission from collecting or disseminating reports from haulers, which it currently makes available for the public to view on its website. *Reports*, Mont. Pub. Serv. Comm'n, https://psc.mt.gov/Regulated-Utilities/Reports (last visited Sept. 15, 2023).

Because the PCN scheme irrationally treats Mr. Noland differently than others similarly situated, it violates his right to equal protection.

In *Oberg v. City of Billings*, the Montana Supreme Court struck down a statute providing that law enforcement agency employees, but not other public employees, could be compelled to take a polygraph test as a condition of employment. 207 Mont. at 281−82. Observing that "the purpose of the legislation is of vital concern," the court held that there was no rational basis to justify singling out law enforcement employees. *Id.* And in response to the claim that the provision was necessary to ensure that law enforcement agencies met a high standard of integrity, the court noted that this concern applies to all government agencies. *Id.* at 282. The polygraph condition could not survive rational basis review. *Id.* at 282−85.

Here, as in *Oberg*, the PCN scheme creates irrational distinctions between similarly situated individuals, in two ways. First, it arbitrarily subjects garbage haulers to requirements that do not apply to other motor carriers. For example, affected parties can only protest applications for certificates to be a transportation network carrier for reasons of fitness. Mont. Code Ann. § 69-12-321(1)(c).[20] And other types of motor carriers, such as moving companies and taxis, do not require a certificate from the Commission at all. *See id.* § 69-12-301(1). But parties can protest garbage hauler applications for any reason (although in practice, have only done so because of purported service conflicts). *Id.* § 69-12-321(1)(c); Brown Decl. ¶ 6. And the State not only requires aspiring garbage haulers to get a Certificate, it requires the Commission to consider the effects of competition on existing haulers, a consideration unique to garbage hauling. Mont. Code

[20] Unlike protests of Class D PCN Certificate, the protest form for the transportation network carriers does not ask about the protestant's PSC number, a service area conflict, or the protestant's revenues from that service area. Mont. Code Ann. §§ 69-12-321(1)(c), 69-12-340. *Protest to Application for Intrastate Certificate of Compliance*, Mont. Pub. Serv. Comm'n at 1, https://tinyurl.com/3acaxhdh (last visited Sept. 15, 2023).

Ann. §§ 69-12-301(1), -323(5)(a). If Mr. Noland wanted to haul something else, he would not face protests. Thus, while the PCN scheme is not well-tailored to ensuring adequate access to motor carrier services, it is effective at accomplishing one goal—protecting incumbent carriers from market competition. This distinction from other kinds of haulers is not justified by an interest in "adequate" motor carrier facilities, since that concern is no less great for haulers of construction equipment, taxis, rideshares, moving companies, and any other motor carrier. *See id.* § 69-12-202. Singling out garbage haulers in this way is arbitrary and irrational. *See, e.g.*, *Merrifield*, 547 F.3d at 991 n.15.

Second, the PCN scheme creates an arbitrary distinction between incumbent garbage haulers and applicants. *See, e.g.*, *Bruner*, 997 F. Supp. 2d at 697−701 ("[T]he statutes run afoul of equal protection rights by favoring existing moving companies over new applicants."). This type of economic protectionism cannot survive rational basis review. *Id.* at 700−01. Haulers who have already received Certificates can haul garbage, but those without Certificates cannot, even if they are equally fit and able to operate. Mont. Code Ann. § 69-12-314. And there is nothing stopping an incumbent hauler from protesting and effectively vetoing a fit applicant solely because it does not want to face competition—and nothing stopping the Commission from denying a Certificate on that basis.[21] These distinctions lack any reasonable relation to providing adequate motor transportation services in Montana—they are pure favoritism, and therefore irrational. *See, e.g.*, *Merrifield*, 547 F.3d at 991 n.15, *Bruner*, 997 F. Supp. 2d at 697−701.

IV. The PCN scheme deprives Mr. Noland of his Fourteenth Amendment rights.

Although economic liberty claims under the Fourteenth Amendment's Due Process and Equal Protection Clauses are often reviewed for rational basis, under the test recently articulated

[21] As noted above, the PCN scheme also does not treat incumbents and applicants equally with respect to fee refunds. Mont. Admin. R. 38.3.402.

by the United States Supreme Court in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), and *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), Mr. Noland's right to earn a living is fundamental and should therefore receive strict scrutiny. The right to earn a living is deeply rooted in our nation's history and tradition, as it derives from English common law and our nation's Founding through the ratification of the Fourteenth Amendment. *See, e.g.*, *Darcy v. Allein* (*The Case of Monopolies*), 74 ER 1131 (K.B. 1602); James Madison, *Property*, Nat'l Gazette (Mar. 27, 1792); Cong. Globe, 42nd Cong., 1st Sess. App. 86 (1871) (statement of Rep. Bingham). As described above with Article II, Section 3 of the Montana Constitution, because no evidence has been offered that the PCN scheme is narrowly tailored to fulfill a compelling interest, using the least restrictive means possible, it cannot survive strict scrutiny.

Nevertheless, at a minimum, under the Fourteenth Amendment's Due Process Clause any restriction on the right to earn a living must have a rational relationship to a legitimate state interest. *See, e.g.*, *St. Joseph Abbey*, 712 F.3d at 221−27; *Bruner*, 997 F. Supp. 2d at 700; *see also New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (need review for sellers of ice is unconstitutional under the Fourteenth Amendment). Similarly, under the Equal Protection Clause, any law treating similarly situated groups differently must have a rational relationship to a legitimate state interest where no fundamental right or suspect classification is implicated. *Merrifield*, 547 F.3d at 989; *Craigmiles*, 312 F.3d at 227−29.

Rational basis review, although deferential to the government, is "not toothless." *Craigmiles*, 312 F.3d at 229 (quoting *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 532 (6th Cir. 2002)). It establishes a presumption in favor of the constitutionality of a statute or regulation, but not an irrebuttable one. *See, e.g.*, *St. Joseph Abbey*, 712 F.3d at 223. If the evidence demonstrates that a law is not rationally tailored to its ends, then it violates the federal Constitution.

Id. The rational basis test does not require blind deference. *Merrifield*, 547 F.3d at 988−92; *see also Craigmiles*, 312 F.3d at 227−29.

For example, in *Merrifield v. Lockyer*, the U.S. Court of Appeals for the Ninth Circuit struck down a licensure law for pest controllers under the Equal Protection Clause. The plaintiff alleged that the law discriminated "between non-pesticide pest controllers of vertebrate animals such as 'bats, raccoons, skunks, and squirrels,' and non-pesticide pest controllers of 'mice, rats, or pigeons.'" 547 F.3d at 988. Only the former were exempt, which the plaintiff argued was irrational. *Id.* at 988−89. The court agreed and held that the exemption had no purpose other than illegitimate protectionism. *Id.* at 990−91. Because those exempted were more likely to encounter pesticide use than those not exempted, it did "not logically follow . . . that removing the licensing requirement for non-pesticide control of less common pests—especially those more commonly and effectively controlled by pesticides—would pose a lesser risk to public welfare." *Id.* at 991. The court also held that "the licensing scheme in this case specifically singles out pest controllers." *Id.* In the eyes of the court, "this type of singling out, in connection with a rationale so weak that it undercuts the principle of non-contradiction, fails to meet the relatively easy standard of rational basis review." *Id.* The court therefore concluded that the law was improperly "designed to favor economically certain constituents at the expense of others similarly situated." *Id.*

In *St. Joseph Abbey*, the U.S. Court of Appeals for the Fifth Circuit similarly held that a law restricting everyone but licensed funeral directors from selling caskets failed rational basis review. 712 F.3d at 223−27. The state's argument that the law protected consumers was betrayed by the fact that it did not require licenses for casket retailers or insist that casket retailers employ a trained funeral director—it gave the funeral industry control over casket sales. *Id.* at 224. Becoming a licensed funeral director also did not require instruction on caskets and there was no

evidence that non-funeral-directors were engaged in widespread unfair or deceptive practices. *Id.* at 224−26. There was also no evidence that the law promoted health and safety, given that the state "does not even require a casket for burial, does not impose requirements for their construction or design, does not require a casket to be sealed before burial, and does not require funeral directors to have any special expertise in caskets." *Id.* at 226. "[T]he great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for regulation." *Id.*

Plaintiffs have also found success in rebutting the government's asserted justifications for need review laws similar to those in Montana. *See Bruner*, 997 F. Supp. 2d 691; *Liebmann*, 285 U.S. 262 (1932). In *Liebmann*, an established ice manufacturer sought to enjoin an individual from selling ice because he lacked a license to do so, which he could only obtain via proof of "necessity," which, like in Montana, was determined based on whether existing manufacturers could meet the "public needs." 285 U.S. at 271−72. The U.S. Supreme Court held that the need regulation was a mere pretext—"[s]tated succinctly, a private corporation here [sought] to prevent a competitor from entering the business of making and selling ice." *Id.* at 278. Because the Court was "not able to see anything peculiar in the business here in question which distinguishes it from ordinary manufacture and production," the law was unconstitutional under the Fourteenth Amendment because "a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistent with the Fourteenth Amendment." *Id.* at 278−80.

Meanwhile, in *Bruner*, the plaintiff successfully challenged a law that, like Montana's PCN scheme, required moving companies to prove that their services were "needed" and subjected them to protests by incumbent movers. 997 F. Supp. 2d at 693−95. Kentucky claimed that the need law

and protest procedure were necessary to prevent "excess entry" into the moving industry, which—much like Defendants claim in this case—could lead to unprofitable moving companies cutting costs and endangering public health and safety. *Id.* at 700. But the court found that this was a mere pretext—as the law was applied, "an existing moving company c[ould] essentially 'veto' competitors from entering the moving business for any reason at all, completely unrelated to safety or societal costs." *Id.* The scheme in *Bruner* served only to protect the incumbent companies from competition—and therefore failed rational basis review. *Id.* at 701.

As in *Merrifield*, *St. Joseph Abbey*, and *Bruner*, Montana's PCN scheme fails rational basis scrutiny under the Fourteenth Amendment. Protecting incumbent companies from competition is not a legitimate end. *See, e.g.*, *Merrifield*, 547 F.3d at 991 n.15; *St. Joseph Abbey*, 712 F.3d at 222; *Craigmiles*, 312 F.3d at 224; *Bruner*, 997 F. Supp. 2d at 700. And where the government offers pretextual arguments for a protectionist regulation, "[n]o sophisticated economic analysis is required" to hold that the regulation fails rational basis review. *Bruner*, 997 F. Supp. 2d at 701 (quoting *Craigmiles*, 312 F.3d at 224). As discussed above with Mr. Noland's claims under the Montana Constitution, the PCN scheme is not reasonably related to any of Defendants' asserted interests, or to any other conceivable legitimate end. *See supra* Part II.[22]

CONCLUSION

Because he is entitled to judgment as a matter of law and there are no genuine issues of material fact, Plaintiff respectfully asks this Court to grant summary judgment in his favor.

[22] Although the Supreme Court has limited the protections of the Fourteenth Amendment's Privileges or Immunities Clause, *see The Slaughter-House Cases*, 83 U.S. 36 (1872), the PCN scheme also violates Mr. Noland's right to pursue a common and lawful occupation under that clause. U.S Const. amend. XIV, § 1. The Clause's author, Rep. John Bingham, viewed it as protecting "our own American constitutional liberty . . . to work an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellowmen, and to be secure in the enjoyment of the fruits of your toil." Cong. Globe, 42nd Cong., 1st Sess. App. 86 (1871) (statement of Rep. Bingham). Plaintiff seeks to preserve this argument for possible appeal.

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Respectfully submitted,

/s/ Ethan W. Blevins

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CERTIFICATE OF SERVICE

I, Ethan Winfred Blevins, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief In Support of Motion to the following on 09-15-2023:

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