IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0575

PARKER NOLAND,
Appellant,

v.

STATE OF MONTANA, et al.,
Appellees,

v.

EVERGREEN DISPOSAL, INC.,
Appellee-Intervenor.

BRIEF OF *AMICI CURIAE* CATO INSTITUTE AND MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT SEEKING REVERSAL

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

APPEARANCES:

Matthew G. Monforton
Monforton Law Offices, PLLC
32 Kelly Court
Bozeman, Montana 59718
Telephone: (406) 570-2949
E-mail: matthewmonforton@yahoo.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of constitutionalism that are the foundation of liberty. To those ends, Cato hosts conferences and publishes books and studies, including the annual *Cato Supreme Court Review*. Consistent with Cato's mission, this brief urges the Court to vindicate the Montana Constitution's protection of economic freedom. Montanans should be at liberty to pursue their employment without the unjust interference of a standardless licensing regime.

Mountain States Legal Foundation ("MSLF") is a nonprofit, public-interest law firm organized under the laws of the state of Colorado. MSLF is dedicated to bringing before the courts issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF attorneys have been active in litigation regarding the proper interpretation and application of statutory, regulatory, and constitutional provisions, including in the Montana Supreme Court. This case concerns *Amici* because it involves the opportunity to vindicate citizens' right to pursue a calling which provides for their wellbeing, a recognized fundamental right in Montana.

SUMMARY OF AGUMENT

"Protection to life, liberty and property rests primarily with the States." *Maxwell v. Dow*, 176 U.S. 581, 593 (1900). As James Wilson, one of the American Founding Fathers, once declared, "[t]he General Government will be as ready to preserve the rights of the States *as the latter are to preserve the rights of individuals*." THE ANTI-FEDERALIST PAPERS & THE CONSTITUTIONAL CONVENTION DEBATES 68 (Ralph Ketcham ed. 2003) (emphasis added). Fitting to that history, and to its nickname—the "Treasure State"—Montana has long served as a beacon of economic liberty, and its constitution protects the right to pursue employment.[1]

Appellant Parker Noland is not your typical 23-year-old Montanan. After graduating high school, Noland joined the U.S. Army, intent on serving his nation. But a few months into basic training, he was honorably discharged due to a medical condition. On returning home to Kalispell, Noland remained committed to serving his community; he just needed to figure out how. After observing pileups in local construction site dumpsters, Noland set out to become a debris-hauling entrepreneur. He developed a business plan and secured a loan to purchase a truck and some dumpsters.

[1] For background and history on this topic, see Anthony B. Sanders, *Montana's Basic Necessities Clause and the Right to Earn a Living*, 84 MONT. L. REV. 75 (2023).

Unfortunately for Noland, Montana's Public Convenience and Necessity ("public convenience") regime for Class D garbage haulers imposes a costly and opaque licensing process on applicants. This scheme, notably, empowers incumbent firms to protest license applications and initiate private investigations of applicants via depositions, production of documents, inspections, and other requests. *See* Mont. Admin. R. 38.2.3301; Mont. Code Ann. §§ 69-12-321, 69-12-323, and A.R.M. Title 38, Ch. 3. When a protest is filed, the Public Service Commission (PSC) approves an application only after a hearing and finding "from the evidence that public convenience and necessity require the authorization of the service proposed or any part of the service proposed." Mont. Code Ann. § 69-12-323(2)(a). Notably, no Montana statute, regulation, or case law defines the term "public convenience and necessity."

In September 2021, Noland applied to the PSC for an operating certificate but was promptly bombarded with discovery demands from competitors. Compl. at 9. Two months later, after incurring thousands of dollars of legal costs and perceiving no clear way to satisfy the vague "public convenience" standards, Noland withdrew his application like several applicants before him. *Id*. at 9–10. Unlike other applicants, Noland sued, alleging violations of his constitutional rights. The district court denied Noland's facial challenge to the public convenience law, reasoning that

the success, over incumbent-firm protest, of three applications in ten years insulated the law from facial challenge. Noland has appealed that dismissal.

Amici write separately to stress two points. First, the district court erred in dismissing Noland's facial challenge. Article II, Section Three of the Montana Constitution does not leave the exercise of Noland's fundamental right to pursue employment at the mercy of regulators and potential competitors. That constitutional provision broadly protects Montanans' "rights of pursuing life's basic necessities, … acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways." Mont. Const. art. II, § 3. Where, as here, the administrative process for approving applicants' employment is conditional, burdensome, and opaque, applicants should be able to bring a facial challenge.

Second, the public convenience regime inflicts an injury under the Due Process Clause of the Fourteenth Amendment and fails to satisfy even rational basis scrutiny. Of all the interests advanced by the state, only one is sufficiently plausible to warrant deference: preventing deleterious competition. But the state's standardless public convenience regime deters new entry and condemns too many of the state's residents and businesses to high prices and shoddy services. Shorn of any plausible economic or consumer justification, the challenged measures are protectionist wealth-transfer mechanisms, untethered from the public good. Even under the most

deferential standard of review, such a law is constitutionally suspect. For these reasons, the Court should reverse the district court's decision.

ARGUMENT

I. THE DISTRICT COURT ERRED IN REJECTING NOLAND'S FACIAL CHALLENGE.

A. The right to pursue employment is a fundamental right.

The right to pursue employment is deeply rooted in Anglo-American history. *See* WILLIAM S. MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 287–91 (2d ed. 1914) (discussing the Magna Carta's injunction that the Crown not "amerce" the individual too heavily, for his "means of livelihood must be saved to him"); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (holding the Fourteenth Amendment enshrined "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition").[2] The American founders recognized the importance of economic liberty and decried the oppression of Crown-sanctioned monopolies as "among the greatest nusances [*sic*] in Government." Letter from James Madison to Thomas Jefferson, FOUNDERS ONLINE (Oct. 17, 1788).[3] So, too, did the Montana voters and framers of the state Constitution, when they enshrined "the rights of pursuing life's basic necessities, … acquiring, possessing and protecting property, and seeking their

[2] *See also* Timothy Sandefur, *The Right to Earn a Living*, 6 CHAP. L. REV. 207, 209-17 (2003) (collecting old English cases embracing the right to pursue lawful work).
[3] https://tinyurl.com/38xsydyh.

safety, health and happiness in all lawful ways." MONT. CONST. art. II, § 3.[4] This Court has appropriately recognized that bundle of liberties—which include the "right to the opportunity to pursue employment"—as so "fundamental" that, were it not for them, "other constitutionally guaranteed rights would have little meaning." *Wadsworth v. State*, 275 Mont. 287, 911 P.2d 1165, 1172 (Mont. 1996).

As a general rule, fundamental rights like the right to pursue employment are not exercised merely at the sufferance of other parties, especially if one of those parties is the government. *See, e.g.*, *Stand Up Montana v. Missoula Cnty. Pub. Schs.*, 2022 MT 153, ¶ 10, 409 Mont. 330, 514 P.3d 1062. Indeed, the very nature of a fundamental right resides in its inviolability. Absent the most compelling reasons, the state may not burden fundamental rights, and even then, it must thoughtfully tailor any policy which does. *See id.*

B. The district court erred in rejecting a facial challenge to the public convenience regime.

When an administrative process burdens the exercise of a fundamental constitutional right, that law or rule authorizing that process is *itself* vulnerable to facial attack. *See Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (sustaining a facial challenge to a publication licensing regime); *see also, e.g.*,

[4] *Cf.* VA. DECL. OF RIGHTS § 1 (1776) (George Mason) (invoking the "inherent right[s]" of "acquiring and possessing property" and "pursuing and obtaining happiness and safety"). *See also* Sanders, *supra*.

Merrifield v. Lockyer, 547 F.3d 978 (9th Cir. 2008) (addressing "whether a state regulatory scheme violate[d] the equal protection [and due process] rights" of a challenger who "never applied for . . . a license and claim[ed] none [was] necessary for his business activity" without discussion of whether challenge was facial or as-applied). The relevant "injury in fact" is in the "barrier" erected by the government, *not* the disposition or outcome of the process. *Gen. Contractors*, 508 U.S. at 666. Accordingly, "one subjected to the restraints of a licensing law" burdening a fundamental liberty interest possesses "the right to attack its constitutionality." *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 756 (1988) (cleaned up).

Here, Noland was clearly "subjected to the restraints of a licensing law" that burdened his fundamental right to pursue employment. He applied to the PSC for an operating certificate and was promptly bombarded with discovery demands from competitors, burdens the public convenience regime expressly imposes. Compl. at 9. Several weeks later, after incurring thousands of dollars of legal costs and perceiving no clear way to satisfy the vague "public convenience" standards and gain self-employment, Noland withdrew his application to stem his financial losses. *Id*. at 9–10. He clearly has standing to bring a facial challenge to this licensing law. *See Lakewood*, 486 U.S. at 755–57 (sustaining a facial challenge to a publication licensing regime); *City of Griffin*, 303 U.S. 444 (1938) (same).

Yet the district court held that Noland lacks standing to vindicate his fundamental right to pursue a lawful occupation until he shoulders the expense and unpredictability of a "lengthy and costly" application process. Doc. 101 at 2. Critically, the district court rejected Noland's facial challenge solely because the law at issue applied to all similarly-situated parties and the law was not a complete prohibition on garbage haulers:

> Every applicant is subjected to the same statutory procedures. Although not every application is granted, there are applicants who have been able to pursue employment and earn a living as a garbage hauler in Montana even after their application was protested and competition was considered. . . . Since there are circumstances in which the statutes have been constitutionally applied, Noland's facial challenge fails.

Doc. 101 at 6.

That conclusion does not follow from its premise, and the district court erred in finding it dispositive. That the PSC granted a handful of applications does not show that the statute was constitutionally applied, and thus does not insulate the licensing regime from facial challenge.

To illustrate why that conclusion is mistaken, suppose a state law provided that "all garbage haulers must have Irish ancestry, unless it is in the public interest to license someone who lacks Irish ancestry." Such a law would almost certainly be subject to facial attack. *See Univ. of California Regents v. Bakke*, 438 U.S. 265, 307 (1978) ("Preferring members of any one group for no reason other than race or ethnic

origin is discrimination for its own sake. This the Constitution forbids."). Yet, under the district court's formulation, it appears that if a few Irish and non-Irish people were licensed, the law could not be facially attacked because "every applicant is subjected to the same statutory procedures" and a few applications were granted. *See* Doc. 101 at 2, 6. That cannot be the standard for evaluating the viability of a facial challenge. A court faced with a facial challenge must ask more than whether the statute applies equally to all similarly-situated parties. *See Lakewood*, 486 U.S. at 755–57; *City of Griffin*, 303 U.S. 444 (1938).

That three applicants managed to survive the PSC's processes does not show the law has been constitutionally applied—it merely shows that three fortunate applicants had the resources and savviness to navigate what the district court described as an "extensive," "lengthy and costly" application process. Doc. 101 at 2. Properly conceived, then, "the statute is unconstitutional in all its applications" because it impermissibly burdens *all applicants'* fundamental right to pursue employment. *Advocates for Sch. Trust Lands v. State*, 2022 MT 46, ¶ 29, 408 Mont. 39, 505 P.3d 825.

C. In all its applications, the public convenience regime impermissibly burdens the fundamental right to pursue employment.

Montana's public convenience regime impermissibly burdens the fundamental right to pursue employment under Article II, Section 3 of the Montana Constitution. It does so in two ways. First, it conditions the pursuit of employment—

here, debris and garbage hauling—on a discretionary and unpredictable licensing process. *See* Mont. Code Ann. § 69-12-323. But this flips the fundamental rights calculus on its head. "Under the strict scrutiny standard, the state carries the burden of demonstrating the challenged law or policy is narrowly tailored to serve a compelling government interest and only that interest." *Stand Up Mont.*, 2022 MT 153, ¶ 10. That *applicants* like Noland must justify their pursuit of employment by showing that their obtaining employment satisfies a standardless "public convenience and necessity" evaluation must fail strict scrutiny.

Second, the public convenience regime empowers incumbent firms to protest new market entrants in the exercise of their fundamental right to pursue employment, without any kind of *prima facie* evidence that the public is disserved by market entry. *See generally* STEARNS, ZYWICKI, & MICELI, LAW AND ECONOMICS: PRIVATE AND PUBLIC 423 (2018). Especially in cases like Noland's—where the applicant is young and operates a single-member LLC—the mere lodging of the protest can deter a novice entrepreneur. Incumbent firms can kill applications in the cradle with intrusive "discovery requests for extensive financial information," while also dissuading an unknowable number of potential applicants from even initiating the process. Doc. 101 at 2. That chilling effect makes Noland's facial challenge all the more appropriate. *Cf. Coates v. Cincinnati*, 402 U.S. 611, 620 (1971) (facial challenges are "deemed justified since the otherwise continued existence of the

statute . . . would tend to suppress constitutionally protected rights"). Few garbage haulers have the wherewithal to take on national corporations in an expensive and protracted regulatory process. Facial challenges like Noland's ensure that the challenged statutes will not continue to suppress the constitutional rights of Montana's prospective garbage haulers, whose "personal histories [have] fit them for th[at occupation]," Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849, 855 (1980), and whose Constitution guarantees "the[m the] rights of pursuing life's basic necessities." MONT. CONST. art. II, § 3.

II. MONTANA'S LICENSURE SCHEME IS NAKEDLY PROTECTIONIST AND FAILS RATIONAL BASIS REVIEW.

Under the Fourteenth Amendment, "naked economic preferences are impermissible to the extent that they harm consumers." *Taxicab Co. Owners Ass'n v. City of Houston*, 660 F.3d 235, 240 (5th Cir. 2011). It is true, the state may favor certain producers over others for reasons related to the public health, safety, or welfare, but "economic 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." *Merrifield*, 547 F.3d at 991 n.15. Even if this Court is inclined to evaluate the public convenience regime under rational basis review, the state's licensure process still fails.

"Pursuant to the rational basis test, the statute must be rationally related to a legitimate government interest." *Hamlin Constr. & Dev. Co. v. Mont. DOT*, 2022 MT 190, ¶ 36, 410 Mont. 187, 521 P.3d 9; *cf. Merrifield*, 547 F.3d at 984 n.9 (analogous federal standard of review). Of all the interests advanced by the state, only one is sufficiently plausible to possibly merit deference: preventing harm to rural communities from deleterious competition. But since competition in this market would generally benefit residents and businesses, the state's administrative processes here in "preventing deleterious competition" must be understood as the "unvarnished economic protectionism" it is. *Powers v. Harris*, 379 F.3d 1208, 1226 (10th Cir. 2004) (Tymkovich, J., concurring in the judgment); *Testimony of Robert Koopman*, HOUSE BUSINESS & LABOR COMM., HB 338 (Feb. 18, 2021).[5] As federal due process jurisprudence is concerned, that is not a legitimate state interest. *See Merrifield*, 547 F.3d at 991 n.15.

The "deleterious competition" rationale is that "[i]f two or more firms compete in such a market, prices will be higher than necessary and unstable," as "competition . . . induce[s] . . . firms to price at marginal costs," engendering losses and bankruptcies in a wasteful "game of chicken" until only one firm remains. Peter M. Van Doren, *Time to Trash Government Intervention in Garbage Service* at 12, POL'Y ANALYSIS No. 331, CATO INST. (Jan. 21, 1999) [hereinafter *Government*

[5] https://tinyurl.com/4m7wut9e.

Intervention in Garbage Service]. But "destructive competition" is rare, observed only where markets are naturally monopolistic due to economies of scale, density, or some combination of both. *Id.*

First, there is little evidence that trash collection firms benefit from economies of scale like traditional utilities (such as electricity generation). Indeed, that a 23-year-old with a truck could take out a loan and secure all the necessary capital to enter the market is strong evidence that fixed costs are not so large as to suggest economies of scale. *See id.* (explaining that "[t]he only capital requirement would seem to be a truck, and even that can be leased by the day, so a firm would not even have to find a week's worth of business to enter the industry"). "[S]ince the barriers to entry into the garbage collection business are so minimal," the state cannot justify its public convenience regime by resort to economies of scale. *Id.*

Second, there is little evidence that this market sees economies of density. "According to the economies-of-density paradigm," when a single firm services a route, it accrues cost savings to the benefit of consumers by expending less labor and capital in between stops than multiple firms servicing the same route would. *Id.* at 4, 10. But "the economies-of-density view of refuse collection" is premised on the dubious proposition "that people's preferences for [trash collection] service[s] as well as the services provided by companies are identical." *Id.* at 12–13.

But as Noland's contemplated business proves, trash collectors are not homogenous in their provision of services. Nor are consumers in their preferences; some residents "want daily service"; others "want once-a-week service and still others want twice-a-week service." *Id.* at 13. What may appear to be "multiple firms serving the same market" may in fact be "multiple firms serving different markets," built on different preferences and informed by different budget constraints. *Id.* Noland's business is different in size, scope, and capability than incumbents', endeavoring to meet unmet demands and unsatisfied preferences. In particular, Noland noticed that "late garbage pickups" from construction sites caused debris to pileup in dumpsters, inconveniencing projects. Doc 101 at 2. Thus, assuming *arguendo* that incumbent firms generate some economies of density and resultant cost savings, Montana's public convenience regime nonetheless disserves the public by limiting consumer choice in a market of heterogenous preferences.

In short, Montana's extant public convenience regime resembles "unvarnished economic protectionism," *Powers*, 379 F.3d at 1226 (Tymkovich, J., concurring in the judgment), and likely fails even the rational basis test.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision to dismiss Noland's facial challenge.

DATED: October 31, 2024

Respectfully submitted,

/s/ Matthew G. Monforton
Monforton Law Offices, PLLC
32 Kelly Court
Bozeman, Montana 59718
Telephone: (406) 570-2949

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionally spaced Times New Roman typeface of 14- point size; is double-spaced; and contains not more than 5,000 words, excluding the certificates of service and compliance.

RESPECTFULLY SUBMITTED this __ day October 2024.