THE LIBERTY SERIES

WHAT YOU WERE NEVER TAUGHT ABOUT THE DRIVER LICENSE

DRIVING IS A PROFESSION

by

Richard, Parks Iverson

2014

- INTRODUCTION -

'One of the saddest lessons of history is this: If we've been Bamboozled long enough, we tend to reject any evidence of the Bamboozle. We're no longer interested in finding out the truth. The Bamboozle has captured us. It is simply too painful to acknowledge - even to ourselves - that we've been so credulous.'
Carl Sagan

We live entangled in webs of endless deceit, often self-deceit, but with a little honest effort, it is possible to extricate ourselves from them.
Noam Chomsky

One day many years ago I asked myself; Why do I keep registering my van? Back then I had a VW van and wasn't very agreeable with what I was lead to believe about the Vehicle Code and the DMV. What prompted the question was my revulsion of having to go to the DMV and giving my hard earned dollars to a bunch of wet blankets who could care less about the people waiting in line to be fleeced. I couldn't stand the place and the employee's attitude who slogged their way through another miserable day on the job who didn't mind dumping their discontent on the customers who put food on their tables. All I wanted was out.

I happened to be at the right place at the right time and the domino that lead to my understanding of why I had to have a driver license and register my van was tipped. That was nearly 30 years ago. What I've come to learn in all these years of study of the topic of the driver license and vehicle registration, is that it's a massive fraud and that people simply would not do what they've been lead to believe they have to do if they knew the truth. This essay is meant to serve that purpose.

This is a question I've posed to countless numbers of people since I began my studies all those years ago, "If you didn't have to have a driver license and register your car or truck, would you?". The answer is always the same. For some reason people simply don't bother asking why they do what they believe they have to do. People can, of course, believe what they want but as someone once said, facts are stubborn things. People are entitled to their own beliefs but not their own facts. What you're about to read are facts, not conjecture or theory or speculation. The facts come from unassailable sources, your government employees.

None of what follows have I made up, I just found what's existed and have compiled and presented some of it for study and evaluation.

So, if you didn't have to have a driver license and register your car or truck or motorcycle, would you? If you answer yes then how do you know for a fact that you have to if you've never seen or been made aware of the following?

Knowledge is power when properly applied.

Richard, Parks Iverson

- The Reason “DRIVING” Is A Privilege -

Everybody knows that driving is a privilege and you have to have a valid driver license in order to legally drive. This is well settled and beyond dispute or debate. So if you want to drive then you better have a valid driver license in your possession.

What everybody doesn’t know is what the license permits. The easy answer is lawful driving. Unfortunately, we’ve not been taught what a license is for and what the technical definition of driving is.

In order to get the driver license one must go to the DMV office and fill out an application and then qualify for it. It is not a secured right because you don’t apply for a secured right nor do you qualify for one. Such a right is acquired at birth. This is why driving is a privilege. It is something offered by government and government does not, can not, grant what it does not possess. What government does not possess are unalienable rights, they only possess and grant taxed and revocable privileges.

As we know, no permission is required to exercise a secured unalienable right. Unlike a secured right, the driving privilege is something one must ask and pay for.

Ask anyone and they’ll tell you they own their car. If that’s in fact true then why does the owner require their municipal servant’s permission to use it? We have the unalienable right to acquire and possess and enjoy property so how did people come to believe they require their servant’s permission to use what they have the secured right to acquire and enjoy? The purpose of a car or truck or van or motorcycle is for getting from Point A to Point B without having to walk. Ask anyone and they’ll probably tell you they enjoy riding in a car 10 miles to get groceries as opposed to walking 10 miles for groceries.

It’s a fact the DMV exists. Was anyone ever taught what the purpose of the DMV was? Was anyone ever taught what a license is for? If not why not? Why would the public schools of this country not teach children who are forced to attend, something as significant as what driving and a motor vehicle and a license is? Who would benefit from the majority of people not knowing this essential information?

Contrary to everyone’s belief, driving is a profession. It’s a job for which one is permitted to receive compensation. The license permits the holder of the license to charge a fee to transport passengers or property from Point A to Point B. A driver is one employed, they’re an employee, they’re on the job and receiving compensation for the activity they’re employed for and engaged in.

This essay will provide the reader with unassailable evidence in support of the assertion that driving is a profession, proof of which is found in the image on the cover.

In the Land of the Blind, the guy with one good eye is king. What follows is meant to open both of ours.

Cattle Drive

The common denominator reflected in all those images is, commerce or business. The parties engaged in all the various activities are employees and getting paid for what they're engaged in. In order to legally engage in the profession they must be licensed.

CALIFORNIA BUSINESS AND PROFESSIONS CODE

> **7028. (a)** It is a misdemeanor for a person to engage in the business or act in the capacity of a contractor within this state without having a license therefor, unless the person is particularly exempted from the provisions of this chapter.

CALIFORNIA VEHICLE CODE

> **12500. (a)** A person may not drive a motor vehicle upon a highway, unless the person then holds a valid driver's license issued under this code, except those persons who are expressly exempted under this code.

A driver is one receiving compensation for driving. Hence, driving is a commercial taxed and revocable inferior privilege. The privilege is inferior to those rights secured by both State and federal constitutions for which no license is required, as you'll see at Vehicle Code sec. 4 immediately below where we're informed by the Legislature that no right accrued is affected by the provisions of the code. It's unfortunate the public schools don't bother teaching the students what an accrued right is.

Driving a vehicle and being in actual control of a vehicle are not synonymous.
Mercer v. Department of Motor Vehicles (1991) 53 Cal.3d 753.

It is settled that the streets of a city belong to the people of a state and the use thereof is an inalienable right of every citizen of the state.
Whyte v. City of Sacramento, 65 Cal. App. 534, 547, (1924)
Escobedo v. State Dept. of Motor Vehicles, 35 Cal.2d 870 (1950)

VEHICLE CODE
GENERAL PROVISIONS
SHORT TITLE

Pending Proceeding and Accrued Rights

4. No action or proceeding commenced before this code takes effect, and no right accrued, is affected by the provisions of this code, but all procedure thereafter taken therein shall conform to the provisions of this code so far as possible.

- WHAT ACTIVITY DOES THE DMV REGULATE AND THE DRIVER LICENSE PERMIT? -

“The activity licensed by state DMVs - the operation of motor vehicles - is itself integrally related to interstate commerce”.
Seth Waxman, Solicitor General
U.S. Department of Justice
BRIEF FOR THE PETITIONERS
Reno v. Condon, 528 U.S. 141, January 12, 2000
Supreme Court of the United States

In other words, the federal government believes that driving is commercial behavior or activity. Obviously they know something you don’t.

A license proper is a permit to do business which could not be done without the license.
CITY AND COUNTY OF SAN FRANCISCO v. LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY et al. (1887), 74 Cal. 113

"We have said, and we reiterate, that a license is merely a privilege to do business and is not a contract between the authority granting it and the grantee, nor is it a property right. See syllabus by the court, No. 4, Prettyman Inc. v. Florida Real Estate Commission ex rel. Branham, 92 Fla. 515, 109 So. 442."
Mayo et al. v. Market Fruit Co. of Sanford, Inc. (1949) 40 So.2d 555

The Garcia court quoted Lambert v. California (1957) 355 U.S. 225, 227 [78 S.Ct. 240, 242][involving registration for convicted felons] as follows: “‘Many [registration] laws are akin to licensing statutes in that they pertain to the regulation of business activities.
People v. Garcia (2001) 25 Cal.4th 744

"... Section 1 [of the Motor Vehicle Act] excludes from the definition of the term 'operator' everyone 'who solely transports by motor vehicle ... his or its own property, or employees, or both, and who transports no persons or property for hire or compensation.'"
Bacon Service Corporation v. Huss (1926), 199 Cal. 21

"Section 250 . . . "(a) It is a misdemeanor for any person to drive a motor vehicle upon a highway unless he then holds a valid operator's or chauffeur's license . . . .." . . . . driving privileges--of which the license is but evidence (People v. Noggle (1935), 7 Cal.App.2d 14, 17, [45 P.2d 430, 432]).
People v. Higgins (1948) 97 Cal.App.2d Supp. 938

STATUTES OF CALIFORNIA
1959 REGULAR SESSION
CHAPTER 3

§310. "Driver's license" includes both an operator's and a chauffeur's license.

A license proper is a permit to do business which could not be done without the license.
CITY AND COUNTY OF SAN FRANCISCO v. LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY et al. (1887), 74 Cal. 113

"We have said, and we reiterate, that a license is merely a privilege to do business and is not a contract between the authority granting it and the grantee, nor is it a property right. See syllabus by the court, No. 4, Prettyman Inc. v. Florida Real Estate Commission ex rel. Branham, 92 Fla. 515, 109 So. 442."
Mayo et al. v. Market Fruit Co. of Sanford, Inc. (1949) 40 So.2d 555

"A chauffeur, within the sense defined in Veh. Code § 71, is one who is paid compensation for his services."
Hutton v. California Portland Cement Co. (1942), 50 CA2d. 684

Code of Federal Regulations

Title 49, Volume 4, Parts 200 to 399
Revised as of October 1, 1999

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TITLE 49 -- TRANSPORTATION

CHAPTER III -- FEDERAL HIGHWAY ADMINISTRATION,

DEPARTMENT OF TRANSPORTATION
PART 390 -- FEDERAL MOTOR CARRIER SAFETY REGULATIONS; GENERAL

Subpart A -- General Applicability and Definitions

Sec. 390.5 Definitions.

Driver means any person who operates any commercial motor vehicle.

Interstate commerce means trade, traffic, or transportation in the United States--

(1) Between a place in a State and a place outside of such State (including a place outside of the United States);
(2) Between two places in a State through another State or a place outside of the United States; or
(3) Between two places in a State as part of trade, traffic, or transportation

Intrastate commerce means any trade, traffic, or transportation in any State which is not described in the term ``interstate commerce.''

Motor vehicle means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property,

Operator -- See driver.

While, as pointed out in Bosse v. Marye, supra, one may be an operator of an automobile within the meaning of the Motor Vehicle Act without actually driving the same, on the other hand, under the definition applying under the terms of the act, one who actually drives the machine is an operator. (Sec. 18 of Motor Vehicle Act; Stats. 1923, p. 519.)
HELEN I. PONTIUS v. G. T. McLAIN et al. (1931), 113 Cal. App. 452, Civ. No. 350, COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

Therefore it becomes necessary at the outset of a consideration of the problem herein presented to distinguish between a right which arises as the result of a contractual obligation and a right acquired by a license granted under the inherent police power of the state.

It is conceded that every citizen has a right to follow any lawful business or profession which is not injurious to the public or a menace to the health, safety or welfare of society, free from regulation by the exercise of the police power of the state except in cases of necessity for such health, safety or welfare, and when its authority is so interposed in behalf of the public it must be by means reasonably necessary for the accomplishment of that purpose.

A license has none of the elements of a contract and does not confer an absolute right but a personal privilege to be exercised under existing restrictions and such as may thereafter be reasonably imposed.

In accordance with such general rule this court stated in the case of Gregory v. Hecke, 73 Cal.App. 268 [238 P. 787]:

"No person can acquire a vested right to continue, when once licensed, in a business, trade or occupation which is subject to legislative control under the police powers." (Citing Hurtado v. California, 110 U.S. 516 [4 S.Ct. 111, 28 L.Ed. 232]. See 12 Am.Jur. § 694, p. 371; 16 C.J.S. § 224, p. 647.)
Rosenblatt v. California (1945), 69 Cal.App.2d 69

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- WHAT IS THE PRIMARY OR COMMON PURPOSE OF THE USE OF THE STREETS? -

34 Cal Jur 2d

MOTOR TRANSPORTATION

II. REGULATION, GENERALLY

I. IN GENERAL

§1. Scope. - The history of the legislation of this state with reference to the transportation of persons and property on the public highways of the state for compensation discloses two distinct lines of statutes. One such line was enacted for the purpose of regulating the business of transportation by motor vehicles of persons or property for hire or compensation on the public highways. Examples are the Highway Carriers Act, the City Carriers Act, the Household Goods Carriers Act, and various sections of the Public Utilities Act relating to motor carriers. On the other hand, the Motor Vehicle Transportation License Tax Act was enacted as a step in the second line, which consists of certain acts and constitutional provisions that are primarily revenue measures, designed to secure for the state a fair return for the use of its highways in transporting persons or property for compensation.

§ 2. In General. - An adequate transportation system is essential to the welfare of the state, and an important part of that system is the service rendered by highway carriers. Among the purposes of regulation are the preservation of the highways for the public benefit and use, consistent with the needs of commerce, without unnecessary congestion or wear and tear; maintenance of a full and unrestricted flow of traffic by auto carriers over the highways; maintenance of adequate, regular, and reliable service by such carriers at reasonable rates and charges; and prevention of discrimination among shippers. To these ends it is necessary to regulate the use of the highways by those transporting property thereon for commercial purposes.

§ 3. Basis of Authority. - It is a recognized principle that the use of the public highways for the purpose of transacting business thereon is a privilege the state may grant or withhold in its discretion and on which it may impose such
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conditions as it sees fit.

[3] Streets and highways are for the use of the traveling public, and, as members of the public, all persons in like situation have equal rights to use the streets and highways in a reasonable manner in the customary way. (13 Cal.Jur. 371.) However, **the common right to use streets in the ordinary way is quite different from the right to use them as a place of business for private gain. Ordinary usage is the right of all, but there is no vested or constitutional right to subject a street to the conduct of private business**. Such use, when authorized, is a special or extraordinary privilege. It is an added easement or burden on the street, and is not comparable to the right to conduct lawful business on private property. Use of a public street for private enterprise may under some circumstances redound to the public good; but nevertheless it is a special privilege peculiarly subject to regulation, and one which may be granted on reasonable terms or entirely withheld. (2 Elliott's Roads and Streets, p. 1632; Hadfield v. Lundin, 98 Wash. 657, 660 [168 P. 516, Ann. Cas. 1918C, 942, L.R.A. 1918B, 909]; Scott v. Hart, 128 Miss. 353, 358 [91 So. 17]; Long's Baggage Trans. Co. v. Burford, 144 Va. 339, 344 [132 S.E. 355]; Re Dickey, 76 W. Va. 576, 584-586 [85 S.E. 781, L.R.A. 1915F, 840]; Schoenfeld v. Seattle, 265 Fed. 726, 732.) [24 Cal.App.2d Supp. 776].
People v. Galena (1937), 24 Cal.App.2d Supp. 770
[Appellate Department, Superior Court, City and County of San Francisco. Crim. A. No. 139. June 8, 1937.]

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Hadfield v. Lundin, 98 Wash. 657, 168 Pac. 516 (1917)
[No. 14239. En Banc. November 8, 1917.]

EARL HADFIELD et al., Appellants, v. ALFRED H. LUNDIN, as Prosecuting Attorney for King County, Respondent. «1»

MUNICIPAL CORPORATIONS - USE OF STREETS - MOTOR VEHICLES -

REGULATION - BONDS - CONSTITUTIONAL LAW - DUE PROCESS - EQUAL

PROTECTION OF LAWS. The jitney bus act, Rem. Code, SS 5562-37 et seq., requiring city motor carriers of passengers for hire to give a security bond executed by a qualified surety company, does not violate the constitutional prohibitions against depriving one of property without due process of law, or of the equal protection of the laws, notwithstanding the act is prohibitive from the fact that there are no qualified surety companies from which such bonds are obtainable; since **the state in the exercise of its police power can prohibit the use of the streets as a place of private business**.

SAME - USE OF STREETS - MOTOR VEHICLES - REGULATION - BONDS - STATUTES. Rem. Code, SS 5562-38, requiring city motor carriers of passengers for hire to give a security bond executed by a surety company to do business in this state, running to the state of Washington, conditioned for the faithful compliance with the provisions of the act, is not satisfied by procuring a liability bond by a mutual union insurance company indemnifying the carrier
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against liability for damages, and assigning such bond to the state for the benefit of third persons who may be injured by the negligent driving of the vehicle.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 25, 1917, dismissing an action for an injunction, upon sustaining a demurrer to the complaint. Affirmed.

William R. Crawford and Ralph S. Pierce, for appellant.

Alfred H. Lundin and Frank P. Halsell, for respondent.

James B. Howe, amicus curiae.

«1» Reported in 168 Pac. 516.

ELLIS, C.J. - Plaintiff, in his own behalf and in behalf of others similarly situated, seeks in this action to enjoin defendant, as prosecuting attorney of King county, from prosecuting persons for operating motor propelled vehicles for hire upon the public streets of Seattle without having filed the bond and obtained the permit required by chapter 57, Laws of 1915, p. 227; Rem. Code, SS 5562-37 et seq.

He alleged, in substance, that, since the passage of that act up to and including a time shortly preceding the commencement of this action, he had been engaged in the business of transporting for hire passengers along the public streets of Seattle in an automobile; that, during such time, he had on file with the secretary of state a bond executed by a qualified surety company in the sum and conditioned as required by that act; that the bond has expired and is now under its terms null and void; that he has been unable to secure a new bond from any surety company doing business in this state, and that no such surety company will write such a bond for him or for any other person engaged in a business similar to that of plaintiff, and this, regardless of the financial responsibility of the applicant; that the secretary of state threatens to, and will, cancel plaintiff's permit and will refuse to issue to him another permit, unless and until plaintiff procures and files a surety bond as required by the act. He further alleged that the Mutual Union Insurance Company, a domestic mutual insurance company, has been organized and is authorized to write liability or indemnity insurance against loss or damage resulting from accident or injury suffered by an employee or other person for which the insured is liable; that such company has issued to plaintiff its contract for such liability in the penal sum of $2,500 which is, by its terms, assignable to the state of Washington in behalf of any person who may be injured through the negligence or unlawful conduct of plaintiff in the conduct of his business of carrying passengers for hire; that this contract has been assigned to the state of Washington for the protection of any person so injured; that, notwithstanding the fact that a solvent fund has been so provided, defendant threatens strictly to enforce such law and compel plaintiff to secure a permit from the secretary of state and to furnish a bond signed by a surety company licensed to do business in this state; that such a course will force plaintiff out of a profitable and legitimate business, deprive him of his means of livelihood and inconvenience the public. Finally, it is alleged:

> "That such law is null and void because so burdensome as to be unreasonable; because it is arbitrary, confiscatory, impossible of fulfillment and tantamount to a prohibition against the carrying on by the plaintiff of a legitimate business; that it contravenes the constitution of the state of Washington, section 3, article 1 thereof, and the constitution of the United States, article 14 thereof, in that it deprives the plaintiff of his liberty and property without due process of law and denies to the plaintiff the equal protection of all the provisions of the constitution of the state and of the United States applicable thereto."

Defendant moved to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The motion was sustained and the complaint was dismissed. Plaintiff appeals.

Appellant's contentions are (1) that chapter 57, Laws of 1915, p. 227 (Rem. Code, SS 5562-37 et seq.), is unconstitutional; (2) that, in any event, he should be permitted to assign to the state and file the indemnity bond tendered in his complaint as a sufficient compliance with the statute.

I. It is urged that the statute is unconstitutional in that it deprives appellant of his liberty and property without due process of law, thus contravening section 3, article 1, of the state constitution, and in that it deprives him of the equal protection of the law in contravention of the Fourteenth Amendment of the Federal constitution. We have twice held this law constitutional. State v. Seattle Taxicab 87 Transfer Co., 90 Wash. 416, 156 Pac. 887, State v. Ferry Line Auto Bus Co., 93 Wash. 614, 161 Pac. 467. But it is argued that, in neither of those cases, did it appear that bonds of the character prescribed by the law could not be procured, which fact does appear in the record now before us and which, it is asserted, demonstrates the unconstitutionality of the law. We shall confine our discussion to a consideration of that question.

The streets and highways belong to the public. They are built and maintained at public expense for the use of the general public in the ordinary and customary manner. The state, and the city as an arm of the state, has absolute control of the streets in the interest of the public. **No private individual or corporation has a right to the use of the streets in the prosecution of the business of a common carrier for private gain without the consent of the state, nor except upon the terms and conditions prescribed by the state or municipality, as the case may be. The use of the streets as a place of business or as a main instrumentality of business is accorded as a mere privilege and not as a matter of natural right.** In State v. Seattle Taxicab 4; Transfer Co., supra, we said:

> "As to those who were denied bonds, the act may be prohibitive, but this does not argue against its constitutionality. It in no manner proves that the regulation is unreasonable. Highways are constructed primarily as a convenient passageway for all of the people, and no one has an absolute right to use them for his own private gain, even though such use be to carry over them people who desire the service."

In Green v. San Antonio (Tex. Civ. App.), 178 S. W. 6, it is said:

> "So in this case, appellant has never had any vested right to use the streets of San Antonio to engage in the business of a common carrier of passengers for hire, and no right of his is infringed or invaded by the ordinance requiring certain things to be done in order to enter into business on the streets, which have, at the expenditure of large sums, been placed by the city in prime condition for automobile travel.
>
> **The streets belong to the public, the city being its trustee, and no private individual or corporation has a right to use such streets for the prosecution of a business without the consent of the trustee** and a compliance with the conditions upon which the permission to use them is given."

In Le Blanc v. New Orleans, 138 La. 243, 70 South. it is said:

> "The streets of the cities and towns in Louisiana being among the things that are 'public' and 'for the common use,' no individual can have a property right in such use for the purposes of his private business, unless, speaking generally, that business being in the nature of a public service or convenience, such as would authorize the grant, the right has been granted by the state, which alone has the power to make or authorize it, or, by the particular city or town, acting under the authority of the state, and in such case the right can be exercised only in accordance with the conditions of the grant; that is to say, an individual seeking, but not possessing, a right of that kind, may accept the grant, with the conditions imposed by the offer, in which case he becomes bound by the conditions, or he may refuse to accept the conditions, in which case there is no grant, and without the grant so offered, or some other, from the authority competent to make it, he can never acquire the right to make use of a street as his place of business."

See, also, to the same effect, Memphis Street R. Co. v. Rapid Transit Co., 133 Tenn. 99, 179 S. W. 635, Ann. Cas. 1917C 1045, L. R. A. 1916B 1143, P. U. R. 1916A Memphis v. Stole ex rel. Ryals, 133 Tenn. 83, 179 S. W. 6,91, Ann. Cas. 1917C 1056, L. R. A. 1916B 1151, P. U. R. 1916A 825; Ex parte Dickey, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915F 840; Ex parte Lee, 28 Cal. 719, 153 Pac. 992; Lutz v. New Orleans, 235 Fed. 978. These cases, though involving regulatory statutes or ordinances, all recognize and are based upon the fundamental ground that **the sovereign state has plenary control of the streets and highways, and, in the exercise of its police power, may absolutely prohibit the use of the streets as a place for the prosecution of a private business for gain. They all recognize the fundamental distinction between the ordinary right of a citizen to use the streets in the usual way and the use of the streets as a place of business or main instrumentality of a business for private gain. The former is a common right, the latter an extraordinary use.** As to the former, the legislative power is confined to regulation; as to the latter, it is plenary and extends even to absolute prohibition. Since **the use of the streets by a common carrier in the prosecution of its business as such is not a right, but a mere license or privilege,** it follows that the legislature

may prohibit such use entirely without impinging any provision either of the state or Federal constitution.

In Allen v. Bellingham, 95 Wash. 12, 163 Pac. 18, we said:

> "**But the use to which the appellant purposes putting the streets is not their ordinary or customary use, but a special one. He proposes using them for the transportation of passengers for hire, a use for which they are not primarily constructed.** As to such users, we think the power of the municipality is plenary, in so far as this particular clause of the statute is commenced. It denies no form of regulation pertaining to business of this character, even to the prohibition of the business entirely."

That language may be said to be obiter, but it states the correct principle as amply sustained by authority. In Cummins v. Jones, 79 Ore. 276, 155 Pac. 171, the supreme court of Oregon, after discussing and quoting at length from many authorities said:

> "We conclude, therefore, that since the ordinance in question is purely prohibitory, and cities have the undoubted right to prohibit such use of their streets, the demurrer should have been sustained."

In Wade v. Nunnelly, 19 Tex. Civ. App. 256, 46 S. W. 668, the Texas Court of Civil Appeals said:

> "The ordinance in question does not undertake to prevent or interfere with the right of the appellees to purchase, sell, or otherwise deal in the products referred to upon their own premises; nor does it prohibit other persons from carrying such products and delivering them to appellees upon their premises. . . . But appellees have no vested right to make marts of the streets, alleys, and other public places; and to deny them the privilege of so doing is not to destroy or deteriorate any of their property rights."

In Ex Parte Dickey, supra, the supreme court of West Virginia used the following language:

> "**The right of a citizen to travel upon the highway and transport his property thereon, in the ordinary course of life and business, differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain, in the running of a stage coach or omnibus. The former is the usual and ordinary right of a citizen, a common right, a right common to all, while the latter is special, unusual, and extraordinary. As to the former, the extent of legislative power is that of regulation; but as to the latter, its power is broader. The right may be wholly denied, or it may be permitted to some and denied to others, because of its extraordinary nature. This distinction, elementary and fundamental in character, is recognized by all the authorities**."

See, also, People v. Rosenheimer, 209 N.Y. 115, 102 N. E. 580, Ann. Cas. 1915A 161, 46 L. R. A.

(N. S.) 977; Memphis v. State ex rel. Ryals, supra; Fifth Ave. Coach Co. v. New York, 194 N.Y. 19, 86 N. E. 824, 21 L. R. A. (N. S.) 744. The regulation here involved, even considered as a prohibition, does not contravene the Fourteenth amendment of the Federal constitution.

"It is settled that the fourteenth amendment does not create any right in a citizen to use the public property in defiance of the laws of the state." Lutz v. New Orleans, supra.

See, also, Davis v. Massachusetts, 167 U. S.

If any proposition may be said to be established by authority, the right of the state, in the exercise of its police power, to prohibit the use of the streets as a place of private business or as the chief instrumentality in conducting such business, must be held so established. Nor can it be questioned that the power to prohibit includes the power to regulate, even to the extent that the regulation under given conditions may be tantamount to a prohibition. Where the power to prohibit exists the reasonableness of any regulation is palpably a legislative question, pure and simple. To hold otherwise, would be to assert an absurdity. When the legislature acts within its constitutional authority in the exercise of the police power, the expediency of its action is not a question for the courts. In such a case, the power once being established, the legislature determines by the enactment itself that the law is reasonable and necessary. State v. Mayo, 106 Me. 62, 75 Atl. 295, 26 L. R. A. (N. S.) 502.

The complaint before us shows that the statute in question not only could be complied with, but for over a year was complied with by the appellant himself. If, as asserted, appellant is now unable to meet those requirements because the character of bond required by the act cannot be secured, then he is not entitled to the privilege which the statute grants; and this, simply because the grant was conditioned upon the meeting of those requirements. Le Blanc v. New Orleans, supra.

II. Appellant urges that he should be accorded the right to procure a liability bond indemnifying himself against liability for damages, written by the Mutual Union Insurance Company, and should be permitted to assign it to the state for the benefit of third persons who may be injured by the negligent operation of his vehicle and file it in lieu of "a bond running to the state of Washington in the penal sum of twenty-five hundred dollars, with good and sufficient surety company licensed to do business in this state as surety to be approved by the secretary of state, conditioned for the faithful compliance by the principal of said bond with the provisions of this act" as required by Rem. Code, SS 5560-38. We have held that the Mutual Union Insurance Company cannot write the bond required by the statute. State ex rel. Mutual Union Ins. Co. v. Fishback, 97 Wash. 565, 166 Pac. 799.

Appellant does not claim that an arrangement such as tendered in his complaint would be a compliance with the law but argues, in substance, that it is something just as good. But the courts cannot legislate. The law-making body, acting within its undoubted powers, has prescribed in plain terms the conditions upon which appellants and others in like case may use the streets in the prosecution of their business. The courts have no power to alter such conditions. The statute is too plain for construction. We are asked not to construe the statute but to amend it under the guise of construction. We must decline that office.

HOLCOMB, MAIN, MORRIS, CHADWICK, PARKER, MOUNT,
and FULLERTON, JJ., concur.

WEBSTER, J., took no part.

District Court of Appeal, Second District, California

Ex parte LEE

Cr. 434.

Nov. 4, 1915

Application for writ of habeas corpus by H. G. Lee against the Chief of Police of the City of San Diego. Writ of discharged.

See, also, 153 Pac. 995.

Automobiles 48A, 61

48A Automobiles
48AIII Public Service Vehicles
48AIII(A) Control and Regulation in General
48Ak61 k. Local Regulations. Most Cited Cases

Section 3a of Ordinance No. 6248 of the city of San Diego, requiring that auto busses be run on a regular schedule from 6 a.m. to midnight daily at least 6 days a week, held a valid exercise of the city's police power.

Lane D. Webber, of San Diego, for petitioner. T. B. Cosgrove, City Atty., and Sweet, Stearns & Forward, all of San Diego, for respondent. Herbert N. Ellis, of San Diego, amicus curiae.

CONREY, P. J.

The petition herein sets forth that the petitioner is under arrest and in custody of the chief of police of the city of San Diego pursuant to a complaint charging him with violations of a penal ordinance of that city. The complaint, which was filed with a city justice of the peace, charges that the defendant has committed a misdemeanor as follows, to wit:

> "That the said defendant on or about the 31st day of August, 1915, in the city of San Diego, * * * being the lessee of and operating an auto bus, as defined in section 1 of Ordinance No. 6248 of the ordinances of said city, said auto bus being operated by virtue of a certain auto bus permit and license numbered 43,

issued pursuant to the terms of said ordinance numbered 6248, did willfully and unlawfully on, to wit, the 31st day of August, A. D. 1915, and on the 1st day of September, A. D. 1915, and on the 2d day of September, A. D. 1915, fail, refuse, and neglect to run and operate said auto bus so as to maintain a regular schedule from 6 o'clock a.m. to 12 o'clock midnight, daily, for at least 6 days in the week, beginning Monday, August 30, A. D. 1915, and ending Monday, September 6, A. D. 1915, all of which is contrary," etc.

The Ordinance No. 6248 is entitled:

"An ordinance regulating the use of the streets of the city of San Diego, California, by self–propelled motor vehicles carrying passengers for hire, and providing for the licensing of such vehicles and for a penalty for the violation of this ordinance." So far as necessary to be set forth herein, the provisions of the ordinance are as follows: "Section 1. An ‘auto bus' is hereby defined to be a self–propelled motor vehicle, other than a street car, traversing the public streets between certain definite points or termini and conveying passengers for a fixed charge of not more than ten cents between such and intermediate points, and so held out, advertised, or announced. An auto bus is hereby declared to be a common carrier and is subject to the regulations herein prescribed."

As a prerequisite to the operation of an auto bus, the owner or lessee thereof is required to obtain a permit therefor. Written application must be made for an auto bus permit, and the ap- plication is required to state, among other things:

"(a) The route or routes proposed to be followed in transporting passengers, and the termini of said route or routes." * * * "(c) The schedule to be observed, showing the times of departure from the termini according to which it is proposed to operate such auto bus."

Section 19 is as follows:

"It shall be unlawful for any person driving any such auto bus, and holding himself out to carry passengers for hire from point to point, to drive or operate such auto bus for hire over a route, or between the termini, or according to a schedule other than the route, termini or schedule described in the license, or to deviate from such route, or fail to maintain such schedule, or to fail, refuse, or neglect after commencing any trip to operate such auto bus between the termini and over the entire route or routes specified in the licenses and mentioned in the sign herein provided to be carried by each auto bus, unless the failure to complete such trip shall be the result of accident, or the breaking down of the auto bus or the engine thereof; provided, however, that such persons may transfer passengers to any other auto bus used to complete such route as herein provided, only a single fare being charged, however, for the entire trip between such specified termini, and provided, always, however, that

> nothing herein contained shall be construed as prohibiting the owner of auto busses from operating the same at times and over routes other than the times and routes mentioned in their schedule, and charge such fare for hire as may be agreed upon between the owners of such auto busses and the passengers therein."

Section 3a reads as follows:

> "In order that adequate transportation facilities may be furnished to the public, each and every auto bus for the operation of which a permit is issued under the provisions of this ordinance, shall be so run and operated as to maintain a regular schedule from six a. m. to twelve midnight daily, for at least six days each week and such schedule shall be so arranged as to provide that such auto bus shall leave from each terminus of its route at stated intervals during the whole of such period from six a.m. to twelve midnight of each day for at least six days in each week. That the intervals of departure from each such terminus shall be so fixed as to allow such auto bus sufficient time to safely traverse the distance between such termini and to remain at each terminus for the purpose of receiving and discharging passengers not longer than thirty minutes between each trip."

Under section 26 the violation of any of the provisions of the ordinance is declared to be a misdemeanor for which certain penalties of fine or imprisonment or both are provided.

The petitioner alleges:

> "That the particular section of said Ordinance No. 6248 with which petitioner believes himself to be charged with violating is section 19 of said ordinance; that the said ordinance, and the said section 19 thereof, with violation of which said H. G. Lee is charged, are unconstitutional, invalid, void and of no force and effect because the said Ordinance No. 6248, and said section 19 thereof, are unreasonable, oppressive, destructive, and unfairly discriminate against your petitioner, said H. G. Lee, and the persons and things by it sought to be regulated."

From the agreed statement of facts herein, which substantially is offered as the return to the writ, it appears that Ordinance 6248 was adopted and approved in the early part of July, 1915, and section 3a was added thereto by amendment approved August 28, 1915; that on or about August 2, 1915, acting under the provisions of said ordinance, the petitioner filed an application for an auto bus permit, gave the bond required by the ordinance, and on August 9th a permit was duly granted licensing petitioner to drive and operate an auto bus in the city of San Diego, and he paid the license fee required by the ordinance. In his application for a permit petitioner specified the route over and upon which he proposed to operate his said auto bus and the termini of such route, which said route is specified in said application to be from Fifth and "E" streets in said city, to University avenue. In the operation of his said auto bus petitioner did, on the day or days alleged in the complaint for his arrest, for three

consecutive days fail and neglect to so operate his said auto bus as to maintain a regular schedule for 18 hours each day, as stated in said complaint.

Without making a detailed statement of the pertinent provisions of the Constitution of the state and of the charter of the city of San Diego, this decision will assume that the city is vested with ample police powers, coextensive with the police power of the state, so far as municipal affairs are concerned; that the city's powers of control over streets include the power to regulate and to license vehicles using the streets for the carriage of passengers; and that it may make it a misdemeanor to carry on the business of carrying passengers on the city streets without a license. Referring to a similar ordinance of San Francisco, the Supreme Court of California said that:

> In regulating the use of its streets the city "may classify vehicles for the purpose of regulation in such manner as is reasonable, in view of the character and manner of use and the danger to the public to be apprehended. * * * It may well be that the board of supervisors concluded that * * * special regulations as to condition of car, competency and fitness of operator, and the operation of the car, as well as security to protect against improper or negligent operation, were essential to the public safety." In re Cardinal, 150 Pac. 348.

As the record presented herein fails to show that the petitioner was prosecuted for a violation of any provision contained in section 19 of the ordinance, we need not consider his objections to the validity of that section. The complaint against him charged him with failure to operate his auto bus according to a schedule which is the schedule required by section 3a. Nevertheless he may have been operating according to the schedule described in his license as required by section 19. The principal question for determination, therefore, is whether the provision of the ordinance which requires a licensed auto bus to be operated 18 hours per day is a regulation made in the lawful exercise of the police power, and especially of the power to make reasonable regulations governing the use of the streets.

In Ex parte Sullivan (decided May 5, 1915) 178 S. W. 537, the petitioner was convicted upon a charge that he violated an ordinance of the city of Ft. Worth in the state of Texas, regulating motor busses of the class commonly called "jitneys," in that he operated such vehicle without the license required by that ordinance. The decision covers many points of objection to the ordinance, including a question identical with that at issue herein. The court said:

> "Again, the applicant attacks those provisions, in effect, requiring him to select a given route over which he will run his motor bus, jitney, designating the termini, and requiring him to stick to that route and termini, and prohibiting him from operating elsewhere and requiring him to run, or cause to be run, his jitney for not less than 12 consecutive hours out of every 24, except, etc. The ordinance on this subject, it seems to us, instead of being unreasonable, is most reasonable, and permits them at any time to apply to the city for a change in their route or termini, and the ordinance provides that the city, in its discretion, can make such desired change. The agreed facts show that the jitneys now operate an average of 15 hours each day. Surely that they should be required

> by the ordinance to operate, with the exceptions mentioned, 12 hours is not unreasonable and violates no law. It seems to us that the ordinance makes every exception in this regard that would be either necessary or proper."

In Greene v. City of San Antonio (decided June 9, 1915) 178 S. W. 6, the plaintiff sought to restrain the enforcement of a certain ordinance regulating the operation of vehicles using the streets of San Antonio for local street transportation. The court said:

> "It has been held time and again that cities have the authority to regulate or even to prohibit the prosecution of a private business on a street, and that such business cannot be engaged in lawfully without a grant of some character from the government. Whether the grant be denominated a franchise, a license, or a privilege would not matter, for the distinction is one in name and not in substance. Dill. Mun. Corp., § 1210, and notes. The author cited defines a franchise 'to be a particular privilege which does not belong to the individual or corporation as of right, but is conferred by a sovereign or government upon, and vested in, individuals or corporations.' The right to solicit passengers and convey them for hire from one part of the city to another, as appellant does, is a privilege, a right, or a power, which he cannot exercise as of right, but its lawful existence must depend upon a grant whose character will not be changed by calling it a franchise, a privilege, or a license. The rights given could, with perfect propriety, be named a franchise."

The ordinance was sustained, and in the course of its discussion the court further said: "The city is duly authorized by its charter to grant franchises for the use of the streets and public places for public purposes alone, and were appellant not engaged in the public service of transporting passengers, the city would not be authorized to license his automobiles to carry passengers for hire. There can be no difference in granting a franchise to run cars on steel rails and to run them on the street surface. There can be no more reason for not exercising the same control over automobiles engaged in transporting passengers for pay than in supervising and controlling, vehicles that can only move on metal rails. In fact there is a greater inconvenience to traffic on the streets and more danger of accidents from numbers of automobiles dashing along at a high rate of speed in the hot quest for nickels than in cars confined to certain well–defined tracks. The ordinance does not indicate any desire upon the part of the city government to destroy or unnecessarily hamper the new mode of transportation, but it is merely exercising that regulation of it which experience has demonstrated must be applied to any individual or corporation serving the general public. Appellants' business is that of a common carrier, subject to the same liability and under the same obligations to the public as any other common carrier. Babbitt, Motor Vehicles, §§ 620, 621; Van Hoeffen v. Columbia Taxicab Co., 179 Mo. App. 591, 162 S. W. 694."

In Ex parte Dickey, 85 S. E. 781, a West Virginia case decided June 22, 1915, the petitioner appears to have been convicted upon a charge that he violated an ordinance regulating, licensing, and taxing vehicles of the class known as "jitney busses," by conducting a motor bus business on the streets of Huntington without the license required by the ordinance. The validity of the ordinance was sustained. This decision also passed upon a provision requiring

the licensee to maintain the service during prescribed hours. The court said:

> "Cabs, hackney coaches, omnibuses, taxicabs, and hacks, when unnecessarily numerous, interfere with ordinary traffic and travel and obstruct them. Prescription of routes or places of business for them is a fair, reasonable, and efficacious means of preventing such results. Nor is it unreasonable to require them to maintain the service during prescribed hours. They are engaged in a public service which the Legislature may always regulate."

Many of the decisions relied upon by the petitioner are instances of unreasonable regulation of harmless and useful employments located upon private property and not conducted in the exercise of rights which include the use of public property. This involves a distinction which is well pointed out by the Supreme Court of Appeals of West Virginia in the case of Ex parte Dickey, supra, wherein the court also said:

> "As regards legislative power or control, the business or interest regulated by the ordinance is clearly distinguishable from vocations, the pursuit of which does not involve the use of public property. **The right of a citizen to pursue any of the ordinary vocations, on his own property and with his own means, can neither be denied nor unduly abridged by the Legislature, for the preservation of such right is the principal purpose of the Constitution itself.** In such cases, the limit of legislative power is regulation, and that power must be cautiously and sparingly exercised, unless the business is of such character as places it within the category of social and economic evils, such as gaming, the liquor traffic, and numerous others. To this list may be added such useful occupations as may under certain circumstances, become public or private nuisances, because offensive or dangerous to health. All of these fall within the board power of prohibition or suppression, some wholly and absolutely and others conditionally. Such pursuits as agriculture, merchandising, manufacturing, and industrial trades cannot be dealt with at will by the Legislature. As to them, the power of regulation is comparatively slight, when they are conducted and carried on upon private property and with private means. But when a citizen claims a private right in public property, such as a street or park, a different situation is presented. Such properties are devoted primarily to general and public, not special or private, uses, and they fall within almost plenary legislative power and control. In them, all citizens have the usual and ordinary rights in an equal degree and to an equal extent. In the regulation thereof, the Legislature cannot discriminate. But, as regards unusual and extraordinary rights respecting public properties, its power of control and regulation is much more extensive. Such rights are in the nature of concessions by the public, wherefore the Legislature may give or withhold them at its pleasure. It may give them for some purposes and withhold them for others, and, in the case of those given, it may, upon considerations of character, quality, and circumstances, discriminate, permitting some things of a general class or nature to be done and refusing to permit others of the same general class to be done, or extending the privilege to some persons and denying it to others because of differences of character or

capacity. **The right of a citizen to travel upon the highway and transport his property thereon, in the ordinary course of life and business, differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain, in the running of a stage coach or omnibus. The former is the usual and ordinary right of a citizen, a common right, a right common to all, while the latter is special, unusual, and extraordinary. As to the former, the extent of legislative power is that of regulation; but, as to the latter, its power is broader. The right may be wholly denied, or it may be permitted to some and denied to others, because of its extraordinary nature. This distinction, elementary and fundamental in character, is recognized by all the authorities**."

The regulations contained in these ordinances are referable to that governmental power commonly known as the police power.

"The police power is not subject to any definite limitations, but is coextensive with the necessities of the case and the safeguard of the public interests." Camfield v. United States, 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260.

"It may be said in a general way that the police power extends to all the great public needs. * * * It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." Noble State Bank v. Haskell, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062. Ann. Cas. 1912A, 487.

"Another vital principle is that, except as restrained by its own fundamental law, or by the supreme law of the land, a state possesses all legislative power consistent with a republican form of government; therefore each state, when not thus restained [sic] and so far as this court is concerned, may, by legislation, provide * * * for the common good, as involved in the well-being, peace, happiness and prosperity of the people.' Halter v. Nebraska, 205 U. S. 40, 27 Sup. Ct. 419, 51 L. Ed. 696, 10 Ann. Cas. 525.

Quoting the words of Chief Justice Shaw in Commonwealth v. Tewksbury, 11 Metc. (Mass.) 55, the Supreme Court of California (Parker v. Otis. 130 Cal. 322, 62 Pac. 571, 927. 92Am. St. Rep. 56) said:

> 'All property in this commonwealth is held subject ot [sic] those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights. are subject ot [sic] such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the Legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient.'

The foregoing citations are sufficient to show that the trend of opinion is wholly in favor of supporting the validity of the class of ordinances here questioned, and the reasons are suffi-

ciently indicated in the quotations made. Our conclusion is that the objections urged against this ordinance of the city of San Diego should not be sustained.

Spacial objection is further made that section 3a of the ordinance, which was added thereto by amendment approved August 28, 1915, was not in force on August 31, September 1, and 2, 1915, the dates of alleged violation of the ordinance by the petitioner. This claim is based upon the fact that, in accordance with the provisions of article 1, c. 4, § 3, of the charter of the city of San Diego, nor ordinance can go into effect for 30 days after its passage, unless the same be one relating to street improvement, or having for its purpose the preservation of the peace, health, or safety of the public. The amendatory ordinance itself declares that it is an ordinance for the immediate preservation of the public peace, health, and safety and one of urgency, 'and shall take effect and be in force from and after its passage and approval.' The ordinance proceeds to set forth a recital of facts concerning the inadequacy of the regulations provided by the ordinance without such amendment, and the failure thereof without such amendment to afford immediate protection to the public safety and adequate and proper facilities to the traveling public. Conceding that the determination of whether or not an ordinance is properly an emergency measure and whether or not the facts upon which the emergency is claimed constitute an emergency, is subject to review by the court, we find no sufficient reason for setting aside the determination of that matter as made by the city council.

The writ is discharged, and the petitioner remanded to custody. We concur: JAMES, J.; SHAW, J. Cal.App. 2 Dist. 1915. Ex parte Lee 28 Cal.App. 719, 153 P. 992

Ex parte Lee, 28 Cal.App. 719, 153 P. 992 (Cal.App. 2 Dist., Nov 04, 1915) (NO. 434) History Direct History

=> 1 Ex parte Lee, 28 Cal.App. 719, 153 P. 992 (Cal.App. 2 Dist. Nov 04, 1915) (NO. 434)

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[7] Nothing in this opinion should be construed as intimating that the common carrier has any right superior to that of the citizen to appropriate the use of the highways. **The right of a citizen to use the highways, including the streets of the city or town, for travel and to transport his goods, is an inherent right which cannot be taken from him, but it is subject to reasonable regulation in the interest of the public good. In degree this right of the citizen is superior to that of the common carrier by motorbus, dray, coach, taxi, or other device, the latter being controlled by legislative grant, or franchise which may be regulated or denied, and may be given to some and denied to others**. *1112 State ex rel. Pennington v. Quigg, 94 Fla. 1056, 114 So. 859, and cases cited."
FLORIDA MOTOR LINES, Inc. v. WARD, 102 Fla. 1105 (1931)

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2. Nor does it violate section 3 or section 14 of article 3 of the state Constitution, nor the Fourteenth Amendment to the Constitution of the United States, securing to the people the

right of acquiring, possessing, and enjoying property, and prohibiting the taking of private property for public use or without due process of law, for, while **a citizen has the right to travel upon the public highways and to transport his property thereon, that right does not extend to the use of the highways, either in whole or in part, as a place of business for private gain. For the latter purpose no person has a vested right in the use of the highways of the state, but is a privilege or license which the Legislature may grant or withhold in its discretion, or which it may grant upon such conditions as it may see fit to impose, provided the imposition applies impartially.** Hadfield v. Lundin, 169 P. 516, 98 Wash. 657, L. R. A. 1918B, 909, Ann. Cas. 1918C, 942; Gizzardelli v. Presbrey, 117 A. 359, 44 R. I. 333; Cummins v. Jones, 155 P. 171, 79 Or. 276; Memphis St. Ry. Co. v. Rapid Transit Co., 139 S. W. 635, 133 Tenn. 99, L. R. A. 1916B, 1143, Ann. Cas. 1917C, 1045; Packard v. Banton, 44 S. Ct. 257, 264 U. S. 140, 68 L. Ed. 598.

It is clearly the express intention of the Legislature to include within the prohibition of the act every person operating a vehicle of the nature described for hire and as a regular business, on a commercial basis, between fixed termini, and to exclude from its operation those residing in rural communities who may occasionally carry either passengers or freight, with or without compensation, but not "on a commercial basis," and not as a regular business. As to this exemption, no doubt those persons included in the exemption would not be subject to the provisions of the act had the Legislature been silent on the subject. Having *1079 spoken, no discretion as to those persons is lodged in the commission. The performance of the act required, i. e., the exemption of those falling within the proviso, affects the rights of third persons, and therefore the proviso is to be construed as though it read "must exempt" instead of "may exempt." State ex rel. Stiefel v. District Court, 96 P. 337, 37 Mont. 298; State v. Dotson, 67 P. 938, 26 Mont. 311; State ex rel. Interstate Lumber Co. v. District Court, 172 P. 1030, 54 Mont. 604; Dryer v. Director General, etc., 213 P. 210, 66 Mont. 299. **The exemption, then, is of a distinct class, and all persons falling within that class are exempted by the act from its operation."**

STATE v. JOHNSON, 75 Mont. 240, 243 P. 1073 (1926)

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PACKARD v. BANTON, 264 U.S. 140 (1924)

264 U.S. 140

PACKARD
v.
BANTON, Dist, Atty., et al.

No. 126.

Argued Jan. 2, 1924.
Decided, Feb. 18, 1924.
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[264 U.S. 140, 141] Messrs. A. B. Silverman and Louis J. Vorhaus, both of New York City (Elijah N. Zoline and Frederick Hemley, both of New York City, of counsel), for appellant.

Messrs. John Caldwell Myers and Felix C. Benvenga, both of New York City, for appellee Banton.

Messrs. Carl Sherman, Atty. Gen. (Edward G. Griffin and Claude T. Dawes, Deputy Attys. Gen., of counsel), for appellee Sherman.

Messrs. Leffert & Tyroler and Katz & Rosen, both of New York City, amici curiae.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

This is a suit to enjoin the enforcement of a statute of New York (Laws 1922, p. 1566, c. 612), alleged to be in contravention of the equal protection of the laws and due process clauses of the Fourteenth Amendment. **The statute requires every person, etc., engaged in the business of carrying passengers for hire in any motor vehicle, except street cars and motor vehicles subject to the Public Service Commission Law, upon any public street in a city of the first class, to file with the state tax commission, either a personal bond with sureties, a corporate surety bond, or a policy of insurance in a solvent and responsible company in the sum of $2,500, conditioned for the payment of any judgment recovered against such person, etc., for death or injury caused in the operation or by the defective construction of such motor vehicle**. The bill alleges that the rate of premium for the required policy is fixed by the insurance companies at $960; that the net income from the operation of a motor vehicle is [264 U.S. 140, 142] about $35 a week, which would be reduced by the operation of the law to $ 16.50 per week, resulting in confiscation of the earnings of appellant for the benefit of the insurance companies. **The statute makes it a misdemeanor to operate such motor vehicle without having furnished the required bond or policy, and appellant avers that appellees, as prosecuting officers of the state, have threatened, and, if not enjoined, will proceed, to prosecute him, unless he complies with the law**. The court below was constituted of three judges, under section 266 of the Judicial Code (Comp. St. 1243). Upon the return of the order to show cause a hearing was had, and the court denied a motion for an injunction pendente lite, and dismissed the bill for want of equity, without handing down an opinion.

1. Appellees insist that the District Court was without jurisdiction because the matter in controversy does not exceed the value of $3,000. Judicial Code, 24, subd. 1 (Comp. St. 991). The bill discloses that the enforcement of the statute sought to be enjoined will have the effect of materially increasing appellant's expenditures, as well as causing injury to him in other respects. The allegations, in general terms, are that the sum or value in controversy exceeds $3,000, which the affidavits filed in the lower court tend to support; that appellant is the owner of four motor vehicles, the income from which would be reduced, if the law be enforced, to the extent of $18.50 each per week; and that his business would otherwise suffer. The object of the suit is to enjoin the enforcement of the statute, and it is the value of this object thus sought to be gained that determines the amount in dispute. Railroad Co. v. Ward, 2 Black, 485; Railway Co. v. Kuteman, 54 Fed. 547, 552, 4 C. C. A. 503; Nashville, C. & St. L. R. R. Co. v. McConnell (C. C.) 82 Fed. 65, 73; Scott v. Donald, 165 U.S. 107, 114 , 17 S. Sup. Ct. 262;

City of Hutchinson v. Beckham, 118 Fed. 399, 402, 55 C. C. A. 333; Evenson v. Spaulding, 150 Fed. 517, 520, 82 C. C. A. 263, 9 L. R. A. (N. S .) 904; Hunt v. N. Y. Cotton Exchange, 205 U.S. 322, 336 , 27 S. Sup. Ct. 529. [264 U.S. 140, 143] Counter affidavits were filed, tending to show that the expenses incident to compliance with the statute would be less than alleged; but it sufficiently appears that the value of the right of appellant to carry on his business, freed from the restraint of the statute, exceeds the jurisdictional amount.

2. Another preliminary contention is that the bill cannot be sustained, because there is a plain, adequate, and complete remedy at law; that is, that the question may be tried and determined as fully in a criminal prosecution under the statute as in a suit in equity. The general rule undoubtedly is that a court of equity is without jurisdiction to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it to try the same right that is in issue there. In re Sawyer, 124 U.S. 200 , 209-211, 8 Sup. Ct. 482; Davis & Farnum Manufacturing Co. v. Los Angeles, 189 U.S. 207, 217 , 23 S. Sup. Ct. 498.

But it is settled that 'a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property.' Truax v. Raich, 239 U.S. 33, 37 , 38 S., 36 Sup. Ct. 7, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283. The question has so recently been considered that we need do no more than cite Terrace v. Thompson, 263 U.S. 197 , 44 Sup. Ct. 15, 68 L. Ed. --, decided November 12, 1923, where the cases are collected, and state our conclusion that the present suit falls within the exception and not the general rule. Huston v. City, 176 Iowa, 455, 464, 156 N. W. 883; Dobbins v. Los Angeles, 195 U.S. 223 , 25 Sup. Ct. 18.

3. We come then, to the question whether the statute assailed contravenes the provisions of the Fourteenth Amendment. That the selection of cities of the first class for the application of the regulations and the exclusion of all others is not an unreasonable and arbitrary classification does not admit of controversy. Hayes v. Missouri, 120 U.S. 68 , 7 Sup. Ct. 350. We cannot say that there are not reasons applicable to the streets of large cities - such as [264 U.S. 140, 144] their use by a great number of persons or the density and continuity of traffic - justifying measures to safeguard the public from dangers incident to the operation of motor vehicles which do not obtain in the case of the smaller communities.

The contention most pressed is that the act unreasonably and arbitrarily discriminates against those engaged in operating motor vehicles for hire in favor of persons operating such vehicles for their private ends, and in favor of street cars and motor omnibuses. If the state determines that the use of streets for private purposes in the usual and ordinary manner shall be preferred over their use by common carriers for hire, there is nothing in the Fourteenth Amendment to prevent. The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for the purposes of gain is special and extraordinary, and, generally at least, may be prohibited or conditioned as the Legislature deems proper. Neither is there substance in the complaint that street cars and omnibuses are not included in the requirements of the statute. The reason, appearing in the statute itself, for excluding them is that they are regulated by the Public Service Commission Laws, and this circumstance, if there were nothing more, would preclude us from saying that their noninclusion renders the classification so arbitrary as to cause it to be obnoxious to the equal

protection clause. Decisions sustaining the validity of legislation like that here involved are numerous and substantially uniform. Among them we cite the following: Nolen v. Riechman (D. C.) 225 Fed. 812, 818; Schoenfeld v. Seattle (D. C.) 265 Fed. 726, 730; Lane v. Whitaker (D. C.) 275 Fed. 476, 480; Huston v City, 176 Iowa, 455, 468, 156 N. W. 883; City of Memphis v. State, 133 Tenn. 83, 89, 179 S. W. 631, L. R. A. 1916B, 1151, Ann. Cas. 1917C, 1056; Ex parte Dickey, 76 W. Va. 576, 578, 85 S. E. 781, L. R. A. 1915F, 840; Melconian v. City of Grand Rapids, 218 Mich. 397, 403, 188 N. W. 521; State v. Seattle Taxicab & Transfer Co., 90 Wash. 416, 423, 156 Pac. 837; Donella v. Enright et al. (Sup.) [264 U.S. 140, 145] 195 N. Y. Supp. 217; People v. Martin, 203 App. Div. 423, 197 N. Y. Supp. 28, where the statute now under review was sustained against the attacks here made as to its constitutionality. And see Fifth Avenue Coach Co. v. New York, 221 U.S. 467 , 31 Sup. Ct. 709; Pacific Express Co. v. Seibert, 142 U.S. 339, 353 , 12 S. Sup. Ct. 250

It is asserted that the requirements of the statute are so burdensome as to amount to confiscation, and therefore to result in depriving appellant of his property without due process of law. The allegation is that the rate of premium fixed by insurance companies operating in New York amounts to about $18.50 per week for each taxicab, while the net income from each is about $35 per week. The operator, under the statute, however, is not confined to this method of security, but instead may file either a personal bond with two approved sureties or a corporate surety bond. Appellant says that he cannot procure a personal bond, but it does not appear that he might not procure the corporate surety bond at a less cost. Affidavits filed below on behalf of appellees tend to show that insurance policies in mutual casualty companies may be secured for $540 a year, and that operators of upwards of a thousand cars have furnished personal bonds. The fact that, because of circumstances peculiar to him, appellant may be unable to comply with the requirement as to security without assuming a burden greater than that generally borne, or excessive in itself, does not militate against the constitutionality of the statute. **Moreover, a distinction must be observed between the regulation of an activity which may be engaged in as a matter of right and one carried on by government sufferance or permission**. In the latter case the power to exclude altogether generally includes the lesser power to condition and may justify a degree of regulation not admissible in the former. See Davis v. Massachusetts, 167 U.S. 43 , 17 Sup. Ct. 731.

Affirmed.

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BALTIMORE STEAM COMPANY v. BALTIMORE GAS ELECTRIC COMPANY

Court of Special Appeals of Maryland.

BALTIMORE STEAM COMPANY t/a Trigen-Baltimore Energy Corporation v. BALTIMORE GAS & ELECTRIC COMPANY, et al.

No. 1534, Sept. Term, 1997.
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Decided: August 31, 1998

Before HOLLANDER, THIEME and KENNEY, JJ. John T. Prisbe (Thomas P. Perkins, III, Emried D. Cole, Jr., Venable, Baetjer and Howard, LLP on the brief) Baltimore, for appellant. Marc K. Sloane (Ronald D. Byrd, David M. Perlman and Paul W. Davis on the brief) Baltimore, for appellees, BG&E and Comfort Link. Otho M. Thompson, City Solicitor and Burton H. Levin, Principal Counsel on the brief, Baltimore, for appellee, Mayor and City Council of Baltimore.

Appellant Baltimore Steam Company, doing business as Trigen-Baltimore Energy Corporation (hereinafter referred to as "Trigen"), appeals from an order of the Circuit Court for Baltimore City dismissing Trigen's declaratory judgment action for lack of standing. Trigen's complaint requested injunctive relief and a declaration (1) that the franchise granted by Baltimore City (the City) to the Baltimore Gas & Electric Company (BGE) was invalid or in the alternative (2) that this franchise could not be exercised until its use was authorized by the Maryland Public Service Commission (PSC). The action was primarily directed against BGE and its affiliate, the District Chilled Water Limited Partnership (hereinafter referred to by its commercial name, "Comfort Link"), but because the complaint necessarily called into question the validity of the city ordinance that purported to grant BGE a franchise, the City was also made a party as required by Md.Code Ann., Cts. & Jud. Proc. § 3-405(b) (1995 Repl.Vol.). BGE, the City, and Comfort Link, appellees, all moved to dismiss the action, arguing inter alia that Trigen lacked standing. After a hearing, the court dismissed the complaint on standing grounds and denied Trigen leave to amend. Within ten days, Trigen moved for clarification and reconsideration, which motion was denied. Trigen timely filed its notice of appeal within thirty days after the docketing of that denial. We have recast the question presented as follows:

Does appellant, as holder of a non-exclusive franchise, have standing to challenge the validity of a competitor's non-exclusive franchise or to force such a competitor to comply with the preauthorization requirements of the Maryland Public Service Commission Law?

I.

Trigen operates a steam heating business in Baltimore City, and this enterprise involves transmitting steam through pipelines under the city streets. Trigen has obtained from the City a franchise granting Trigen the City's permission "to construct, lay, operate and maintain" an underground pipeline system within a designated portion of the downtown area "for the purpose of transmitting heat or refrigeration, or both." Trigen's franchise additionally authorizes use of public streets for connecting any building within the designated area to this pipeline system. This franchise was granted via City Ordinance No. 171, approved on 29 June 1984. As a matter of purely historical interest, this grant roughly coincides with Trigen's purchase of an existing underground steam pipeline system from BGE, Trigen's present rival. There is no dispute that Trigen's franchise is non-exclusive, i.e., it does not purport to prevent the City from granting similar franchises to other entities. In fact, the ordinance states:

[N]othing in this ordinance shall be construed to give to the said Grantee, its successors and assigns, an exclusive right to occupy any of the streets, lanes or alleys embraced in and covered by the terms of this ordinance, nor to prevent the Mayor and City Council of Baltimore from

granting similar privileges to any other person or company, nor to prevent the Mayor and City Council of Baltimore from granting to such other person or company the privilege of laying subways, pipe lines, ducts or conduits in juxtaposition to those embraced in this ordinance.

In 1984, BGE ceased operations of its steam heating business and consequently forfeited the franchise under which it had previously enjoyed the right to transmit steam beneath the city streets. In 1995, BGE decided to reenter this heating market and incorporated Comfort Link for that purpose.1 BGE applied for a new franchise, and the proposed franchise was introduced before the City Council as Council Bill 1295. Trigen addressed the City Council at a hearing on the bill and requested certain amendments and deletions. Bill 1295 was eventually passed and became Ordinance No. 624, signed by the Mayor on 29 November 1995.

The franchise that was granted to BGE is similar to the one previously granted to Trigen. It authorizes BGE “to construct, lay, operate and maintain subways and pipe lines . for the purpose of transmitting heat or refrigeration, or both.” BGE's franchise, like Trigen's, is also indisputably non-exclusive. The geographical boundaries of the two franchises differ somewhat, but they basically cover the same areas of downtown Baltimore. BGE formally accepted its franchise in a letter of 12 April 1996.

The catalyst for the instant suit was a steam heating bid request issued by the University of Maryland Medical System. The Medical System published a “Request for Proposal to Provide Steam and Chilled Water” in 1996, and Comfort Link submitted a proposal for such services in late March 1997. Trigen responded swiftly by filing this four-count declaratory judgment action on 24 March 1997.

In Count One, Trigen sought a declaration that Ordinance No. 624 was invalid for failure to comply with two different procedural requirements of Article VIII (governing franchise grants) of the Baltimore City Charter. Specifically, Trigen alleged that the City Council had failed to advertise the proposed franchise grant for three days in a daily newspaper, Baltimore City, Md. Charter, art VIII, § 6, and that the proposed franchise had not been valued by the Board of Estimates for purposes of obtaining maximum compensation from the franchisee. Id. at § 2. Count Two sought a declaration that the franchise granted by Ordinance No. 624 cannot be exercised or otherwise acted upon without first obtaining authorization from the PSC, as required both by § 13 of the Ordinance and by the Maryland Public Service Commission Law (MPSCL). Section 13 of the Ordinance authorized BGE to charge such sums for its services “as may be established by, and subject to the jurisdiction of, the Public Service Commission, if any.” The MPSCL requires all “public service companies” to obtain prior authorization from the PSC before exercising, assigning, or transferring any franchise. Md. Ann.Code art. 78, § 24 (1998 Repl.Vol.). (Trigen alleged that since Comfort Link was purporting to exercise a franchise that was granted solely to BGE, an assignment or transfer must have occurred.) Count Three sought a declaration of the invalidity of Ordinance No. 624 on the alternate rationale that, assuming that PSC authorization is not required, then the ordinance is invalid for failure to set forth the rates at which customers will be charged, a mandatory term according to the Charter, art. VIII, § 2. Count Four requested an injunction against any competition from BGE/Comfort Link and other relief based on all of the foregoing counts.

Appellees moved the circuit court to dismiss the case on several grounds, one of which was that Trigen lacked standing to bring the action. At the conclusion of the hearing on the issue of standing on 18 June 1997, the court ruled that Trigen lacked standing and ordered the entire case dismissed.

II.

Some preliminary matters must be resolved before addressing the central issues. To begin with, appellees BGE and Comfort Link have moved to dismiss this appeal on the grounds that Trigen has previously taken a position that is inconsistent with its right to appeal. The motion is premised on the principle that "[t]he right to appeal may be lost by acquiescence in, or recognition of, the validity of the decision below from which the appeal is taken or by otherwise taking a position which is inconsistent with the right of appeal." Banegura v. Taylor, 312 Md. 609, 615, 541 A.2d 969, 972 (1988) (quoting Rocks v. Brosius, 241 Md. 612, 630, 217 A.2d 531, 541 (1966)). Stated another way, "[A] voluntary act of a party which is inconsistent with the assignment of errors on appeal normally precludes that party from obtaining appellate review." Id. (quoting Franzen v. Dubinok, 290 Md. 65, 69, 427 A.2d 1002, 1004 (1981)).

At the hearing before the circuit court, the arguments focused mostly on standing to challenge the validity of the franchise ordinance and much less so on standing to enjoin a violation of the MPSCL. The court orally ruled that Trigen had no standing to challenge the validity of the ordinance. As previously noted, the court then dismissed the complaint and denied leave to amend, and Trigen responded with a Motion for Clarification and Reconsideration. The desired clarification pertained to whether the court had also ruled on standing to enforce the MPSCL. The request for reconsideration concerned the court's denial of leave to amend, as Trigen argued that it could assert other bases for standing which would not call into question the validity of Ordinance No. 624. In reply to the City's response to this motion, counsel for Trigen filed a letter pleading dated 8 July 1997. The letter stated:

The City's Opposition asserts and is premised upon the mischaracterization that "[Trigen] challenges the validity of a franchise ordinance enacted by the City." This is patently wrong. For purposes of amending its complaint, Trigen would assume that the enactment of Ordinance No. 624 is valid. Trigen still has legal claims that can be asserted based on BGE's failure to comply with the ordinance.

(Emphasis in original.) (Citation omitted.) BGE and Comfort Link now allege that these statements constitute "a clear acquiescence in the decision by [the court] that Trigen lacks standing to challenge the subject ordinance," and that Trigen has thereby lost its right to appeal any issue pertaining to the validity of Ordinance No. 624.

We do not agree. By its context and its very words, the import of the above passage is limited to "purposes of amending [Trigen's] complaint." The type of argument signified by this language is a common one, whereby a party concedes a preliminary point for purposes of argument only, in order to demonstrate how that party would still win an ultimate victory on a secondary point. In so specifying the purposes for which the preliminary point is conceded, the party is reserving the right to contest the issue in another context and is not acquiescing in

or conceding the point generally. The technique is so common that we wonder at BGE's and Comfort Link's misreading of the significance of the quoted passage. Having fought and lost on the issue of standing to challenge the validity of Ordinance No. 624, Trigen had already preserved its appeal with regard to that issue and was merely attempting to ensure that its other arguments were addressed as well. Nothing about Trigen's post-judgment motion is inconsistent with its right to appeal the ruling against it. We also note that it usually takes far more than a post-judgment argument for a party to lose the right to appellate review. The motion of BGE and Comfort Link to dismiss the appeal is denied.

Since the appeal itself arises from a motion to dismiss, "we assume the truth of all relevant and material well-pled facts, as well as all the inferences that could reasonably be drawn from those facts, in the light most favorable to appellant." Ferguson v. Cramer, 116 Md.App. 99, 103, 695 A.2d 603, 605 (1997). We may only consider those allegations set forth in the complaint. Frericks v. General Motors Corp., 274 Md. 288, 303, 336 A.2d 118, 127 (1975). As the issue in this case is a party's standing to be heard in court, it is especially important to note that we will at no point be reviewing the merits of Trigen's case. See Sugarloaf Citizens' Ass'n v. Department of Env't, 344 Md. 271, 295, 686 A.2d 605, 617 (1996) ("[S]tanding to challenge governmental action, and the merits of the challenge, are separate and distinct issues."). Our review is confined solely to matters of law, based on the facts as alleged in Trigen's complaint.

BGE and Comfort Link would have us apply a more searching standard of review, as they argue that we may reject some allegations in the complaint which are "patently false." We find no support for such a proposition in the law of this state. It is true that we need not consider wholly conclusory charges that have no factual support, Berman v. Karvounis, 308 Md. 259, 265, 518 A.2d 726, 728-29 (1987), and that we may even construe ambiguities in the complaint against the pleader. Ronald M. Sharrow, Chtd. v. State Farm Mut. Auto. Ins. Co., 306 Md. 754, 768, 511 A.2d 492, 500 (1986). We cannot, however, resolve a factual dispute in the first instance, regardless of how conclusive the evidence may be. Md. Rule 8-131(a); Harrell v. Sea Colony, Inc., 35 Md.App. 300, 308, 370 A.2d 119, 124 (1977). BGE and Comfort Link argue that Trigen cannot allege particular facts contradicting a prior determination by the PSC that its authorization is not required with regard to the exercise of the franchise at issue.2 We believe this issue properly sounds in preclusion or perhaps administrative exclusivity, neither of which has been argued here or decided below. The issue also relies on factual matters beyond the complaint and thus is properly raised in a motion for summary judgment, not a motion to dismiss. Lusby v. Baltimore Transit Co., 199 Md. 283, 285, 86 A.2d 407, 408 (1952). The court was very careful to note that it took into consideration no matters beyond the pleadings, so there is no basis for recasting its ruling as a grant of summary judgment. Since the lower court never took into consideration the effect of any prior proceedings before the PSC, neither shall we.

Finally, Trigen has presented us with two alternate bases for standing not pled in the complaint: taxpayer standing and standing to sue for tortious interference with economic and business relationships. These same bases were also proffered to the lower court in Trigen's motion for reconsideration of that court's denial of leave to amend the complaint. In order to address these alternate bases we would first have to reverse the lower court's denial of leave to amend, and such a ruling may only be reversed for abuse of discretion. Downs v. Roman

Catholic Archbishop, 111 Md.App. 616, 626, 683 A.2d 808, 813 (1996). Trigen has not even attempted to argue that the lower court abused its discretion in denying leave to amend, and we will not speculate as to why these alternate bases were not pled in the first instance. Trigen's standing must therefore be determined solely according to the complaint.

III.

The matter before us is simply a dispute over whether Trigen has standing, yet the ease with which the problem can be stated belies its complexity. There are in fact two questions of standing before us, as Trigen's complaint seeks both to challenge the validity of a competitor's franchise and to enjoin a violation of the MPSCL. Trigen has argued its case primarily through citation of precedent, contending that the Court of Appeals and other authorities recognize a franchisee's standing to challenge the validity of a competitor's franchise and to seek an injunction barring a competitor from exercising its franchise without first obtaining necessary authorizations from the appropriate regulatory bodies. The City adopts a similar strategy, albeit in opposition, by proposing that we follow KAKE-TV and Radio, Inc. v. City of Wichita, 213 Kan. 537, 516 P.2d 929 (1973), in which the Supreme Court of Kansas rejected the plaintiff's standing to challenge the validity of a competitor's franchise. BGE and Comfort Link, on the other hand, have taken a more doctrinal approach. While they certainly contest Trigen's interpretation of precedent and join the City in support of the Kansas case, BGE and Comfort Link propose that the reason Trigen has no standing is because its interests in the instant suit are not within the “zone of interests” contemplated by any of the various provisions of law Trigen seeks to enforce. As we shall soon discuss, these various approaches also signify differing views on how a party attains standing.

We begin our approach with the basic prerequisites of a declaratory judgment. The Maryland Uniform Declaratory Judgments Act authorizes a court to grant such judgment if:

> it will serve to terminate the uncertainty or controversy giving rise to the proceeding, and if:
>
> > (1) An actual controversy exists between contending parties;
> >
> > (2) Antagonistic claims are present between the parties involved which indicated imminent and inevitable litigation; or
> >
> > (3) A party asserts a legal relation, status, right, or privilege and this is challenged or denied by an adversary party, who also has or asserts a concrete interest in it.

Md.Code Ann., Cts. & Jud. Proc. § 3-409(a). The statute is remedial in nature and is intended “to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations. It shall be liberally construed and administered.” Id. at § 3-402. Consistent with such a broad purpose, it takes only the most basic showing of “a justiciable controversy” in order to invoke a court's jurisdiction under the Act. Hatt v. Anderson, 297 Md. 42, 45, 464 A.2d 1076, 1078 (1983). A justiciable controversy is present “when there are interested parties

asserting adverse claims upon a state of facts which must have accrued wherein a legal decision is sought or demanded." Reyes v. Prince George's County, 281 Md. 279, 288, 380 A.2d 12, 17 (1977).

A declaratory judgment is not justiciable if a party lacks "standing" to bring a suit. Citizens Planning and Hous. Ass'n. v. County Executive, 20 Md.App. 430, 437, 316 A.2d 263, 267, rev'd on other grounds, 273 Md. 333, 329 A.2d 681 (1974). **The doctrine of standing is that strain of justiciability focusing on the interestedness of the parties**. See Maryland State Admin. Bd. of Election Laws v. Talbot County, 316 Md. 332, 339, 558 A.2d 724, 727 (1988). Although it is perhaps more accurate to describe standing as a collection of context-specific doctrines, **the core inquiry of standing is whether a particular party has an interest that is sufficient as a matter of judicial policy to entitle that party to be heard in court.** See Louis L. Jaffe, Judicial Control of Administrative Action 501-05 (1965). **At the most basic level, a plaintiff's interest in the case must be legally cognizable, i.e., it must be a "legal interest," which has been succinctly defined by the Supreme Court as "one of property, one arising out of a contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.**" Tennessee Elec. Power Co. v. Tennessee Valley Auth., 306 U.S. 118, 137-38, 59 S.Ct. 366, 369, 83 L.Ed. 543 (1939). This so-called "legal interest test" has been criticized in other contexts as overly conducive to blending issues of standing with the merits of the claim. Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970). We refer to the test here merely as a useful road map of the various potential routes to demonstrating standing.

The only interest Trigen has alleged in the instant case is an interest in being free from competition by BGE and/or Comfort Link. In most cases, however, such an interest is not legally cognizable and is thus insufficient to confer standing. Cook v. Normac Corp., 176 Md. 394, 397-98, 4 A.2d 747, 749 (1939) ("[M]ere competition is not an evil which business men may enjoin as a wrong to them."). This is not to say that Trigen's interest is negligible or not susceptible to proof. To the contrary, we have little doubt that Trigen would suffer real financial consequences from the introduction of competition into the Baltimore steam heating market. The rule, however, is the necessary corollary of a public policy favoring competition as a source of social benefit. As the Court of Appeals has eloquently put it, in the context of explaining why tortious competition is such a narrow concept:

> " 'Iron sharpeneth iron' is ancient wisdom, and the law is in accord in favoring free competition, since ordinarily it is essential to the general welfare of society, notwithstanding competition is not altruistic but is fundamentally the play of interest against interest, and so involves the interference of the successful competitor with the interest of his unsuccessful competitor in the matter of their common rivalry. Competition is the state in which men live and is not a tort, unless the nature of the method employed is not justified by public policy, and so supplies the condition to constitute a legal wrong."

Natural Design, Inc. v. Rouse Co., 302 Md. 47, 72-73, 485 A.2d 663, 676 (1984) (quoting Goldman v. Harford Rd. Building Ass'n, 150 Md. 677, 684, 133 A. 843, 846 (1926)). Courts are thus understandably reluctant to characterize something "essential to the general welfare" as

an actionable wrong. Instead, the law considers the economic consequences of competition to be damnum absque injuria, or damage without legally cognizable injury. Tennessee Elec. Power Co., 306 U.S. at 140, 59 S.Ct. at 370; Macklin v. Robert Logan Assocs., 334 Md. 287, 303-04, 639 A.2d 112, 120 (1994) (citing Walker v. Cronin, 107 Mass. 555, 564 (1871)).

In Cook, the plaintiff owned a movie theater and sought an injunction against the construction of a rival movie theater across the street, alleging that the construction was in violation of the city building code. As already quoted above, the Court's initial response was to note that "mere competition" is not an enjoinable "evil." The plaintiff countered that, because of the building code violations, this was not a case of "mere competition" but of "illegal competition. "The Court was ultimately unswayed. It conceded that

[c]ompetition without full compliance with the law has been enjoined at the suit of private individuals, but only under some conditions; a principle upon which the relief may be permitted seems generally agreed upon, although courts have differed in its applications. It is allowable only to preserve an exclusive privilege or advantage which the law gives, as, for instance, that to a class of persons admitted to a business or profession by reason of special qualifications for it, or those who exercise a franchise from the government.

176 Md. at 397-98, 4 A.2d at 749 (citations omitted). There was no allegation that any sort of franchise was involved, so the Court queried whether the portions of the building code at issue gave the plaintiff "an exclusive privilege."

The court is clear that the requirements of the building code to which reference is made are concerned with fire and other hazards in a theater, and are not at all intended to confer privileges or advantages on owners of other theaters.

Id. at 399, 4 A.2d at 749.

Trigen's burden, then, is to demonstrate how its interest in avoiding competition is cognizable in spite of the Cook rule that competition generally is mere damnum absque injuria. This Trigen has attempted to do in two different ways, each of which was foreshadowed in Cook and each of which addresses a different prong of the legal interest test. First, Trigen points to the franchise in its possession and alleges that such a franchise carries with it a right in the nature of a property right to be free from any illegal and unauthorized competition from BGE and Comfort Link. The Cook Court itself suggested that a franchise might confer standing to enjoin competition, and this will be our first area of inquiry below.

Second, Trigen resurrects the argument that what it seeks to enjoin is not "mere competition" but "illegal competition," since BGE and Comfort Link are allegedly violating various provisions of law, most notably the MPSCL. As Cook demonstrates, however, the fact that competition is contrary to law does not by itself confer standing on a competitor. A ready explanation of why this is so may be found by referring to the rules of standing applicable to so-called "public rights" cases. Ordinarily, only the public authorities have standing to seek redress for violations of the public laws, and a private individual has standing to do so only when she can show that she has " 'suffered some special damage [read "injury"] from such wrong differing in

character and kind from that suffered by the general public.' " Becker v. Litty, 318 Md. 76, 92-93, 566 A.2d 1101, 1109 (1989) (quoting Weinberg v. Kracke, 189 Md. 275, 280, 55 A.2d 797, 799 (1947)). A competitor's interest in avoiding competition will frequently be "special" enough to satisfy this rule, but the fact yet remains that competition results in no "injury" at all.

In order for an individual to have standing to seek an injunction against a market competitor's violations of the law, the law allegedly violated must be one that protects the individual's interest in avoiding competition. Cook, 176 Md. at 399, 4 A.2d at 749 (rejecting standing on the grounds that "the requirements of the building code to which reference is made . are not at all intended to confer privileges or advantages on owners of other theaters"); see also Kreatchman v. Ramsburg, 224 Md. 209, 222, 167 A.2d 345, 352 (1961) (a competitor cannot appeal a zoning decree allowing the construction of a rival store because "competition is not a proper element of zoning"); Baltimore Retail Liquor Package Stores Ass'n v. Board of License Comm'rs, 171 Md. 426, 429, 189 A. 209, 210 (1936) (liquor licensees have no standing to compel the revocation of their competitors' licenses that were allegedly improperly renewed because, inter alia, "it was not within the purpose of the [licensing] statute to restrict competition for the benefit of any licensee"). Compare Thomas v. Howard County, 261 Md. 422, 430, 276 A.2d 49, 53 (1971) (plumbers found to have standing as taxpayers to compel the enforcement of plumbing licensing laws; no need to discuss standing based on competitive injury). But see Dart Drug v. Hechinger Co., 272 Md. 15, 24, 320 A.2d 266, 271 (1974).3 Only under these special circumstances can it be said both that the plaintiff asserts a legal interest "conferred by a statute" and that the plaintiff would be "specially 'injured' " by the alleged statutory violation. If necessary, this will be our second topic of discussion below.

IV.

The term "franchise" has acquired several different usages through the years, and so we caution that the species of franchise with which we are here concerned should not be confused with, for example, a corporate charter, a licensing agreement, a regulatory permit or license, or the right to vote. We address the type of franchise most commonly associated with a utility company's right to dig up the public streets in the course of providing its particular service. Almost any utility company serving individual households will need to make some use of public streets or other public property in order to transmit its product to its customers, whether this be by hanging wires from poles, laying cables in the ground, or running pipes along a road. Such permanent encroachments on public property for private use would, in the absence of authorization, constitute a public nuisance and a trespass against the governing authority. See Board of County Comm'rs v. Bell Atl.-Md., Inc., 346 Md. 160, 170-71, 695 A.2d 171, 176 (1997) (a public service company suing for damage to its underground cables which were laid without any governmental authorization has the status of a trespasser); Adams v. Commissioners of Trappe, 204 Md. 165, 169-71, 102 A.2d 830, 833-34 (1954) (**all unauthorized permanent encroachments on public streets for private use are public nuisances**). **Although a municipality can authorize minor encroachments in any number of ways (by license, permit, or perhaps even acquiescence)**, Huebschmann v. Grand Co., 166 Md. 615, 624-25, 172 A. 227, 231 (1934), a utility company will generally require the type of ongoing and widespread authorization that only a franchise can provide. 1 A.J.G. Priest, Principles of Public Utility

Regulation 230-31 (1969). **Of course, franchises apply to industries beyond modern day utilities. They also apply to streetcars, toll roads and bridges, ferry boats, motor buses, and any other undertaking that requires regular private use of public property**. See generally 63 Am.Jur.2d Franchises §§ 1-4 (1968); 37 C.J.S. Franchises §§ 2-5 (1997).

The franchise is an unusual privilege that is not easily explained by reference to other, more common rights and privileges. Perhaps the most precise description of a franchise, first adopted by the Court of Appeals over a hundred years ago, is "a special privilege conferred by the State on certain persons, and which does not belong to them of common right." State v. Philadelphia, W. & B. R.R. Co., 45 Md. 361, 379 (1876). **The franchise's most salient feature is that, not being "of common right," it does not exist in the people collectively at common law but is rather a privilege that can only be granted by the General Assembly, or by a local government pursuant to power specifically delegated by the General Assembly**. Charles County Sanitary Dist., Inc. v. Charles Utils., Inc., 267 Md. 590, 598, 298 A.2d 419, 423 (1973).

The franchise is clearly a valuable property right, and it is thus subject to valuation and taxation along with other property. Philadelphia, W. & B., 45 Md. at 379. Strictly speaking, the franchise is neither real estate nor an interest in real estate, even though the exercise of a franchise by installing conduits and occupying space in the public streets will usually result in the acquisition of an easement. Consolidated Gas Co. v. Mayor & City Council of Baltimore, 101 Md. 541, 545-46, 61 A. 532, 534 (1905). **The franchise itself is more accurately characterized as an "incorporeal hereditament.**" Van Dyck v. Bloede, 128 Md. 330, 335, 97 A. 630, 632 (1916). **Perhaps the closest functional relative of the franchise is the license, although a license is "less extensive in its duration and incidents than a franchise**." Huebschmann, 166 Md. at 622, 172 A. at 230. **Furthermore, a license is imposed primarily for the purpose of regulation or for revenue, and it merely authorizes the exercise of a restricted privilege instead of creating a privilege where none existed previously**. Greenfeld v. Maryland Jockey Club, 190 Md. 96, 105-06, 57 A.2d 335, 338-39 (1948).

To a lesser extent, franchises also implicate the law of contract. Mayor of Baltimore v. Chesapeake & Potomac Tel. Co., 92 Md. 692, 696, 48 A. 465, 466 (1901). **The franchise is itself referred to as a contract between the grantor and grantee, and since such a contract confers "exceptional privileges and powers," it is to be strictly construed against the franchisee**. Id. As it makes no difference to our analysis of standing whether the franchise is a property right or a contract right, we will refer to the franchise as simply a property right for the remainder of this opinion.

Since a franchise is a valuable property right, a franchisee has standing in court to protect its franchise from unwarranted interference or encroachment by others, including city authorities, id. at 694, 48 A. at 465, or competitors. Charles County Sanitary Dist., 267 Md. at 595, 298 A.2d at 422. A franchisee may also enjoin any physical interference with its right to lay conduits, whether such interference arises from the municipality, a competitor, or an adjoining landowner. See 36 Am.Jur.2d Franchises §§ 42-43, 70. Franchises can be either exclusive or non-exclusive, and an exclusive franchise is, in effect, a contractual promise by the granting authority not to grant any similar franchises to anyone else. See 37 C.J.S. Franchises § 20b. An exclusive franchise is not necessarily the same thing as a monopoly, but a grant of any

similar franchises by the granting authority will constitute interference with the exclusive franchise. Id.

Even non-exclusive franchises, however, carry a type of exclusive privilege. In Kelly v. Consolidated Gas, Elec. Light & Power Co., 153 Md. 523, 138 A. 487 (1927), a case we will discuss in great detail below, the Court of Appeals quoted with approval the proposition that holders of non-exclusive franchises can enjoin competition by one who possesses no such franchise.

"**The plaintiff may maintain its suit for an injunction. It has a franchise right to transport passengers between the points named. That right carries with it heavy obligations to the public. Although that franchise right is not exclusive against other grants authorized by the Legislature, it is exclusive against one conducting competition, as is the defendant, without a franchise or license[4] and contrary to law.**"

Id. at 529, 138 A. at 489 (quoting New York, N.H. & H. R.R. Co. v. Deister, 253 Mass. 178, 181, 148 N.E. 590, 591 (1925)).5 Kelly 's authority on this point, however, is weakened by the fact that the quoted proposition is inapplicable to Kelly 's facts. Both the plaintiff and the defendant in that case possessed valid franchises.

A review of the law of other states reveals almost universal agreement with the Kelly proposition that a holder of a nonexclusive franchise has standing to enjoin competition by one lacking any franchise. E.g., Kinder v. Looney, 171 Ark. 16, 18-19, 283 S.W. 9, 10 (1926); City of Groton v. Yankee Gas Services Co., 224 Conn. 675, 685-86, 620 A.2d 771, 776 (1993); Central States Electric Co. v. Incorporated Town of Randall, 230 Iowa 376, 386, 297 N.W. 804, 809 (1941); Reo Bus Lines Co. v. Southern Bus Line Co., 209 Ky. 40, 43-44, 272 S.W. 18, 19 (1925); Gulf States Utils. Co. v. Dixie Elec. Membership Corp., 185 So.2d 313, 315 (La.Ct.App.1966); Deister, supra; Village of Blaine v. Independent Sch. Dist. No. 12, 265 Minn. 9, 22, 121 N.W.2d 183, 193 (1963); Payne v. Jackson City Lines, 220 Miss. 180, 191, 70 So.2d 520, 523 (1954); Lincoln Traction Co. v. Omaha, L. & B. Ry. Co., 108 Neb. 154, 159-60, 187 N.W. 790, 793 (1922); Millville Gas Light Co. v. Vineland Light & Power Co., 72 N.J.Eq. 305, 307-08, 65 A. 504, 505 (1906); CENTRAL CROSSTOWN R.R. CO. V. METROPOLITAN ST. ry. co., 16 A.D. 229, 234-35, 44 N.Y.S. 752, 756-57 (N.Y.App.Div.1897); City Coach Co. v. Gastonia Transit Co., 227 N.C. 391, 395, 42 S.E.2d 398, 400 (1947); Bartlesville Elec. Light & Power Co. v. Bartlesville Interurban Ry. Co., 26 Okla. 453, 458, 109 P. 228, 229 (1910); Citizens' Elec. Illuminating Co. v. Lackawanna & Wyo. Valley Power Co., 255 Pa. 145, 155, 99 A. 462, 465 (1916); Memphis St. Ry. Co. v. Rapid Transit Co., 133 Tenn. 99, 109, 179 S.W. 635, 638 (1915) (Memphis St. Ry. Co. I); Lindsley v. Dallas Consol. St. Ry. Co., 200 S.W. 207, 210 (Tex.Civ.App.1917); Turner v. Hicks, 164 Va. 612, 617, 180 S.E. 543, 545 (1935); Puget Sound Traction, Light & Power Co. v. Grassmeyer, 102 Wash. 482, 490, 173 P. 504, 507 (1918); Carson v. Woodram, 95 W.Va. 197, 202, 120 S.E. 512 (1923). See also Frost v. Corporation Comm'n, 278 U.S. 515, 521, 49 S.Ct. 235, 237, 73 L.Ed. 483 (1929). But see Coffeyville Mining & Gas Co. v. Citizens' Natural Gas & Mining Co., 55 Kan. 173, 40 P. 326 (1895) (discussed infra).

While most states follow the rule that all franchises are exclusive against unfranchised competition, very few cases actually explain the reasoning behind the rule. A notable

exception is the Bartlesville case, in which the Supreme Court of Oklahoma explained that the rule does not per se protect the franchisee's interest in avoiding all competition but follows of necessity from the heavy obligations that any franchisee owes to the public.

When plaintiff accepted its franchise, it did so subject to the power of the municipality to grant to other persons or corporations similar franchises, and with the knowledge that it might be compelled to exercise its rights under its franchise with others exercising similar rights. If, by the competition of rival companies to whom the use of the streets and public grounds has been granted by the municipality, plaintiff is rendered unable to discharge the obligations of its contract to furnish the city and its inhabitants with light and power at stipulated prices, except at a financial loss to it, plaintiff cannot complain, for it must be held to have contemplated such condition might arise and to have agreed thereto, when it accepted the franchise; but such cannot be said of the defendant who unlawfully occupies the streets and public grounds of the city in competition with plaintiff.

By its unlawful acts defendant can and will take from plaintiff a portion of its business. At the same time defendant is under no obligation to the city or its inhabitants, and is all the while maintaining upon the streets and public grounds of the city a public nuisance, and the loss plaintiff sustains is to defend its fruits from its violation of the law . By these unlawful actions of defendant plaintiff may be rendered financially unable to comply with the obligations of its contract, and may be subjected to suits for damages, mandamus proceedings to enforce the performance of its contract, or an action to forfeit its franchise . Defendant does not undertake to compete with plaintiff for the business of the city and its inhabitants by furnishing to them light and power other than by the use of the streets and alleys. **Its right to sell light and power is not dependent upon any franchise, but its right to use the streets and public grounds of the city for that purpose does depend upon the consent of the city; and, when it uses the streets without that consent, it is not only guilty of maintaining a public nuisance, but also inflicts upon plaintiff a special injury by its unlawful act which may be restrained.**

Id. at 457-58, 109 P. at 229-30. **Thus, while a non-exclusive franchisee cannot complain of being driven to unprofitability by competition from one either possessing a franchise or not needing to make use of the streets, when the competitor has no franchise, and yet appropriates public property for private use, then a franchisee has standing to defend its franchise in court. "[A]ny attempted exercise of such rights, without legislative sanction, operates as a direct invasion of the private property rights of those upon whom the franchises have been so conferred**." Millville, 72 N.J.Eq. at 307, 65 A. at 505.

We re-affirm the overwhelming majority rule stated in Kelly, and we hold that a non-exclusive franchisee has standing to enjoin unfranchised competition. According to the facts as presented in Trigen's complaint, Trigen possesses a non-exclusive franchise to use the streets of downtown Baltimore for the transmission of steam. Comfort Link has submitted a bid on a steam heating contract which apparently will bring that company into competition with Trigen and will require Comfort Link to make use of steam pipes in the public streets within the same general area covered by Trigen's franchise. Baltimore City has not granted a franchise to Comfort Link, but the City has granted one to BGE. On these facts alone it appears

that Trigen would have standing as a franchisee to enjoin Comfort Link's unfranchised competition, but none of the parties have relied on these facts alone. All involved have apparently proceeded on the assumption either that BGE and Comfort Link are the same entity for franchise purposes or that BGE has in some way transferred its franchise rights to Comfort Link.6

We thus confront a situation in which a holder of a non-exclusive franchise seeks to enjoin competition by another franchisee on the grounds that the latter's franchise is invalid. The general rule appears to be that only the granting authority may challenge the validity of a franchise. See 36 Am.Jur.2d Franchises § 20; 37 C.J.S. Franchises § 28. Trigen argues, however, that this rule is subject to the same exceptions applicable in all public rights cases and that it must be afforded an opportunity to protect its valuable franchise property right through just such a challenge.

BGE and Comfort Link claim that the Court of Appeals has already ruled in Kelly that a franchisee cannot challenge the validity of a competitor's franchise. We disagree with their reading of Kelly, which, in all fairness, is a complex case. The plaintiff in that case, the Northern Maryland Power Company, had provided electricity and street lighting to the city of Havre de Grace since before 1902 under franchises granted from both the General Assembly and the city. In January of 1927, the city informed Northern that its services to the city would cease in June and that the city would immediately enter into negotiations with Consolidated Gas, Electric Light & Power Company to take Northern's place. (As a historical note, it appears that Consolidated is a corporate predecessor of appellee BGE. 153 Md. at 527, 138 A. at 489.) In March, the city contracted with Consolidated to provide electric service, and Northern then immediately sued 7 to enjoin Consolidated from exercising its franchise until it applied for authorization from the PSC. (We will, of course, discuss this aspect of Kelly when we address Trigen's standing to enforce the MPSCL, but for present purposes we focus solely on the issue of standing to challenge the validity of a competitor's franchise.) Eight days after the suit was filed (but still months before Northern's service was slated to end), the city repealed every ordinance that had ever granted a city franchise to Northern. Id., 138 A. at 488. The lower court dismissed the complaint for undisclosed reasons, and Northern appealed.

On appeal, Consolidated argued that appellant Northern no longer had standing to seek any injunction because Northern's city franchise(s) had been repealed. The Court, however, rejected Consolidated's argument and accepted Northern's standing by noting that Consolidated “is not in a position to dispute, under its own claim of a state-wide franchise, the right of the appellant, the Northern Company, to exercise” its franchise. Id. at 528, 138 A. at 489. The Court then decided that, because Northern had an electric plant and system operating in the city, Northern had “**sufficient apparent show of interest and value** for us to hold, until and unless otherwise decided in a direct proceeding by the city of Havre de Grace, that it has a right to maintain this suit.” Id. at 529, 138 A. at 489.

BGE and Comfort Link interpret this language to mean that there can be no collateral attacks by competitors on the validity of franchises and that Trigen accordingly has no standing to do so here. A closer reading of the entire Kelly case, however, indicates that the Court was not stating such a broad proposition of law as BGE and Comfort Link maintain. The Court was

merely stating that Consolidated was not “in a position” to dispute Northern's franchise because such an argument was inconsistent with Consolidated's arguments on the merits. Aside from any question of city franchises, both Consolidated and Northern possessed state-wide franchises granted directly by the General Assembly under the same statute. Each party acquired its franchise prior to 1902. In 1902, the General Assembly enacted a law requiring any utility company to obtain the consent of the Havre de Grace authorities before making use of that city's public streets, and in 1910 the Assembly enacted the MPSCL, requiring PSC approval before any utility exercises any franchise in any new area. Consolidated maintained that it was not required to obtain PSC approval because its state-wide franchise was granted prior to, and thus could not be made subject to, the MPSCL. This argument was flatly inconsistent with Consolidated's simultaneous claim that Northern had no franchise right to serve Havre de Grace, because under Consolidated's rubric, Northern's co-extensive franchise could not have been amended by the statute creating the need for local consent. The Court eventually embraced the view that state-wide franchise rights vest only when the franchise actually has been exercised and that franchises are subject to later amendment by statute with regard to all other areas. Such a view of the case would have lead to the conclusion that Northern had a valid state-wide franchise with regard to Havre de Grace, but the Court disposed of Consolidated's argument by instead refusing to let that party simultaneously argue contrary interpretations of the same franchising statute. Thus, we do not read Kelly as establishing any rule regarding a franchisee's standing to challenge the validity of a competitor's franchise.

Trigen relies on two other Maryland cases to support its standing to challenge the validity of a competitor's franchise, but those cases provide no real support at all. In Charles County Sanitary Dist., supra, a sewerage company sought to extend its service into a new area. The local sanitary district refused to recognize the sewerage company's franchise right to do so and imposed conditions on the extension that the company considered unreasonable. The company brought an action seeking injunctive relief and a declaration that it had a valid franchise to serve the area in question. The Court of Appeals determined that the company had never acquired any franchise whatsoever, even in the areas it was already serving. 267 Md. at 599, 298 A.2d at 424. Standing was never discussed, and the case is otherwise distinguishable because the plaintiff sought to establish the validity of its own claimed franchise rather than to challenge the validity of a competitor's franchise.

In Trigen's second case, Commissioners of Cambridge v. Eastern Shore Pub. Serv. Co., 192 Md. 333, 64 A.2d 151 (1949) (Commissioners of Cambridge I), a town had recently been granted authority by the General Assembly to construct its own electricity system, but the utility company then providing all electricity for the town claimed to have an exclusive franchise to do so. The town brought an action for a declaratory judgment that the utility was without any franchise to serve the town. The town admittedly could have simply applied for construction authorization from the Public Service Commission and awaited a challenge from the utility based on its purported exclusive franchise, but the town hoped to settle the issue prior to incurring the substantial costs incident to such an application. The lower court found that the PSC had exclusive jurisdiction over the issues and dismissed the case, but the Court of Appeals allowed the case to proceed. See also Commissioners of Cambridge v. Eastern Shore Pub. Serv. Co., 194 Md. 653, 72 A.2d 21 (1950) (Commissioners of Cambridge II) (dismissing a

subsequent appeal for lack of a final or appealable order). Again, standing was never discussed, and this case even lacks the factual details necessary for any reliable postmortem analysis of standing. It would appear, however, that the town would have had standing to challenge anyone's claim to a franchise right over the town's streets.

With no Maryland authority on point, we again turn to the law of other jurisdictions, which shows a considerable degree of consistency. **When competing franchise rights are claimed, courts will generally permit challenges to the validity of franchises on any grounds that would render a franchise invalid. Courts have permitted franchisees to attack competing franchises for being granted without legislative authority**, Goddard v. Chicago & N.W. Ry. Co., 202 Ill. 362, 366, 66 N.E. 1066, 1067 (1903); Central States Elec. Co., 230 Iowa at 386, 297 N.W. at 809; Elizabeth City v. Banks, 150 N.C. 407, 410, 64 S.E. 189 (1909); Lindsley, 200 S.W. at 211; for being granted in violation of the United States Constitution, Frost, 278 U.S. at 519-21, 49 S.Ct. at 237; In re City of Brooklyn, 143 N.Y. 596, 607, 38 N.E. 983, 985 (1894); for being granted in violation of a state constitution, City of Princeton v. Princeton Elec. Light & Power Co., 166 Ky. 730, 734, 179 S.W. 1074, 1076 (1915); Lincoln Traction Co., 108 Neb. at 163, 187 N.W. at 794; Patterson v. Wollmann, 5 N.D. 608, 612, 67 N.W. 1040, 1041-42 (1896); and for being granted in violation of a state law. Gas Service Co. v. Consolidated Gas Utils. Corp., 145 Kan. 423, 427, 65 P.2d 584, 586-87 (1937); Consumers Power Co. v. Michigan Consol. Gas Co., 213 Mich.App. 82, 86, 539 N.W.2d 550, 552 (1955); Bartlesville, 26 Okla. at 458, 109 P. at 230; Eldridge v. Fort Worth Transit Co., 136 S.W.2d 955, 969 (Tex.Civ.App.1940).

In the instant case, Trigen's particular challenge to the validity of its competitor's franchise is based on alleged violations of the Baltimore City Charter, and these alleged violations may be fairly characterized as procedural. We note that several of the cases just cited involved alleged procedural deficiencies, Gas Service Co.; City of Princeton; Consumers Power Co.; Lincoln Traction Co.; Eldridge; and we take special note of the following cases permitting challenges based on procedural requirements contained in city charters: Atlanta Ry. & Power Co. v. Atlanta Rapid-Transit Co., 113 Ga. 481, 488-89, 39 S.E. 12 (1901) (city council allegedly never voted on the ordinance in the proper manner after a motion for reconsideration was made); Memphis St. Ry. Co. v. Rapid Transit Co., 138 Tenn. 594, 599, 198 S.W. 890, 891 (1917) (Memphis St. Ry. Co. II) (ordinance allegedly not signed into law by the mayor); Fort Worth Gas Co. v. Latex Oil & Gas Co., 299 S.W. 705, 710 (Tex.Civ.App.1927) (ordinance allegedly not submitted for referendum).

The cases we have found in which a party was denied the opportunity to challenge the validity of a competitor's franchise are either distinguishable or of questionable authority. The parties have repeatedly and with great vigor argued the wisdom of KAKE-TV and Radio, Inc. v. City of Wichita, 213 Kan. 537, 516 P.2d 929 (1973), in which the Supreme Court of Kansas held that a radio and television broadcasting company had no standing to challenge the legality of a franchise recently granted to a cable television system. The case is distinguishable on the fundamental grounds that although the plaintiff broadcaster's sole interest in the case was in preventing competition, nowhere in the case is there any mention that the broadcaster had any franchise or even any claim to a franchise. **This lack of a franchise should not be surprising considering that a broadcaster has no need to make constant use of public streets**. Therefore, even assuming that the cable company's franchise was completely invalid, the KAKE

plaintiff still would have lacked standing to enjoin this competitor for want of any justiciable, legal interest in the matter. **Unfranchised competition, it should be recalled, only becomes privately actionable when it interferes with the legal right of another**, and the plaintiff in KAKE simply had no claim to any such right. And, **since the plaintiff could not enjoin unfranchised competition, there was no basis for allowing the plaintiff to challenge the validity of its competitor's franchise**.

Two other cases rejecting standing to make such challenges are also distinguishable for the same reason that the party making the challenge did not possess a franchise. Town of Coushatta v. Valley Elec. Membership Corp., 139 So.2d 822 (La.App.1961); In re Douglass, 118 Pa. 65, 12 A. 834 (1888). These cases differ from KAKE, however, in that the posture of the parties was reversed: instead of a plaintiff being denied standing to challenge a defendant's franchise, the latter cases involve defendants who were denied standing to challenge the plaintiffs' franchise. We are hesitant to overstate our approval of these two cases, because in refusing the defendant the opportunity to challenge the validity of the plaintiff's franchise, these courts may have been foreclosing inquiry into their own jurisdiction, as well as the plaintiff's ultimate entitlement to relief. See Charles County Sanitary Dist., 267 Md. at 599, 298 A.2d at 424 (rejecting the plaintiff's claim to any enforceable franchise). Each of these two cases is also distinguishable on alternate grounds. In Town of Coushatta, the town itself was a plaintiff and clearly had standing, which, under Maryland law, would render the utility company's standing moot. People's Counsel v. Crown Dev. Corp., 328 Md. 303, 317, 614 A.2d 553, 559-60 (1992).

The additional basis for distinguishing In re Douglass is the nature of the attack on the franchise. The defendant argued that the **plaintiff had violated a provision of his own franchise by failing to maintain his ferry and landings in good condition**. 118 Pa. at 76, 12 A. at 839-40. The provision at issue was, at most, a condition subsequent, enforcement of which is generally reserved for the grantor alone as a matter of property and contract law. Harmon v. State Roads Comm'n, 242 Md. 24, 42-43, 217 A.2d 513, 523 (1966) ("**No principle of law is more securely established than that which requires the enforcement of a breach of a condition subsequent to be made by formal entry by the grantor**."); Inasmuch Gospel Mission v. Mercantile Trust Co., 184 Md. 231, 237, 40 A.2d 506, 509 (1945) (**only the state may seek the forfeiture of corporate charter**). Thus, the nature of the challenge injected new standing problems into the case. Other states addressing the same issue have reached similar conclusions. See Memphis St. Ry. Co. II, 138 Tenn. at 604-05, 198 S.W. at 892 ("Forfeiture of such franchise, or its impeachment for invalidity because of a breach of a condition subsequent, we think, falls within the rule of the minority cases-that a proceeding in the name of the State on authority of the attorney-general is necessary."); Fort Worth Gas Co., 299 S.W. at 708 (denying the defendant standing to take advantage of "the nonperformance of a condition subsequent" contained in the franchise itself). In the instant case, no part of Trigen's complaint seeks the invalidity or forfeiture of BGE/Comfort Link's franchise solely on the basis of a violation of a condition subsequent.

The only case squarely on point which holds that a franchisee has no standing to assail the validity of a competitor's purported franchise is Coffeyville Mining & Gas Co. v. Citizens' Natural Gas & Mining Co., 55 Kan. 173, 40 P. 326 (1895), which we consider to be of questionable

wisdom and authority today. The city council in Coffeyville, Kansas, granted an exclusive franchise to a natural gas utility, even though another utility was already operating in the area under a non-exclusive franchise. After the local attorney general commenced an action to annul the exclusive franchise as having been enacted by corrupt means, the existing natural gas provider brought a separate action testing the validity of the exclusive franchise and seeking to enjoin the defendant from laying any pipes. The Supreme Court of Kansas stated the general rule that only the public authorities may test the validity of ordinances and then ruled:

> It is apparent then that the plaintiff has no standing in court to litigate the principal questions it seeks to present. It can neither test the validity of the ordinances under which the defendants claim a right to act, nor could it, if no ordinances had been passed, try the right of the defendant to lay pipes in the streets for the purpose of supplying natural gas.

Id. at 179, 40 P. at 328. Consequently, the Supreme Court of Kansas rejected not only the plaintiff franchisee's standing to challenge the validity of a competitor's franchise but also rejected, albeit in dicta, the proposition that a franchisee can enjoin unfranchised competition. The Court cited no authority for its ruling.

A fair reading of Coffeyville is that the Court based its ruling with regard to franchise challenges on its unsupported ruling that franchisees cannot even enjoin unfranchised competition. Other courts have already taken the Coffeyville Court to task for the latter ruling. Bartlesville, 26 Okla. at 456, 109 P. at 229 (criticizing Coffeyville as “supported neither by the better reason nor by the weight of authorities”); Memphis St. Ry. Co. II, 138 Tenn. at 603, 198 S.W. at 892 (“The text-writers pronounce against the doctrine of [Coffeyville].”); Lindsley, 200 S.W. at 209, 211 (discussing Coffeyville but concluding that “not only the current of authority, but the better reason as well, supports the right to challenge such grants”). See also Wichita Transp. Co. v. People's Taxicab Co., 140 Kan. 40, 43, 34 P.2d 550, 551-52 (1934) (quoting favorably the majority rule of franchisee standing from Deister, supra). Given Maryland's (and the rest of the nation's) embrace of franchisee standing to enjoin unfranchised competition, there is hardly any reason to follow Coffeyville for what appears to be an extension of a contrary rule.

Coffeyville has never been overruled by the Supreme Court of Kansas, but the case's specific holding that a franchisee lacks standing to challenge the validity of a competitor's franchise has been undermined by later Kansas cases. The Kansas Court has cited Coffeyville for this specific proposition on only two occasions, Baxter Tel. Co. v. Cherokee County Mut. Tel. Ass'n, 94 Kan. 159, 163, 146 P. 324, 326 (1915); KAKE, 213 Kan. at 541, 516 P.2d at 932; but neither of these two cases presented an applicable set of facts. In KAKE, as previously noted, the plaintiff never had or even claimed a franchise and thus lacked any legal interest in the case at all. In Baxter, a franchisee sued to force its competitor to obtain a license from the state public utilities commission, an entirely distinct question. See discussion infra. On the other hand, a situation directly on point was presented in Gas Service Co., supra, and in that case the Supreme Court of Kansas reached a result directly contrary to Coffeyville. In Gas Service Co., a plaintiff natural gas franchisee sued in quo warranto to challenge the validity of a franchise granted by the city of Wichita to the defendant, and the Court ruled that the plaintiff could litigate the issue. 145 Kan. at 429, 65 P.2d at 588. Without ever mentioning Coffeyville, the

Court acknowledged that it had formerly applied a narrower rule in Baxter, but it noted, “In later decisions this court has relaxed this rule somewhat.” 8

Although other courts have occasionally stated the proposition that a distinction exists between standing to enjoin unfranchised competition and standing to challenge the validity of a competitor's franchise, we have found no other decision that rests upon application of such a rule. On the other hand, a multitude of cases already cited have permitted just such challenges. Given that Trigen has a right in the nature of a property right to exclude unfranchised competition, we are of the opinion that Trigen must necessarily be afforded the opportunity to prove that the competition in question is unfranchised. If this can only be accomplished by proving that a facially valid franchise is invalid, then it follows that Trigen has a real property interest at stake in this challenge. Accord Habliston v. City of Salisbury, 258 Md. 350, 353-55, 265 A.2d 885, 887 (1970) (one demonstrating a particularized invasion of a legal right has standing to challenge the validity of an ordinance). We prefer the majority rule over the Coffeyville rule, and we find that Trigen has an interest that is both cognizable and sufficient to endow Trigen with standing to challenge the validity of its competitor's franchise as against the procedural requirements of the Baltimore City Charter.

V.

The next issue is whether Trigen also has standing by virtue of its franchise to enjoin a competitor for failure to obtain the authorizations required under the MPSCL. Once again, we take our bearings from the polestar case of Kelly. The Court of Appeals held in Kelly that the Northern Maryland Power Company, an electricity provider and a franchisee, had standing to enjoin competition from rival electricity provider/franchisee Consolidated Gas Electric Light & Power Company until such time as Consolidated obtained statutorily required approval of its proposed service from the PSC. 153 Md. at 529, 138 A. at 489. The facts of our case could hardly be more similar. Trigen is a steam heat provider and a franchisee, and it seeks to enjoin a rival steam provider/franchisee from competing until such time as the competitor obtains statutorily required approval of its proposed service from the PSC. Purely on the basis of controlling precedent, we have little choice but to rule that Trigen has standing to seek just such an injunction. As a doctrinal matter, however, we are troubled by the fact that Kelly's decision on standing may be in conflict with the rule of standing adopted therein, as well as later cases. Further explanation requires further analysis of Kelly.

It will be recalled that both Northern and Consolidated enjoyed state-wide franchises granted under the same statute. Northern had served the city of Havre de Grace since before 1902, but in 1927 the city terminated Northern's service and contracted with Consolidated for new service. Northern's complaint sought to enjoin Consolidated from (1) constructing and laying gas lines within the town and (2) extending Consolidated's existing lines in the direction of the town. Statutes enacted in 1902 and 1910 required utilities to obtain Havre de Grace's consent and the PSC's approval, respectively, but Consolidated argued that its state-wide franchise predated, and thus was not subject to, either of those laws.

The Court employed two separate approaches in addressing Consolidated's arguments. Under the first approach, the Court began by reasoning that, since Consolidated had not actually

exercised its state-wide franchise within the territory of Havre de Grace prior to 1902, its franchise rights had not vested with regard to that territory as of that time. Thus, Consolidated's franchise could be amended by the 1902 law requiring city consent. Id. at 532, 138 A. at 490. Then the Court ruled that, when the city granted such consent in 1927, Consolidated in effect acquired a completely new and distinct franchise that, unlike its state-wide franchise, was already subject to the 1910 MPSCL:

It is evident from the decisions in this state that the ordinance of the Mayor and City Council of Havre de Grace, consenting to the use of its streets by the appellee, was a franchise, and, before its exercise, required the approval of the Public Service Commission and permission for its exercise.

Id. at 539, 138 A. at 493. This approach to the case, however, did not resolve the question of whether Northern was entitled to enjoin Consolidated from extending existing service lines in the direction of the city, because such activity was beyond the scope of the law requiring the city's consent. Therefore, under its second approach, the Court ruled that since Consolidated's state-wide franchise rights had not vested with regard to any territory where they had not been exercised, all post-1910 extensions, including the 1927 Havre de Grace extension, were subject to the 1910 preapproval requirement.9 Id. at 541, 138 A. at 494.

The only basis for standing that can be gleaned from Kelly is the Court's adoption of the proposition that "[T]h[e] franchise right is not exclusive against other grants authorized by the Legislature, [but] it is exclusive against one conducting competition without a franchise or license and contrary to law." This proposition, however, has no direct application to Kelly, because Consolidated possessed a valid franchise (or perhaps two different ones) authorized by the legislature. This would seem to deprive the court of jurisdiction under the rule quoted. It is true that the Court also made reference to Northern's existing electric plant just before ruling that Northern had a "sufficient apparent show of interest and value," id. at 529, 138 A. at 489; but it cannot be seriously contended today that this plant entitled Northern to any protection from competition.

We are at a loss as to how we can reconcile the facts of Kelly with the rule of standing therein adopted. The two could be reconciled if PSC approval could be considered the equivalent of a franchise for purposes of standing, but we find no support for such equivalency. First of all, the Kelly Court can hardly be accused of conflating the two concepts, considering the lengths to which it went to make sure that the MPSCL did not infringe upon any vested franchise right of the defendant. Secondly, the Court of Appeals has since held that the PSC cannot grant a franchise because it is entirely without authorization from the General Assembly to do so. Commissioners of Cambridge I, 192 Md. at 339, 64 A.2d at 154 (citing Kelly for support).

Nor can we reconcile Kelly through expansive interpretations of the rule of standing it adopted. It is true that the Court of Appeals inherited some dicta from the Supreme Judicial Court of Massachusetts referring to licenses, but **Maryland has always recognized a strict separation between franchises and all lesser privileges, including licenses**. Greenfeld, 190 Md. at 105-06, 57 A.2d at 338-39 (**licenses regulate the exercise of rights existing at common law while franchises grant privileges not previously enjoyed of common right**); Huebschmann, 166 Md.

at 622, 172 A. at 231 (**a single permanent encroachment in a street may be authorized by a permit, but ongoing authority requires a franchise**). The only Maryland cases we have found addressing a licensee's standing to enjoin unlicensed competition have rejected such standing. Edgewater Liquors, Inc. v. Liston, 349 Md. 803, 811, 709 A.2d 1301, 1304 (1998) (competitor liquor licensees are not within the statutory definition of "licensees" with standing to challenge license grants); Baltimore Retail Liquor Package Stores Ass'n, 171 Md. at 429, 189 A. at 210 ("**As holders of liquor licenses [plaintiffs] have no franchises or exclusive privileges to be affected" by the allegedly improper renewal of their competitors' licenses**). Furthermore, given the narrow set of circumstances under which competition constitutes encroachment on a franchise, and **since a mere license is incapable of conferring the rights contained in a franchise, it follows that a competitor's failure to obtain a license, by itself, can never amount to a violation of a franchisee's property rights**. Cf. Purnell v. McLane, 98 Md. 589, 592-93, 56 A. 830, 831 (1904) (the right to trade in electricity is open to all, subject to regulatory restriction by the state; **it is only the use of the streets to transmit the electricity that requires an affirmative grant of a franchise**).

Trigen has also suggested that the reason it has standing to enjoin violations of the MPSCL is that such competition is "contrary to law" and thus is covered by the tail end of the Kelly rule. **We are of the opinion, however, that the language "without a franchise and contrary to law " merely means "without a franchise that is required by law."** This latter reading has the virtue of mooring the rule to situations in which competition actually invades a franchisee's property rights. Cf. Intermountain Elecs., Inc. v. Tintic Sch. Dist., 14 Utah 2d 86, 88, 377 P.2d 783, 785 (1963) (**a cable television franchisee's property rights are not invaded as a result of competition from a broadcast television company not making private use of public streets**). The broader reading Trigen suggests would seem to apply to violations of any law and would thus turn any franchisee into the policeman of its competitors, with standing to enjoin violations of, for example, traffic laws or employment laws. Contra Tennessee Elec. Power Co., 306 U.S. at 140, 59 S.Ct. at 370 (franchisees have no standing to enjoin allegedly illegal loans to competitors or other allegedly illegal acts generally); Denver Tramway Corp. v. People's Cab Co., 1 F.Supp. 449, 452 (D.Colo.1932) (**a streetcar franchisee can enjoin taxis from mimicking the streetcar's routes, but it cannot enjoin unrelated violations of traffic or licensing laws**). **Such a result would be clearly absurd, and yet absurd in an insightful way. If the reason it sounds absurd for a competitor to enforce a traffic law is because traffic laws have nothing to do with competition, whereas the MPSCL arguably does, then this is an indication that the inquiry has strayed beyond the realm of property rights and into the realm of rights "conferred by a statute**."

It may come as no surprise that many other states are in accord with Kelly 's main thrust, that a public service company has standing to enjoin a competitor's violation of a regulatory law. Some foreign cases even appear to agree with Kelly 's specific rationale that such standing is based on the plaintiff's franchise property interest. Kinder, 171 Ark. at 19, 283 S.W. at 10; Kosciusko County Rural Elec. Membership Corp. v. Public Serv. Comm'n, 225 Ind. 666, 675-76, 77 N.E.2d 572, 576 (1948); Reo Bus Lines Co., 209 Ky. at 43-44, 272 S.W. at 19; Campbell Sixty-Six Express, Inc. v. J. & G. Express, Inc., 244 Miss. 427, 436, 141 So.2d 720, 724 (1962); City Coach Co., 227 N.C. at 395, 42 S.E.2d at 400; Davis v. Clevinger, 127 Wash. 136, 138, 219 P. 845, 845 (1923); Calumet Serv. Co. v. City of Chilton, 148 Wis. 334, 349-50, 135 N.W. 131, 137

(1912). Yet, in each of these cases, one of two distinguishing characteristics was present: either the regulatory commission at issue enjoyed the statutory authority to grant actual franchises (turning approval itself into a franchise) or the court treated the grant of regulatory approval as the legal equivalent of a franchise. As we have already explained, neither proposition is in accord with the law of this state.

Although Kelly's explicit rationale has been undermined, we believe that its result can be followed in this case based on the alternate rationale that standing is conferred by the MPSCL itself. See South Carolina Elec. & Gas Co. v. South Carolina Pub. Serv. Auth., 215 S.C. 193, 204-05, 54 S.E.2d 777, 781-82 (1949) (plaintiff utility company has standing to enjoin a competitor's violation of the utility regulatory law even though plaintiff's franchise rights are not invaded thereby); Public Utils. Bd. v. Central Power & Light Co., 587 S.W.2d 782, 786 (Tex.Civ.App.1979) (same). While we have admittedly backed ourselves into this proposition, there is support for it in our case law.

The parties are not in complete accord as to how a court should test whether a particular interest is rendered cognizable by virtue of a statute. Trigen never directly addresses this issue at all, preferring precedent over doctrine, while BGE and Comfort Link argue in support of the so-called "zone of interests" test adopted by the Supreme Court of the United States in Association of Data Processing Serv. Orgs. Inc., 397 U.S. at 153, 90 S.Ct. at 830 (" [The question of standing concerns] whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute in question."). The zone of interests test, however, has never been adopted in Maryland. The Court of Appeals mentioned the federal zone of interests test in passing in Sugarloaf Citizens' Ass'n, 344 Md. at 295, 686 A.2d at 617; but the Court neither applied the test nor expressed any real approval of the particular standard contained therein. The zone of interests test was applied in News Am. Div., Hearst Corp. v. State, 294 Md. 30, 40, 447 A.2d 1264, 1269 (1982), but apparently only because the Court thought it mete to employ a federal test of standing to a claim involving federal First Amendment rights. Maryland courts have tended to rely on marginally less liberal standards for statutory standing. Dart Drug, 272 Md. at 24, 320 A.2d at 271 (plaintiff must show the statute "was passed for his benefit"); Cook, 176 Md. at 398-99, 4 A.2d at 749 (plaintiff has standing if "[the law gives] an exclusive privilege or advantage," if "one of the purposes of the enactment is to protect the [plaintiff] against unauthorized competition," if "the statute was enacted for his advantage or for the advantage of a class to which he belongs," if the statute "intended to confer privileges or advantages"); Baltimore Retail Liquor Package Stores Ass'n, 171 Md. at 429, 189 A. at 210 ("[I]t was not within the purpose of the statute to restrict competition for the benefit of any licensee.").

Ultimately, we need not decide which test to apply, because the Court of Appeals has already provided us with our answer, albeit transposed from a slightly different context. On at least three prior occasions, the Court of Appeals has entertained actions brought by a public service company to challenge the PSC's decision to authorize another public service company to enter into competition against the plaintiff. Maryland Transp. Co. v. Public Serv. Comm'n, 253 Md. 618, 253 A.2d 896 (1969); Baltimore Tank Lines v. Public Serv. Comm'n, 215 Md. 125, 137 A.2d 187 (1957); Tidewater Express Lines v. Public Serv. Comm'n, 199 Md. 533, 87 A.2d 158 (1952). None of these cases explicitly discussed standing, but together they indicate that a public

service company's interest in avoiding competition is sufficient by itself to provide standing in court when a claim is made that the MPSCL has been violated. The cases cannot be completely distinguished by the fact that the plaintiffs were, in effect, appealing from proceedings in which they already were participants, because administrative standing is not determinative of judicial standing. Edgewater Liquors, Inc., 349 Md. at 806, 709 A.2d at 1302; Sugarloaf Citizens' Ass'n, 344 Md. at 285-86, 686 A.2d at 613; Kreatchman, 224 Md. at 214-15, 167 A.2d at 348.

Other cases provide further support for the more general proposition that one of the interests animating the MPSCL is the prevention of competition among public service companies. Maryland Transp. Co., 253 Md. at 628-29, 253 A.2d at 902 (the PSC is authorized to determine whether monopoly or competition between carriers is in the public interest); Barton v. Public Serv. Comm'n, 214 Md. 359, 365, 135 A.2d 442, 445-46 (1957) (same); Clark v. Public Serv. Comm'n, 209 Md. 121, 132-33, 120 A.2d 363, 369 (1956) (**the PSC's "obligation to protect a common carrier against competition" is secondary to its obligation to secure adequate and inexpensive service for the public**); Capital Transit Co. v. Bosley, 191 Md. 502, 511, 62 A.2d 267, 272 (1948) ("The power to fix minimum rates . relates to the prevention of destructive competition."); Bosley v. Quigley, 189 Md. 493, 508-09, 56 A.2d 835, 842 (1948) (the PSC's finding of adequate existing service supported its decision to exclude competitors); Maryland People's Counsel v. Heintz, 69 Md.App. 74, 87, 94, 516 A.2d 599, 606, 609 (1986) (the introduction of competition into the interexchange telecommunications market justified the PSC's decisions to alter its rate-making method and the utility's rate of revenue return).

In fact, the very concept of a "public service" company or a utility company has traditionally been imbued with the exclusion of competition, on the theory that market forces would either produce a monopoly or else would not provide the entire population with adequate access to the particular type of service. See New State Ice Co. v. Liebmann, 285 U.S. 262, 281-82, 52 S.Ct. 371, 376, 76 L.Ed. 747 (1932); 1 Priest, supra, at 361-69; see also Black's Law Dictionary 1232 (6th ed. 1990) ("[A public utility] is always a virtual monopoly."). Movements are currently afoot to introduce competition into many markets that have traditionally been served by a limited number of public service corporations, but this only confirms the fact that competitive interests are intimately associated with the public interest in the field of public utilities regulation.

In sum, we find that Trigen has standing both to challenge the validity of its competitor's franchise and to enjoin a competitor for failure to obtain PSC authorization. Of course, we express no opinion on the merits of any claim, nor have we addressed any other possible impediments to relief that may still lie before Trigen (such as ripeness, administrative exclusivity, preclusion, etc.). We only hold that Trigen's interest is sufficient to be heard in court.

JUDGMENT REVERSED; CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR FURTHER PROCEEDINGS.

COSTS TO BE PAID TWO-THIRDS BY APPELLEES BALTIMORE GAS & ELECTRIC COMPANY AND THE DISTRICT CHILLED WATER LIMITED PARTNERSHIP AND ONE-THIRD BY APPELLEE CITY OF

BALTIMORE.

FOOTNOTES

1. BGE is the majority owner of Comfort Link, with a sixty percent ownership interest. Monumental Investments owns the other forty percent.

2. The record contains only the scantiest details of these collateral proceedings. The parties seem to agree that the PSC's decision was affirmed by the Circuit Court for Baltimore City subsequent to the hearing at issue. Trigen plays down the effect of these prior proceedings by alleging that the court's affirmance was on ripeness grounds. We are simply not in a position to engage in any meaningful review of the PSC's actions.

3. In Dart Drug, the Court of Appeals without explanation reached a result that appears contrary to Cook and its progeny. In that case, Hechinger hardware and lumber store believed that the local Sunday closing law was being unevenly enforced, and it brought an action against three rival drug stores for declaratory and injunctive relief. While Hechinger had been forced to shut down on Sundays, the drug stores (which allegedly sold about two-thirds of the same products as were sold by Hechinger) were allowed to stay open under a statutory exception for stores “whose basic business is the sale of drugs and related items.” The lower court found the exception to be unconstitutional and enjoined the drug stores from staying open on Sundays. The Court of Appeals reversed as to constitutionality. The drug stores argued in their appeal that Hechinger lacked standing to enjoin competitors since the Sunday closing law in no way related to competition, but the Court brushed aside such concerns:The answer to these arguments [that Hechinger has no standing] is that while it is generally true that a private person cannot enforce a criminal statute without a showing that it was passed for his benefit, Cook v. Normac Corp., 176 Md. 394, 398, 4 A.2d 747, 749 (1939), it is equally true that the mere fact that a course of action is a crime will not prevent equity from dealing with it, if it causes the complainant harm for which there is no legal remedy, Dvorine v. Castelberg Jewelry Corp., 170 Md. 661, 668, 185 A. 562, 565 (1936). In fact, **there are cases where the imposition of a criminal sanction may be less effective and complete than injunctive relief, and equity will act,** State v. Ficker, 266 Md. 500, 508, 295 A.2d 231, 235-36 (1972). See generally Clark v. Todd, 192 Md. 487, 492, 64 A.2d 547, 549 (1949).272 Md. at 24, 320 A.2d at 271. Although the Court purported to be responding to arguments that Hechinger had no cognizable interest, the Court instead responded to an entirely different argument concerning equity jurisdiction. The Court did not discuss whether the Sunday laws protected Hechinger's competitive interests, and none of the cases cited by the Court support its ruling on standing. (In Dvorine, the Court specifically refrained from ruling on standing. 170 Md. at 668, 185 A. at 565.) Since Dart Drug cannot fairly be read as overruling Cook, we believe Dart Drug is simply anomalous and should be limited to its facts.

4. As neither Deister, Kelly, nor the instant case involves licenses, we may put aside for the moment the reference made to licensee standing, which we consider to be an entirely separate question. See discussion infra.

5. In their brief, BGE and Comfort Link attempted to distinguish Kelly by asserting that the

plaintiff in that case wielded an exclusive franchise. That position is erroneous; the exclusive portion of the plaintiff's franchise had expired over a year prior to the filing of the suit. 153 Md. at 525, 528, 138 A. at 488, 489. The fact that the Court discussed the exclusive properties of non-exclusive franchises at all demonstrates that a non-exclusive franchise was at issue. We point out the error because it represents an understandable reading in isolation of certain ambiguous sentences, as well as the case reporter's notes. We also took note that counsel did not repeat the error at oral argument.

6. Ordinance No. 624 appears to contemplate that BGE will exercise its franchise through Comfort Link.

7. Also serving as plaintiffs were twenty-one citizens of Havre de Grace, one of whom presumably provided the case's name. The Court, of course, had no reason to address the standing of these citizens once satisfied that Northern had standing. See People's Counsel v. Crown Dev. Corp., 328 Md. 303, 317, 614 A.2d 553, 559-60 (1992).

8. Forty years after Gas Service Co., the KAKE Court attempted to reconcile this line of cases on the grounds that the local franchise-granting authority was made a party defendant on its own motion in Gas Service Co. but was not made a party to the case at all in either Coffeyville, Baxter, or KAKE, 213 Kan. at 543, 516 P.2d at 933. We find this distinction unpersuasive since the issue of standing cannot be waived by any party and is entirely separate from the issue of joinder of necessary parties.

9. As Judge Offutt pointed out in his dissent in Kelly, this second approach appears sufficient to decide the entire case and may have obviated any need for the first approach.

THIEME, Judge.

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United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff–Appellee, v. Daniel Richard GARCIA, Defendant–Appellant.

No. 12–10189.

Decided: September 18, 2014

Before RICHARD C. TALLMAN and JOHNNIE B. RAWLINSON, Circuit Judges, and MARVINJ. GARBIS, Senior District Judge.* Timothy E. Warriner, Sacramento, CA, for Defendant–Appellant. Michael D. Anderson (argued) and Phillip A. Talbert, Assistant United States Attorneys, Sacramento, CA, for Plaintiff–Appellee.

OPINION
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Appellant Daniel Garcia (Garcia) challenges his conviction for using a pipe bomb to damage a vehicle and apartment building in violation of 18 U.S.C. § 844(i). **Garcia contends that the government failed to present sufficient evidence to satisfy the Commerce Clause jurisdictional requirement of 18 U.S.C. § 844(i), because the government failed to demonstrate that Garcia's criminal conduct affected interstate commerce.** Garcia also maintains that **the district court erred in instructing the jury that damage to the rental apartment building and vehicle met the jurisdictional mandates, and that 18 U.S.C. § 844(i) is unconstitutional on its face**. We affirm.

I. BACKGROUND

A. Indictment

In a four-count indictment, Garcia was charged with "maliciously damag[ing] and destroy[ing] and attempt[ing] to damage and destroy, by means of an explosive, a building and vehicle used in interstate commerce, and in an activity affecting interstate commerce" in violation of 18 U.S.C. § 844(I). The indictment alleged that Garcia "knowingly carr[ied] and use[d] a destructive device, to wit, a pipe bomb" in violation of 18 U.S.C. § 924(c)(1)(A).1

B. Garcia's Motion To Dismiss The Indictment

Prior to trial, Garcia filed a motion to dismiss the indictment. Garcia asserted that the government was unable to satisfy the Commerce Clause jurisdictional requirements of § 844(i) because **there were no allegations that the privately owned vehicle, a Chevrolet Tahoe SUV, was utilized in interstate or foreign commerce by the vehicle's owner**. The district court denied Garcia's motion.

C. Garcia's Proffered Interstate Commerce Jury Instruction

During the jury instruction conference, Garcia proffered an interstate commerce instruction providing that:

> Used in interstate commerce means that a vehicle or a building is used in an activity substantially affecting interstate or foreign commerce **if the vehicle or building is actively used for commercial purposes** and the vehicle or building does not merely have a passive, passing, or past connection to interstate or foreign commerce. **A vehicle or building may affect interstate commerce if it takes on economic functions unrelated to every day, non-commercial, private use.** The fact that the vehicle is manufactured in a different state or is insured by an out-of-state company is insufficient to trigger federal jurisdiction under 844(i) or to fulfill the fourth element of the offense.

The district court rejected Garcia's proffered instruction, and instead instructed the jury that an apartment building "is used in interstate commerce, or in an activity affecting interstate commerce, if it contains rental units and is used as rental property," and that "**[a] vehicle is**

used in interstate commerce if it is transported from the state where it was manufactured into another state."

D. Trial Testimony and Verdict

At trial, Jantina Reed (Reed) testified that she, her boyfriend, Kenneth Clark (Clark), and two children resided in Garcia's house for approximately two and a half months. Reed eventually moved from Garcia's home because of Garcia's unusual behavior. According to Reed, Garcia would "run around naked" and "stand in front of [her] doorway and breathe hard ." Reed and her family moved to an apartment complex in Fairfield, California, and did not inform Garcia of their new address. However, Garcia came to their apartment complex on two occasions in an attempt to contact Reed and her family. During one incident, Reed called the police, and Garcia was arrested.

Reed related that she had an altercation with Garcia when she had a vehicle towed from his residence. As the vehicle was being towed, Garcia threw several items on Reed's car and threatened, "tick, tick, boom, I'm going to blow this up to pieces." Garcia also allegedly told Reed, "you know I have the means to do it, and if I can't get it, I can go online and get it." Reed did not hear from Garcia after the incident.

On May 26, 2011, Reed fell asleep at approximately 11:30 or 11:45 p.m. Reed subsequently "heard a giant bang noise" and "there was fire all in their window." Reed grabbed her children and ran outside, where she saw flames coming from her Chevy Tahoe SUV, which Reed had borrowed from her mother.

Clark testified that he heard "a little noise like tink, tink, and then boom" before the apartment's window was engulfed in flames. Clark went outside and extinguished the flames around the vehicle with a fire extinguisher.

Officer Christopher Grimm of the City of Fairfield Police Department responded to a police dispatch "just after 1:00 a.m. on May 27, 2011" to an apartment complex. When he arrived, Officer Grimm noticed a blue Chevy Tahoe with "what appeared to be a steel galvanized pipe below it and several blue propane canisters around it." Officer Grimm "collected . pieces of cardboard around the vehicle, approximately 20 feet or so in a kind of circular circumference around the vehicle, along with several blue propane canisters, the galvanized pipe and cap, and several pieces of duct tape and other materials that were found in the area."

Officer Grimm also measured the time and distance between the site of the explosion and a 24 Hour Fitness gym. According to Officer Grimm, it took "[a]pproximately five minutes and two seconds" at 2:45 a.m. to drive the 2.2 miles from the gym to the site of the explosion.

Detective William Shaffer of the City of Fairfield Police Department investigated the components of the explosive device. Detective Shaffer testified that the device was attached to five Worthington brand propane cylinders—a commonly available type of propane canister. Detective Shaffer related that the device was "a 2–inch by 12–inch piece of galvanized steel pipe . with Mueller brand end caps on both ends." Detective Shaffer believed that the device utilized smokeless or black powder, but he was unable to recover any materials indicating how

the device was detonated. Detective Shaffer observed that the end cap had a drill hole that may have served as “an ignition source into the interior of the pipe.” Detective Shaffer did not recover any timing devices or fuses.

Detective Shaffer also found damage from the explosion to the nearby apartment building. According to Detective Shaffer, there were impact marks approximately two to three feet from the ground in the stucco wall near the children's bedroom. Detective Shaffer opined that the impact marks were created by metal fragments from the pipe bomb or from the propane cylinders.

Detective Shaffer observed that the pieces from a cardboard box contained a model number. Detective Shaffer determined that the cardboard box served as the container for the pipe bomb and that the model number was for a “3,000 watt power inverter.”

Detective Shaffer also participated in the search of Garcia's residence. During the search, the officers found a receipt for an AIMS 3,000 watt power inverter; a pipe bomb wrapped in a sheet in the garage; and a set of gopher gassers with fuses similar to the one on the pipe bomb. According to Detective Shaffer, the pipe bomb found in Garcia's garage was similar to the one used in the apartment complex explosion because both bombs were “constructed out of a length of galvanized steel pipe, both of them had cast metal end caps on each end, both of them had paper towel or some type of a paper wadding, both of them had gunpowder as a filler or combustible material inside.”

Matthew Rainsberg (Rainsberg), a forensic chemist for the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), determined that the two pipe bombs contained similar smokeless gunpowder, and that the fuse on the pipe bomb found in Garcia's garage was visually and physically similar to the fuses on the gopher gassers. Although Rainsberg could not conclusively determine if the fuses were the same, he opined that the fuses were “visually and physically similar, and . contain[ed] the similar fuse core powder.”

Tania Kapila, an ATF fingerprint specialist, testified that Garcia's latent fingerprints and palm print were found on the gopher gasser control devices.

Robert Krause (Krause), a friend of Garcia's, testified that he drove Garcia to an apartment complex where Garcia identified a Chevy Tahoe as belonging to a friend. According to Krause, Garcia complained that he had problems with roommates who had taken “quite a few of his possessions.” Garcia indicated that the roommates were “a mother and father and child .” Krause related that, a few weeks after driving Garcia to the apartment complex, Garcia showed Krause a pipe bomb that Garcia stored in an ice chest in his garage. Garcia did not inform Krause what he intended to do with the pipe bomb.

Leonard Duprez, a General Motors district manager for after sales, testified that, based on the vehicle identification number, the SUV damaged in the explosion was manufactured in Jamesville, Wisconsin.

Maricela Avila, a property manager, testified that the apartment complex in which the

explosion occurred advertised apartment rentals online and that some of the residents who signed lease agreements came from out of state.

Sean Nichols (Nichols), the vice-president of sales for Aims Power, testified that the cardboard box from the site of the explosion resembled the outside box that Aims Power utilized for shipping power inverters. According to Nichols, Garcia purchased the only 3,000 watt power inverter that Aims Power shipped to Fairfield, California. Nichols confirmed that the product number on the cardboard box from the explosion corresponded to the part number associated with Garcia's order.

Dan Gagnon (Gagnon), the regional loss prevention manager for 24 Hour Fitness, reviewed Garcia's membership records for May 26–27, 2011. According to Gagnon, Garcia checked into the 24 Hour Fitness on May 26, 2011, at 11:01:06 p.m. and checked in again at 12:51:12 a .m. on May 27, 2011. Gagnon testified that the fitness center did not utilize a system reflecting when its members leave the facility.

Shalimar Ramirez (Ramirez), the service manager for 24 Hour Fitness, provided Garcia's check-in records pursuant to a subpoena. In June, 2011, Ramirez also met with an investigator from the Solano County Public Defender's Office and reviewed video surveillance of Garcia's 11:00 p.m. check-in. The video did not reflect that Garcia left the fitness center between 11:00 p.m. and 12:00 a.m.

Frank Huntington (Huntington), a private investigator appointed to assist Garcia, testified that he measured the duration of two routes from the 24 Hour Fitness to the apartment complex where the explosion occurred. Huntington estimated that one route took him “[a]pproximately nine minutes and two seconds” at 11:45 a.m. during “[n]ormal daytime traffic .” The second route took Huntington “approximately eight minutes and fifty . seconds” at 1:50 p.m. during “normal daytime traffic.”

Huntington also tested the length of time needed for a four-inch gopher gasser fuse to burn. Huntington estimated that the fuses took from 12.6 seconds to 13.4 seconds to burn.

Garcia testified that, on May 27, 2011, he drove his roommate's car to the 24 Hour Fitness and checked in at 12:51 a.m. According to Garcia, he left the 24 Hour Fitness at approximately 2:00 a.m. and “went directly home, had a post-workout meal, got prepared to go to sleep, [and] made sure [his] dog was fed .” Garcia estimated that it took him approximately five to ten minutes to drive from the fitness center to his home.

Garcia stated that, on May 26, 2011, he checked into the fitness center at approximately 11:00 p.m. According to Garcia, he lacked the energy to exercise and he left the fitness center “approximately 15 minutes later.” He went home; consumed “a power meal”; went to a restaurant for more food; returned home to “[l]et the meal digest”; watched television; took his dog for a walk; and then returned to the fitness center. Garcia related that he left his home at 12:30 a.m. and arrived at the fitness center after purchasing energy drinks at a nearby store.

Garcia denied driving to the apartment complex that evening or possessing a pipe bomb.

According to Garcia, he did not know who constructed the pipe bomb found in his garage and he used the gopher gassers for a rodent problem. Garcia acknowledged that he purchased the Aims power inverter and that he had an extensive background as an electrician.

Garcia filed a motion for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29, which the district court denied. The jury found Garcia guilty of malicious use of explosive materials in violation of 18 U.S.C. § 844(I). On the verdict form, the jury indicated its finding that the apartment building and the vehicle "were used in interstate commerce or in an activity affecting interstate commerce[.]"

The district court sentenced Garcia to 420 months' imprisonment and 60 months of supervised release. Garcia filed a timely notice of appeal.

II. STANDARDS OF REVIEW

"**We review de novo [Garcia's] challenge to the sufficiency of the evidence, including questions of statutory interpretation**." United States v. Wright, 625 F.3d 583, 590 (9th Cir.2010) (citations omitted).

"**This court reviews the constitutionality of a statute de novo**." Chamness v. Bowen, 722 F.3d 1110, 1116 (9th Cir.2013) (citation omitted).

"We review the language and formulation of a jury instruction for an abuse of discretion. However, **when jury instructions are challenged as misstatements of law, we review them de novo.**" United States v. Cortes, 757 F.3d 850, 857 (9th Cir.2014), as amended (citations, alteration, and internal quotation marks omitted).

III. DISCUSSION

Relying on United States v. Lopez, 514 U.S. 549 (1995), and United States v. Morrison, 529 U.S. 598 (2000), Garcia asserts that damage to the apartment complex did not satisfy the Commerce Clause jurisdictional element of 18 U.S.C. § 844(i) because there was insufficient evidence that any damage to the apartment building substantially affected interstate commerce. We disagree, and conclude that the Commerce Clause jurisdictional element for a conviction pursuant to 18 U.S.C. § 844(i) was satisfied as discussed in Russell v. United States, 471 U.S. 858 (1985), and United States v. Gomez, 87 F.3d 1093 (9th Cir.1996).

In Russell, the Supreme Court considered "whether 18 U.S.C. § 844(i) applies to a two-unit apartment building that is used as rental property." Russell, 471 U.S. at 858. The Supreme Court observed that "reference [in 18 U.S.C. § 844(i)] to any building used in any activity affecting interstate or foreign commerce expresses an intent by Congress to exercise its full power under the Commerce Clause." Id. at 859 (alterations, footnote reference, and internal quotation marks omitted). The Supreme Court held:

By its terms the statute only applies to property that is used in an activity that affects commerce. The rental of real estate is unquestionably such an activity. We need not rely on

the connection between the market for residential units and the interstate movement of people, to recognize that the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties. **The congressional power to regulate the class of activities that constitute the rental market for real estate includes the pow er to regulate individual activity within that class**.

Id. at 862 (footnote references and internal quotation marks omitted).

In Gomez, we consulted Russell to resolve the defendant's challenge to his conviction for arson. According to Gomez, the prosecution failed to establish that the burned building substantially affected interstate commerce, as required for a conviction under 18 U.S.C. § 844(i). See Gomez, 87 F.3d at 1094. Although **there was no testimony at trial as to any specific interstate commerce connection**, the burned building was a six-unit apartment complex. See id. Gomez maintained that the Supreme Court's decision in Lopez "reinterpreted the Court's commerce clause jurisprudence, and thereby undermined **Russell's per se rule that all rental property affects commerce sufficiently enough to warrant federal jurisdiction under section 844(i)**." Id.

In rejecting Gomez's argument premised on Lopez, we observed that in drafting § 844(i), Congress sought to reach "those arsons that damage or destroy property that had been used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." Id. at 1095 (citation and internal quotation marks omitted). **We interpreted the plain language of the statute as treating the interstate commerce aspect of the crime separately from the crime of arson, with the interstate aspect of the crime being totally dependent "on what the property had been used for (or whether the property was moving in interstate commerce)**." Id. at 1096. From that premise, **we formulated the "proper inquiry" as whether application of § 844(i) to the burning of the six-unit apartment complex "regulates conduct that is commercial or economic in nature.**" Id. **Citing Russell, we held that "an apartment building currently in use in the rental market is used in an activity affecting interstate commerce**." Id. (citations omitted). We explained that "[a]lthough one apartment building may have no more than a de minimis effect on interstate commerce, the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties." Id. (citation omitted). However, when aggregated, the commercial market in rental properties "undeniably has a substantial effect on interstate commerce." Id. Therefore, **applying § 844(i) to the aggregated commercial market in rental properties "regulates conduct that is within Congress's commerce power.**" Id. **We concluded that the jurisdictional requirement of § 844(i) could be met by a showing that the damaged building was being used as a rental property**. Such use "per se substantially affects interstate commerce." Id. In sum, we answered the "proper inquiry" by ruling that application of § 844(i) to the arson of the six-unit apartment complex regulated conduct that was commercial or economic in nature, and thereby within the reach of Congress's Commerce Clause powers. Id.

Garcia contends that Gomez and Russell are no longer binding precedent because those decisions were undermined by the Supreme Court in Morrison. **In Morrison, the Supreme Court held that Congress exceeded its constitutional authority in passing the Violence Against Women Act because "[g]ender-motivated crimes of violence are not, in any sense of**

the phrase, economic activity ." 529 U.S. at 613. However, we have consistently distinguished Morrison's holding as limited to non-economic activity. See Voggenthaler v. Maryland Square LLC, 724 F.3d 1050, 1060 (9th Cir.2013), as amended ("The Supreme Court's decisions in Lopez and Morrison concerning non-economic activity are not relevant here, for the Court's holding in both depended upon the conclusion that the activities sought to be regulated were not commercial activities.") (citations omitted); United States v. McCalla, 545 F.3d 750, 754 (9th Cir.2008) (distinguishing Morrison and Lopez because "the statutes in question had no connection to commerce or economic enterprise") (citation omitted); United States v. Latu, 479 F.3d 1153, 1156 (9th Cir.2007) (holding that "[u]nlike the statutes at issue in Lopez and Morrison, [18 U.S.C.] § 922(g) contains a jurisdictional element, specifically requiring that [the defendant's] possession be in or affecting commerce. The presence of the jurisdictional element satisfies the Commerce Clause concerns articulated in Lopez .") (citation and internal quotation marks omitted); United States v. Clark, 435 F.3d 1100, 1115 (9th Cir.2006) (holding that "[t]he essential economic character of the commercial sex acts regulated by [18 U.S.C.] § 2423(c) stands in contrast to the non-economic activities regulated by the statutes at issue in Lopez and Morrison ") (citations omitted).

In contrast to the statute invalidated in Morrison, § 844(i) possesses the requisite jurisdictional element missing in Morrison, as it specifically requires that the defendant damage or destroy "any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce ." 18 U.S.C. § 844(i). As the Supreme Court explained in Russell, "[t]he congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within that class." 471 U.S. at 862 (footnote reference omitted). Considering our precedent distinguishing Morrison and considering Russell's holding that § 844(i) was validly enacted pursuant to Congress's Commerce Clause power, we reject Garcia's facial and **as-applied challenges** to the statute. See Russell, 471 U.S. at 859 ("The reference to any building used in any activity affecting interstate or foreign commerce expresses an intent by Congress to exercise its full power under the Commerce Clause.") (alterations, footnote reference, and internal quotation marks omitted); see also Gomez, 87 F.3d at 1096 ("According to the plain language of the statute, the interstate commerce aspect of **the crime is distinct from the arson-it depends solely on what the property had been used for** (or whether the property was moving in interstate commerce).").2

Garcia's assertion that Morrison undermined Russell's analysis premised on the aggregate effect of a defendant's criminal conduct on interstate commerce is unavailing. The Second Circuit's opinion in United States v. Logan, 419 F.3d 172 (2d Cir.2005) is instructive on this point. In Logan, the Second Circuit reviewed an arson conviction stemming from the burning of a rented fraternity house on a university campus. The defendant was convicted of violating 18 U.S.C. § 844(n), "which criminalizes conspiracy to commit arson on property that is used in interstate commerce or in any activity affecting interstate commerce." Id. at 179. The Second Circuit initially observed that the Supreme Court cited Russell with approval in Jones v. United States, 529 U.S. 848 (2000), a case decided post-Morrison. See Logan, 419 F.3d at 180.3 **The Second Circuit pointed out that the Supreme Court distinguished the owner-occupied residence at issue in Jones from the rental property at issue in Russell** . See id. The Second Circuit also noted that the Supreme Court recently reaffirmed in Gonzales v. Raich, 545 U.S. 1

(2005), Congress's power to regulate purely local activity if that local activity is part of an economic chain of activities substantially affecting interstate commerce. See id. The Second Circuit emphasized that this was the same rationale used in Russell to uphold “federal regulation of local properties involved in the nationwide class of activities that constitute the rental market for real estate.” Id. (citation and internal quotation marks omitted). Moreover, the Second Circuit concluded that “even if we had reason to believe that Russell's holding is questionable in light of Morrison and Lopez, it has not been expressly overruled by the Supreme Court. **Courts of Appeals are therefore obligated to follow Russell until the Supreme Court itself sees fit to reconsider that decision**.” Id.

Although the Second Circuit addressed the conspiracy subsection of the statute in Logan, its reasoning is nevertheless instructive because the conspiracy subsection incorporates the other offenses defined in § 844(i). See 18 U.S.C. § 844(n) (punishing “a person who conspires to commit any offense defined in this chapter”). Based on our precedent distinguishing Morrison and Lopez, we also agree with the Second Circuit that those cases did not undermine Russell's holding that damage to a rental apartment building satisfies the jurisdictional requirements of 18 U .S.C. § 844(i). Finally, we have expressed a similar reluctance to abandon Supreme Court precedent on the premise that a subsequent case has effected an implicit overruling of earlier Supreme Court precedent. See Lacano Inv., LLC v. Balash, No. 13–35854, ––– F.3d ––––, 2014 WL 4236461, at *5 (9th Cir. Aug. 28, 2014) (expressing that “we must follow [a Supreme Court opinion] which directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions”) (citation and alteration omitted).

Applying Russell and Gomez, we conclude that there was sufficient evidence to satisfy “Russell's per se rule that all rental property affects commerce sufficiently enough to warrant federal jurisdiction under section 844(i).”4 Gomez, 87 F.3d at 1094. The government presented evidence that the apartments were leased; the apartment building was advertised on the internet; and many of its residents were from out-of-state. The government also presented evidence that the apartment building was damaged by Garcia's use of an explosive device. Thus, the government satisfied the jurisdictional provisions of 18 U.S.C. § 844(i), and the district court properly denied Garcia's motion for a judgment of acquittal.

IV. CONCLUSION

We conclude that nothing in Morrison undermined Russell's per se rule that damage to a rental apartment building satisfies the jurisdictional provisions of 18 U.S.C. § 844(i). Morrison did not overrule Russell or Gomez in any way, and we are required to apply this binding precedent in affirming Garcia's convictions. The government presented sufficient evidence that Garcia's use of an explosive device damaged an apartment building that was used in interstate commerce.

AFFIRMED.

FOOTNOTES

1. The other counts alleged in the indictment are not at issue on appeal.

2. Russell's holding that 18 U.S.C. § 844(i) was constitutional under the facts of that case completely undermines Garcia's facial challenge. See United States v. Peeples, 630 F.3d 1136, 1138 (9th Cir.2010) ("**A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid**.") (citation omitted).

3. In Jones, the Supreme Court considered "whether arson of an owner-occupied private residence falls within § 844(i)'s compass" and held that "**an owner-occupied residence not used for any commercial purpose does not qualify as property used in commerce or commerce-affecting activity**; arson of such a dwelling, therefore, is not subject to federal prosecution under § 844(i)." 529 U.S. at 850–51 (internal quotation marks omitted). In support of its holding, the Supreme Court observed that Russell involved rented real estate, whereas in Jones "the owner used the property as his home, the center of his family life. **He did not use the residence in any trade or business**." Id. at 856.

4. Although **there is a serious question as to whether the government presented sufficient evidence that the Chevrolet Tahoe SUV was used in interstate commerce**, see United States v. Geiger, 263 F.3d 1034, 1037 (9th Cir.2001) (**holding that "the 'used in' qualification is most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce**") (citation, alteration, and internal quotation marks omitted), we need not reach this issue. According to the verdict form, the jury determined that both the apartment building and the vehicle were "used in interstate commerce or in an activity affecting interstate commerce[.]" We affirm Garcia's conviction based on Russell's per se rule that damage to a rented apartment building satisfies 18 U.S.C. § 844(i)'s jurisdictional requirement irrespective of the jury's finding concerning the vehicle. We also do not address Garcia's challenge to the district court's jury instruction concerning the vehicle because the district court properly instructed the jury that an apartment building "is used in interstate commerce, or in an activity affecting interstate commerce, if it contains rental units and is used as rental property."

RAWLINSON, Circuit Judge:

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[Crim. No. 18431. In Bank. - February 24, 1914.]

In the Matter of the Application of CHARLES STORK for a Writ of Habeas Corpus, 167 Cal. 294

CONSTITUTIONAL LAW-REGULATION OF CHAUFFEURS-LICENSE FEES.

> The occupation of a chauffeur is one calling for regulation, and therefore permitting a regulatory license fee, under the rule that when a calling or profession or business is attended with danger or requires a certain degree of scientific knowledge upon which others must rely, then legislation properly steps in and imposes conditions upon its exercise.
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ID. - CLASSIFICATION OF DRIVERS OF MOTOR VEHICLES - WHETHER REASONABLE. -

> The Motor Vehicle Act (Stats. 1913, p. 639) is not unconstitutional as making an arbitrary and unwarranted classification, in that it requires professional chauffeurs, or drivers of motor vehicles for hire, to pay an annual license tax, but exempts all other operators of such vehicles from such tax and regulation.

APPLICATION for Writ of Habeas Corpus to be directed against D. A. White, Chief of Police of San Francisco.

The facts are stated in the opinion of the court.

Walter H. Duane, for Petitioner.

U. S. Webb, Attorney-General, Raymond Benjamin, Chief Deputy Attorney-General, and John T. Nourse, Deputy Attorney-General, for Respondent.

JUDGES: In Bank. Henshaw, J. Shaw, J., Angellotti, J., Lorigan, J., Melvin, J., and Sloss, J., concurred.

HENSHAW, J. - Petitioner, a chauffeur who refused to pay the annual license fee of two dollars exacted by the provisions of the Motor Vehicle Act (Stats. 1913, p. 639), suffered arrest and has sued out this writ of habeas corpus under his contention that the portion of the act exacting a chauffeur license fee of two dollars annually is unconstitutional.

His sole contention in this regard is that the legislature without reason and warrant has made an arbitrary classification whereby chauffeurs or drivers of motor vehicles for hire are required to pay a license, while all other drivers of vehicles are classed as "operators" and are not required to secure a license or pay a license fee.

Conceding his construction of the law in this respect to be sound, is the division by the legislature of drivers of motor vehicles into the two classes indicated and the exaction of a license fee from the one and not from the other class so unwarranted and arbitrary as to compel a declaration from this court that it is unconstitutional special legislation?

That **the occupation of a chauffeur is one calling for regulation and therefore permitting a regulatory license fee is beyond question**. "When the calling or profession or business is attended with danger or requires a certain degree of scientific knowledge upon which others must rely, then legislation properly steps in and imposes conditions upon its exercise." (Minneapolis etc. Railroad Co. v. Beckwith, 129 U.S. 29, [32 L. Ed. 585, 9 Sup. Ct. Rep. 207].) That the occupation of a chauffeur is of this character may not be questioned and has been decided. (State v. Swagerty, 203 Mo. 517, [120 Am. St. Rep. 671, 11 Ann. Cas. 725, 10 L. R. A. (N. S.) 601, 102 S. W. 483]; Christy v. Elliott, 216 Ill. 31, [108 Am. St. Rep. 196, 3 Ann. Cas. 487, 1 L. R. A. (N. S.) 215, 74 N. E. 1035].) There are unquestionable elements of similarity, even of identity, between the driving of an automobile by a professional chauffeur and the driving of a like vehicle by a private owner, designated in this act as an "operator." Thus it may

not be gainsaid that the ignorance of the one is as likely to result in accident as the same ignorance upon the part of the other. The recklessness of the one is as likely to result in injury as the recklessness of the other. It is equally dangerous to other occupants and users of the highway whether the unskilled or reckless driver be a chauffeur or "operator." All these matters may be conceded, and yet there are others of equal significance where the differences between the two classes of drivers are radical. **Of first importance in this is the fact that the chauffeur offers his services to the public and is frequently a carrier of the general public. These circumstances put professional chauffeurs in a class by themselves and entitle the public to receive the protection which the legislature may accord in making provision for the competency and carefulness of such drivers**. The chauffeur, generally speaking, is not driving his own car. He is intrusted with the property of others. In the nature of things a different amount of care will ordinarily be exercised by such a driver than will be exercised by the man driving his own car and risking his own property. Many other considerations of like nature will readily present themselves, but enough has been said to show that there are sound, just, and valid reasons for the classification adopted. The argument of the peril attending the public at the hands of the unlicensed operator driving his own car is not without force, but it can only successfully be presented to the legislative department and not to the courts.

In conclusion it may be said that while on reason we hold the classification to be sound and the license fee therefore legal, no case where any court of last resort has taken a contrary view has been called to our attention, while, besides the intimations in the cases above cited, this precise conclusion was adopted by the court of appeals of Maryland in Ruggles v. State, 120 Md. 553 [87 Atl. 1080].

Wherefore, the writ is discharged and the petitioner is remanded.

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CONCLUSION

> **The duty of the district attorney is not merely that of an advocate. [1, 2] His duty is not to obtain convictions, but to fully and fairly present to the court the evidence material to the charge upon which the defendant stands trial, and it is the solemn duty of the trial judge to see that the facts material to the charge are fairly presented.** (People v. Kiihoa, 53 Cal.2d 748 , 753 [3 Cal.Rptr. 1, 349 P.2d 673]; People v. Sheffield, 108 Cal.App. 721, 732 [293 P. 72].) **In the light of the great resources at the command of the district attorney and our commitment that justice be done to the individual, restraints are placed on him to assure that the power committed to his care is used to further the administration of justice in our courts and not to subvert our procedures in criminal trials designed to ascertain the truth**.
>
> **The search for truth is not served but hindered by the concealment of relevant and material evidence. Although our system of administering criminal justice is adversary in nature, a trial is not a game. [3] Its ultimate goal is the**
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ascertainment of truth, and where furtherance of the adversary system comes in conflict with the ultimate goal, the adversary system must give way to reasonable restraints designed to further that goal. [5 Cal.3d 532] [4] **Implementation of this policy requires recognition of a duty on the part of the prosecution to disclose evidence to the defense in appropriate cases.**

[5] It is settled that the intentional suppression of material evidence upon request denies the defendant a fair trial.
IN RE FERGUSON, (1971) 5 Cal.3d 525
[Crim. No. 14569. In Bank. Aug. 24, 1971.]

WEST'S ANNOTATED

Commercial Code

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§9109. Classification of Goods: "Consumer goods"; "Equipment"; "Farm Products"; "Inventory"

Goods are

(1) "Consumer goods" if they are used or bought for use primarily for personal, family or household purposes;

(2) "Equipment" if they are used or bought for the use primarily in business (including farming or a profession) or by a debtor who is a nonprofit organization or a government subdivision or agency or if the goods are not included in the definitions of inventory, farm products, or consumer goods.

California Code Comment

By John A. Bohn and Charles J. Williams

Prior California Law

1. The classification of goods in this section is new statutory law. The significance of this classification is described in Official Comment 1.

Although goods cannot belong to more than one category at any time, they may change their classification depending upon who holds them and for what reason. Each classification is mutually exclusive but the four classifications described are intended to include all goods.

Official Comment 2.

In other words, how something is USED determines what it is, this applies to both nouns (streets/highways/car), and verbs (getting from Point A to Point B).

The streets and highways belong to the people. The people have the secured unalienable right to use their streets and highways for the common or primary purpose for which they were laid out. The primary purpose of the streets and highway is for noncommercial travel use. In other words, no one has a right to use the streets and highways as their place of business which requires the State's permission which is evidenced by the driver license. The driver license permits engagement in business or a profession (verb) that would otherwise be illegal.

> "A license is in the general nature of a special privilege, entitling the licensee to do something that he would not be entitled to do without the license".
> **51 Am. Jur.2d., LICENSES AND PERMITS,** PART ONE, GENERAL PRINCIPLES, I. GENERAL, §1. Generally, p. 7

The Vehicle Code applies to COMMERCIAL USE of the streets and highways by those engaged in business which are identified by the term DRIVER or OPERATOR. The mechanical device used for the COMMERCIAL or BUSINESS purpose is identified by the term MOTOR VEHICLE or VEHICLE or AUTOMOBILE.

COMMERCIAL use of the streets and highways is an EXTRA ordinary use and NOT the primary purpose of the streets and highways which is for NONCOMMERCIAL or ORDINARY or COMMON travel purposes.

SECURED RIGHT = ORDINARY/COMMON USE, NO LICENSE REQUIRED
TAXED COMMERCIAL INFERIOR PRIVILEGE = EXTRA ORDINARY USE, LICENSE REQUIRED

Given the foregoing, it should be obvious that there are two sets of rules. One set of rules governs commercial use of the streets and highways. Those rules are located in the Vehicle Code and the Business and Professions Code. Whenever someone is interrupted by a police officer while using their car, it will be for an alleged violation of the Vehicle Code.

The Vehicle Code provides the procedures applicable to police when they make a stop for an alleged violation of the COMMERCIAL or BUSINESS RULES. The procedures are identified by the Legislature as arrest procedures, hence, what is commonly called a "traffic stop" is in fact an arrest, and more precisely a warrantless arrest (Cal. Vehicle Code §40300 et seq). The arrest triggers, or is the precipitating cause of a criminal action. No one can be prosecuted for crime in absence of an arrest. An arrest therefore is a requisite condition precedent that triggers a criminal action. In order for a criminal court to acquire subject matter jurisdiction a crime must be alleged in a complaint.

In order for the defendant to be found guilty for a crime, the alleged offense must be a crime, every element of the crime must be proven and supported by sufficient evidence. In

other words, just because the cop says so isn't sufficient.

Prima facie, the law presumes that the defendant is innocent of crime or wrong.
Going v. Dinwiddie (1890), 86 Cal. 633

EVIDENCE CODE

520. The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue.

...a crime must be charged in an accusatory pleading...
People v. Wallace (2003) 109 Cal.App.4th 1699

The prosecution must establish that a crime has been committed.
People v. Brower (1949), 92 C.A. 2d 562

...infractions are not crimes...

...the Legislature did not intend to classify infractions as crimes.
People v. Sava (1987) 190 Cal.App.3d 935

An alleged infraction cited on the notice to appear is not a crime; the arresting officer held a mistaken view of the law, there was no probable cause or reasonable suspicion of a crime having been committed, "As applied" to the defendant the vehicle code section cited on the notice to appear is unconstitutional, the accuser does not comply with their obligations, and the defendant remains innocent.

Add to all that:

CALIFORNIA VEHICLE CODE
DIVISION 17. OFFENSES AND PROSECUTION
CHAPTER 2. PROCEDURE ON ARRESTS
Article 1. Arrests .... 40300 - 40313

40300. The provisions of this chapter shall govern all peace officers in making arrests for violations of this code without a warrant for offenses committed in their presence,...

40504. (a) The officer shall deliver one copy of the notice to appear to the arrested person and the arrested person in order to secure release must give his or her written promise to appear in court... Thereupon, the arresting officer shall forthwith release the person arrested from custody.

"...traffic stops are technically 'arrests'..."
"**Investigative Detentions**", Spring 2010 POINT OF VIEW, ALAMEDA COUNTY DISTRICT ATTORNEY'S OFFICE. p. 1

A traffic arrest occurs when an officer stops a vehicle after seeing the driver commit an infraction. ...the purpose of the stop is to enforce the law, not conduct an investigation.
"**Arrests**", Spring 2009, POINT OF VIEW, ALAMEDA COUNTY DISTRICT ATTORNEY'S OFFICE, p. 1

Did you know you were "in custody" at the time of what you've been lead to believe is a "traffic stop"? Had you known you were arrested and in custody would your defense been different on the day you went to trial?

People are being arrested without a warrant and held in custody for an alleged violation of a COMMERCIAL or BUSINESS rule during what we've been lead to believe is a "traffic stop". I've been in court on numerous occasions where the arresting officer during his testimony called it an "enforcement stop". What is being enforced? COMMERCIAL or BUSINESS rules!

CALIFORNIA BUSINESS AND PROFESSIONS CODE

7028. (a) It is a misdemeanor for a person to engage in the business or act in the capacity of a contractor within this state without having a license therefor, unless the person is particularly exempted from the provisions of this chapter.

CALIFORNIA VEHICLE CODE

12500. (a) A person may not drive a motor vehicle upon a highway, unless the person then holds a valid driver's license issued under this code, except those persons who are expressly exempted under this code.

Every man should be able to know with certainty when he is committing a crime**.** (In re Peppers, 189 Cal. 682, 686 [209 P.896].)
Agnew v. City of Culver City (1956), 147 Cal.App.2d 144

The vice of this sort of legislation is quite aptly pointed out in the case of United States v. Reeve, 92 U.S. 214 [23 L. Ed. 563, see, also, Rose's U. S. Notes], in which the court says: "If the legislature undertakes to define a new offense and provide for its punishment, it should express its will in language that need not deceive the common mind: Every man should be able to know with certainty when he is committing a crime. . . . It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and see who could be rightfully detained and who should be set at large."
In re Peppers (1922), 189 Cal. 682

Again, notwithstanding the fact that driving is a profession and permitted by the driver license, when it comes to infractions, the arresting officer did not witness a crime:

> ...infractions are not crimes...
>
> ...the Legislature did not intend to classify infractions as crimes.
> ***People v. Sava*** (1987) 190 Cal.App.3d 935

People are being routinely arrested without a warrant for noncriminal behavior. It's municipal and State policy without any legislative or constitutional authorization. So how does one "beat" a "traffic ticket" which represents an allegation of the violation of a commercial or business rules if they're not engaged in commerce or business at the time of the so-called "traffic stop"?

The accuser NEVER PROVES the type of use, which is an element of the alleged crime. The accuser never introduces any evidence that establishes that the defendant was engaged in the activity being regulated under the Vehicle Code and permitted by the driver license. The vast majority of allegations of a violation of the Vehicle Code is the infraction. The accuser does not allege that a crime has been committed.

The argument is: **INSUFFICIENCY OF EVIDENCE TO SUSTAIN A FINDING OF GUILT**.

It's a pity none of the foregoing is taught to those forced to attend a public school who are then graduated with society expecting the graduates to be responsible adults and comply with rules they were never taught. Such people are nothing more than walking wallets for the unscrupulous municipal servants leeching there way through life while pretending to serve. Again, in the Land of the Blind, the guy with one good eye is king. And unfortunately "We the people..." are no longer king, thanks to a failed public school system and uninquisitive adults who don't mind living lives based on false information and unqualified beliefs.

> It is settled that the streets of a city belong to the people of a state and the use thereof is an inalienable right of every citizen of the state.
> ***Whyte v. City of Sacramento***, 65 Cal. App. 534, 547, (1924)
> ***Escobedo v. State Dept. of Motor Vehicles***, 35 Cal.2d 870 (1950)

CALIFORNIA GOVERNMENT CODE

> **§54950.** The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created".

Again, knowledge is power when properly applied.