July 2, 2008

Institute for Justice
Litigation Backgrounder

Grassroots Tyranny in the Cradle of the Constitution:

Philadelphia Tour Guides Stand Up For the Framers' Vision of Freedom

The Issue in a Nutshell

Starting this fall, tour guides in Philadelphia will be subject to hundreds of dollars in fines for engaging in unauthorized talking. A law enacted April 2008 will make it illegal for anyone to give a tour of much of the city's downtown area without first passing a test and obtaining a government license—without, in essence, getting the government's permission to speak. Unlicensed tour guides can be punished by the suspension of their business license and fines of up to $300 per violation.

The irony of forbidding people to talk about Philadelphia's history—including the history of the Framers' enshrining fundamental American liberties in the Constitution—is not lost on Mike Tait, Josh Silver and Ann Boulais, three Philadelphians who make their living by telling visitors and natives about the history, culture and architecture of the place they love. Mike, Josh and Ann are serious about their city's history—they share a deep commitment to accuracy as well as entertainment in their tours—and they are also serious about the liberties protected by the Constitution.

Simply put, the Constitution protects the right to communicate for a living, whether as a journalist, a musician or a tour guide. The government cannot be in the business of deciding who may speak about a topic and who may not. Rather, guides like Mike, Josh and Ann must be free to speak with their fellow citizens in a free marketplace of ideas—a marketplace that anyone can enter.

That is why on July 2, 2008, they joined forces with the Institute for Justice, a national public interest law firm with a history of defending free speech and the rights of entrepreneurs, to file suit in federal court in the Eastern District of Pennsylvania, challenging Philadelphia's new tour-guide licensing scheme as a violation of their fundamental constitutional rights.

Introduction

The history of Philadelphia is the story of fundamental American liberties. The First Continental Congress was held there. The Declaration of Independence was adopted there. And the U.S. Constitution was drafted there. It is out of a love for that history that tour guides like Mike Tait, Josh Silver and Ann Boulais have dedicated their lives to teaching other people about it. And it is that history that makes the city of Philadelphia's attempt to undermine those fundamental liberties all the more appalling.

On April 16, 2008, Philadelphia Mayor Michael Nutter signed a new law that will make it illegal for Mike, Josh, Ann and people like them to give tours without first passing a test and obtaining a government license.[1] In passing this law, the city government has set itself up as an arbiter of who may—and may not—speak about Philadelphia's history. Imagine the city had set up a Ministry of Sports to determine who was qualified to talk about baseball—or a new department to determine who would be allowed to discuss music—and you will have some sense of the outrage many of the city's tour guides felt when they were told that the local government would be deciding whether the guides could continue in their chosen occupation. As surprising as it may sound, Philadelphia has passed a law that will make it illegal to talk about the Liberty Bell.

Philadelphia's new tour-guide licensing scheme is a direct assault on two fundamental American rights: the right to speak freely and the right to earn an honest living. By attempting to make it illegal to earn a living by talking about the city's history, Philadelphia's city council is undermining the tradition of liberty that is at the very heart of the city's unique story.

Fines for Unauthorized Talking

The new law literally makes it illegal to give a tour for compensation of the city's main tourist area[2] without first getting the government's permission.[3] Would-be tour guides must submit a written application, pay a fee, provide proof of insurance and pass a written examination in order to be granted a license to tour.[4] Those caught giving an unauthorized tour are at risk of losing their license to operate a business in Philadelphia and liable for fines of up to $300 per violation.[5] The program will be administered and the test developed by an administrative agency to be named by the mayor's office. As of this writing, no test has been made public.

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[1] Bill No. 080024-A, certified copy on file with the Institute for Justice.

[2] The law applies to tours in what it calls the "Center City Tourist Area," which runs between the Delaware and Schuylkill River, and Vine and South Streets. Phila. Code Ch. 9-214(2)(a). It encompasses traditional attractions like Independence Hall and the Liberty Bell.

[3] Phila. Code Ch. 9-214(3).

[4] Phila. Code Ch. 9-214(3)(b). A business license is different from the special tour guide license. The law already requires anyone who runs a business in the city of Philadelphia, whether they're a tour guide working as an independent contractor or a vendor selling hot dogs, to have a basic business license. The law at issue here requires a special license *on top* of a business license.

[5] Phila. Code Ch. 9-214(13).; 1-109(1).

The law is targeted at speech—and only at particular speech. It makes clear that it applies only to someone who guides or directs people within the city or offers to do so while "provid[ing] information on the City's geography, history, historic sites, historic structures, historic objects or other places of interest."[6] There is no restriction on simply walking or guiding people to historical sites without talking about them as, indeed, many people who work in the hospitality industry do on a regular basis. Nor is there a limit on doing so while holding forth on, for example, the strengths and weaknesses of the Philadelphia Eagles if you were so inclined. The only people the city seeks to license are those who want to talk about the city—people who want to tell others stories about the place where they live.

To make matters worse, the program discriminates against small or independent tour operators. Not only are large operators better able to cope with the costs of regulation, but the law actually gives the administrative agency complete discretion to exempt companies from the testing requirements, provided the company has a training program that is "equivalent." Such boundless discretion has rightly been condemned by the U.S. Supreme Court as an invitation to discrimination and unlawful favoritism.[7]

Government Cannot Be in the Business of Deciding Who May Speak and Who May Not

At the heart of the First Amendment is a simple principle: in normal circumstances, the government does not have the power to decide who may speak and who may not.[8] Similarly, government cannot single out speech for special burdens or regulations on the basis of its content.[9] Content-based regulations—regulations where the government restricts speech on certain topics but not others—are especially dangerous speech restrictions, and they are almost always illegal. A law like the one in question here—which picks and chooses which tour guides will be able to speak about the city's history and geography in order to "improve" (in the government's estimation) the quality of what tour guides say—is blatantly unconstitutional.

The government simply lacks the power to regulate people's discussion of history in the guise of occupational licensing. Where government has sought to punish people for the unauthorized dissemination of ideas—whether those people are professional fundraisers,[10] investment analysts,[11] or commodities traders,[12] courts have recognized that the state simply lacks the authority to control the public debate by controlling who may—and may not—participate in it. As Justice Jackson noted more than fifty years ago, the state does not have the power to establish an official doctrine in any area[13]—and that principle applies to history just as much as it does to politics.

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[6] Phila. Code Ch. 9-214(2)(e).
[7] *See, e.g., Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 763-64 (1988).
[8] *See, e.g., Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 675 () (O'Connor, J., concurring in part and dissenting in part).
[9] *See, e.g., Carey v. Brown*, 447 U.S. 455, 467-9 (1980).
[10] *See Riley v. Nat'l Federation of the Blind*, 487 U.S. 781, 803 (1988) (Scalia, J., concurring).
[11] *See Lowe v. S.E.C.*, 472 U.S. 181, 232 (1985) (White, J., concurring)
[12] *See Taucher v. Born*, 53 F. Supp.2d 464, 477 (D.D.C. 1999).
[13] *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

The reasoning behind the new tour-guide licensing scheme—that requiring a test and continuing education will "improve" the experience of those who deal with privately-run tours—is truly one that knows no bounds. The same logic would allow the city to license those who write and sell self-guided tours or pre-recorded audio tours.[14] If the city's interest in improving the quality of things that are communicated to visitors justifies its restricting who is allowed to communicate, it could restrict access into a tremendous swathe of occupations that center around communicating or storytelling. The Constitution, the precedents of the Supreme Court and simple logic dictate that it can do no such thing.

An Unconstitutional Requirement

As mentioned above, the city has not yet unveiled its licensing test—and this lawsuit is meant to vindicate the rights of Philadelphia's tour guides before anyone is forced to even take a test. This is important for two reasons. First, the very idea of "improving" the quality of privately-run tours in the city by making it illegal for certain people to give them is unconstitutional in itself. There is nothing the city could put on a test that would salvage this kind of content-based restriction on speech, and there is no reason to force anyone to study for or sit through an examination that is blatantly unconstitutional.

Second, there is quite simply no way to create a comprehensive test of things a tour guide in Philadelphia should know. Visitors to Philadelphia can participate in a tremendous variety of tours—traditional historical tours, "ghost" tours discussing the area's folklore, and other specialized tours focusing on subjects from the history of slavery to that of Freemasonry. There is no such thing as a list of things that are important to all of these tours—it would be absurd to require someone to have a comprehensive knowledge of Freemasonry in order to give a ghost tour, just as it would be absurd to require someone to have a comprehensive knowledge of ghosts in order to give an ordinary historical tour. The stories that can be told about Philadelphia are as varied and diverse as the people who have lived there—and the government has no authority to pick and choose which of these stories are part of the city's official history.

Moreover, history is the subject of constant debate, dispute and revision—as it should be. Even stories that all of us have accepted as true since grade school, such as Ben Franklin's famous experiment involving the kite in the lightning storm, are often the subject of heated debate among historians.[15] The city of Philadelphia has no business shutting down such debates, picking one view over another, or declaring an issue settled. Rather, questions about our history should be treated just the way questions over politics, sports or art are—with open and free debate among individuals and no final answer imposed by a government official.

[14] The Constitutional Walking Tour in Philadelphia, for example, sells an MP3 version of its tour of the city. *See* http://www.theconstitutional.com/phillymp3/index.html.

[15] *See, e.g.,* Michael Brian Schiffer, *Did Franklin Really Fake the Kite Experiment?*, History News Network, available at http://hnn.us/articles/1770.html (discussing the controversy).

The Plaintiffs

No one gets rich by guiding tour groups around Philadelphia—being a tour guide is, at heart, a labor of love. That is certainly the case for plaintiffs Mike Tait, Josh Silver and Ann Boulais, all of whom have an abiding love for the city of Philadelphia and its history. The three of them share a deep knowledge of the city and a strong commitment to providing their customers with accurate, entertaining tours—and a strong opposition to letting the government determine whether they are qualified to share their knowledge of the city they love with people who want to listen to them.

Mike is a lifelong Philadelphian who began giving tours in early 2006, when he was glad to discover that they were an excellent way to combine his lifelong interest in history with his knack for giving an engaging performance—all while not having to spend forty hours a week in an office. Mike is currently an employee of the Constitutional Walking Tour of Philadelphia and also works as an independent contractor for other local companies, giving traditional historical tours as well as guiding more off-beat outings, such as "haunted history" tours centering on the city's folklore and ghost legends.

Josh's career as a tour guide offers him an opportunity to indulge his lifelong passion for urban history. He has worked as an independent contractor for a wide variety of Philadelphia organizations, doing everything from guiding visitors at Christ Church to leading ghost tours steeped in the folklore of Philadelphia. Josh's extensive training includes a graduate degree in historic preservation.

Ann Boulais is the Operations Manager of American Trolley Tours, a Philadelphia-based tour company. In addition to leading the occasional tour herself, she is also primarily responsible for creating the content and scripts used by American's tour guides. Deeply invested in the city of Philadelphia's tourism (and tour guide) community, Ann's experience giving, watching and writing tours gives her significant insight into how best to provide a visiting group with an unforgettable experience.

The Importance of Economic Liberty

The United States is in the midst of an explosion of occupational licensing. In 1981, there were roughly 80 different jobs that required a government license in at least one state; that number has now ballooned to 1,100.[16] Roughly 20 percent of American workers are now forced to meet government-imposed licensing requirements to work in their chosen field, up from only 4.5 percent in the early 1950s.[17] Philadelphia's new tour-guide licensing scheme is just one of the more outrageous examples of government gone wrong, but in occupation after occupation—from floristry to interior design—the meteoric growth of arbitrary and unreasonable barriers to entry is making it more difficult for entrepreneurs to break into the career of their choice.

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[16] Suzanne Hoppough, *The New Unions*, *Forbes*, February 25, 2008 (citing the Council of State Governments).
[17] Morris M. Kleiner, *Licensing occupations: Ensuring quality or restricting competition*, at 1 (Kalamazoo, MI: Upjohn Institute, 2006).

America's history and tradition recognizes the dignity inherent in honest work and entrepreneurship and recognizes that pointless—or blatantly discriminatory—government interference insults this dignity. The right to engage in honest work and competition is also fundamental to a free society because it is the cornerstone of independence and responsibility.

The plight of Philadelphia's tour guides is not unique. It is easy to single out this new regulation as unjust because the government's goal—protecting people from hearing things that the government does not want them to hear—is patently illegitimate. But individuals have a right to be free from unreasonable restrictions on their choice of occupation no matter what that occupation is—be it braiding hair, arranging furniture or giving tours. Every American has the right to pursue his or her vision of the American Dream without facing arbitrary barriers to entry, and the casual trampling of this basic liberty must be stopped—particularly in the very place our liberties were first enshrined in the Constitution.

Litigation Team

The Institute for Justice filed its complaint in this case, *Tait v. City of Philadelphia*, on July 2, 2008. The litigation team for the Institute for Justice in this case is William H. Mellor, III, President and General Counsel of the Institute, and Robert McNamara, an IJ staff attorney. Assisting as local counsel are Gayle Sproul and Michael Berry of the law firm Levine Sullivan Koch & Schulz, L.L.P.

Founded in 1991, the Institute for Justice is a public interest law firm that advances a rule of law under which individuals can control their destinies as free and responsible members of society. Through litigation, communication and outreach, IJ secures protection for individual liberty and extends the benefits of freedom to those whose full enjoyment is denied by government. IJ has successfully represented entrepreneurs nationwide who fought arbitrary government regulation:

- ***Swedenburg v. Kelly***—The Institute for Justice successfully waged the nation's leading legal battle to reestablish the American ideal of economic liberty when, on May 16, 2005, the U.S. Supreme Court struck down discriminatory laws that existed only to protect the monopoly power of large, politically connected liquor wholesalers. Vintner entrepreneurs Juanita Swedenburg and David Lucas joined wine consumers and IJ in filing this federal lawsuit as a challenge to the ban on direct interstate wine shipments in New York. The case raised issues of Internet commerce, free trade among the states, and regulations that hamper small businesses and the consumers they seek to serve.

- ***Craigmiles v. Giles***—The Institute for Justice successfully led a federal court to strike down Tennessee's casket sales licensing scheme as unconstitutional, a decision that was upheld unanimously in December 2002 by the 6th U.S. Circuit Court of Appeals and not appealed. This marked the first federal appeals court victory for economic liberty since the New Deal.

- ***Franzoy v. Templeman***—IJ represented two interior designers in successfully challenging New Mexico's titling law, which prohibited anyone except government-

licensed interior designers from using the terms "interior design" or "interior designer." The New Mexico Legislature amended the law doing away with the speech restriction. The Governor signed the bill into law in April 2007.

- ***Rissmiller v. Arizona Structural Pest Control Commission***—In the fall of 2006, the Institute for Justice Arizona Chapter (IJ-AZ) challenged the state's requirement that gardeners and landscape maintenance workers obtain three separate licenses simply to kill weeds with over the counter products. As a result of this litigation, gardeners throughout the state are now free to control weeds using products available to the average consumer.

- ***Diaw v. Washington State Cosmetology, Barbering, Esthetics, and Manicuring Advisory Board***—In March 2005, after being sued by the Institute for Justice Washington Chapter (IJ-WA) just seven months earlier, state bureaucrats exempted braiders from discriminatory cosmetology licensing requirements.

- ***Armstrong v. Lunsford***—The Institute for Justice opened the hairbraiding profession in Mississippi in 2005 when the state Legislature responded to this lawsuit, filed in federal court in 2004, by allowing IJ's clients to continue their entrepreneurship without obtaining a needless government license.

- ***Alf v. Arizona Structural Pest Control Commission***—In 2004, IJ-AZ persuaded Arizona bureaucrats to change their position on requiring teenage entrepreneur Christian Alf to obtain a government-issued license for his after-school handyman business helping local residents prevent roof rats.

- ***Farmer v. Arizona Board of Cosmetology***—In 2004, as a result of an IJ-AZ lawsuit, the Arizona Legislature exempted hairbraiders from the state's outdated cosmetology scheme.

- ***ForSaleByOwner.com Corp. v. Zinnemann***—Also in 2004, the Institute for Justice prevailed in persuading the U.S. District Court for the Eastern District of California to stop the state of California's efforts to impose real estate broker licensing requirements on an informational website.

- ***Wexler v. City of New Orleans***—In 2003, the Institute for Justice successfully persuaded a federal court to strike down an absurd ordinance that prohibited booksellers from selling books on city sidewalks without a government issued permit.

- ***Clutter v. Transportation Services Authority***—In 2001, IJ defeated Nevada's Transportation Services Authority and its entrenched limousine cartel that had stifled competition in the Las Vegas limousine market.

- ***Cornwell v. California Board of Barbering and Cosmetology***—In 1999, IJ defeated California's arbitrary cosmetology licensing requirement for African braiders.

- ***Ricketts v. City of New York***—The Institute for Justice successfully defended commuter van entrepreneurs in 1999 in a fight against the government bus monopoly that would not allow any jitney entrepreneurs to provide service to consumers in underserved metropolitan neighborhoods in New York City.

- ***Jones v. Temmer***—In 1995, IJ helped three entrepreneurs overcome Colorado's protectionist taxicab monopoly to open Denver's first new cab company in nearly 50 years. IJ used this victory to help break open government-sanctioned taxicab monopolies in Indianapolis and Cincinnati.

- ***Uqdah v. D.C. Board of Cosmetology***—In 1993, IJ's work in court and the court of public opinion led the District of Columbia to eliminate a 1938 Jim Crow-era licensing law against African hairbraiders.

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