**Litigation Backgrounder**

# Fighting the Competitor's Veto in Nevada

(*Perlman,* et al. *v. Mackay*, et al.)

*"[M]ere economic protectionism for the sake of economic protectionism is irrational [and] cannot be said to be in furtherance of a legitimate governmental interest."*
*—Merrifield v. Lockyer (2008)*[1]

Most people define the American Dream in terms of opportunity. For generations, people have cherished the right to start a new business and earn an honest living for themselves and for their families. Sadly, throughout the United States, licensing laws and other restrictions often bar hardworking entrepreneurs from entering trades and professions not to protect the public from dangerous or criminal activities, but for the sole purpose of protecting established businesses against competition. The most egregious of these restrictions are "Certificate of Public Convenience and Necessity" (CPCN) laws, which essentially force new businesses to get permission from their own competitors before they can open their doors. Because these laws allow existing businesses to protest any application for a new business, and to subject the applicant to an expensive, burdensome, and often insurmountable hearing requirement, these laws have sometimes been called the "Competitor's Veto."

Of the many "Competitor's Veto" laws in the nation, the very worst is Nevada's. That state imposes an explicitly anti-competitive restriction against new companies that want to offer transportation services—like limousine rides or full-service moves—to residents of the Silver State. On February 18, 2015, Pacific Legal Foundation (PLF) filed a federal civil rights lawsuit on behalf of Reno entrepreneurs Ron and Danell Perlman, and Sacramento-based father and son moving team Steven and Patrick Saxon. That lawsuit challenges the constitutionality of Nevada's licensing scheme, which prevents the Perlmans and the Saxons from earning a living in the state, and this backgrounder explains why their fight is critical to entrepreneurs across the United States.

## Ron and Danell Perlman's Small-Business Dream

Ron Perlman bought his first limousine not to start a business, but because he was a car enthusiast. Ron had worked as a Volkswagon mechanic after high school, leading him to open up his own shop specializing in foreign car repairs for a short time after. So when the chance came along to buy a limo, he thought it would be fun. But after friends and clients

asked to rent the limousine for special occasions, Ron decided to add another limo to his fleet. Such was the birth of Ron's first limousine company in 1987.

Ron's wife Danell was born to small-business owners in the southernmost part of Africa. She moved to the United States to pursue the American dream after graduating from college. Since meeting in 1997, Ron and Danell have grown their company to twenty five vehicles—seven of which are limousines. "We built a business from nothing, and are now a main player in the region—which tells me we did something right," says Danell. "Ron and I used to wash the cars, be the reservation agents, act as the chauffeurs—and now we have a full staff. To be able to both provide our services to the public and to employ a full staff is very rewarding."

Even with seven limousines, the Perlmans regularly receive calls for service that they cannot meet. They already own several more vehicles which they currently use for trips to and from California, and they'd like to add those limousines to their Nevada fleet in order to fulfill the additional requests. But the Perlmans only have authority to operate seven limousines in Nevada; if they want to operate any additional vehicles, they have to ask their competitors for permission first.

Two years ago the Perlmans filed the proper paperwork with the Nevada Transportation Authority (NTA) and asked for such permission. But when they did, a competitor immediately filed an intervention. Any such intervention triggers an administrative hearing before NTA. After the hearing, NTA denied the application. But it did not reject the application on the basis that the Perlmans were unfit or unable to maintain additional vehicles—the Perlmans already own the additional vehicles they want to use and comply with all of the relevant safety requirements. Instead, NTA denied the application on the basis that the additional limousines would compete with existing firms in the area.

Says Danell, "NTA should regulate transportation companies from a safety point of view; they should care about what is best for the public, not what is best for the competition. This country is supposed to be the land of the free and of opportunity. Yet we're being prevented from growing our business not because of any public concern, but simply because we want to compete. "

## The Saxon Family's Moving Business

Steve Saxon began working for himself at a very young age. He has started and run his own businesses his entire life. "I don't know anything else," says Steve. "It's the only way I know how to operate." In 2002, Steve started Affordable Moving and Storage, which he runs with his son Patrick in Sacramento, California. Patrick is slated to take over the company one day, so his father wants him to gain experience by opening a branch in Reno, Nevada. Steve has always felt that Reno would be an ideal place to set up shop. "My son and I love the outdoors, and in particular, motorcycle riding and boating," he said. "Reno is a natural fit, and isn't too far from Sacramento where I live."

But in order to start a moving company there, Steve knows he would have to navigate the complex and impossible Nevada statutes that govern moving companies and other transportation industries. He sent a business associate to the area to research starting a branch, but when he found out his competitors could ask the government to deny him his right to open up a business, he was disheartened. As Steve puts it, "What I love most about being a business owner is the autonomy it provides, and the possibility of success. For bureaucrats to take that away from me is un-American."

## Nevada's War Against Competition

The licensing law that stands in the Perlmans' and the Saxons' way is a Nevada statute requiring any person who operates a transportation company to have a "Certificate of Public Convenience and Necessity," or CPCN.[2] To get a Certificate, a person must run a complicated gauntlet of rules that are explicitly devoted to protecting established firms against fair competition. Indeed, of all the states that impose CPCN requirements on businesses, Nevada's is the most explicitly anti-competitive. That is why there are today only 44 limousine companies and 41 licensed moving businesses in a state that has a population of over 2.8 million.[3]

According to Nevada law, a person who wants a Certificate must first prove not only that his proposed business is qualified, safe, and financially fit, but also:

- that allowing a new company "will not unreasonably and adversely affect other" transportation companies,[4]

- that a new company would "benefit and protect the safety and convenience of . . . the motor carrier business,"[5]

- and, most shockingly, that a new company would be consistent with the official state policy of "discourag[ing] any practices which would tend to increase or create competition."[6]

On top of these requirements, state regulations also force any person who wants to start a transportation company to draw a scale map of the areas he or she intends to serve; to photograph all equipment the new company will use; to submit a year's worth of financial statements; and to demonstrate "facts showing that the proposed operation is or will be beneficial to the traveling public," a vague term that is not defined in the law.[7]

What these standards mean is that when a person applies for a Certificate to operate a limousine or moving company, and if an existing business objects to the application, the applicant is forced to attend a hearing and prove to NTA that there is a need for a new business—and that the business will not "adversely effect" existing companies. In other words, a new company must prove that it will not effectively compete against established firms.

Going through the obligatory hearing is difficult enough for many firms. Under Nevada law, corporations must be represented before any administrative agency by a licensed lawyer.[8] This can be very expensive, since most potential transportation companies are small businesses that have little spare cash for legal representation. And hearings can take a long time. Indeed, it took the Perlmans nearly two years to apply for a new Certificate and to go through the hearing procedure—only to be denied. But on top of these concerns, the laws and regulations governing transporation companies in Nevada are explicitly anti-competitive—creating a cartel that simply uses government to forbid fair competition.

The Perlmans and the Saxons, like millions of entrepreneurs in the United States, are not asking for special favors or government handouts. They're only asking for the right to use their constitutionally protected liberty to succeed in the marketplace through their own hard work and individual effort.

## How CPCN Laws Block Fair Economic Competition

Well-established businesses have often exploited government power to protect themselves from competition by new companies.[9] Occupational licensing laws, for example, which require extensive training and educational credentials before a person can enter a trade, are often abused to restrict business opportunities, and create barriers against the market forces that would otherwise require established companies to lower their prices or improve service.[10] As law professor Walter Gellhorn noted half a century ago, occupational licensing is often "eagerly sought" by established professionals on "the purported ground that licensure protects the uninformed public against incompetence or dishonesty," when their real motive is "that members of the licensed group become protected against [] newcomers" and competition.[11]

Unlike most occupational licensing laws, which are ostensibly aimed at ensuring that practitioners have the training and skills required to practice a profession, CPCN laws have no relationship to skill. They are designed to limit competition regardless of whether a business is safe and qualified. These laws originated during the Nineteenth Century to regulate quasi-monopoly industries like railroads, but gradually came to be applied even to fully competitive industries like the limousine and moving businesses.[12] Although economists and specialists in regulation—including even Stephen Breyer, before he was appointed to the Supreme Court[13]—have repeatedly shown that CPCN laws are inefficient and harmful to consumers when applied to these competitive industries, such laws remain on the books in most states.

These laws force potential new businesses first to prove to a board of government bureaucrats that there is a "public need" for a new business. One problem, however, is that government officials are no better than industry at predicting public needs or consumer demands. In fact, government officials have less incentive to make accurate predictions, since they do not bear the cost of any loss the way industry does. Nor do they typically have the same access to information about consumer demand that professionals have. It is simply not possible for government agencies to determine "public need" more effectively than businesses can, and there is much reason to believe they do a poor job of it. Perhaps the most shocking example of CPCN laws comes from the medical industry. Many states require a Certificate before a new hospital may open, and established hospitals sometimes exploit these laws to delay or prohibit new hospitals from opening—at the expense of people who need medical care.[14]

Moreover, proving the necessity for one's business in advance may be an impossible task. The only way to demonstrate that there is a need for products or services—particularly new and innovative ones—is to offer them to the public and find out. The market allows entrepreneurs to discover whether their services are needed through experimentation. CPCN laws deny entrepreneurs that chance, and deny consumers access to those new, potentially useful products.

Apart from their harm to the public, CPCN laws violate the principles of economic opportunity and freedom that are the cornerstone of the American dream. Entrepreneurs like the Perlmans and the Saxons are the engine of economic progress, because they shake up the business world with new ideas. One reason small businesses account for the vast majority of employment opportunities in America[15] is that, motivated by the need to succeed, and not having the luxury of resting on their laurels, start-ups are willing to listen to consumers' desires and devise innovative new business strategies. In fact, small firms in the U.S. are responsible for more of the nation's technological growth and innovation than their larger, more established counterparts.[16]

The Nevada CPCN laws stifle entrepreneurship by strangling economic opportunity and progress. The only winners in this protectionist scheme are established transportation companies. Ultimately, the state's consumers are deprived of the untapped potential that a free competitive market provides.

## The Law and Economic Freedom

The Perlmans' and the Saxons' fight for economic freedom is just one part of a nationwide problem. Abusive licensing laws and other restrictions on the right to earn a living are a national epidemic, burdening America's wealth creators, stifling job creation, and raising the cost of living. Government is supposed to protect the public, but its power is frequently exploited to prevent fair competition with established businesses.

Fortunately, federal and state courts have agreed that government may not allow private interest groups to monopolize entry into a business by preventing entrepreneurs from competing with them.

The right to earn a living in one's chosen occupation is a constitutional right protected under the U.S. Constitution. The Fourteenth Amendment protects the liberty that the Supreme Court has described as "the right to hold specific private employment and to

follow a chosen profession free from unreasonable governmental interference."[17] Indeed, in a 2009 case litigated by the Pacific Legal Foundation, the Ninth Circuit Court of Appeals—which has jurisdiction over Nevada—ruled that government may not use its licensing requirements simply "to favor economically certain constituents at the expense of others similarly situated."[18] While government may regulate businesses to protect the consumer, it may not arbitrarily restrict the right of economic freedom simply to please private interest groups.

In 1932, the Supreme Court struck down an Oklahoma law similar to the Nevada licensing requirement. That law, enacted before refrigerators were widely used, made it a crime to sell ice without first proving that there was a public necessity for a new ice company.[19] The government board that decided that question was staffed by owners of existing ice companies. In *New State Ice Company v. Leibmann*, the Court declared the Oklahoma scheme unconstitutional because private corporations were seeking "to prevent a competitor from entering the business of making and selling ice" rather than actually protecting the public.[20] Under the Constitution, wrote the justices, "it is beyond the power of a state, under the guise of protecting the public, arbitrarily to interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."[21] For the state to abuse its constitutional power to "shut out new enterprises, and thus create and foster monopoly in the hands of existing establishments," violated the Constitution's guarantee of due process of law.[22]

Despite this decision, most states still impose burdensome licensing requirements against entrepreneurs seeking to enter a new line of business. This is because in the years after the *New State Ice* case, courts backed off, giving states vast new powers to regulate economic choice. Under a legal theory called the "rational basis test," created only two years after the *New State Ice* decision, courts allowed government to interfere with the rights of entrepreneurs with almost no judicial oversight.[23] Although the Supreme Court has never overruled *New State Ice*, judges often ignore the way government abuses regulatory power to protect existing companies from fair competition.[24] In one recent Illinois case, for example, the state supreme court upheld a state law that allows existing car dealerships to veto the opening of new dealerships nearby.[25]

But the tide is turning, as judges are showing increasing willingness to protect the right to earn a living. In 2002, a federal court of appeals struck down a Tennessee licensing law that required casket retailers to obtain a funeral director's license in order to sell caskets

and coffins.[26] The court struck down that requirement, and ruled that using the law to "protect[] a discrete interest group from economic competition is not a legitimatevgovernmental purpose."[27] The court recognized that protectionist legislation not only harms economic opportunity, but that it also "harms consumers in their pocketbooks."[28]

The Ninth Circuit Court of Appeals agreed when in 2008 it invalidated a California licensing law for pest control workers. That law 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 "economic protectionism for the sake of economic protectionism" is unconstitutional.[29]

And PLF has scored victories when challenging laws similar to Nevada's. PLF attorneys have challenged CPCN laws in Oregon, Missouri, and Montana. And just last year a federal judge in Kentucky struck down the state's Competitor's Veto law in the moving industry. The court found that the law was not related to any legitimate health or safety objective. After all, a competitor's objection was enough to deny an application, even if the applicant satisfied all of the remaining health and safety criteria. And 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. Instead, every protest was lodged, and every application was rejected, on the basis that the new firm would compete with those already operating. Kentucky's Competitor's Veto law therefore "offend[ed] and violate[d] the Fourteenth Amendment of the United States Constitution."

PLF believes that it is the constitutional right of every person to earn an honest living without unreasonable government interference. Starting a business has long been an important part of the American dream; we call this country the "land of opportunity" exactly because of the political and economic freedom that forms the core of American life. This system requires competition for its health and vigor,[30] and the law should not be used to exclude competition just to benefit the politically powerful.

## Pacific Legal Foundation's Economic Liberty Project

The Perlmans and the Saxons are represented by PLF attorneys Timothy Sandefur and Anastasia Boden. None of the clients are seeking damages—they only seek an injunction and a declaratory judgment that rules Nevada's "Competitor's Veto" scheme unconstitutional under the Fourteenth Amendment's Due Process, Equal Protection, and Privileges or Immunities Clauses so that they can grow their businesses legally.

Pacific Legal Foundation (www.pacificlegal.org) is the largest and oldest public interest law firm dedicated to individual liberty, private property rights, and limited government. Established in 1973, PLF is headquartered in Sacramento, California, and maintains offices in Florida, Washington state, and Washington D.C. Its Economic Liberty Project is led by PLF Principal Attorney Timothy Sandefur, whose book, *The Right to Earn a Living: Economic Freedom and the Law* was published in 2010 by the Cato Institute. Through the Project, PLF defends the fundamental right of all Americans to earn a living through an honest trade.

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**Notes:**

1. 547 F.3d 978, 991 n.15 (9th Cir. 2008).

2. Nev. Rev. Stat. § 706.386.

3. Nevada Transportation Authority Website, List of Certificated Carriers, http://tsa1.nv.gov/ActiveCertificates.asp (last visited January 14, 2014).

4. Nev. Rev. Stat. § 706.391(c).

5. Nev. Rev. Stat. § 706.391(d).

6. Nev. Rev. Stat. § 706.151(e), incorporated by reference in Nev. Rev. Stat. § 706.391(2)(b).

7. Nev. Admin. Code § 706.1375.

8. *In re Discipline of Schaefer*, 117 Nev. 496, 509 (2001).

9. Timothy Sandefur, *The Right to Earn a Living: Economic Freedom and the Law* ch. 7 (2010).

10. Morris M. Kleiner, *Licensing Occupations: Ensuring Quality or Restricting Competition?* 31 (2006).

11. Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. Chi. L. Rev. 6, 11 (1976).

12. William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 70 Colum. L. Rev. 426 (1979); Paul H. Gardner, Jr., *Entry and Rate Regulation of Interstate Motor Carriers in Missouri: A Strategy for Reform*, 57 Mo. L. Rev. 693 (1982).

13. Stephen Breyer, *Regulation and Its Reform* 30 (1982).

14. John E. Schneider & Robert L. Ohsfeldt, *The Role of Markets and Competition in Health Care Reform Initiatives to Improve Efficiency and Enhance Access to Care*, 37 Cumb. L. Rev. 479, 501-02 (2007); Patrick John McGinley, *Beyond Health Care Reform: Reconsidering Certificate of Need Laws in a "Managed Competition" System*, 23 Fla. St. U. L. Rev. 141, 167 (1995); Lauretta Higgins Wolfson, *State Regulation of Health Facility Planning: The Economic Theory and Political Realities of Certificates of Need*, 4 DePaul J. Health Care L. 261 (2001).

15. U.S. Small Business Administration, Fact Sheet, August 2007; *available at* http://web.sba.gov/faqs/faqIndexAll.cfm?areaid=24 (last visited Sep. 25, 2012) (Small businesses represent 99.7 percent of all employer firms, employ about half of all private sector employees, and have generated about 65 percent of net new jobs annually over the past 17 years).

16. *Id.* (Small firms "produce 13 times more patents per employee than large patenting firms," and their patents are "twice as likely as large firm patents to be the [] most cited.").

17. *Greene v. McElroy*, 360 U.S. 474, 492 (1959) (citing *Dent v. West Virginia*, 129 U.S. 114 (1989); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Peters v. Hobby*, 349 U.S. 331, 352 (1955) (concurring opinion *cf. Slochower v. Board of Higher Education*, 350 U.S. 551 (1956); *Truax v. Raich*, 239 U.S. 33, 41 (1915); *Allgeyer v. Louisiana*, 165 U.S. 578, 589-90 (1897); *Powell v. Pennsylvania*, 127 U.S. 678, 684 (1888)).

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

19. *New State Ice Co. v. Leibmann*, 285 U.S. 262, 272 (1932) ("The portion of the section immediately in question here is that which forbids the commission to issue a license to any applicant except upon proof of the necessity for a supply of ice at the place where it is sought to establish the business, and which authorizes a denial of the application where the existing licensed facilities 'are sufficient to meet the public needs therein.'").

20. *Id.* at 278.

21. *Id.*

22. *Id.*

23. *See* Timothy Sandefur, *Equality of Opportunity in the Regulatory Age: Why Yesterday's Rationality Review Isn't Enough*, 24 N. Ill. U. L. Rev. 457, 474 (2004) ("[S]ome courts have held that the rational basis test does not require that the state's asserted basis for the law be the actual basis on which the legislature passed the law. Further, some courts have held that the law does not actually have to be a rational solution in order to pass the test; . . . since the court asks only whether a legislator could have believed the policy would be effective.").

24. Timothy Sandefur, *Insiders, Outsiders, and the American Dream: How Certificate of Necessity Laws Harm Our Society's Values*, 26 ND J. L. Ethics & Pub. Pol'y 381, 410-16 (2012).

25. *General Motors Corp. v. State Motor Vehicle Review Bd.*, 862 N.E.2d 209 (Ill. 2007).

26. *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002).

27. *Id.* at 224.

28. *Id.* at 228.

29. *Merrifield v. Lockyer*, 547 F.3d 978, 991, 991 n.5 (9th Cir. 2008).

30. *See Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 262 (1972).