

SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY,
AND CONSUMER RIGHTS

License to Compete:
Occupational Licensing and the State Action Doctrine

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Dirksen Senate Office Building 226

Testimony of Bill Main

Good afternoon Chairman Lee, Ranking Member Klobuchar, and Members of the Committee. I am pleased to have this opportunity to speak with you about my experience with licensing requirements for tour guides.

I have given tours in four jurisdictions, two of which have required a license to work as a tour guide and two of which have not. In my observation, tour guide licensing has nothing to do with protecting consumers. Tour guide licensing exams tend to cover trivial historical details that would not be of any interest to a tourist, and the ability to pass a multiple-choice history exam does not ensure that a guide will actually give a good tour. Instead, tour guide licensing is all about keeping out competition. Licensed guides have been quick to wield licensing as a weapon against new tour businesses. In Washington, D.C., I was able to fight back and get the city's tour guide licensing scheme struck down as a violation of the First Amendment. But I continue to be hampered by licensing restrictions put in place by the federal government at the Gettysburg National Park.

Segs in the City

Together with Tonia Edwards, I founded Segs in the City in 2004. At the time, Tonia and I operated a bicycle rental shop in Annapolis, MD, and Segways were a relatively recent invention. At first we rented out Segways to customers, but we quickly realized that there was a market to offer guided Segway tours.

Our tours are hard to miss: The guide (either Tonia, me, or one of our guides) leads the tour wearing a bright pink shirt, and a series of tourists follow behind by Segway. During the tour, guides can talk to the group by radio earpiece. Our tours

feature a mix of instruction on riding the Segway, historical facts, jokes, stories, trivia, and light-hearted conversation.

Our tour company offers a source of seasonal and part time work. Working as a tour guide can be a good way for people to supplement their income, and working as a tour guide can also be a good source of employment for students on their summer holidays. Over the years, we have probably engaged over 100 people as tour guides.

Our guided tours proved so popular, we soon expanded our business from Annapolis to Baltimore, Gettysburg, and Washington, D.C. In Annapolis and Baltimore, we have been able to offer tours without having to be licensed. But in Gettysburg and D.C. we quickly found that the simple act of talking to tourists without a license could violate the law.

D.C.'s Tour Guide Licensing Law

When we started doing business in Washington, D.C., in 2005, we had no idea that we might need a license to do something as simple as leading a tour. But not long after we showed up in town, we were approached by other tour guides—members of D.C.'s so-called tour guide “guild”—who informed us that we had to have a license in order to give a tour. It was my strong impression that these guides were worried about the new competition we were bringing to the market.

When I first looked into becoming a licensed tour guide, it actually would have been impossible for me to become licensed. That is because the regulations required that tour guides be U.S. citizens and have resided in D.C. for over three

years. At that time I was neither a resident of D.C. nor a citizen, although I did have a green card allowing me to work legally in the country. I did not see why my right to talk for a living should be contingent on my citizenship or residence.

Although D.C. eliminated the residency and citizenship requirements in 2010, the city continued to impose other burdensome requirements on would-be tour guides. Guides were required to pay application fees totaling \$200 and were required to pass a multiple-choice test on D.C.'s general history and geography. The test covered fourteen different topics drawn from nine different publications—a vast universe of material that in many cases had little or nothing to do with the topics that we wanted to discuss on our tours.

While the requirement to pay a fee and take a test was burdensome for me, it was even more burdensome for my guides. As I mentioned earlier, many of our guides are part time or seasonal workers. These guides cannot afford to pay a \$200 licensing fee and devote significant time to studying for a test just to obtain part time or seasonal work.

D.C.'s licensing law was full of loopholes that made it all the more absurd. The license requirement would not apply if you stood in a single place (say, directly in front of the White House) and spoke about that location to tourists for a fee. And the license requirement *also* would not apply if you led tourists around from place-to-place and played a pre-recorded narration. The license requirement only applied if you wanted to talk to people while leading them from place-to-place. I was never able to see what government interest could possibly be served by such a scheme.

Our First Amendment Lawsuit

In September 2010, Tonia and I joined with the Institute for Justice to file a First Amendment lawsuit challenging D.C.'s tour guide licensing law. Our claim was simple: Tour guides talk for a living, and under the First Amendment the government cannot force you to get a license to talk. It would be outrageous if the government were to require a license to work as a stand-up comedian, journalist, or novelist. Requiring a license to work as a tour guide is no less unconstitutional.

To be clear, I do not object to reasonable health and safety regulation. We comply with the requirement in D.C. that all Segway riders be over 16 years of age, for instance, and we complied with a temporary moratorium on the use of Segways on the National Mall that was put in place to determine if Segways cause any harm to the turf. (The moratorium was lifted after it was determined that they do not.) I simply do not see how requiring tour guides to pass a multiple-choice history test could have anything at all to do with health and safety.

Throughout the course of our lawsuit, nobody ever identified any real danger posed by unlicensed tour guides. Tour guides are storytellers. Tourists do not go on tours because they have a vital need for accurate information; tourists go on tours because they want to be entertained. If a tour guide makes a mistake about a historic site—say, confusing the Lincoln and Jefferson Memorials—nobody will suffer dire consequences. Indeed, if a tourist thinks they are getting bad information from a guide, they can easily double-check the story online.

Tour guide licensing is particularly unnecessary in today's world, as tourists now have access to TripAdvisor, Yelp, and other online rating tools. Today, few things are more important to a tour business than those online ratings. If tour guides do a bad job, their online ratings will decline, and they will very quickly find it difficult to attract new business. Online rating systems are a far more effective safeguard of quality than a government licensing scheme.

In 2014, the United States Court of Appeals for the D.C. Circuit agreed. The Court struck down D.C.'s tour guide licensing law, ruling that the government had failed to justify the infringement of our First Amendment right to speak.¹

Our Continued Exclusion From Gettysburg

Around the same time that we were running into these problems in D.C., we ran into a similar licensing scheme at the Gettysburg National Park. This time, however, the scheme was put in place by the National Park Service, rather than a local municipal government.

Tour guides must surmount a series of hurdles in order to become licensed to lead a tour of the Gettysburg battlefield.² First, guides must pass a written exam that covers a broad variety of topics—many of which are completely unrelated to the kinds of things that we talk about on our tours. Tour guides must then undergo a “panel interview,” which is conducted by individuals who are already licensed as tour guides (accompanied by Park Rangers). The panel evaluates would-be guides

¹ *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014).

² Licensed Battlefield Examination Process and Information Packet, U.S. Dep't of the Interior (Aug. 2015), *available at* <http://gettysburgtourguides.org/wp-content/uploads/2015/09/Becoming-LBG-Packet.pdf>.

on a range of subjective factors, including “oral and interpersonal communications skills,” “voice tone,” “the ability to connect with the interviewers/visitors,” “good posture,” and “use of correct grammar.” Finally, after completing an orientation program, guides must undergo an oral examination, which also is conducted by a licensed guide (along with a Park Ranger).

This licensing scheme is particularly outrageous because—as I was informed by the National Park Service—we would *not* be required to obtain the license in order to lead a tour so long as we played a pre-recorded tour message. The licensing requirement only came into play because we wanted to talk directly to the people on our tours. That plainly targets speech and violates the First Amendment.

The National Park Service admits that it operates this licensing scheme to limit competition. In a recent publication, the Park Ranger who oversees the licensing process explained that the park makes a decision “whether the entire testing process should be initiated and how many guides will be licensed” based on a review of “the number of requests for guided tours and the number of visitors not able to obtain a [tour] because no guide is available to serve them.”³

It would be completely unrealistic and unnecessary for us to complete the government’s licensing process to conduct our tours. The government’s exam covers a wide variety of topics that we simply do not address on our tours. Moreover, as burdensome as it would be for Tonia and me to take the exam, it would be out of the question for us to impose such a requirement on our part time and seasonal guides.

³ Licensed Battlefield Examination Process, note 2.

Our tour guides do not purport to be experts on all aspects of Civil War history, and our customers do not expect our guides to have that expertise. We offer an entirely different type of tour experience, and the choice whether to take our tour or some other type of tour should rest with the customer—not with the government.

Today, customers no longer have that choice, as we have been forced to shut down our Gettysburg tour business. Almost as soon as we started giving tours in Gettysburg, we were approached by licensed tour guides who complained that we were working without a license. I felt these guides objected that we were taking away “their” customers. Finally, we were approached by a Park Police Officer who informed us that we were breaking the law. While the officer did not arrest us at that time, we clearly received the message that we would be subject to criminal sanctions if we continued offering our tours without a license.

Conclusion

Because tour guides talk for a living, I was able to successfully challenge licensing in Washington, D.C. under the First Amendment. But many licensing laws do not fall within the protection of the First Amendment—even though they place equally unnecessary and burdensome restrictions on the right to earn a living. And, what’s more, even if a law is unconstitutional, it is a difficult and time-consuming process to challenge the law in court. I believe the licensing system in Gettysburg is unconstitutional, but until a court agrees I have no choice but to comply.

I welcome further attention to this issue from the nation's legislators, and I hope you will take action to promote the right to earn a living without a permission slip from the government.

Thank you for the opportunity to testify.