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INTRODUCTION

One of the most important constitutional rights is the right to earn a living for oneself and one's family without arbitrary government interference, and most people define the American Dream exactly this way. Yet Certificate of Public Convenience and Necessity (CPCN) laws, like Mont. Code Ann. § 69-12-321, deprive would-be entrepreneurs of their economic liberty not for some public purpose, but to protect interest groups from competition.

CPCN laws differ from ordinary licensing laws in that they have no relation to the applicant's fitness or capacity to practice the trade. Instead, they are expressly aimed at preventing new businesses from entering an industry unless the licensing officials are persuaded that more competition is desirable. CPCN laws further enable existing firms to file an objection to any application for a new business, and that protest triggers a hearing requirement that is often insurmountable. The laws have therefore sometimes been termed "the Competitor's Veto." These licensing requirements reduce the availability of services to consumers, drive up prices, stifle innovation, and suppress economic opportunity. And in a field like the motor carrier industry—which features relatively low start-up costs, and would otherwise make a prime opportunity for unskilled or inexperienced workers—the consequence can be particularly inhumane: obstructing economic opportunity for precisely those people who need it most.

Montana's licensing requirements for common carriers are no different. They are designed to prevent fair competition and they stifle the economic liberty of entrepreneurs to the detriment of the public at large. Such laws are not only unjust—they are unconstitutional.

I. THE HISTORY OF CPCN LAWS

The CPCN was invented in the late nineteenth century to regulate the railroad industry.¹ At that time, the government granted railroads certain monopoly characteristics, and railroads, in return, agreed to abide by certain regulations which were often expensive to comply with. This arrangement raised the specter of new businesses entering the market and choosing not to comply with those inefficient requirements, and that possibility was thought to deter private investment in public services.² Because CPCN laws strengthened government's power to compel all railroads to comply with government regulation, proponents of those laws saw them as encouraging private investment in public utilities.

Whatever the merits of this rationale, it applies only to public utilities. It does not apply to industries like the taxi or moving industry, which have low start-up costs, are not themselves considered public utilities, and do not significantly compete with public utilities like railroads. Moreover, those justifications do not apply to industries which, unlike railroads, may vary widely in the types of services they provide. Yet CPCN laws in those industries persist.

Some have argued that CPCN laws are simply an investigative tool, whereby existing firms help the government agency police the industry by providing it with expertise about the necessary qualifications for running a business. But this argument overlooks the obvious conflict of interest involved in allowing existing firms to decide who may enter the market to compete against them. Moreover, it ignores the fact that in many, if not most, CPCN schemes, the existing firms are not actually required to provide *any* information, let alone legally

¹ See William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 COLUM. L. REV. 426, 428 (1979).

² See Timothy Sandefur, *A Public Convenience and Necessity and Other Conspiracies Against Trade: A Case Study from the Missouri Moving Industry*, 24 GEO. MASON U. CIV. RTS. L.J. 159, 165 (2014).

admissible evidence, relating to the applicant's skills or public safety. In Montana, protesting firms are required to provide very precise information about the basis for their protest—but that information must actually specify how the applicant will compete with the existing business.³ Thus, in this state, the anti-competitive implications are even clearer.

Litigation from states that have Competitor's Veto laws corroborates the argument that CPCN requirements are not used to protect the public, but instead to block legitimate competition. Evidence from a lawsuit filed by Pacific Legal Foundation (PLF) against Missouri shows that from 2005-2010, whenever a CPCN application was filed requesting permission to operate a moving company, that application was protested by an existing firm.⁴ All 106 of these objections were based on the argument that the applicant would compete with an existing business; not one alleged that the applicant was unskilled or would be dangerous to public safety, nor was there any evidence that the state denied an application out of concerns for public safety during that time. Moreover, where applicants amended their application to request permission to operate in a small, rural area—meaning they would present less competition—the protestant invariably withdrew its protest, which undermines any argument that the protesting firm was concerned about public safety.

Likewise, not one of the 114 protests filed in Kentucky between 2007 and 2012 alleged that the applicant would present any danger to the public, nor did the Kentucky Transportation Cabinet deny an application on that basis.⁵ Instead, every protest was lodged, and every

³ Mont. Admin. R. 38.3.405.

⁴ Sandefur, *A Public Convenience and Necessity and Other Conspiracies Against Trade*, *supra* n.2 at 183.

⁵ Timothy Sandefur, *State "Competitor Veto" Laws and the Right to Earn a Living: Some Paths to Federal Reform* (forthcoming) (on file with author).

application was rejected, on the basis that the new firm would compete with those already operating. In states with such a system, entrenched businesses have every reason to resist change.

Today CPCN laws exist in some form in the motor carrier industry in at least 31 states. Yet the purposes for these laws, if they were ever valid, are no longer tenable. These laws' continued existence causes substantial harm to consumers in the form of higher prices and reduced innovation, and forestall the dreams of entrepreneurs across the United States.

II. THE HARM CAUSED BY CPCN LAWS

CPCN laws harm both consumers and entrepreneurs. Even aside from the fact that an applicant may be denied a license, the hearing requirement is by itself a substantial barrier to entry for entrepreneurs that drives up the cost of starting a business. Like many states, Montana requires any business organized as a corporation to be represented at such hearings by an attorney. But hiring a lawyer is expensive, and gathering the information necessary to prove one's "necessity" is burdensome.

Moreover, CPCN requirements essentially allow businesses to veto their own competition—which they obviously have an incentive to do. And as licenses to operate a business becomes rarer and harder to get, there is less availability of services, lower quality services, and higher prices.

Research in the 1970s and 1980s showed that barriers to entry raised prices for intrastate household goods services by anywhere between 25 and 40 percent,⁶ and were not associated with

⁶ Dennis A. Breen, *The Monopoly Value of Household-Goods Carrier Operating Certificate*, 20 J.L. & ECON. 153, 178 (1977).

any increase in quality.⁷ Data from cities that have reduced barriers to entry into the taxicab market likewise show that CPCN laws raise costs to consumers.⁸ After Indianapolis lifted its cap on the number of taxicab permits available, the number of cabs nearly doubled, fares decreased by an average of 7 percent, waiting times were almost halved, and complaints diminished.⁹ Other countries have also reported that significant innovations were introduced after deregulation,¹⁰ and findings from other sectors of the transportation industry also show that CPCN laws tend to raise prices, stifle innovation, and restrict economic opportunity.

These laws also deter the innovation that produces new goods and services. Where companies are not subjected to normal, competitive pressures, they have no incentive to improve. And where businesses can bar innovators from entering the market, they deny consumers access to improved services from others. Moreover, it is not reasonably possible to know whether a new business will be necessary or desirable without starting that business and seeing if consumers like it. Yet that process of experimentation is illegal under Competitor's Veto laws. The laws thus deter the experimentation and innovation on which economic growth and progress depend.

⁷ Edward A. Morash, *Entry Controls on Regulated Household Goods Carriers: The Question of Benefits*, 13 *TRANSP. L.J.* 227, 240 (1984).

⁸ See, e.g., Mark W. Frankena & Paul A. Pautler, *An Economic Analysis of Taxicab Regulation* 101 (FTC Bureau of Economics Staff Report, May 1984).

⁹ Adrian T. Moore & Tom Rose, *Regulatory Reform at the Local Level: Regulating for Competition, Opportunity, and Prosperity*, Reason Foundation Policy Study No. 238 at 15-16 (1998).

¹⁰ Sean D. Barrett, *Regulatory Capture, Property Rights and Taxi Deregulation: A Case Study*, 23 *ECON. AFF.* 34 (2003); Organization for Economic Development Policy Roundtables, *Taxi Services: Competition and Regulation* 2007 at 7 (2008); Jason Soon, *Taxi!!: Reinvigorating Competition in the Taxi Market*, Centre for Independent Studies Issue Analysis, No. 7 at 9 (May 1999).

III. MONTANA'S CPCN LAW

Under Montana's CPCN requirement, once an application for a CPCN is filed, the Commission "shall provide" notice of the filing of the application to "any interested party."¹¹ Any interested party can then protest, which triggers a hearing on the application.¹² The protesting party has no obligation to provide any factual information relating to the applicant's qualifications or skills.¹³ If a protest is filed, the Commission schedules an administrative hearing to determine whether to grant the CPCN to the applicant, and the protesting party may attend that hearing and offer testimony against the granting of the Certificate. If no protest is filed, the Commission can act on the application without the need for a hearing.

Any protest lodged by an "interested party" subjects the applicant to a hearing in which the Commission decides whether granting the application suits the "public convenience and necessity."¹⁴ That term is not defined by law. Instead, the Commission relies on vague, subjective, and anti-competitive criteria. Montana statutes direct the Commission to give "due consideration" to:

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

¹¹ Mont. Code Ann. § 69-12-321(1).

¹² *Id.*

¹³ Mont. Admin. R. 38.3.405.

¹⁴ Mont. Code Ann. § 69-12-321(2).

- (c) the effect of the proposed service on other forms of transportation that are “essential and indispensable to the communities to be affected” that will be, or “might” be affected by the proposed transportation service; and
- (d) for some motor carriers, the effect of the service on competition.¹⁵

The statute lacks definitions of crucial terms within these factors; criteria like “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,” and whether “public convenience and necessity require the authorization of the service” are not explained in any statute, regulation, or case law. Nor is it clear how, or even whether, “public convenience and necessity” differs from “the public interest.” This lack of definition means that applicants are left with little guidance on how they could prove “convenience” or “necessity.” And regulators are given wide latitude to interpret what they mean.

While the precise meaning of many terms are unclear, it is at least clear that these factors are inherently biased towards existing businesses, and are totally unrelated to the public health or safety. The statute explicitly requires the Commission to consider the effect of the new business on existing companies—which is particularly problematic given that *any* new company will have some effect on the market for its goods.

Additionally, applicants are required to prove the necessity for their services—that is, that there is a need for their services, and that existing businesses will not meet that need. Yet the only way to demonstrate that there is a need for products or services—particularly new and innovative ones—is to try. The market allows entrepreneurs to discover whether their services

¹⁵ *Id.*

are needed through experimentation. But CPCN laws deny entrepreneurs that experiment. Thus, requiring applicants to prove that there is a public “necessity” for their services requires them to prove something that cannot be proven in advance.

Moreover, a protestant’s mere allegation that an applicant will affect its business, or that an applicant does not meet the fitness standard, subjects the applicant to an expensive process—since many will have to hire an attorney, and all must submit a long list of evidence. For example, in a recent CPCN hearing involving a taxi company, the applicant was forced to call a total of 18 witnesses to attest to the public need for its service.¹⁶ Witnesses testified to unmet and untimely transportation, long waits, having to miss medical appointments, and unpleasant experiences. The applicant also submitted detailed logs showing the number of calls it had received for rides outside of its authority to operate. Even then, while the Commission granted the applicant’s request to provide transportation to and from medical appointments, it denied the applicant’s request to expand its service area because there was a purported lack of evidence that the additional service was needed.

IV. CPCN LAWS AND THE CONSTITUTION

The Due Process Clause forbids states from imposing occupational licensing requirements that are not related to an applicant’s skill in practicing the trade. The Supreme Court first made this pronouncement in *Dent v. West Virginia*,¹⁷ in which it upheld a licensing requirement for doctors on the basis that the training and education standards were “appropriate

¹⁶ Dep’t of Pub. Serv. Regulation, Proposed Order, *In the Matter of Green Taxi, LLC*, Docket T-12.16.PCN, Order No. 7240.

¹⁷ 129 U.S. 114 (1889).

to the calling or profession, and attainable by reasonable study or application.”¹⁷ The Court warned that requirements that lack such a relationship would unconstitutionally “deprive one of his right to pursue a lawful vocation.”¹⁸

Likewise, the Ninth Circuit—the federal Court of Appeals that governs Montana—struck down a licensing law for pest-control workers because it required extensive training in the use and storage of pesticides, even where the individual did not work with pesticides. This requirement applied only to persons who worked with certain kinds of pests—including mice, rats, and pigeons—and not others, even though those exempted were most likely to encounter pesticides in their work. The court found this irrationality to be strong evidence of economic protectionism, and ruled that without any relation to the common good, “economic protectionism for the sake of economic protectionism” is unconstitutional.¹⁹ This precedent is controlling in Montana.

CPCN laws have no connection to a person’s fitness or capacity to practice, and therefore no relationship to protecting the public. In 1932, the Supreme Court struck down a law very similar to Montana’s because it prohibited new ice-delivery businesses without a CPCN and allowed existing companies to block new firms from competing. That law did not protect the public; instead it “shut out new enterprises, and thus create[d] and foster[ed] monopoly in the hands of existing establishments, against, rather than in aid of, the interest of the consuming public.”²⁰

¹⁷ *Id.* at 122.

¹⁸ *Id.*

¹⁹ *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008).

²⁰ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 278 (1932).

Last year, a federal court in Kentucky affirmed that CPCNs that stifle economic opportunity in order to protect existing businesses lack the rational connection to protecting the public that the Due Process Clause requires.²¹ First, that state’s CPCN requirement did nothing to prevent property damage—existing laws already made property damage illegal. Moreover, experienced, skilled movers who were unlikely to damage property could be, and often were, denied CPCNs without regard to their qualifications.²² Nor did the Competitor’s Veto process decrease administrative costs, because “when a protest is filed, the Cabinet *must* hold a hearing,” thus actually increasing costs.²³ The record further showed that consumers never objected to new companies starting—it was only existing companies who used the law to block new competition. After dispensing with the state’s other rationales for the Competitor’s Veto procedure, the court concluded that it served instead only the unconstitutional goal of economic protectionism.²⁴ That ruling affirms what the Supreme Court has held for years; to operate a business, and as in that case, a transportation firm, one need only be qualified and abide by public safety laws.

CONCLUSION

Government may use licensing laws to protect the public from dishonest or dangerous practices. It may not use those laws to protect a favored few against legitimate competition from new entrepreneurs. Montana’s licensing requirement under Mont. Code Ann. § 69-12-321 is therefore an unconstitutional restriction on the right to earn a living. That’s why yesterday, we

²¹ Bruner v. Zawacki, 997 F. Supp. 2d 691, 697 (E.D. Ky. 2014).

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 701.

at Pacific Legal Foundation filed a lawsuit against the Montana Public Service Commission challenging the constitutionality of this law.

CPCN laws that allow existing businesses to trigger a burdensome, time-consuming, and often insurmountable public hearing requirement for new applicants are irrational. The justifications on which they were based are no longer tenable—especially as applied to taxis, or moving companies. And allowing competitors to protest, or government to deny, applications for new businesses for the purpose of preventing competition is unconstitutional. These laws aren't related to protecting the public—they harm the public—and violate the promise of economic liberty that the Constitution secures.