IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

TRACIE PABST and BIG SKY SHUTTLE, INC.,

Plaintiffs,

v.

TIM FOX, Attorney General of Montana; BRAD JOHNSON, Chairman of the Montana Public Service Commission; TRAVIS KAVULLA, Vice-Chairman of the Montana Public Service Commission; KIRK BUSHMAN, ROGER KOOPMAN, BOB LAKE, Commissioners of the Montana Public Service Commission; and NICKIE ECK, Business Operation Supervisor, Montana Public Service Commission, all in their official capacities,

Defendants.

No. 6:15-cv-00006-CCL

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS; INTRODUCTION AND STATEMENT OF FACTS

Jury Trial Not Demanded

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INTRODUCTION

Plaintiffs Tracie Pabst and her business Big Sky Shuttle, Inc., filed suit in this Court on January 29, 2015, to challenge the constitutionality of a Montana law that unreasonably restricts their right to earn a living. Complaint [Docket No. 1] ¶ 1. Pabst[1] founded Big Sky Shuttle in 2006 to provide transportation services between Bozeman and Big Sky, Montana, on a contract basis with a private club. *Id.* ¶ 2. Now she would like to operate the company as a taxi service in Big Sky, instead of as a shuttle service. *Id.* Pabst is fully qualified and competent to perform transportation services, and her company has provided transportation services to approximately 170,000 passengers without a single accident or moving violation. *Id.* ¶¶ 3, 10. But Montana law prevents her from operating a taxi company unless she first undergoes an arbitrary, irrational, and discriminatory licensing procedure which essentially requires her to *get permission from all existing taxi companies* before she can start her business. *Id.*

Montana law requires a person to have a Certificate of Public Convenience and Necessity (PCN) in order to operate a taxi company. Mont. Code Ann. § 61-12-312.

[1] Unless otherwise specified, Plaintiffs are herein referred to collectively as "Pabst."

When a person applies for a PCN, the Montana Public Service Commission[2] notifies all "interested part[ies],"—*i.e.*, existing taxi companies—and gives them the opportunity to file protests against the granting of the PCN application. Mont. Code Ann. §§ 69-12-321(1) & (2). An existing taxi company can file a protest simply because it does not want to have to compete economically against a new company. Complaint ¶¶ 21, 29.

The law requires that a protest identify the geographical areas that the protestor is currently serving, and include a "statement of the protesting motor carrier's annual revenues received for services provided" in those areas, to show that the applicant's proposed business would "conflict"—*i.e.*, compete economically—with the protesting company's operations. Mont. Admin. R. 38.3.405(1).

When a protest is filed, it triggers a mandatory hearing where the PCN applicant must prove to the Commission's satisfaction that she should be allowed to start a new transportation business. Mont Code Ann. § 69-12-321(1). A corporate applicant, like Plaintiff Big Sky Shuttle, Inc., must be represented at the hearing by a licensed attorney. *Weaver v. Law Firm of Graybill, Ostrem, Warner & Crotty*, 246 Mont. 175,

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[2] Defendants are sued in their official capacities pursuant to *Ex parte Young*, 209 U.S. 123 (1908), but are referred to herein collectively as "Commission" for ease and brevity.

178 (1990). The hearing process can therefore be an expensive undertaking. Complaint ¶ 43.

The Commission then uses vague and anti-competitive criteria to decide whether to issue a PCN. *Id.* ¶ 4. For example, the Commission must "give reasonable consideration to the transportation service being furnished or that will be furnished by any . . . existing transportation agency" and "the effect which the proposed transportation service may have upon other forms of transportation service which are essential and indispensable to the communities to be affected by such proposed transportation service or that might be affected thereby." Mont. Code Ann. § 69-12-323(2)(a). In other words, the Commission may refuse the applicant a PCN regardless of her skills, qualifications, experience, or fitness to practice the trade of transporting persons if it concludes that the "public convenience and necessity" does not warrant a new taxi company, or that the applicant would compete against "other forms of transportation" in a way that would "affect[]" them economically. *Id.* The terms "reasonable consideration," "public convenience and necessity," "essential and indispensable," and "affected" are not defined in any statute, regulation, case law, or other binding legal authority in Montana. Complaint ¶ 25.

Thus the PCN requirement in Mont. Code Ann. §§ 69-12-312, 69-12-321, and 69-12-323, and Title 38, chapter 3 of the Montana Administrative Rules operate as an unconstitutional "Competitor's Veto," whereby existing firms can block economic competition against themselves for reasons that lack a rational relationship to a legitimate government interest. *See Bruner v. Zawacki*, 997 F. Supp. 2d 691, 697 (E.D. Ky. 2014).

Pabst alleges that this Competitor's Veto is unconstitutional because it allows existing businesses to subject PCN applicants to an expensive, time-consuming, and burdensome hearing process for reasons unrelated to the applicant's fitness, and because the laws empower the Commission to deny applications based on purely protectionist criteria. Complaint ¶¶ 29-31; *see also Bruner*, 997 F. Supp. 2d at 699 (virtually identical PCN law was unconstitutional because it "provide[d] an umbrella of protection for preferred private businesses while blocking others from competing, even if they satisfy all other regulatory requirements"); *cf. Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008) ("[E]conomic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest.").

Pabst further alleges that the challenged laws provide only vague, undefined, and unintelligible standards for determining whether the Commission will grant or withhold a PCN from an applicant, and the Commission therefore enjoys unbridled discretion in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Complaint ¶¶ 56-59; *see Yick Wo v. Hopkins*, 118 U.S. 356, 368 (1886) (licensing law that did "not prescribe a rule and conditions" but allowed officials to grant or deny business permits "at their mere will and pleasure" violated Equal Protection and Due Process Clauses). Plaintiff Pabst also asserts that the challenged laws abridge the privileges or immunities of citizenship in violation of the Fourteenth Amendment. Complaint ¶ 63.

The Commission moves to dismiss on the basis that Pabst did not apply for a PCN and therefore her claims are not ripe, and that Pabst fails to state a claim for a violation of the Privileges and Immunities Clause. Defendants' Motion to Dismiss (MTD) [Docket No. 19] at 11, 19. The Commission further argues that Plaintiffs' unbridled discretion claims are not ripe. *Id.* at 19.

LEGAL STANDARD FOR A MOTION TO DISMISS

The Commission's motion to dismiss Pabst's case on the grounds of lack of ripeness is brought pursuant to Fed. R. Civ. P. 12(b)(1). *Chandler v. State Farm*

Mutual Auto. Ins. Co., 598 F.3d 1115, 1122 (9th Cir. 2010); *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). In reviewing a Rule 12(b)(1) motion, the Court must accept all factual allegations in the Complaint as true and make all inferences in the light most favorable to Pabst. *Carson Harbor Vill., Ltd. v. City of Carson*, 353 F.3d 824, 826 (9th Cir. 2004).

Defendants' motion to dismiss for failure to state a claim is brought pursuant to Rule 12(b)(6). A 12(b)(6) motion must be denied if the Complaint alleges facts that, if true, would "plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009). If so, dismissal is improper "even if it appears 'that a recovery is very remote and unlikely.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (citation omitted). "At the pleading stage, 'general allegations embrace the specific facts that are necessary to support the claim.'" *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1121 (9th Cir. 2009) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

Under both rules, this Court "should 'construe pleadings to do substantial justice' and give the plaintiff 'the benefit of the doubt if his pleading makes out any claim for relief.'" *Charfauros v. Bd. of Elections*, 249 F.3d 941, 956-57 (9th Cir.

2001) (citations omitted). Pabst's complaint easily withstands Defendants' motion under both Rules 12(b)(1) and 12(b)(6).

ARGUMENT

I

PLAINTIFFS' CLAIMS ARE RIPE FOR REVIEW

A. A Plaintiff Need Not Submit to an Allegedly Unconstitutional Licensing Scheme Before Challenging It in Court

A plaintiff has standing if she has suffered a concrete and particularized injury, fairly traceable to the defendant's conduct, which the court can remedy. *Lujan*, 504 U.S. at 560-61. In a case in which the plaintiff seeks *prospective* relief, such as this one, she need not wait for the government to take action against her before bringing suit. *See Merrifield*, 547 F.3d 980. Where a plaintiff is forbidden to engage in constitutionally protected activity because she is threatened with likely prosecution if she does so, she has standing to seek a court order to enjoin the defendants' future conduct. *Id.* Thus, where a person must obtain an occupational license before engaging in the profession of her choice, she may seek prospective injunctive relief challenging the constitutionality of that licensing requirement without first applying for the license. *Id.*; *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d

1011, 1019 (9th Cir. 2009); *Bruner v. Zawacki*, No. 3:12-57-DCR, 2013 WL 684177, at **4-5 (E.D. Ky. Feb. 25, 2013) (plaintiff not required to apply for PCN before challenging constitutionality of PCN laws); *Munie v. Koster*, No. 4:10CV01096, 2011 WL 839608, at *3 (E.D. Mo. Mar. 7, 2011) (same).

The Supreme Court has made clear that a pre-enforcement challenge is constitutionally ripe if: (1) the plaintiff has alleged an intention to act in a manner affected with a constitutional interest, but proscribed by the challenged law; and (2) there exists a credible threat of prosecution. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1173 (9th Cir. 2011).

In *Babbitt*, the Supreme Court held that a preenforcement challenge to laws prohibiting certain consumer publicity campaigns was ripe even though the plaintiffs were not engaged in such campaigns at the time, and even though the penalty provisions "ha[d] not yet been applied" to the plaintiffs. 442 U.S. at 302. The Court held that because the challenged statute proscribed the conduct on its face, the plaintiffs could not engage in that conduct without risking enforcement penalties, and they therefore faced a realistic prospect of prosecution if they engaged in the

prohibited conduct. *Id.* The plaintiffs could therefore seek prospective relief in the form of an injunction to bar such enforcement in the future. *Id.*; *see also City of Chicago v. Atchison, Topeka, & Santa Fe Ry. Co.*, 357 U.S. 77, 89 (1958) (company prohibited from engaging in business without obtaining a PCN "was not obligated to apply for a certificate of convenience and necessity and submit to the administrative procedure incident thereto before bringing the action").

Likewise, in *Merrifield*, 547 F.3d at 980, the Ninth Circuit rejected arguments nearly identical to those made by the Commission here. *Id.* In that case, the plaintiff challenged the constitutionality of a licensing law that involved irrational licensing criteria. *Id.* Like Pabst, he refused to apply for the license, and instead brought Section 1983 claims for prospective declaratory and injunctive relief. *Id.* at 982. The state argued that the plaintiff lacked standing because he had not applied for a license. The district court rejected these arguments, finding that the plaintiff could seek an injunction to bar enforcement of the unconstitutional licensing law. *Merrifield v. Schwarzenneger*, No. 04-0498 MMC, 2004 WL 2926161, at **2-3 (N.D. Cal. July 16, 2004). The Ninth Circuit agreed, holding that the plaintiff "ha[d] standing because he [could not] engage in his trade unless he first satisfie[d] the current licensing

requirement." 547 F.3d at 981 n.1. He could therefore challenge the constitutionality of the licensing procedure prospectively. No further "ripening" was necessary.

The facts of *Bruner*, 2013 WL 684177, are almost identical to those presented here. In that case, the plaintiff sought prospective injunctive relief to challenge the constitutionality of a Competitor's Veto law very similar to Montana's. *See* 2013 WL 684177, at **1-2. The government defendants argued that the case was unripe because the plaintiff had not applied for a PCN. *Id.* at *5. The court rejected these arguments, because "there is no requirement that a plaintiff in a § 1983 action subject themselves to the statutes they allege are unconstitutional." *Id.* at *5.[3] *Accord, Munie*, 2011 WL 839608, at *3.

Pabst's case is ripe. She alleges that she intends to engage in the taxicab business, and is fit, willing, and able to do so. Complaint ¶¶ 2, 12. That conduct is proscribed by the challenged statute, because she cannot operate a taxicab business without first applying for a PCN and subjecting herself to the challenged process. *Id.* ¶¶ 3, 18. If Pabst were to operate without a license, she would face civil penalties and misdemeanor charges. *Id.* ¶ 18. Defendants are charged with enforcing the

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[3] The plaintiff ultimately prevailed. *See Bruner*, 997 F. Supp. 2d at 697-701.

challenged statutes, *id.* ¶¶ 13-17, and regularly do so.[4] *Id.* ¶¶ 21, 34, 51. The Commission would likely punish Pabst if she were to operate a taxi company without first obtaining a license, and Pabst alleges that she has refrained from operating a taxi company out of fear of such prosecution. *Id.* ¶ 26. Because her desired conduct is proscribed on the law's face, and because she alleges a credible fear of prosecution if she were to operate a taxi in violation of that law, she has alleged a threat of injury that is sufficiently imminent to satisfy the ripeness requirement. *See Babbitt*, 442 U.S. at 298; *Salazar*, 638 F.3d at 1173.

The Commission argues that Pabst has not been injured because she has not yet applied for and been denied a license. MTD at 2. But this is a case for *prospective* relief. Complaint ¶ 6. Pabst does not claim that her injury stems from any previous action by the Commission. Rather, she claims that she is barred from exercising her constitutionally protected right to pursue a lawful occupation of her choice unless she first undergoes an unconstitutional procedure to obtain a license, and she seeks prospective relief to enjoin the Commission from applying that procedure in the

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[4] The Commission routinely denies applications for PCNs. *See*, *e.g.*, *Billings Yellow Cab, LLC v. State ex rel. Dep't of Pub. Serv. Regulation*, 376 Mont. 463, 465 (2014) (taxi company's appeal of denial of CPCN); *In the Matter of Green Taxi, LLC*, Mont. Dep't of Public Service Regulation, Docket T-12.16.PCN, Order No. 7240 (Mar. 6, 2013) (denying in part an application for a CPCN in the taxicab industry).

future. *Id.* ¶¶ 2, 6. She need not subject herself to that unconstitutional licensing law before challenging its constitutionality. *Merrifield*, 547 F.3d at 980; *Bruner*, 2013 WL 684177, at *5.

The Commission relies heavily on the unpublished Nevada District Court decision in *Underwood v. Mackay*, No. 3:12-cv-00533, 2013 WL 3270564 (D. Nev. June 26, 2013), but that case was wrongly decided, is on appeal in the Ninth Circuit, and is not binding on this Court. *See Starbuck v. City & Cnty. of San Francisco*, 556 F.2d 450, 457 n.13 (9th Cir. 1977) (district court opinions are not binding on other district courts). The *Underwood* court erred in holding that a case challenging the constitutionality of a licensing requirement was unripe because the plaintiff "may well [have] succeed[ed]" in obtaining a license if he had applied. 2013 WL 3270564, at *7. A plaintiff may challenge the constitutionality of arbitrary and unconstitutional licensing criteria without first applying for a license under those criteria. *See Kaahumanu v. Hawaii*, 682 F.3d 789, 796 (9th Cir. 2012) ("Plaintiffs who challenge a permitting system are not required to show that they have applied for, or have been denied, a permit."); *Long Beach Area Peace Network*, 574 F.3d at 1019 ("[a] plaintiff 'need not apply for a benefit conditioned by a facially unconstitutional law,' but must demonstrate a 'serious[ ] interest [ ] in subjecting [him]self to' the challenged

measure, and must demonstrate that 'the defendant [is] seriously intent on enforcing[ ] the challenged measure.'" (citations omitted)). Because Pabst cannot engage in the constitutionally protected behavior of earning a living without subjecting herself to prosecution, her case is ripe. *Merrifield*, 547 F.3d at 980.

**B. No Further "Ripening"
Would Aid This Court's Decision**

The ripeness doctrine is intended to ensure sufficient "factual development" to permit the Court to resolve legal issues. *Chang v. United States*, 327 F.3d 911, 922 (9th Cir. 2003). But where, as here, the matter is a question of law, and the law in question will certainly apply, Complaint ¶ 3; MTD at 2, the claim is not speculative and no additional administrative procedures are necessary to ripen the case. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967).

In *Abbott Labs.*, a group of drug manufacturers challenged a government restriction that required them to provide additional labeling for their products. 387 U.S. at 138-39. Failure to comply could have resulted in civil or criminal penalties. *Id.* at 153. The manufacturers argued that the government had exceeded its statutory authority by promulgating that rule. *Id.* at 138-39. The government contended that the manufacturers' claims were not ripe because they had not yet been penalized, and might never have been. *Id.* at 154. The Court rejected these arguments, explaining

that "[w]here the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts . . . must be permitted." *Id.* at 153; *see also United States v. Storer Broad. Co.*, 351 U.S. 192, 200 (1956) (challenge was ripe even though the plaintiff had no application pending before the defendants because the plaintiff "[could not] cogently plan its present or future operations" or "plan to enlarge the number of its . . . stations" because of the licensing rule).

Here, as in *Abbott Labs.*, there is no question that the licensing requirements, including the Competitor's Veto provisions, apply to Pabst. MTD at 2. Nor is there any question that she is forbidden from operating a taxi company without a PCN; she would risk criminal and civil penalties if she tried to operate a taxi business without complying with the challenged procedure. Complaint ¶ 26. That procedure on its face allows the Commission to deny applications based on criteria wholly unrelated to Pabst's fitness or capacity to operate a taxi service, Complaint ¶¶ 29-31, even though the Constitution forbids the state from imposing licensing requirements that are not related to her fitness and capacity. *See Schware v. Bd. of Bar Exam'rs of the State of N.M.*, 353 U.S. 232, 239 (1957). Further factual development would not alter the

Competitor's Veto process, or change its constitutionality, nor change the fact that Pabst is currently forced to either risk prosecution or forego the exercise of her constitutionally protected rights. Her case is thus ripe.[5]

C. Plaintiff's Claims Would Be Redressed by a Decision in Her Favor

The Commission argues that Pabst's case is not ripe because she never applied for a license, and therefore she may be denied a license for failing to meet statutory criteria other than the challenged requirements.[6] MTD at 2. This is a fallacious argument that misunderstands the nature of Pabst's claim. Her asserted injury is not the denial of a license; rather, she complains that she is prohibited from operating a taxi company unless she submits to a licensing procedure which employs arbitrary and irrational criteria in determining who gets a license and how. Complaint ¶ 3. That

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[5] Indeed, if Pabst were to submit an application, she would then be barred from seeking this Court's review of the application process under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971).

[6] The Commission relies on *KH Outdoor, L.L.C. v. Clay Cnty., Fla.*, 482 F.3d 1299, 1303-04 (11th Cir. 2007), for the proposition that a plaintiff must apply for a license before challenging the licensing requirement because she may be denied on other, legitimate grounds. But that case is distinguishable. In that case, the court found that it was *certain* that the applicant would be denied a license even if the allegedly unconstitutional portions of the statute were struck down, because the applicant affirmatively failed to satisfy several constitutional criteria. 482 F.3d at 1303-04. In contrast, here, Pabst has alleged that she is fit to provide taxi services in Montana. Complaint ¶ 3.

prohibition is currently in effect, which is why her case is ripe. But she does not seek a PCN; she seeks not to be subject to an unconstitutionally arbitrary restriction on her right to pursue a lawful occupation. *Id.* ¶ 4. A favorable decision will redress her injuries because, if successful, she will no longer have to submit to an unconstitutional licensing procedure. *Bruner*, 997 F. Supp. 2d at 696-97 ("A favorable decision by this Court would redress the injury, not because the Plaintiffs would automatically be granted a Certificate, but because the unconstitutional obstacle would be removed from their path to operate a moving company.").

Pabst need not show that a favorable decision will remove every obstacle to her desired conduct; she need only show "an injury . . . that is likely to be redressed by a favorable decision." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (citation omitted); *see also Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998) (A case is redressable when judgment in plaintiff's favor would bar an administrative agency from basing decisions on invalid rules, "even though the [agency] might" otherwise "reach the same result exercising its discretionary powers lawfully."). Thus, it is irrelevant whether Pabst would eventually receive a license or not under constitutionally *valid* criteria. What is relevant here is that the challenged laws employ constitutionally *invalid* criteria.

In *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), the Court held that the plaintiffs could challenge housing regulations even though an injunction would not guarantee the plaintiffs' desired result of seeing a housing project built. 429 U.S. at 261. Though plaintiffs would "still have to secure financing, qualify for federal subsidies, and carry through with construction," a court need not engage in "undue speculation as a predicate for finding" standing." *Id.* at 261-62; *Idaho Bldg. & Const. Trades Council, AFL-CIO v. Wasden*, 32 F. Supp. 3d 1143, 1152 (D. Idaho 2014) (A plaintiff need not show that they will necessarily obtain a government contract if the suit is successful, they need only show "that they are able and ready to seek the opportunity . . . but an allegedly unconstitutional law prevents them from doing so.").

Regardless of whether she will otherwise receive a PCN, a decision in Pabst's favor would eliminate one of the unconstitutional licensing requirements and allow her to pursue her business without first subjecting herself to the unlawful portions of the process. Her claims are thus redressable.

II

PABST'S UNBRIDLED DISCRETION CLAIMS ARE LIKEWISE RIPE

The Commission describes Pabst's unbridled discretion claim as an allegation that "certain words or phrases within the [statutory] scheme are 'vague' and somehow unconstitutional." MTD at 19. But Pabst's allegations are quite clear and thorough on this score. The Complaint devotes an entire count and seven paragraphs to the allegation that the terms "public convenience and necessity"; "reasonable consideration to the transportation service being furnished or that will be furnished by any . . . existing transportation agency"; "effect which the proposed transportation service may have upon other forms of transportation service"; "essential and indispensable to the communities"; and "might be affected" give the Commission unbridled discretion to grant or withhold a PCN in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See City of Chicago v. Morales*, 527 U.S. 41, 61-64 (1999) (striking down law which provided police unbridled discretion to disperse crowds which officer determined were gathered for no "apparent purpose").

Pabst alleges that because the terms are so broad and undefined, the laws at issue place little or no restraint on the Commission's decision-making process.

Complaint ¶¶ 56-59. She further alleges that these words are not explained in any statute, regulation, or other legal authority, so that a person of ordinary intelligence would necessarily have to guess as to their meaning. *Id.* ¶¶ 56-59, 24. Under such broad terms, the Commission is able to exercise unguided discretion over whether to grant or withhold a PCN based on what it deems to be "essential and indispensable," "necessary and convenient," or any of the other ambiguous "standards" found in the challenged statutes. *Id.* Her assertions are neither conclusory nor difficult to understand, and easily survive the standards applicable to 12(b)(6) motions. *See Great Atlantic & Pacific Tea Co. v. Amalgamated Meat Cutters & Butcher Workmen of N.A.*, 410 F.2d 650, 652-53 (8th Cir. 1969) (Plaintiffs are "not required to set forth specific facts to support [their] general allegations, and pleadings are to be construed liberally in favor of the pleader."). Pabst has therefore adequately alleged a claim for unbridled discretion.

In *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 769 (1988), the Court struck down a law which allowed the Mayor to deny newspaper sales stand permits if he found that granting a permit was "not in the public interest." Because the permit process did not expressly limit or define what the Mayor could determine to be in the "public interest," the law was unconstitutionally vague. *Id.*; *see also Kolender v.*

Lawson, 461 U.S. 352, 358 (1983) (law unconstitutionally vague which allowed police officers to detain individuals who failed to provide "credible and reliable" identification, and the terms "credible and reliable" were not defined at law). These vagueness standards are not just applicable in the First Amendment context. In *Yick Wo*, 118 U.S. at 373, the Court found that a licensing requirement which empowered government officials to deny business licenses to individuals for arbitrary or undefined reasons "hardly falls within the domain of law," and was void for vagueness.

Here, Pabst alleges that the challenged statutes grant the Commission unbridled authority to deny her the right to pursue a lawful vocation—a right protected by the Constitution, *see Merrifield*, 547 F.3d at 990-92—on the basis of subjective and unintelligible criteria. Complaint ¶¶ 56-59. She alleges that, like the ordinances in *Lakewood, Kolender*, and *Yick Wo*, the statutes at issue provide no guidelines for determining the meanings of those terms, nor are there any other restrictions designed to ensure that such decisions are made for reasons related to "the health, safety, or welfare of [the public]." Complaint ¶¶ 56-59. If these allegations are true, Pabst would be entitled to relief.

Defendants also argue that Pabst's unbridled discretion claim is not ripe because she could "test the vagueness of the statute as applied" to her, or obtain a declaratory ruling under the Montana Administrative Procedure Act. MTD at 19. Plaintiffs need not exhaust state or administrative remedies before bringing a Section 1983 case for prospective relief. *Patsy v. Bd. of Regents of the State of Fla.*, 457 U.S. 496, 500 (1982). Moreover, though Defendants rely on *Gun Owners' Action League, Inc. v. Swift*, 284 F.3d 198, 207 (1st Cir. 2002), for the argument that Pabst must apply for a PCN before challenging it on vagueness grounds, in that case, the plaintiffs claimed that the vagueness of the statute meant they could not predict whether they needed a license, which is not in dispute here. *Id.* There, the First Circuit held that the plaintiffs could resolve that ambiguity by applying and waiting to see how the statute was applied. *Id.* By contrast, there is no question that the challenged laws require Pabst to obtain a PCN. Complaint ¶ 26; MTD at 2. Nor is there any dispute that the vague and irrational criteria specified in the statute will be applied to any application that is filed. Even if she were to apply, that would not cure the unconstitutional vagueness Pabst alleges, because the Commission would still enjoy unbridled discretion in deciding whether her business would satisfy "public

convenience"—whatever that means—or whether her business would "affect" the "existing carriers" unduly—whatever that means.

III

PABST'S PRIVILEGES OR IMMUNITIES CLAUSE CLAIM IS PROPERLY DISMISSED

Finally, the Commission argues that Pabst[7] fails to state a claim for the violation of her privileges or immunities because the challenged statutes "do not grant to any citizen of Montana any privilege or immunity not available to citizens of other states within Montana" and because the Fourteenth Amendment's Privileges or Immunities Clause "does not protect one's right to pursue any chosen occupation or profession." MTD at 19-20. Defendants base this argument on *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), and *Merrifield*, 547 F.3d at 983-84.

The applicable portions of *Slaughter-House*, however, have been abrogated. When *Slaughter-House* was decided, the Court held that the right to earn a living at a common occupation was a right of state citizenship, and not a right that owed its existence to the national Constitution or laws. *Id.* at 80. The Supreme Court has subsequently abandoned this position. *See*, *e.g.*, *Lowe v. SEC*, 472 U.S. 181, 228

[7] The Privileges or Immunities Clause is inapplicable to corporations, *Asbury Hosp. v. Cass Cnty., N.D.*, 326 U.S. 207, 210-11 (1945), and therefore this cause of action is asserted only on behalf of Tracie Pabst individually.

(1985) ("It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose."); *Greene v. McElroy*, 360 U.S. 474, 492 (1959) ("[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment."). *Saenz v. Roe*, 526 U.S. 489, 502-03 (1999), reiterated that the rights of federal citizenship are, indeed, protected against state interference by the Privileges or Immunities Clause even after *The Slaughter-House Cases*. However, Pabst acknowledges that *Merrifield* squarely holds otherwise, and compels dismissal of this cause of action. Pabst asserts it solely to preserve it for appellate review.

CONCLUSION

Defendants' motion to dismiss Pabst's privileges or immunities cause of action is compelled by binding precedent. Otherwise, Defendants' motion should be *denied*.

DATED: April 2, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule Local Rule 7.1(d)(2), I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by WordPerfect X5 is 5,021 words, excluding caption, certificates of service and compliance, and table of contents and authorities.

/s/ Anastasia P. Boden
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*_pro hac vice_

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Montana by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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**pro hac vice*