Comments on AB 240 to the Nevada Assembly Committee on Transportation

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As currently written, Nevada law essentially creates a Competitor's Veto in the transportation industry, whereby existing firms can isolate themselves from any new competition. The result is to reduce economic opportunity for honest, hard-working entrepreneurs, and to deprive Nevada consumers of choices between competing firms. AB 240 removes the anti-competitive provisions from the law, while preserving the Nevada Transportation Authority's (NTA's) ability to focus on legitimate public health and safety concerns. As an attorney that has represented entrepreneurs across the country in constitutional lawsuits against Competitor's Veto laws—including a lawsuit on behalf of Nevada businesspeople Ron and Danell Perlman—I support Nevada's effort to open up the transportation industry to entrepreneurs like the Perlmans.

NEVADA'S COMPETITOR'S VETO LAW

Under Nevada law, anyone who wants to operate a transportation company must obtain a Certificate of Public Convenience and Necessity (CPCN or Certificate) from the NTA. Once an application for a Certificate is filed, NTA provides notice to the public, and anyone may protest that application.[1] The protesting party has no obligation to provide any factual information relating to the applicant's qualifications or skills.[2] A protestant—including an existing business—can protest an application for *any* reason, including the bare reason that they do not want to compete. If no interventions are filed, NTA decides whether to grant or deny the application based on whether the applicant is "financially fit and otherwise capable of providing

[1] NAC § 706.155.

[2] NAC § 706.397.

safe transportation."[3] But if a protest is lodged, NTA schedules an administrative hearing, at which the applicant must prove to the NTA's satisfaction that 1) the proposed operation will not "unreasonably and adversely affect other carriers operating in the same territory," and, 2) the market will "support the applicant's proposed business."[4] Failure to prove either factor requires the NTA to deny the applicant a certificate.

The statute's explicit requirement that applicants prove that they will not adversely affect competitors is particularly problematic—given that *any* new company will have some effect on the market for its goods. Thus, though the statute contains a perfunctory disclaimer that "the creation of competition" is not "by itself" grounds for denying an application,[5] NTA is empowered, if not *required* to deny applications on the basis that the new company will compete with it.

The requirement that applicants prove that there is a market for their services[6] is often fatal to an application, because it is a futile task. The only way to demonstrate that there is a need for products or services—particularly new and innovative ones—is to try it and find out. Consumers signal whether a product or service is "needed" by choosing to buy it, or choosing not to buy it. Requiring applicants to prove that there is a public "necessity" for their services requires them to prove something that cannot be proven in advance. In practice then, a competitor's protest means that the applicant will be subjected to a hearing requirement which

[3] NAC § 706.155.

[4] *Id.*

[5] NRS § 706.391(2)(c).

[6] NRS § 706.391(2)(f).

they cannot satisfy. For this reason, CPCN laws have sometimes been called the "Competitor's Veto."

WHERE DO COMPETITOR'S VETO LAWS COME FROM?

The CPCN was invented in the late nineteenth century to regulate the railroad industry.[7] Proponents of these laws saw them as encouraging private investment in public utilities—which often had to abide by unique regulations that were expensive to comply with.[8] As transportation modernized, the government agencies that formerly regulated railroads began regulating new methods of transportation, like taxis, and moving companies. Thus, the application of CPCN laws to modern motor carriers is complete historical accident. And whatever the merits of applying those laws to railroads or other utilities, those merits do not apply to fully competitive industries like the taxi, limousine, or moving industry, which have low start-up costs, are not themselves considered public utilities, and do not significantly compete with public utilities. Moreover, those justifications do not apply to industries which, unlike railroads, may vary widely in the types of services they provide. Yet, due to inertia and at the behest of certificate-holders, CPCN laws in all of these industries persist.

In modern days, CPCN laws are sometimes justified based on the outdated notion that competition is somehow destructive. That theory posits that the free market is "detrimental" because it will force firms to cut services and quality in order to stay competitive. That theory has long been proven false, and it is universally recognized that a free market provides industry

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[7] *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).

[8] *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).

participants with normal, competitive pressure to improve their services—not worsen them. Independent health and safety requirements ensure that businesses do not cut corners in terms of safety measures, or otherwise engage in dangerous practices.

The absurdity of this reasoning is easily demonstrated by applying it to other industries. We do not impose a similar requirement in the restaurant industry—an industry that, like the transportation industry, presents safety concerns. We do not prevent an entrepreneur from starting an Italian restaurant just because there are other Italian businesses in the vicinity on the theory that, if there's not a market for the new restaurant, it will start serving unsafe food to save money. Instead, we allow entrepreneurs to freely enter the market, so long as they comply with health and safety regulations.

Carried to its logical conclusion, the argument that financially-pressed businesses will skimp on safety measures justifies rejecting *any* new business, because any new business will have the potential to take away business from existing companies. Yet economists generally now agree that the "threat" of competition is not detrimental to public health or safety; it's a benefit to consumers that produces efficient outcomes. In sum, the best way to ensure public health and safety regulations is to enforce health and safety regulations—not to impose an expensive, burdensome, and nearly insurmountable obstacle in the way of economic opportunity.

COMPETITOR'S VETO LAWS IN PRACTICE

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 invariably protested by an existing firm.[9] In five years, there were 106 protests filed, and all were based on the argument that the applicant would compete with an existing business; not one protest 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. Every application was protested, and eventually denied, on the basis that the new business would compete with existing ones. It is telling that, 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.[10]

HOW COMPETITOR'S VETO LAWS HARM ENTREPRENEURS

CPCN laws create a substantial burden for would-be entrepreneurs. Even if applications for CPCNs are approved—and in most states with Competitor's Veto laws, applications are rarely approved—the hearing requirement is itself a substantial barrier to entry that drives up the cost of starting a business. Nevada requires any business organized as a corporation to be represented at such hearings by an attorney.[11] But hiring a lawyer is expensive, and gathering the information necessary to prove that one's business is "necessary" is lengthy, and burdensome. Sadly, we can never know the kinds of innovations that would have resulted in states with a truly competitive market. And in a field like the motor carrier industry—which

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

[10] 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. Instead, every protest was lodged, and every application was rejected, on the basis that the new firm would compete with those already operating.

[11] *In re Discipline of Schaefer*, 117 Nev. 496, 509 (2001).

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.

The stories of entrepreneurs facing Competitor's Veto laws are tragic. Ron and Danell Perlman, for example, are the owners of Reno Tahoe Limousine, based in Reno, Nevada. 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 that they are authorized to use in Nevada. 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 based on their perception of current Nevada demand, they'd like to add those limousines to their Nevada fleet. Because their Certificate limits them to seven vehicles, they had to undergo the CPCN process before adding any vehicles.

The Perlmans filed an application with the NTA asking for authority to use more vehicles in Nevada. But when they did, a competitor immediately filed an intervention, triggering a

hearing. After two years, NTA denied the application. It did not do so on the basis that the Perlmans were unfit or not financially equipped to maintain additional vehicles—indeed the Perlmans already owned the additional vehicles they wanted to use and complied with all relevant safety requirements. Instead, NTA denied the application on the basis that the couple could not demonstrate a need for additional limousine service, and that they would therefore compete with and "adversely affect" existing businesses.[12]

HOW COMPETITOR'S VETO LAWS HARM CONSUMERS

CPCN laws don't just harm Nevada entrepreneurs, they harm consumers. For example, research in the 1970s and 1980s showed that barriers to entry in the household goods industry raised prices by anywhere between 25 and 40 percent,[13] and were not associated with any increase in quality.[14] Data from cities that have reduced barriers to entry into the taxicab market likewise show that CPCN laws raise costs to consumers.[15] After Indianapolis lifted its cap on the number of taxicab permits available, the number of cabs nearly doubled, fares decreased by an

[12] *See* Nevada Transportation Authority, *In re Application of Ronald M. Perlman d/b/a/ Reno Tahoe Limousine for expansion of authority*, Docket 12-09001.

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

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

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

average of 7 percent, waiting times were almost halved, and complaints diminished.[16] Other countries have reported significant innovations after deregulation.[17]

THE NATIONAL LANDSCAPE FOR COMPETITOR'S VETO LAWS

All told, approximately 30 states that have Competitor's Veto laws. Pacific Legal Foundation has challenged these laws in Missouri, Oregon, and Montana, where the legislatures repealed the laws following the lawsuits. Following PLF's lawsuit on behalf of Arty Vogt, West Virginia also introduced a repeal bill—which remains pending.[18] Slowly states are recognizing the irrational nature of these laws.

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.[19] 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.[20] Nor did the Competitor's Veto process decrease administrative costs, because "when a protest is filed, the Cabinet *must* hold a hearing,"

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[16] 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).

[17] 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).

[18] Pennsylvania recently repealed it's Competitor's Veto law while a PLF lawsuit was pending.

[19] *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 697 (E.D. Ky. 2014).

[20] *Id.*

thus actually increasing costs.[21] 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.[22] 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. Since then, Bruner has successfully grown his business.

CONCLUSION

AB 240 removes the existing law's anti-competitive licensing requirements while preserving NTA's ability to police the industry adequately for purposes of health and safety. It restores NTA's duty to the public, and frees up resources for the agency to actually focus on health and safety. Entrepreneurs and consumers would benefit from such a change.

[21] *Id*

[22] *Id.* at 701.

Founded over 40 years ago, Pacific Legal Foundation (PLF) is the oldest non-profit legal organization of its kind. PLF advocates in courts across the country on behalf of individuals who seek to earn an a honest living, or to reasonably use their property, without irrational government interference. PLF represents all of its clients free of charge.