No. 08-16726

In the United States Court of Appeals for the Ninth Circuit

William Slone and Michael Merrithew,

Plaintiffs and Appellants,

vs.

Taxi Commission, City & County of San Francisco; Heidi Machen, Executive Director; City & County of San Francisco, a California public entity,

Defendants and Appellees.

OPENING BRIEF OF APPELLANTS WILLIAM SLONE AND MICHAEL MERRITHEW

Appeal From a Judgment after Entry of Judgment on Grant of Appellees' Motion for Summary Judgment and Denial of Appellants' Cross-Motion for Summary Judgment
United States District Court, Northern District of California
No. 07-cv-03335-JSW, The Honorable Jeffrey S. White

Philip S. Ward, Esq. (SBN 51768)
Richard G. Katerndahl, Esq. (SBN 88492)
HASSARD BONNINGTON LLP
Two Embarcadero Center, Suite 1800
San Francisco, CA 94111-3993
Telephone: (415) 288-9800
Facsimile: (415) 288-9802

Joseph M. Breall, Esq. (SBN 124329)
BREALL & BREALL LLP
1255 Post Street, Suite 800
San Francisco, CA 94109
Telephone: (415) 345-0545
Facsimile: (415) 345-0538

Elliott A. Myles, Esq. (SBN 127712)
MYLES LAW FIRM, INC.
P.O. Box 11094
Oakland, CA 94611-0094
Telephone: (510) 986-0877
Facsimile: (510) 986-0843

Attorneys for Appellants William Slone and Michael Merrithew

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned certifies that Appellants are individuals.

DATED: November ___, 2008.

HASSARD BONNINGTON LLP

By_____
Philip S. Ward
Attorneys for Appellants William Slone and Michael Merrithew

INTRODUCTION

This is a case arising out of the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§12101-12213) ("ADA"). It presents to this Court the legal question whether the City and County of San Francisco and its Taxi Commission are required by the ADA to accommodate taxi permit holders who become disabled within the meaning of the Act by further reducing or waiving a personal driving requirement when such disability prevents a return to "full-time driving" within the strictly limited time permitted by the taxi permit ordinance's disability policy.

Appellants William Slone and Michael Merrithew are holders of taxi permits issued by the Appellees, the City and County of San Francisco ("City") and its Taxi Commission. Taxis are regulated in San Francisco under Proposition K, a voter-passed initiative, set forth in Appendix 6 of the San Francisco Administrative Code and codified in Article 16 of the San Francisco Municipal Police Code ("MPC"). Since being issued their taxi permits, Slone and Merrithew have become disabled. Accordingly, they asked the Taxi Commission to waive or reduce their "full-time driving" requirement as a result of their disabilities. The Taxi Commission refused to make any such

accommodation on the ground that their disabilities were such that they would be unable to return to "full-time driving" in compliance with the taxi permit ordinance in its current form – i.e., they would require accommodation beyond the maximum 120 days allowed in any one year or suspension of the driving requirement for more than one year in five due to "catastrophic recoverable illnesses."

This action followed. In due course, the City and the Taxi Commission filed a motion for summary judgment, contending that the ADA did not require them to waive or reduce the "full-time driving" requirement because it is an essential eligibility requirement of the City's taxi permit program. In their opposition and cross-motion for summary judgment, plaintiffs Slone and Merrithew opposed the City's motion and cross-moved for summary judgment on the grounds that a permit holder who becomes disabled after receipt of the permit can still satisfy the fundamental purpose of the ordinance by arranging for the "continuous operation" of his or her taxicab even though he or she cannot drive the vehicle personally.

In its original form as approved by the voters of San Francisco – which pursuant to the City Charter could not be substantively amended or repealed by the Board of Supervisors -- the personal driving

requirement in Proposition K amounted to a commitment by applicants and a finding by the Police Commission (which governed taxicab operations prior to the creation of the Taxi Commission) that the applicant would abide by it; since then, by a succession of amendments and resolutions, the personal driving requirement has been repeatedly expanded. But, plaintiffs submit, what amounts to a regulatory afterthought cannot be considered an essential eligibility requirement of the program authorized by the voters.

In granting Appellees' motion and denying Appellants' cross motion, the District Court held that the personal driving requirement constitutes an "essential eligibility requirement" from which a waiver or exemption of disabled individuals under the ADA is not required. The court reasoned that any such modification would constitute a "fundamental alteration" of the program. In doing so, however, it misconstrued the plain language of Proposition K and equated and conflated the personal driving requirement with a separate requirement contained in another section of the ordinance providing that a permit holder must "operate" his or her taxicab on a regular basis, as defined. The court thereby accorded the "full time driving requirement"

significance under Proposition K that is not supported by either its language or its history of enforcement.

The District Court's acquiescence in what amounts to imposition of an "able-bodied" requirement in the allocation of what the City itself characterized in its moving papers as a scarce "public asset[]" [Excerpts of Record ("EOR") 297] is not consistent with Ninth Circuit precedent holding that the "fundamental alteration" defense is inapplicable in cases involving facially discriminatory policies. Its ruling thus derogates what the ADA recognized as a "'compelling need' for a 'clear and comprehensive national mandate' to eliminate discrimination against disabled individuals, and to integrate them 'into the economic and social mainstream of American life.'" *PGA Tour, Inc*. v. *Martin,* 532 U.S. 661, 675 (2001), *quoting* S. Rep. No. 101-116, p. 20 (1989); H. R. Rep. No. 101-485, pt. 2, p. 50 (1990).[1]

---

[1] On September 25, 2008, Public Law 110-325 was enacted, significantly broadening protections for the disabled. Known as the ''ADA Amendments Act of 2008,'' it expresses Congress' "inten[t] that the Act 'provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities' and provide broad coverage." In explicitly endorsing a less restrictive interpretation of "disability" than had been accorded in some Supreme Court opinions and applied by lower courts, it purports to "reinstat[e] a broad scope of protection to be available under the ADA."

Ninth Circuit precedent also establishes that the reasonableness of proposed modifications is generally a fact-intensive question not amenable to summary determination. See *Crowder* v. *Kitagawa*, 81 F.3d 1480, 1485-1487 (9th Cir. 1996). Yet the District Court's ruling effectively determines that any request for accommodation of a permittee's disability beyond the strict time limits set in the Appellees' 2006 disability policy is unreasonable *per se*.

The District Court's summary resolution also seems at odds with the provision in the new amendments to the ADA, noted in fn. 1, that the exclusion of "transitory impairment[s]" from the category of conditions regarded as disabilities applies to "an impairment with an actual or expected duration of 6 months or less." S.3406, Sec. 3, Definition of Disability. The position of the City and the Taxi Commission is, in essence, that they have no obligation under the ADA to accommodate any disability that might be described as more than a "transitory" impairment. That cannot be the law.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Is "full-time driving" an essential eligibility requirement under Proposition K with respect to permit holders who become disabled after receiving their permits?

2. Does the ADA require the City and Taxi Commission to waive or reduce the "full-time driving" requirement for permit holders who become disabled after receiving their permits?

3. Does a waiver of the "full-time driving" requirement beyond that permitted by the disability policy adopted in Taxi Commission Resolution 2006-28 constitute a "fundamental alteration" of Proposition K?

4. Should this Court reverse the judgment entered by the District Court and direct the lower court to enter a judgment invalidating the limitations prescribed in Taxi Commission Resolution 2006-28 on the duration and frequency of any waivers of or exemptions from the "full-time driving" requirement for holders of taxi permits with disabilities covered by the ADA?

This Court reviews a district court's grant of summary judgment under the ADA *de novo*. *Humphrey* v. *Memorial Hospitals Ass'n.,* 239 F.3d 1128, 1133 (9th Cir. 2001) (ADA); *Coons* v. *Sec'y of the U.S. Dep't. of Treasury*, 383 F.3d 879, 884 (9th Cir. 2004) (Rehabilitation Act).

> Viewing the evidence in the light most favorable to the nonmoving party, and drawing all reasonable inferences in [his or] her favor, [the reviewing court] must determine whether the district court correctly applied the relevant

> substantive law and whether there are any genuine issues of material fact.

Walton v. *United States Marshals Serv.*, 476 F.3d 723, 727 (9th Cir. 2007), *quoting Coons* v. *Sec'y of the U.S. Dep't of the Treasury, supra*, 383 F.3d at 884 and *Brown* v. *Lucky Stores, Inc.*, 246 F.3d 1182, 1187 (9th Cir. 2001).

STATEMENT OF JURISDICTION

The jurisdiction of the District Court was based on the existence of a federal question (28 U.S.C. section 1331), arising out of plaintiffs' claim that the defendants' taxi permit program violates Title II of the ADA, 42 U.S.C. Chapter 126, section 12101.

This Court has jurisdiction to review the District Court's final judgment under 28 U.S.C. section 1291.

The District Court granted the summary judgment motion by the City and Taxi Commission, denied the cross-motion of plaintiffs Slone and Merrithew and entered summary judgment in favor of defendants and against plaintiffs on June 30, 2008. Plaintiffs and appellants Slone and Merrithew filed a timely notice of appeal from that judgment on July 25, 2008. *See* Fed. R. App. P. 4(a)(4)(A)(i), (v).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

For purposes of the parties' cross-motions, the facts strictly pertaining to the individual plaintiffs and their disabilities were not in dispute. As the District Court observed,

> Plaintiff William Slone is disabled due to a wasting lung disease that requires him to be constantly connected to oxygen and therefore unable to operate his taxicab vehicle personally. According to his submissions before the Taxi Commission, Mr. Slone's condition is permanent. Plaintiff Michael Merrithew is physically disabled and unable to operate his taxicab personally. According to his submissions, Mr. Merrithew represented that this disability was expected to last one year.

Slone, supra, 2008 U.S. Dist. LEXIS 50274 at *4-5. [EOR 4]

No action was taken on plaintiff Slone's requests for accommodation, pending resolution of this action, but Mr. Merrithew's request was denied and the denial affirmed by the Taxi Commission. [EOR 130-131, 135-165, 285-286] The basis upon which the Taxi Commission evaluated and denied the plaintiffs' applications for full or partial waiver as a "reasonable accommodation" of their disabilities implicates a whole history of initiatives, ordinances, resolutions and other legislation regulating taxicabs in San Francisco.

A. Procedural History

Slone and Merrithew filed their complaint on June 25, 2007, and the defendants answered a month later. [EOR 318, 332] On

February 15, 2008, the City and Taxi Commission filed a motion for summary judgment. [EOR 288] On February 29, 2008, Slone and Merrithew filed their opposition and a cross-motion for summary judgment. [EOR 96] After briefing (including reply briefs filed by both sides [EOR 22, 46]) was completed, the District Court took the matter under submission and, on June 30, 2008, decided the motion and cross-motion without a hearing, granting the motion of the City and Taxi Commission and denying the plaintiffs' cross-motion. [EOR 2] The District Court entered judgment against plaintiffs and in favor of defendants on the same day. [EOR 1]

Slone and Merrithew timely filed their notice of appeal on July 25, 2008. [EOR 11]

B. San Francisco's Taxicab Permit Program

1. Proposition K.

On June 6, 1978, City voters passed Proposition K ("Prop. K"). It is described in the preamble as "[a]n Ordinance providing regulations, policies and procedures relating to the issuance of permits for taxicabs . . . regulating the times for operation under such permits, nontransferability of permits, surrender and exchange of existing permits; provisions as to corporate permittees, financial and accounting

records, and certain aspects of taxicab rates…." *SF Admin. C., App. 6, Preamble.* [EOR 174] Section 1 declared it to be "the law of the City and County of San Francisco" that

> (a) All taxicab permits and other vehicle for hire permits issued by the City and County of San Francisco are the property of the people of the City and County of San Francisco and shall not be sold, assigned or transferred; and
>
> (b) The Chief of Police of the City and County of San Francisco shall have the responsibility of establishing regulations to assure prompt, courteous and honest service to the riding public; and
>
> (c) The taxicab business shall operate under the principles of free enterprise and that taxicab operators may charge less than the maximum rate of fare set by law, as set forth below.
>
> (d) The Police Commission shall issue a sufficient number of permits to assure adequate taxicab service throughout the City and County of San Francisco.

SF Admin. C., App. 6, §§1(a)-(d). [EOR 174]

Section 2 of Prop. K addressed "The Application for A Permit" and specifically dealt with new applicants for taxi permits – i.e., persons who had not previously held a permit and surrendered it for reissuance under Prop. K, Section 4(b). *SF Admin. C., App. 6, §2(f)*. Section 2(a) requires "[a]ny applicant for a permit to operate a taxicab" to declare "under penalty of perjury his or her intention actively and personally to engage as a permit driver under any permit issued to him or her" for four hours in every 24 on at least 75% of the business days

in a calendar year. Additionally, Section 2(c) created a two-year preference for issuing a permit to "any person who has driven a taxicab . . . in San Francisco for at least one consecutive 12-month period during any of the three calendar years immediately prior to the filing of an application for issuance of such permit."[2] [EOR 174-175]

Under Prop. K, section 3, entitled "Facts to be Considered by Police Commission," the Police Commission[3] was given the task of "determining whether or not public convenience and necessity exist for the issuance of a permit," in the course of which it could consider such facts as it deems pertinent, but must consider whether:

> (a) The applicant is financially responsible and will maintain proper financial records.
>
> (b) The public will not be adequately or properly served unless the application is granted.
>
> (c) The applicant has complied with all provisions of the Municipal Code, including pertinent motor vehicle laws.
>
> (d) *The applicant will be a full-time driver, within the meaning of Section 2(b) of this Ordinance, of the taxicab or other motor vehicle for hire.*

SF Admin. C., App. 6, §§3(a)-(d) [emphasis added]. [EOR 175]

---

[2] This preference expired by its terms in 1980.

[3] The Taxi Commission succeeded to these duties in 1999 with the voters' adoption of Proposition D in November of 1998. [EOR 167]

Section 4 of Prop. K is entitled "Continuous Operation." It requires a permit holder to "regularly and daily operate the taxicab or other motor vehicle for hire." *SF Admin. C., App. 6, §4(a)*. [EOR 175-176] Section 4(a) also re-enacts a pre-1978 MPC provision allowing revocation of a permit upon abandonment of "such business" by the "permittee or operator" and allows operation of the permit to be suspended for 90 days in one 12-month period "in case of sickness, death, or other similar hardship." By its language, this 90-day suspension relates to "operation" of the permit, not "driving."[4]

Prop. K, section 4(b), is also worth noting because it required pre-Prop. K permit holders to surrender their permits for reissuance. The rest of Prop. K is not relevant to this action. [EOR 176]

Significantly, the words "drive," "driver," "driven" or "driving" appear only three times in the first four sections of Prop. K. They do not appear at all in the preamble or Section 1. Section 2(b) requires

---

[4] The District Court's finding that this provision for a 90-day suspension was "the only authority for modification of the proposition's *driving* requirement" (emphasis supplied) illustrates its confusion of Prop. K's separate "driving" and "continuous operation" requirements. As the court went on to observe, this 90-day suspension provision related to abandonment of the business and suspension of operation. *Slone* v. *Taxi Commission,* 2008 U.S. Dist. LEXIS 50274 at *12. [EOR 3]

applicants for a taxi permit to pledge "to engage as a permittee driver." Section 2(c) gives a two-year preference for permits to "any person who has driven a taxicab". Section 3(c) requires the Taxi Commission to consider whether "the applicant will be a full time driver" before granting the permit. Of particular significance to this case, Section 4 (which regulates permit holders after the permit is issued) refers to "continuous operation," and does not mention "drive," "driver," or any other variation of the word.

Operation and driving clearly mean different things. While the MPC does not define "operation," it defines "operator" to mean "any person, business, firm, partnership, association or corporation licensed by the City and County of San Francisco pursuant to the provisions of this Article and any agent of such permittee including, but not limited to, any manager or lessee of said permittee." MPC §1076(m). [EOR 224] Clearly, if "operator" includes a lessee (and leases of permits are permissible under MPC §1124 [EOR 201-202]), then "operation" is more than just "driving." By its terms, the "continuous operation" contemplated by Section 4 of Prop. K comprehends operating a "taxicab . . . business" [EOR 175], not just driving the vehicle.

2. Ordinance 562-88.

In 1988, the City enacted Ordinance 562-88, requiring the Police Department to revoke permits of permit holders who cease to be full-time drivers. MPC §1090(a)(i). [EOR 192-193] Apparently spurred by the pledge required of applicants under Section 2(b) of Prop. K, Ordinance 562-88 defined "full-time driver" as a driver "actually engaged in the mechanical operation and having physical charge or custody of a motor vehicle for hire which is available for hire or actually hired for at least four hours during any 24-hour period on at least 75 percent of the business days during the calendar year." MPC §1076(o). [EOR 183-184]

3. Succession of the Taxi Commission.

In November 1998, the role of the Police Department in regulating taxi permits was transferred to the Taxi Commission. *SF Charter*, section 4.133. [EOR 247-248]

In 1999, the newly created Taxi Commission adopted "Rules and Regulations" for the taxi industry. The preface to those rules provided that "[t]he Taxicab Commission or designee may suspend or exempt any or all enforcement of these rules and regulations when implementing special studies and or projects to service needs relating to

the Public Convenience and Necessity." The newly promulgated rules also provided that permit holders must comply with the full-time driving pledge of permit applicants under Prop. K, Section 2(b).

Contemporaneous opinions provided to the Taxi Commission by the City Attorney shed light on the defendants' legislative intent. In a letter dated August 5, 1999, the City Attorney opined that "Proposition K . . . requires that all permit holders be 'full time drivers' . . . ," citing Sections 2(b) and 3(d) of Prop. K. [EOR 257] In a second opinion dated April 25, 2000, however, the City Attorney's office also acknowledged that the Taxi Commission's regulations, and predecessor Ordinance 562-88, did not exempt the "full-time driving" requirement from the operation of the ADA:

> We emphasize that no determination has been made at this point that the enforcement of the driving requirement for permit-holders conflicts with the ADA. The Commission may decide that being a full-time driver is an essential eligibility requirement for permit-holders under Proposition K and that full or partial waiver of the requirement would fundamentally alter the program. [EOR 79-80]

4. Taxi Commission Adoption of an ADA Application Procedure and Resolution No. 2002-93.

In February 2002, the Taxi Commission adopted a procedure for reviewing and granting ADA accommodation requests by permit

holders. *SFTC "Processing a Request Under the Americans with Disabilities Act."* [EOR 250, 252] Other than restating general ADA requirements in Section II, this procedure did not define the types of modifications the Taxi Commission could grant.

In July of 2002, the California Court of Appeal decided a case that had been brought by the San Francisco Taxi Permitholders and Drivers Association (the "Association") and two of its members challenging "the existence and application of a requirement that permit holders be full time drivers." *San Francisco Taxi Permitholders and Drivers Assn.* v. *City and County of San Francisco*, 2002 Cal. App. Unpub. LEXIS 6371, at *3. While it did not directly address the ADA in its opinion,[5] the California Court of Appeal found that there could be exemptions from the standard of "continuous operation" for disability:

> [Permittees] may request a declaration that the standard for continuous operation in Section 4 would allow the enactment of local legislation or regulations, or the exercise of discretion under existing legislation and regulations, so as to make some limited allowance, consistent with the strong policy of Proposition K favoring

[5] Although this unpublished opinion has no binding effect on this Court (California Rules of Court, rule 8.1115), the Court of Appeal's analysis of the provisions of Prop. K and subsequent implementing legislation bears the careful consideration it is given in the argument *infra* .

> full-time operation of taxicabs by permit holders, for a permit holder's . . . physical disability.

S.F. Taxi Permitholders, supra, 2002 Cal. App. Unpub. LEXIS 6371, at *16. The Court of Appeal also specifically acknowledged the appellants' right to "seek a declaration that the general standard in section 4 does not necessarily mirror in all cases the quantitative driving standard of sections 2 and 3." *Id.*, at *15-16.

In October 2002, following the decision of the California Court of Appeal, the Taxi Commission adopted Resolution 2002-93. [EOR 263] For the first time, the Taxi Commission formally declared that "continuous driving is an essential eligibility requirement of the City's programs for the permitting of motor vehicles for hire, and that exempting a permitholder from that requirement would fundamentally alter the nature of those programs." *Taxi Commission Resolution No. 2002-93*. [EOR 264] The Taxi Commission also reserved to itself the discretion "in determining what sanction or sanctions may be appropriate to impose on a disabled permitholder who does not meet Proposition K's continuous driving requirement."

While the language used by the Taxi Commission in Resolution 2002-93 (". . . strong policy favoring full-time, or continuous, driving by permitholders") parallels the language of the California Court of

Appeal (". . . strong policy of Proposition K favoring full-time operation of taxicabs by permit holders"), it differs in one critical respect: the substitution of "continuous driving" by the Taxi Commission for "continuous operation" as used by the Court of Appeal and Prop. K. In fact, Resolution 2002-93 is the only document prior to 2006 to use the phrase "continuous driving"; the term does not appear in either Prop. K or the MPC.

Nevertheless, despite the legal posturing, the Taxi Commission's Executive Director was working on and under an informal ADA policy which allowed a waiver or reduction of the continuous driving requirement depending on the severity of an individual permit holder's disability. The policy was comparable to the "City's catastrophic illness program for City employees," and provided that a "disabled permit holder may apply for a waiver or reduction of the driving requirement, and waiver or reduction, in appropriate cases, may be renewed on a yearly basis." [EOR 17-20, 168]

5. Ordinance 111-04.

In 2004, by adopting Ordinance 111-04, codified at MPC §1081(f), the City expressly required all post-Prop. K permit holders to be full-time drivers. [EOR 188, 221]

6. Resolution No. 2006-28.

In March 2006, Defendants adopted Resolution 2006-28. [EOR 279] In this Resolution, the Taxi Commission reiterated its 2002 declaration that "continuous driving" was an "essential eligibility requirement" of Prop. K. It further provided that modifications or waivers of the "continuous driving" requirement can only be made for disabilities of 120 days or less in any one-year period or for "catastrophic recoverable illnesses" one year out of five. Thus, the City and the Taxi Commission, after years of temporizing, finally promulgated a disability policy which repudiated their prior informal policy and effectively accommodates only transitory impairments. Resolution 2006-28 makes no provision for physical or mental disabilities of longer than 120 days duration in a single year or for chronic or recurrent illnesses. Defendants' position is that any other or further accommodation would be unreasonable.

SUMMARY OF ARGUMENT

Appellants Slone and Merrithew advance a simple and compelling argument: although the District Court correctly discerned in the voters' passage of Prop. K an intent to "enable actual taxi cab drivers access to City-owned permits," it erred in overstating the

importance and centrality of the "requirement that the permittee be a full-time driver." Section 4 of Prop. K itself imposes a "continuous operation" requirement on permit holders designed to assure the core purposes identified in Section 1 are accomplished: that permit holders deliver "adequate" as well as "prompt, courteous and honest service to the riding public." As provided in sections 2 and 3, the "full-time driving" requirement began with a relatively narrow scope, as an administrative selection device designed to favor "actual taxicab drivers" among new applicants for permits. Although it eventually came to be extended by subsequent implementing legislation to all post-Prop. K permit holders, only an egregious melding of distinct requirements allowed the District Court to conclude that "full-time driving" was tantamount to "continuous operation," and so deemed to be fundamental to -- or an essential eligibility requirement of -- Prop. K.

The District Court accordingly leapt to the erroneous factual conclusion that any waiver of the personal driving requirement beyond the stringently limited regulations promulgated in 2006 would be fundamentally at odds with the purposes of San Francisco's taxicab medallion program. Its ruling also gave short shrift to generally

recognized principles reflected in the case law that has developed under the ADA.

Thus, at the outset, this Court should look askance at the defendants' invitation to countenance what amounts to an "able-bodied" requirement for taxi medallion holders on the ground that this discriminatory qualification is what makes it "innovative" [EOR 295] and unique among metropolitan taxicab permit programs. Moreover, the "reasonableness of proposed modifications is generally a fact question not amenable to summary determination." *Heather K.* v. *City of Mallard*, 946 F. Supp. 1373, 1388-1389 (N.D. Iowa 1996), *citing Crowder, supra*, 81 F.3d at 1485-87 [finding the question of reasonableness of modifications a fact-intensive one not appropriate for determination on summary judgment]. Yet the defendants defend the adequacy of a recently adopted ADA application protocol whose limited scope of accommodation -- addressing only transitory disabilities -- renders it illusory.

ARGUMENT

I. The Americans With Disabilities Act Requires a public entity to make "reasonable modifications" in policies, practices, or procedures to avoid discrimination on the basis of disability, unless it can demonstrate that doing so would "fundamentally alter" the nature of the service, program, or activity

In 1990, Congress passed Title II of the ADA, which contains a sweeping prohibition of practices by public entities that discriminate against qualified persons with disabilities. A "qualified person with disabilities" is a disabled individual who, with or without reasonable accommodation, "meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. §12131(2). The duty of a public entity to make reasonable modifications in its policies, practices or procedures when necessary to avoid discrimination against a qualified person with a disability, unless the entity can show that the modification would fundamentally alter its program or is codified in a regulation promulgated pursuant to the ADA by the Department of Justice. 28 C.F.R. §35.130(b)(7).

Granting permits, such as taxi permits, is clearly a program affected by the ADA. *Hason* v. *Medical Board of California*, 279 F.3d 1167 (9th Cir. 2002) (medical license); *Strathie* v. *Department of*

Transportation, 716 F.2d 227, 231 (3rd Cir. 1983) (bus driver's license).

The Supreme Court described the scope and import of the ADA in *Tennessee* v. *Lane*, 541 U.S. 509 (2004):

> [T]he ADA is designed 'to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.' §§12101(b)(1), (b)(4). It forbids discrimination against persons with disabilities in three major areas of public life: employment, which is covered by Title I of the statute; public services, programs, and activities, which are the subject of Title II; and public accommodations, which are covered by Title III.
>
> "Title II, §§12131-12134, prohibits any public entity from discriminating against 'qualified' persons with disabilities in the provision or operation of public services, programs, or activities. The Act defines the term 'public entity' to include state and local governments, as well as their agencies and instrumentalities. §12131(1). Persons with disabilities are 'qualified' if they, 'with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, mee[t] *the essential eligibility requirements* for the receipt of services or the participation in programs or activities provided by a public entity.' §12131(2).

Tennessee v. *Lane*, *supra*, 541 U.S. 516-517 (emphasis added).

II. "Full-Time Driving" is not a Fundamental Part or Essential Eligibility Requirement of Prop. K for Permit Holders.

The governing principle identified by the District Court for its decision is that a public entity is required to make "reasonable

modifications" in policies, practices, or procedures to avoid discrimination on the basis of disability, *unless* the public entity can demonstrate that making such modifications would "fundamentally alter" the nature of the service, program, or activity. *Slone, supra*, 2008 U.S. Dist. LEXIS 50274 at *3 [EOR 3]. As the court recognized, that rule is embodied in 28 C.F.R. §35.130(b)(7), a regulation adopted by the Department of Justice implementing Title II of the ADA.[6]

The "unreasonable modification/fundamental alteration" limitation to the ADA has its roots in Supreme Court precedent under the Rehabilitation Act. The Supreme Court held in *Southeastern Community College* v. *Davis,* 442 U.S. 397, 410 (1979), that Section 504 of the Rehabilitation Act does not require "affirmative action" on the part of a public entity. The *Davis* Court held that requiring a nursing school to accommodate a deaf student, including providing individualized assistance, would amount to a "fundamental

---

[6] The regulation provides:

> A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. §35.130(b)(7).

alteration in the nature of [the] program. . . far more than the 'modification' [Section 504] requires." *Ibid*.

> Such a "fundamental alteration in the nature of a program" was far more than the reasonable modifications the statute or regulations required. *Id*., at 410. *Davis* thus struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make "fundamental" or "substantial" modifications to accommodate the handicapped, it may be required to make "reasonable" ones.

Alexander v. *Choate, supra*, 469 U.S. 287, 300 (1985).

As the District Court acknowledged (*Slone, supra*, 2008 U.S. Dist. LEXIS 50274 at *17) [EOR 10], citing *Choate*, "[a] program eligibility requirement is essential when the program's purposes could not be achieved without. . . it." *Id.*, at 300-301; *Panzadides* v. *Virginia Board of Education*, 946 F.2d 345, 349-350 (4th Cir. 1991).[7]

The District Court was obliged to construe the taxicab permit legislation in question as it believed California courts would. *NLRB v.*

---

[7] Federal courts have taken two different approaches to defining "essential eligibility requirements" under the ADA, one seeking to ascertain the importance of the *requirement itself* to the program and the other on the *effect* on the program of granting an *exemption or other modification. Fry* v. *Saenz*, 98 Cal.App.4th 256, 264-265 (2002). As will be seen, the District Court's misreading of the "plain meaning" of Proposition K taints its determination, whichever approach is taken.

Calkins, 187 F.3d 1080, 1089 (9th Cir. 1999). Under California law, "ordinary principles of interpretation" govern initiatives. *San Francisco Taxpayers Assn.* v. *Board of Supervisors of CCSF*, 2 Cal.4th 571, 577 (1992).

> In interpreting a voter initiative, we apply the same principles that govern statutory construction. Thus, "we turn first to the language of the statute, giving the words their ordinary meaning." . . . When the language is ambiguous, "we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet."

Robert L. v. *Superior Court*, 30 Cal.4th 894, 899-900 (2003) [citations and fn. omitted].

The District Court correctly noted that, according to their "plain meaning," sections 2 and 3 of Prop. K

> indicate that the Ordinance requires applicants to state under penalty of perjury that they intend to be full-time drivers and to issue a permit, that the applicant actually will be a full-time driver of the motor vehicle.

Slone, supra, 2008 U.S. Dist. LEXIS 50274 at *11-12. [EOR 7] The requirement to consider whether the pledge will be kept was plausibly interpreted by the court to mean that

> [t]he pledge requires that the applicant will comply with his or her declared intent. Although such a promise relates to probable future conduct, the finding is made in

> connection with the issuance of the permit and therefore bears on the qualification of the expected permitholder.

Id., at *12. [EOR 6-7]

Nevertheless, the District Court erred in *equating* the distinct standards of Prop. K, sections 2 and 3, with those of Prop. K, section 4:

> Section 4, which clearly refers to permittees, requires that the permit holder "regularly and daily operate their taxicab or other motor vehicle for hire business during each day of the year to the extent reasonably necessary to meet the public demand for such taxicab or motor vehicle for hire service." S.F. Admin. Code Appx. 6 §4(a). Although there is no question that the plain language of the Ordinance requires the holders of the permits to operate their taxicab full-time [sic]. However, Plaintiffs essentially argue that "operate" does not mean "drive." Plaintiffs contend that "operating" a taxicab includes other tasks such as paying annual fees, providing insurance, and performing routine record keeping.
>
> Again, the Court finds this argument unconvincing. In the context of legislation which requires that the permit applicant pledge his or her commitment to be the full-time driver of the taxicab, it is clear from the plain meaning of the text that the requirement to operate the taxicab full-time was meant to reflect the full-time driving requirement. The peripheral tasks associated with maintaining a taxicab business do not amount to the "operation" of a taxicab.

Id., at *13. [EOR 8]

The "plain language" of Section 4(a), however, will not support such a construction. The disjunctive parallel of "taxicab" and "vehicle for hire" clearly indicates that both terms modify "business." In its

holding, the District Court misconstrued Proposition K by bulldozing over an important distinction between "full-time driv[ing]" and "continuous operation" noted by both the California Court of Appeal in its aforementioned unpublished opinion (*S.F. Taxi Permitholders and Drivers Assn.* v. *City and County of San Francisco*, *supra*, 2002 Cal. App. Unpub. LEXIS 6371) and expressly acknowledged by the City in its moving papers [EOR 298].[8]

The California Court of Appeal held that Prop. K, section 4(a) "establishes a distinct standard from that applying to the declaration and assessment of the applicant's intent in section 2, subdivision (b) and section 3, subdivision (d)." *Id.*, at *26. Furthermore, section 2(b)'s "quantitative" requirement that applicants commit to driving on at least "75 percent of. . . business days" is not the same as Section 4(a)'s more "general" mandate of "regular[] and daily operat[ion]." See *San Francisco Taxi Permitholders and Drivers Assn.* v. *City and County of*

[8] In April 2000, twelve years after the adoption of MPC §1090, the City Attorney opined that the Taxi Commission could "decide that being a full-time driver is an essential eligibility requirement for permit-holders under Proposition K and that full or partial waiver of the requirement would fundamentally alter the program." As will be seen, plaintiffs contend that any such attempt would constitute a prohibited "amendment" of a voter-approved initiative, but, in contrast, "continuous operation" was *always* an essential eligibility requirement for retaining a taxicab permit. [EOR 80]

San Francisco, *supra*, 2002 Cal. App. Unpub. LEXIS 6371 at *15-16 [allowing appellant taxicab drivers to "seek a declaration that the general standard in section 4 does not necessarily mirror in all cases the quantitative driving standard of sections 2 and 3"].[9]

The District Court's reading also flies in the face of the state appellate court's explicit conclusion that the City and Taxi Commission may, either through "the enactment of local legislation or regulations or the exercise of discretion under existing legislation and regulations," make accommodations for disabled permit holders under Prop. K "consistent with the strong policy of Proposition K favoring full-time operation of taxicabs by permit holders." *San Francisco Taxi Permitholders and Drivers Assn.* v. *City and County of San Francisco*, 2002 Cal. App. Unpub. LEXIS 6371, at *16.

Nor is the District Court's conclusion supported by the paid arguments in the voter guides in support of Prop. K. [EOR 179-180] The language relied on by the District Court refers to persons who hold

---

[9] Despite the District Court's stated conclusion that "operation" is no different than "driving" (*Slone, supra*, 2008 U.S. Dist. LEXIS 50274 at *13) [EOR 8], the MPC (at § 1124) allows a permit holder to operate his or her taxi through an approved lease. [EOR 201-202] "Operation" as used in Prop. K, section 4, and as construed by the California Court

(continued...)

permits for speculative gain, and it restates the standards of Prop. K, sections 2 and 3: "the permits would return to the Police Commission where new permits would be issued to people who actually want to drive a taxicab." *Slone*, *supra*, 2008 U.S. Dist. LEXIS 50274 at *14. [EOR 9] This simply reflects the pledge in Prop. K, section 2(b). The District Court also erroneously equates "those who own permits with the sole purpose of reselling them for an enormous profit," which is illegal, with those who lease out their permits, which is perfectly legal. *Ibid*.

Although, as noted above, the City Attorney in 2000 took the position that the Taxi Commission could "decide that being a full-time driver is an essential eligibility requirement for permit-holders under Proposition K and that full or partial waiver of the requirement would fundamentally alter the program" [EOR 80] this conclusion is simply wrong. As was explicitly recognized by the District Court, "'[n]o initiative or declaration of policy approved by the voters shall be subject to veto, or to amendment or repeal except by the voters, unless

---

(...continued)

of Appeal, therefore differs from "driving," as used in Prop. K, sections 2 and 3, and includes either direct operation or leased operation.

such initiative or declaration of policy shall otherwise provide.' S.F. Charter, § 14.101." *Slone, supra*, 2008 U.S. Dist. LEXIS 50274 at *9-10 [EOR 6] Therefore, if "full-time driving" was not an essential eligibility requirement of Prop. K, Section 4, as it was approved, the subsequent actions of the Taxi Commission and the City cannot make it so. Notwithstanding the District Court's suggestion that the voters' intent can be clearly discerned to "enable actual taxi cab drivers access to City-owned permits" and, accordingly, impose a "requirement that the permittee be a full-time driver," this cannot justify the implicit repudiation of the state Court of Appeal decision in 2002 which held that the taxicab driver plaintiffs were entitled to

> seek a declaration that the standard for continuous operation in section 4 would allow the enactment of local legislation or regulations, or the exercise of discretion under existing legislation and regulations, so as to make some *limited allowance*, consistent with the strong policy of Proposition K favoring full-time operation of taxicabs by permit holders, for a permit holder's leadership position in a taxicab cooperative or *physical disability.*

Id., at *16 (emphasis added).

As the City Attorney observed in its moving papers below, the Court of Appeal's decision "opened the door" to a "limited" liberalization of the policy governing the accommodation of disabilities. [EOR 301] It was pursuant to this liberating mandate that

the Taxi Commission authorized a modification of the driving requirement for up to 120 days in one year and suspension of the requirement for up to one year in five for individuals with catastrophic recoverable illnesses (Resolution No. 2006-28). [EOR 279] The problem with this "accommodation," however, is its failure to go far enough to bring the City's enforcement of Prop. K into compliance with the ADA.

III. The ADA Requires Appellants to Waive or Reduce the "Full-Time Driving" Requirement for Permit Holders Who Become Disabled After Issuance of Their Permit

As recognized by the District Court:

> Under Title II of the ADA, a public entity is required to make 'reasonable modifications' in policies, practices, or procedures to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making such modifications would 'fundamentally alter the nature of the service, program, or activity.' 28 C.F.R. Section 35.130(b)(7). Title II does not require States to compromise their essential eligibility criteria for public programs. It requires only 'reasonable modifications' that would not fundamentally alter the nature of the service provided, and only when the individual is otherwise eligible for the service. *Tennessee* v. *Lane*, 541 U.S. at 531-2 (citing 42 U.S.C. section 12131(2)).

Slone, supra, 2008 U.S. Dist. LEXIS 50274 at *3. [EOR 2-3]

As stated above, both the language of Prop. K and the interpretation cast on that language by the City Attorney and by the

California Court of Appeal conclusively demonstrate that the standards of Prop. K, sections 2 and 3, and of Prop. K, section 4 are "distinct." The standard under Prop. K, sections 2 and 3 is one of "full-time driv[ing]." The standard under Prop. K, section 4 is one of "continuous operation." Thus, there is no real conflict between Prop. K and the ADA. Under Prop. K, as it was originally approved by the voters, an applicant for a permit had to satisfy the "full-time driving" requirements. And Prop. K always imposed on all permit holders the duty to comply with the distinct "continuous operation" requirement, which they might do by a combination of personal operation of the taxi and leasing the taxi to a third party. If the permit holder can still operate the permit but, because of his or her disability, is unable to be a "full-time driver," the ADA requires the City and the Taxi Commission to waive or reduce the "full-time driv[ing]" requirement. Only if the permit holder is unable to operate his or her business and does not obtain a suspension of the permit must he or she surrender the permit.

Under the construction of the District Court – which holds "the full-time driving requirement is an essential eligibility requirement" without considering the attenuating effect of the fact that it was extended to all permittees only by later "implementing" legislation

[EOR 9] – the ADA is ignored and its critically important, salutary policies given no effect. The City and the Taxi Commission are now free to discriminate without penalty against permit holders who can continue to operate their permits but who cannot be "full-time drivers."

Indeed, the District Court's ruling countenances blatant, bald-faced discrimination. This Court has consistently held that the "fundamental alteration test has no application to cases of facial discrimination." *Lovell* v. *Chandler*, 303 F.3d 1039, 1054 (9th Cir. 2002); *Bay Area Addiction Research & Treatment, Inc*. v. *City of Antioch*, 179 F.3d 725, 734-35 (9th Cir. 1999); *Townsend* v. *Quasim*, 328 F.3d 511, 513-520 (9th Cir. 2003) ["Nor, ordinarily, must public entities make modifications that would fundamentally alter existing programs and services administered *pursuant to policies that do not facially discriminate* against the disabled," citing 28 C.F.R. §35.130(b)(7), but cautioning that an overly "broad reading of fundamental alteration regulation would render the protection against isolation of the disabled substanceless"];[10] see also *MX Group, Inc*. v.

[10] Citing *Lovell* and *BAART* as establishing the inapplicability of the "fundamental alteration" defense in cases involving facially discriminatory policies, the *Townsend* court observes:

(continued...)

City of Covington, 293 F.3d 326, 345 (6th Cir. 2002). The stated rationale for that limitation is that

> the only possible modification of a facially discriminatory law that would avoid discrimination on the basis of disability would be the actual removal of the portion of the law that discriminates on the basis of disability. However, such a modification would fundamentally alter the ordinance.

BAART, *supra*, 179 F.3d at 734.

(...continued)

> . . . Washington's law, explicitly providing only nursing-home based long term care services to the medically needy, may be read to facially discriminate against disabled persons, because those who need the kind of long term assistance at issue here (i.e., assistance in performing essential life activities) are disabled within the meaning of the ADA. See 42 U.S.C. § 12102(2).
>
> The Secretary contends that a decision that the state must offer community-based long term care services to disabled medically needy persons would fundamentally alter Congress's and the state legislature's considered policy decisions to provide long term care services to medically needy persons only in nursing homes. But policy choices that isolate the disabled cannot be upheld solely because offering integrated services would change the segregated way in which existing services are provided. *Olmstead* [v. *L.C. ex rel. Zimring*, 527 U.S. 581 (1999)] makes that clear, for precisely that alteration was at issue in *Olmstead*, and *Olmstead* did not regard the transfer of services to a community setting, without more, as a fundamental alteration. Indeed, such a broad reading of fundamental alteration regulation would render the protection against isolation of the disabled substanceless.

Townsend v. *Quasim*, *supra*, at 518-519.

> Public entities could evade the ADA by claiming it would fundamentally alter their program to eliminate a facially discriminatory provision of a challenged program, and Congress' intent in enacting the ADA would be defeated.

Lovell v. *Chandler, supra,* 303 F.3d at 1055. The District Court's acceptance of the City's position that waiving the driving requirement amounts to a "fundamental alteration" of its permit program because it designed the program for drivers thus discriminates on the basis of disability.

A court must take a jaundiced view under the ADA of any program of a public entity that provides a benefit restricted to the able-bodied. Thus, in *South Dakota Farm Bureau, Inc*. v. *Hazeltine*, 202 F. Supp. 2d 1020 (D.S.D. 2002), *affirmed on another ground*, 340 F.3d 583 (8th Cir. 2003), the District Court rejected an amendment of South Dakota's constitution which effectively "prevent[ed] those individuals who cannot live on the farm or perform 'both daily or routine substantial physical exertion and administration' from owning in a limited liability format South Dakota agricultural land." *Id*. at 1042.[11]

---

[11] The court found that "[t]hose individuals not only could not engage in the occupation of raising cattle; they would have to dissolve their limited liability entities or sell their grass land."

> Amendment E does more than place limits on limited liability entities; it prohibits disabled persons who cannot

(continued...)

Amendment E was accordingly invalidated as "constitut[ing] an attempt to override the ADA." *Ibid*. [12]The State may not. . . base. . . restrictions [on the use of property] on impermissible categories such as religion, race, gender, and, under the ADA, disability." *Id*. at 1041.

(...continued)

> live "on the farm" from owning South Dakota agricultural land in a limited liability format and using such land for farming. Non-disabled persons are not so limited. . . . [Plaintiffs] Brost and Holben are physically unable to perform all of the physical labor required to raise livestock on their South Dakota ranch land. Performing substantial physical exertion is a prerequisite under Amendment E to engaging in farming as a member of a limited liability entity. Some member of the entity must be a non-disabled individual or a person who lives "on the farm." The only member of the Brost Land and Cattle Co. Inc. is a disabled individual. A non-disabled farmer need not live on the farm. A disabled farmer would be required to live on the farm to be able to conduct business in a limited liability format. People who are disabled obviously tend to prefer to live in or very near larger communities with health care facilities able to promptly and easily meet their medical needs. There is no such facility in or even near . . . the Brost ranch. Brost would be hours away from medical care he needs.

Id. at 1041-1042.

[12] The Court of Appeals vacated the judgment as to the ADA claims on the ground that the district court allowed them to be resurrected post-trial after initially dismissing them on grounds later determined to be erroneous. The appellate panel affirmed the judgment on another ground, invalidating the amendment as violative of the Commerce Clause. Nothing in the appellate opinion, however, calls into question the district court's analysis of the substantive ADA issue.

Even if the discrimination somehow is not deemed to be "facial," strict adherence to a personal driving requirement certainly will "screen out or tend to screen out an individual with a disability," thereby running afoul of 28 C.F.R. §35.130(b)(8).[13]

It may be argued that, in Sections 2 and 3 of Proposition K, voters undeniably expressed their intent to "screen out" disabled *applicants*, at least. Nonetheless, the Supreme Court in *Alexander* v. *Choate, supra*, 469 U.S. 287, concluded that Congress intended to protect disabled persons from discrimination arising out of both discriminatory animus and "thoughtlessness," "indifference," or "benign neglect." *Id*. at 295. Moreover, a distinction has been recognized in the ADA caselaw between alleged discrimination or denial of reasonable accommodation to an applicant to a program as opposed to "a handicapped individual who has already been admitted to a program and deemed to be "otherwise qualified" but who requests

---

[13] The regulation pertinently provides:

> A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered."

individual accommodation in order to have access to or to continue benefitting from the program." *Nathanson* v. *Medical College of Pennsylvania*, 926 F.2d 1368, 1384 (3d Cir. 1991) (emphasis added).

The question then arises what is a sufficient showing that such a requirement is "necessary for the provision of the service, program, or activity" of regulating taxicab service in San Francisco. Of course, prior to the adoption of Proposition K in 1978, San Francisco operated a medallion program that contained no such requirement, as the City Attorney noted in its moving papers other cities still do today. [EOR 297] The City proffers legislative findings by the Taxi Commission claiming benefits tending to flow from the driving requirement such as "increas[ing] the professionalism of drivers and the quality of taxi services, promot[ing] stability in the workforce, and promot[ing] equity in the cab industry by avoiding the creation of separate classes of owners and workers." [EOR 263-264, 309] But the ADA does not generally countenance advantaging the able-bodied at the expense of the disabled.[14]

---

[14] The City Attorney cites Taxi Commission Resolution No. 2002-93's enumeration of the purposes of the driving requirement:

(continued...)

IV. What Constitutes a Reasonable Modification of the "Full-Time Driving" Requirement for Disabled Is a Question of Fact and Is Not Limited to the Allowances Made in Taxi Commission Resolution 2006-28

Whether a modification is "reasonable" is generally a question of fact not amenable to summary disposition. *Heather K.* v. *City of*

(...continued)

> • it tends to promote stability in the driving work force, because if permits can be held by absentees, there will be fewer opportunities for nonpermitholding drivers to obtain permits and thus less incentive for drivers to stay in the industry for lengthy periods of time;
>
> • it tends to promote experience in the driving work force, because it ensures that for a significant part of the time a permitted vehicle is driven, the driver must be someone who drives frequently;
>
> • it tends to promote a sense of equity among the driving work force, because it requires that persons doing the day-to-day work of driving receive the rewards of being a permitholder;
>
> • it tends to promote greater cleanliness, comfort, and safety of vehicles, because the permitholder must drive the permitted vehicle frequently and thus has a personal incentive to ensure that the vehicle is clean, comfortable, and safe; and
>
> • it provides an entrepreneurial opportunity and a degree of upward mobility for drivers; …

[EOR 263-264, 309] As will be noted, however, the City's stated intention to revoke the medallions of permit holders rendered unable by reason of disability to meet the personal driving requirement in order to make room for people on the waiting list cuts both ways with respect to "a sense of equity" regarding "the rewards of being a permitholder" and the provision of "an entrepreneurial opportunity and a degree of upward mobility for drivers …"

Mallard, 946 F. Supp. 1373, 1390 (N.D. Iowa 1996). The *Heather K.* decision quotes this Court's opinion in *Crowder* v. *Kitagawa*, *supra*:

> The court's obligation under the ADA and accompanying regulations is to ensure that the decision reached by the state authority is appropriate under the law and in light of proposed alternatives. Otherwise, any state could adopt requirements imposing unreasonable obstacles to the disabled, and when haled into court could evade the antidiscrimination mandate of the ADA merely by explaining that the state authority considered possible modifications and rejected them.

Crowder, *supra*, 81 F.3d at 1485. In *Crowder*, "the reasonableness of the plaintiff's proposed alternative modifications could not be determined as a matter of law on the record before the court," and, indeed, the opinion cast doubt on whether "the reasonableness of proposed modifications could be anything but a fact question":

> [W]e have held that the determination of what constitutes reasonable modification is highly fact-specific, requiring case-by-case inquiry. *Chalk* v. *United States District Court*, 840 F.2d 701, 705 (9th Cir. 1988). Moreover, inquiry into reasonable modification would necessitate findings of fact regarding the nature of the [harm in question], the extent of the risk posed [by that harm], and the probability that [the harm would spread if not regulated]. *Crowder*, 81 F.3d at 1486-87 (considering reasonable modifications to a rabies quarantine regulation on animals brought into Hawaii in light of the regulation's discriminatory effect on visually-impaired persons in need of guide dogs). The appellate court therefore reversed the district court's grant of summary judgment in favor of the state.

Heather K., supra, at 1390.[15]

Beyond and apart from the factual complexities that ordinarily counsel against summary judgment as to whether a proposed "reasonable modification" constitutes a "fundamental alteration," there is the additional complication of parties' tendentious characterizations of the nature and purposes of programs. The Supreme Court has recognized this problem:

> The balance struck in *Davis* requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made.

---

[15] The *Heather K.* court also points to non-Ninth Circuit precedents establishing that the test of "reasonableness" is unavoidably "fact-based" or "fact intensive." See, e.g., *Staron* v. *McDonald's Corp.*, 51 F.3d 353, 356 (2d Cir. 1995), which it cites for the proposition that

> the determination of whether a particular modification is "reasonable" involves a fact-specific, case-by-case inquiry that considers among other factors, the effectiveness of the modification in light of the nature of the disability in question and the cost to the organization that would implement it.

Heather K. v. *City of Mallard, supra*, 946 F. Supp. at 1389.

Alexander v. *Choate*, *supra*, 469 U.S. at 301. The court thus endorsed the federal government's warning in its *amicus* brief that "Antidiscrimination legislation can obviously be emptied of meaning if every discriminatory policy is 'collapsed' into one's definition of what is the relevant benefit." *Ibid*, fn. 21.

Commentators remark on this difficulty, as well:

> But how is a court to go about meaningfully determining when a defendant has defined the relevant benefit in such a way as to systemically and unnecessarily exclude the disabled? Once a defendant has defined itself and its offerings so as to make the plaintiff's request exceed the parameters of that which it generally offers, it can easily argue that its offerings will be fundamentally altered if that request is granted because "the purpose of the ADA's public accommodations requirements is to ensure accessibility to the goods offered by a public accommodation, not to alter the nature or mix of goods that the public accommodation has typically provided." [*Parker* v. *Metro. Life Ins. Co*. 121 F.3d 1006, 1012 (6th Cir. 1997).]
>
> The line between substance and access, then, is often so fine that it almost seems to shift when one alternately views the query through the eyes of the plaintiff and those of the defendant. Courts' location of this line is a subjective endeavor, and it is undertaken against the backdrop of the parties' own characterizations of what the defendant entity does and to what the plaintiff is entitled. When choosing how searching a look it will give a defendant's fundamental alteration argument or how broad the relevant universe of evidence and considerations will be in the analysis, a court must, at least implicitly, decide how much deference to accord a defendant entity in defining what it is, does, or offers. Thus, a court that accords a greater degree of deference to

> an entity contouring the parameters of what it is, does, or offers will more readily accept its characterization of that "nature."

Kerri Lynn Stone, *Symposium: The Politics of Deference and Inclusion: Toward a Uniform Framework for the Analysis of "Fundamental Alteration" under the ADA*, 58 Hastings L.J. 1241, 1263 (2007) (fn. omitted).

This "fundamental alteration" conundrum was the central issue before the United States Supreme Court in *PGA Tour, Inc*. v. *Martin, supra*, 532 U.S. 661. Casey Martin, a professional golfer afflicted with a circulatory disorder that impaired his ability to walk, sued the defendant PGA Tour for refusing his request to be allowed to use a golf cart during a qualifying tournament. *Martin, supra* at 668-669. The Tour argued that walking constituted a substantive rule of golf and that waiving this rule in any circumstances would fundamentally alter the nature of the competition. *Id*. at 670. The Supreme Court ruled in Martin's favor. *Id*. at 683. According to the Court:

> [A] modification of [the Tour's] golf tournaments might constitute a fundamental alteration in two different ways. It might alter such an essential aspect of the game of golf that it would be unacceptable even if it affected all competitors equally; changing the diameter of the hole from three to six inches might be such a modification. Alternatively, a less significant change that has only a peripheral impact on the game itself might nevertheless

> give a disabled player, in addition to access to the competition as required by Title III, an advantage over others and, for that reason, fundamentally alter the character of the competition.

Id. at 682-683. Thus, the Court concluded, the Tour's walking rule, which was "based on an optional condition buried in an appendix to the Rules of Golf," was neither an essential element of the game -- as the "essence of the game has been shot-making" -- nor "an indispensable feature of tournament golf," *Id*. at 683, 685. Nor did a review of the facts concerning his disability indicate that Martin would gain an unfair advantage over his competitors if permitted to use a golf cart. *Id*. at 686-688.

Although some legal scholars have criticized the *Martin* decision as affording insufficient guidance to lower courts,[16] the opinion notably

---

[16] Professor Stone complains in her article, quoted above, that, since *Martin* was decided in 2001,

> courts found themselves in a situation in which: (1) they could not accord wholesale deference to any defendant unless directed to do so by statute; and (2) they were left with only the most basic definitions of what amounted to a fundamental alteration, but no binding guidelines as to how to approach the query. . . .
>
> Commentators examining the limited number of cases in which federal courts have performed a fundamental alteration inquiry since *Martin* "have recognized the need for meaningful guidance and standards for courts and

(continued...)

stresses "the need of a disabled person to be evaluated on an individual basis":

> Under the ADA's basic requirement that the need of a disabled person be evaluated on an individual basis, we have no doubt that allowing Martin to use a golf cart would not fundamentally alter the nature of petitioner's tournaments. . . . A modification that provides an exception to a peripheral tournament rule without impairing its purpose cannot be said to "fundamentally alter" the tournament. What it can be said to do, on the other hand, is to allow Martin the chance to qualify for and compete in the athletic events petitioner offers to those members of the public who have the skill and desire to enter. That is exactly what the ADA requires. As a result, Martin's request for a waiver of the walking rule should have been granted.
>
> The ADA admittedly imposes some administrative burdens on the operators of places of public accommodation that could be avoided by strictly adhering to general rules and policies that are entirely fair with respect to the able-bodied but that may indiscriminately preclude access by qualified persons with disabilities. But surely, in a case of this kind, Congress intended that an entity like the PGA not only give individualized attention to the handful of requests that it might receive from talented but disabled athletes for a modification or waiver of a rule to allow them access to the competition, but also carefully weigh the purpose, as well as the letter, of the

---

(...continued)

> potential defendants to employ with these issues before them.

Stone, *op. cit., Symposium: The Politics of Deference and Inclusion: Toward a Uniform Framework for the Analysis of "Fundamental Alteration" under the ADA*, 58 Hastings L.J. at 1254-1255, 1258.

> rule before determining that no accommodation would be tolerable.

Martin, supra, 532 U.S. at 690-691 (fn. omitted).

Martin's emphasis on "the need of a disabled person to be evaluated on an individual basis" supports the approach to identifying what is a "fundamental alteration" taken by Court of Appeals in *Washington* v. *Indiana High School Athletic Ass'n*, 181 F.3d 840 (7th Cir. 1999), which adopts the "individualized approach" which focuses on the *effect of granting a waiver* on the purposes of a program rather than the *importance* of the rule itself (see fn. 7), asking "whether waiver of the rule in the particular case at hand would be so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change" in the government program. *Id*., at 850;[17] see

---

[17] The Seventh Circuit Court of Appeals thus aligned itself with the Sixth Circuit in *McPherson* v. *Michigan High Sch. Athletic Ass'n*., 119 F.3d 453, 461-462 (6th Cir. 1997), and with Judge Richard Arnold's minority opinion in *Pottgen* v. *Missouri State High Sch. Activities Ass'n*, 40 F.3d 926 (8th Cir. 1994), explaining :

> We think that the individualized approach is consistent with the protections intended by the ADA. . . . [S]ome exceptions ought to be made to general requirements to allow opportunities to individuals with disabilities. To require a focus on the general purposes behind a rule without considering the effect an exception for a disabled individual would have on those purposes would negate the reason for requiring reasonable exceptions.

(continued...)

also *Cruz* v. *Pa. Interscholastic Ath. Ass'n.*, 157 F. Supp. 2d 485, 498-499 (E.D. Pa. 2001) ["in *Martin*, the Supreme Court made clear that a basic requirement of the ADA is the evaluation of a disabled person on an individual basis"]; *Matthews* v. *NCAA*, 179 F. Supp. 2d 1209, 1225 (E.D. Wash. 2001) ["In *Martin* . . . the Supreme Court emphasized that an evaluation of what constitutes a reasonable modification of rules for a disabled participant must focus on the individual and may not generally evaluate whether a blanket waiver of a requirement would constitute a fundamental alteration."].[18]

Accordingly, if a medallion holder who has become disabled within the meaning of the ADA seeks a waiver of the personal driving requirement commensurate with his disability, it may well mean that he

---

(...continued)

Washington, supra, at 852.

[18] In *Matthews, supra*, which the defendants described in their moving papers below as "a case perhaps most analogous to the present one" [EOR 313], the District Court held that granting a learning-disabled student-athlete a waiver of a rule requiring that students complete 75 percent of their coursework outside of summer school – the so-called "75/25 Rule" – "would not result in a fundamental alteration of the NCAA's purpose and policies," since it "already ha[d] granted Plaintiff two waivers, including one waiver of the 75/25 Rule." Applying "the individualized inquiry required by *Martin*," the court concluded that "a waiver of the 75/25 Rule -- even for all athletes -- would not alter an essential aspect of the NCAA's purpose to promote academics and athleticism." *Matthews, supra*, 179 F. Supp. 2d at 1226-1227.

needs a waiver broader than the limited exemptions allowed under the Taxi Commission's regulations. As has been established, under Commission Resolution No. 2006-28, medallion holders may seek either (1) a one-year exemption from the driving requirement for a catastrophic recoverable illness once in five years or (2) 120 days leave per year from the driving requirement for up to three consecutive years.[19] [EOR 279] The District Court's grant of summary judgment to the City and the Taxi Commission amounts to a determination as a matter of law that any accommodation of a permittee's disability beyond these limits is unreasonable, but under the ADA the "reasonable[ness]" of an accommodation is supposed to depend on

> . . . a fully developed record [which] will allow the court to determine whether any of these proposed modifications is "effective[] . . . in light of the nature of the disability in question and the cost to the organization that would implement it,"[citation] or the extent to which it alters the objectives of the ordinance or imposes undue hardships upon the City. [Citation.]

Heather K. v. *City of Mallard, supra*, 946 F. Supp. at 1389.

---

[19] This one-third reduction means that the medallion holder must drive either 104 four-hour shifts per year (a one-third reduction of Proposition K's 156 four hour shifts) or 533 hours per year (a one third reduction of the Police Code's required 800 hours). [EOR 129-130]

It also seems quite significant in this regard that, as has been noted, under the new amendments to the ADA, the exclusion of "transitory impairment[s]" from the category of conditions regarded as disabilities applies to "an impairment with an actual or expected duration of 6 months or less." S.3406, Sec. 3, Definition of Disability.

If a broader waiver appropriately tailored to an individual's condition allows a permittee to continue to operate his or her taxicab business in compliance with the rules and regulations that are designed to "ensure prompt, courteous and honest public service," then that is not at all inconsistent with what the District Court determined was the "clear intent of the Proposition . . . to enable actual cab drivers an opportunity to obtain a permit and be allowed to engage in the taxicab business himself" or herself. The defendants professed great concern in their moving papers that current permittees may retain their medallions longer if they cannot be revoked when they become disabled, to the frustration of drivers on the long waiting list. [EOR 296] Why does the City fail to express a similar concern for drivers who finally obtained medallions after spending years on the waiting list, only to face the prospect of their being taken away as soon as they have gained the fruits of their labor? To the extent that Proposition K was intended to

foster an entrepreneurial spirit by making "permit holders free to operate their taxicab businesses and to compete under the principles of free enterprise," that freedom can only be enhanced by allowing a medallion holder to rise above misfortune and continue to operate his taxi business despite the untimely onset of disability.

Therefore, the District Court's determination as a matter of law was improper and must be overturned.

CONCLUSION

The District Court incorrectly equated "full-time driving" with "continuous operation." The latter has always been the indispensable responsibility of the permit holder; the former is an important accretion, but cannot override the profoundly important national policies embodied by the ADA. Based on this conflation, the District Court's characterization of the essential purposes of the taxicab permit program is distorted and unconvincing. Plaintiffs and similarly situated permitholders are entitled under the ADA to individualized assessments of the effects of granting them appropriate waivers and exemptions unconstrained by the Procrustean limitations embodied in the

defendants' recently-adopted ADA application protocols.

DATED: November ___, 2008

Respectfully Submitted,

HASSARD BONNINGTON LLP

By_____
Philip S. Ward, Esq.

Attorneys for Appellants William Slone and Michael Merrithew

STATEMENT OF RELATED CASES

(Ninth Circuit Rule 28-2.6)

Appellants William Slone and Michael Merrithew are unaware of any other cases pending before this Court that are related to this case.

DATED: November ___, 2008

HASSARD BONNINGTON LLP

By_____
Philip S. Ward, Esq.

Attorneys for Appellants William Slone and Michael Merrithew

CERTIFICATION OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(C) AND NINTH CIRCUIT RULE 32-1

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the foregoing Opening Brief of Appellants William Slone and Michael Merrithew is double-spaced and was printed in proportionately-spaced 14-point CG Times type. It contains 11,454 words (inclusive of footnotes, but exclusive of tables, the Statement of Related Cases, Corporate Disclosure Statement, and this Certificate). In preparing this certificate, I relied on the word count generated by MS Word 97.

Executed on November ___, 2008, at San Francisco, California.

_____
Philip S. Ward

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

WARNING: This section retains the original formatting, including headers and footers, of the main document. If you delete the section break above this message, any special formatting, including headers and footers for the Table of Contents/Authorities section will be lost.

If you delete the section break above the Table of Contents/Authorities, you will overwrite the headers and footers of the main document with Table of Contents/Authorities headers and footers.

To delete the Table of Contents/Authorities, begin your selection at the section break above the TOC/TOA section and continue through the end of this message.

No. 08-16726

In the United States Court of Appeals for the Ninth Circuit

William Slone and Michael Merrithew,

Plaintiffs and Appellants,

vs.

Taxi Commission, City & County of San Francisco; Heidi Machen, Executive Director; City & County of San Francisco, a California public entity,

Defendants and Appellees.

APPELLANTS' EXCERPTS OF RECORD VOLUME ONE

Appeal From a Judgment after Entry of Judgment on Grant of Appellees' Motion for Summary Judgment and Denial of Appellants' Cross-Motion for Summary Judgment
United States District Court, Northern District of California
No. 07-cv-03335-JSW, The Honorable Jeffrey S. White

Philip S. Ward, Esq. (SBN 51768)
Richard G. Katerndahl, Esq. (SBN 88492)
HASSARD BONNINGTON LLP
Two Embarcadero Center, Suite 1800
San Francisco, CA 94111-3993
Telephone: (415) 288-9800
Facsimile: (415) 288-9802

Joseph M. Breall, Esq. (SBN 124329)
BREALL & BREALL LLP
1255 Post Street, Suite 800
San Francisco, CA 94109
Telephone: (415) 345-0545
Facsimile: (415) 345-0538

Elliott A. Myles, Esq. (SBN 127712)
MYLES LAW FIRM, INC.
P.O. Box 11094
Oakland, CA 94611-0094
Telephone: (510) 986-0877
Facsimile: (510) 986-0843

Attorneys for Appellants William Slone and Michael Merrithew

No. 08-16726

In the United States Court of Appeals for the Ninth Circuit

William Slone and Michael Merrithew,

Plaintiffs and Appellants,

vs.

Taxi Commission, City & County of San Francisco; Heidi Machen, Executive Director; City & County of San Francisco, a California public entity,

Defendants and Appellees.

APPELLANTS' EXCERPTS OF RECORD VOLUME TWO

Appeal From a Judgment after Entry of Judgment on Grant of Appellees' Motion for Summary Judgment and Denial of Appellants' Cross-Motion for Summary Judgment
United States District Court, Northern District of California
No. 07-cv-03335-JSW, The Honorable Jeffrey S. White

Philip S. Ward, Esq. (SBN 51768)
Richard G. Katerndahl, Esq. (SBN 88492)
HASSARD BONNINGTON LLP
Two Embarcadero Center, Suite 1800
San Francisco, CA 94111-3993
Telephone: (415) 288-9800
Facsimile: (415) 288-9802

Joseph M. Breall, Esq. (SBN 124329)
BREALL & BREALL LLP
1255 Post Street, Suite 800
San Francisco, CA 94109
Telephone: (415) 345-0545
Facsimile: (415) 345-0538

Elliott A. Myles, Esq. (SBN 127712)
MYLES LAW FIRM, INC.
P.O. Box 11094
Oakland, CA 94611-0094
Telephone: (510) 986-0877
Facsimile: (510) 986-0843

Attorneys for Appellants William Slone and Michael Merrithew

No. 08-16726

In the United States Court of Appeals for the Ninth Circuit

William Slone and Michael Merrithew,

Plaintiffs and Appellants,

vs.

Taxi Commission, City & County of San Francisco; Heidi Machen, Executive Director; City & County of San Francisco, a California public entity,

Defendants and Appellees.

APPELLANTS' EXCERPTS OF RECORD VOLUME THREE

Appeal From a Judgment after Entry of Judgment on Grant of Appellees' Motion for Summary Judgment and Denial of Appellants' Cross-Motion for Summary Judgment
United States District Court, Northern District of California
No. 07-cv-03335-JSW, The Honorable Jeffrey S. White

Philip S. Ward, Esq. (SBN 51768)
Richard G. Katerndahl, Esq. (SBN 88492)
HASSARD BONNINGTON LLP
Two Embarcadero Center, Suite 1800
San Francisco, CA 94111-3993
Telephone: (415) 288-9800
Facsimile: (415) 288-9802

Joseph M. Breall, Esq. (SBN 124329)
BREALL & BREALL LLP
1255 Post Street, Suite 800
San Francisco, CA 94109
Telephone: (415) 345-0545
Facsimile: (415) 345-0538

Elliott A. Myles, Esq. (SBN 127712)
MYLES LAW FIRM, INC.
P.O. Box 11094
Oakland, CA 94611-0094
Telephone: (510) 986-0877
Facsimile: (510) 986-0843

Attorneys for Appellants William Slone and Michael Merrithew