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.

REPLY 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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

In their Answering Brief, the appellees spend more than forty pages ignoring the language of Proposition K most inconvenient to their position. Instead, relying upon a selective history of regulatory implementation, they elevate the "full-time driving" requirement demanded of taxicab permit holders to near-absolute status.

The appellees' rhetorical revisionism, however, cannot be sustained for a number of reasons. First, it improperly attempts to rewrite the text of Proposition K as it was approved by the voters in 1978. Second, it ignores critical doctrinal developments concerning application of the "fundamental alteration/reasonable modification" dichotomy recognized under the Americans With Disabilities Act of 1990 ("ADA"). Finally, it fails utterly to justify the unrealistic limits of the Taxi Commission's concededly "short-term" relief program that purports to pass for an ADA accommodation policy in San Francisco's taxicab permit program.

I. THE "FULL-TIME DRIVING" PROVISIONS OF PROPOSITION K DO NOT AMOUNT TO AN ESSENTIAL ELIGIBILITY REQUIREMENT UNDER APPLICABLE LAW

In the appellees' Answering Brief ("AAB" 1), they extol the "full-time driving" requirement as a "central" and "longstanding, core feature" of Proposition K, the voter-enacted initiative governing taxicab service in San Francisco (S.F. Admin. Code, Appx. 6). In doing so, the appellees attempt to shift the focus of this court's analysis away from the actual language of the initiative and toward the

subsequent trail of ordinances and administrative agency resolutions that, beginning with Ordinance 562-88 in 1988, first authorized revocation of a taxicab permit for failure to fulfill the minimum driving requirement.

For decades, little attention was paid to the effect of Proposition K on disabled permit holders. Thus, when the Taxi Commission sought advice in 1999 as to whether it would violate Proposition K if the Board of Supervisors amended the Police Code to permanently dispense with the driving requirement for permit holders who cannot drive on account of disability, the City Attorney's response carefully noted that it did not "address the separate question of what accommodations the City must make under the Americans With Disabilities Act for disabled permit holders." [EOR 260-261] And, similarly, in 2000, the City Attorney's office reminded the Taxi Commission that questions regarding the application of the driving requirement of Proposition K and the City's obligations under the ADA remained to be addressed:

> The City does have the separate and independent obligation to comply with the Americans With Disabilities Act (42 U.S.C. § 12101 *et seq*.) and any other superseding state or federal statute. Compliance may mean disregarding or not enforcing all or part of a voter-approved initiative ordinance.
>
> The City, acting here through its Taxi Commission, is responsible for ensuring that qualified individuals with disabilities are not "excluded from participation in or ... denied the benefits of the services, programs, or activities" provided or offered by the City. (42 U.S.C. § 12132.) The Commission should consider whether reasonable modifications of its rules, policies, or practices would allow otherwise qualified individuals with disabilities to meet the

> "essential eligibility requirements" for participation in the program, if those modifications did not fundamentally alter the nature of those requirements or of the program. (42 U.S.C. § 12131.)
>
> 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. Those determinations will have to be made as the Taxi Commission develops its ADA policies and identifies what modifications of the driving requirement, if any, would be a reasonable accommodation for particular disabled individuals.

[EOR 80]

Then in February 2002, the Taxi Commission adopted Guidelines for Processing a Request Under the ADA for Modification of a Permit Requirement (Resolution 2002-14). [EOR 250] In July, the Court of Appeal decided *San Francisco Taxi Permitholders and Drivers Assn*. v. *City and County of San Francisco*, 2002 Cal. App. Unpub. LEXIS 6371, and in October the Taxi Commission adopted Resolution 2002-93 formally declaring for the first time 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." [EOR 264] In the meantime, as appellees recognized in their Answering Brief (AAB 11), the Commission's Executive Director was developing a proposed ADA accommodation plan patterned on the City's existing catastrophic illness program

for employees with long-term or ongoing conditions. [EOR 121] Only appellants' characterization of the proposal as an "informal policy" is in dispute, ostensibly on the ground that under the City Charter only the Commission itself can make "policy," whereas the Executive Director "manage[s]the affairs and operations of the … commission" [SER 63]

In 2003, the voters defeated Proposition N, which would have prohibited revocation of taxi permits for failure to meet the full-time driving requirement due to disability.[1] Thereafter, the appellees started going out of their way to enforce the full-time driving requirement with zeal and single-minded intensity, culminating in the Taxi Commission's adoption in 2006 of Resolution No. 2006-28 which:

(1) reiterated its 2002 declaration that "continuous driving is an essential eligibility requirement,"

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[1] When appellants objected on relevance grounds to the introduction of this latter development in evidence in the district court [EOR 38-39, 356 (Doc. 35)], appellees conceded in their Opposition to appellants' cross-motion for summary judgment [EOR 71] that it is well-established in California cases that "[u]npassed bills, as evidences of legislative intent, have little value," since the reasons for their failure may be legion and unascertainable. *Dyna-Med, Inc*. v. *Fair Employment & Housing Comm'n.*, 43 Cal.3d 1379, 1396 (1987). Nevertheless, they insisted that it was relevant as a "historical fact" that influenced their future conduct. Judging from their repeated emphasis on it, appellees evidently perceived (and still perceive) the failure of Proposition N as a mandate from San Francisco voters to sacrifice the interests of disabled medallion holders to uphold the working driver paradigm. As will be seen, however, even if appellees are right in their assessment that San Franciscans are indifferent to the fates of disabled taxicab permit holders, such indifference is among the evils that the ADA was enacted to combat. *Alexander* v. *Choate*, 469 U.S. 287, 295 (1985) [Congress intended to protect disabled persons from discrimination arising out of both discriminatory animus and "thoughtlessness," "indifference," or "benign neglect"].

(2) acknowledged that "the Commission presently allows some variation from the 90-day medical leave prescribed in Proposition K, but without clear guidelines, in instances where a medallion holder experiences a medically verified disability or catastrophic illness," and

(3) established "policies for disabled medallion-holders" allowing "[a] 120-day maximum leave per year from the driving requirement with a three consecutive year cap" and "[u]p to a full year exemption from the driving requirement once per five years for treatment for catastrophic recoverable illness…" [EOR 279]

The actual language of the pertinent provisions of Proposition K is, however, clear and precise, and, ultimately, is more important to this court's analysis than the history of the measure's regulatory implementation. Section 2 ("The Application for a Permit"), subdivision (b), requires an applicant to declare "under penalty of perjury his or her intention actively and personally to engage as a permitee-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. Subdivision (d) of Section 3 goes on to provide that among the "Facts to be Considered by Police Commission" in "determining whether or not public convenience and necessity exist for the issuance of a permit" is whether "[t]he 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." [EOR 74-75]

Had the drafters of Proposition K chosen to do so, which they did not, they could have included language in the initiative providing that permit holders who failed to personally *drive* their taxis could have their permit revoked. The drafters certainly knew how to make such a provision since, in Section 4 ("Continuous Operation"), they expressly stated that if permit holders failed to "regularly and daily *operate* their taxicab", the Police Commission should revoke the permit (absent an approved suspension of operation for up to 90 days in a 12-month period "in case of sickness, death, or other similar hardship"). [EOR 175-176]

It therefore follows, as appellants contended in their opening brief, that the district court erred in conflating the distinct requirements of "full-time driving" and "continuous operation." The concepts are different, and the drafters of Proposition K treated them differently. Even appellees begrudgingly "accept[] arguendo the linguistic distinction between driving a taxi and operating a taxi 'business.'" (AAB 32) Still, they insist, appellants' attack on the district court's judgment on this ground is no more than a "distraction" (AAB 30), since the additions to the Police Code over the years "provide[] an independent statutory basis for the Court to conclude that driving is a basic, central requirement of the City's taxi medallion program . . . " (AAB 25) and, in any event, the "continuous operation requirement"

of Section 4 or Proposition K may be read broadly enough to "encompass[] or 'reflect[]' the driving requirement."

As the appellees' argument emerges, however, it wisely shrinks from advancing the claim that subsequent legislation affords independent support for the driving requirement. Instead, they cite *San Francisco Taxi Permitholders and Drivers Assn*. v. *City and County of San Francisco*, *supra*, 2002 Cal. App. Unpub. LEXIS 6371, and *Flavell* v. *City of Albany*, 19 Cal.App.4th 1846, 1852 (1993), for the proposition that the validity of the ordinances and commission resolutions purporting to impose a personal driving requirement upon the appellants depends upon whether said "legislation properly effectuated the intent of the voters who adopted Proposition K." (AAB 24-25) *Creighton* v. *City of Santa Monica*, 160 Cal. App. 3d 1011, 1018, 1021-1022 (1984), cited by the district court [EOR 8], establishes the governing principle that where the "electorate has enacted basic policies" and, by "exercising the power of the initiative, resolved the fundamental policy questions," it is appropriate by subsequent ordinances to "clarify and implement the intent of the electorate"; in such cases, "[t]he words must be understood, not as the words of the civil service commission, or the city council, or the mayor, or the city attorney, but as the words of the voters who adopted the amendment." C*ompare Mobilepark West Homeowners Ass'n* v. *Escondido Mobilepark West*, 35 Cal. App. 4th 32, 42-43 (1995) ["We cannot say the

ordinance advanced the purposes of Proposition K when it expanded its scope and added new provisions, rather than merely implementing it," distinguishing *Creighton, supra*]; see also *Franchise Tax Bd.* v. *Cory*, 80 Cal.App.3d 772, 776 ["amendment" defined as a change in the scope or effect of an existing statute by adding to or taking away from its provisions, whether by an act purporting to amend or repeal it or by an act independent and original in form].

All of these authorities stand for the elementary proposition that the actual language of an initiative measure guides and constrains its implementation. That language is only a "distraction" when, as in this case, it has been consistently ignored or misused by the officials charged with its enforcement.

Appellants thus have no quarrel with the California Court of Appeal's holding in *San Francisco Taxi Permitholders and Drivers Assn.* v. *City and County of San Francisco*, 2002 Cal. App. Unpub. LEXIS 6371 at *17-18, that "[t]he City retains legislative power to interpret the proposition by enumerating considerations constituting good cause," including "[t]he use of this specific standard of section 2, subdivision (b) as good cause for revocation of a permit . . ."[2] But that does not obliterate the distinction between "full-time driving" and "continuous operation":

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[2] The opinion explains:

> The last sentence of section 4, subdivision (a), of the proposition authorizes the Police Commission to revoke taxicab permits "for good cause." The City retains legislative power to

> [t]he City may reasonably construe section 4 as incorporating the identical standard as section 2, subdivision (b), *in a broad range of cases*" (*id*., at *18-19) . . . [so long as it is recognized that] the general standard in section 4 does not necessarily mirror in *all cases* the quantitative driving standard of sections 2 and 3 [and] . . .specifically, . . . 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 . . . *physical disability* (*id*., at 15-16). (Emphasis added.)[3]

Moreover, the voters' specific expression in the text of Proposition K itself that revocation was called for by an unexcused failure to comply with the continuous *operation* requirement, but *not* the precisely articulated "full-time driving" pledge, is especially notable here, in light of the underlying basic policy preference identified *by appellees* (AAB 23) as having been unambiguously expressed in the ballot arguments upon which they rely as extrinsic evidence of the

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> interpret the proposition by enumerating considerations constituting good cause. [Citations.] We see no conflict between the language of section 1090 and Proposition K. . . . The use of this specific standard of section 2, subdivision (b) as good cause for revocation of a permit does not necessarily conflict with the more generally worded continued-driving standard of section 4.

Ibid.

[3] As the appellees point out (AAB 9, fn. 3), the Court of Appeal did not have occasion to address the application or effect of the ADA on San Francisco's taxicab permit program.

voters' intent. See *Mobilepark W. Homeowners Ass'n* v. *Escondido Mobilepark W.*, *supra*, 35 Cal. App. 4th at 43 fn. 6.

Thus, as appellees point out, "[t]he argument three times refers to medallions going to those who will personally drive their own cabs" (AAB 23)[4] and thereby expresses a consistent and unmistakable basic policy preference in favor of "people who actually *want* to drive a taxicab," of "driver[s] who *want*[] to . . . be allowed to engage in the taxicab business, of "cab drivers who *want* to serve all San Franciscans."

Purporting to describe the rationale of the "full-time driving" requirement, appellees state in their Answering Brief (AAB 1) that "the voters required medallion holders, who receive this valuable public asset essentially for free, to personally drive their cabs for a certain number of shifts/hours per year." It would be more accurate to say that, in exchange for an opportunity to (eventually) obtain these valuable permits, medallion holders commit themselves to careers in the San Francisco taxicab business. Certainly, however, there is no inconsistency between these clear expressions of the voters' intent and making reasonable accommodations for driver-owners who despite their intentions (and good faith

[4] The argument promises, ". . . When unused, the permits would return to the Police Commission where new permits would be issued to people who actually want to drive a taxicab." Second, it identifies the "individual taxicab driver who wants to obtain a permit and be allowed to engage in the taxicab business himself" as someone who "gets hurt by the present system." Third, it states that Proposition K "will provide an equitable arrangement for the public and for cab drivers who want to serve all San Franciscans." [EOR 180]

driving for decades in many cases) suffer the onset of disabilities which make it impossible or impracticable for them to continue to meet the “full-time driving” requirement.

II. APPELLEES ARGUMENTS GIVE SHORT SHRIFT TO THE ADA’S PURPOSES AND PRINCIPLES

The ADA "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 …" *Tennessee* v. *Lane*, 541 U.S. 509, 532 (2004). But, as appellants’ opening brief pointed out (AOB 42-46), the determination of what proposed modifications are “reasonable” and, conversely, what alterations are “fundamental” is often fraught with difficulties. Appellees’ Answering Brief fails even to acknowledge these conceptual difficulties, not to mention the different approaches or varying results that the tension between “reasonable” modifications and “fundamental” alterations has produced in the case law.

A. **PGA Tour *v.* Martin** *favors courts’ “individualized approach” to determining the effect of a proposed alteration*

In their opening brief, appellants noted that federal courts have taken two very different approaches to defining an “essential eligibility requirement” under the ADA. Under the first approach, the court seeks to ascertain the importance of the requirement to the program. The other considers the effect on the program of

granting an exemption or "alteration". *Fry* v. *Saenz*, 98 Cal.App.4th 256, 264-265 (2002).

In urging the application of the latter test to the facts of this case, appellants argued that "the need of a disabled person to be evaluated on an individual basis" mandates identification of whether the requested accommodation effects a "fundamental alteration" on the involved program – the approach taken by the cases that have considered the significance of the Supreme Court's decision in *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 675 (2001). See *Washington* v. *Indiana High School Athletic Ass'n*, 181 F.3d 840, 850 (7th Cir. 1999) [relying on *Martin* in adopting 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, inquiring "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];[5] see also *Cruz* v. *Pa. Interscholastic Ath. Ass'n.*, 157 F. Supp. 2d 485, 498-499 (E.D. Pa. 2001) ["in

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[5] The court analysed the issue thus:

> 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.

Id., at 852.

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."].

In *Washington*, the Seventh Circuit Court of Appeals followed the Sixth Circuit's earlier decision in *McPherson* v. *Michigan High Sch. Athletic Ass'n*., 119 F.3d 453, 461-462 (6th Cir. 1997), and agreed with Judge Richard Arnold's *minority* opinion in *Pottgen* v. *Missouri State High Sch. Activities Ass'n*, 40 F.3d 926 (8th Cir. 1994). Yet appellees' Answering Brief blithely and repeatedly cites the *Pottgen* majority's test for defining an "essential" eligibility requirement in terms of its "importance" to the program as though no other test exists. (AAB 17, 18, 27, 36, 37)[6]

Along with *Martin*, *supra*, 532 U.S. at 689, and *Pottgen*, appellees also rely on *Jones* v. *Monroe*, 341 F.3d 474, 480 (6th Cir. 2003) and *Aughe* v. *Shalala*, 885 F. Supp. 1428, 1433 (W.D. Wash. 1995) for the proposition that waiver of an

[6] As will be seen, the result in *Pottgen* does not necessarily depend on its mode of analysis, as courts generally accord deference to administrative bodies' determinations implicating safety.

essential eligibility requirement is not a "reasonable accommodation" under § 35.130(b)(7) as a matter of law. (AAB 37, fn. 13) Again, however, they fail to note the withering criticism to which these opinions have been subjected.

For example, in *Aughe* the district court held that a Washington rule barring a family from receiving AFDC benefits because a disabled 18 year old would not complete high school within a year was an essential eligibility requirement that justified its application to families whose children could not comply due to disabilities. *Id*. But in *Fry* v. *Saenz, supra*, 98 Cal.App.4th 256, involving California's CalWORKS program (Welf. & Inst. Code, § 11200, succeeding its former AFDC law), the Court of Appeal rejected the state's reliance on *Aughe* as "unpersuasive." *Id*., at 267. The court explained:

> Relying on *Aughe, supra*, 885 F. Supp. at page 1432, the Department asserts that plaintiffs' remedy would "essentially rewrite the statute," which (apparently by definition) would fundamentally alter CalWORKs. . . .
>
> The court in *Aughe* based this part of its analysis solely on *Pottgen, supra*, 40 F.3d 926, which upheld a school sports program's age cutoff against a challenge by an athlete whose disability had kept him in school past the cutoff age. *Pottgen* held that it would fundamentally alter school sports programs to waive the age limit, which serves essential purposes of scholastic athletics (to protect younger athletes and to discourage coaches from seeking unfair advantage by using older athletes, among others). (*Id*. at p. 929.) The only possible accommodation for the plaintiff--to waive the age limit--was therefore not "reasonable." (*Id*. at p. 930.)
>
> *Pottgen*'s analysis, which *Aughe* simply parrots (*Aughe, supra*, 885 F. Supp. at pp. 1431-1432), is inapplicable to section 11253(b).

> Unlike the age-limitation rule in athletics, which prevents older youths from competing unfairly with younger youths, elimination of the completion rule in this case would not result in disabled students competing unfairly in academics with younger students. . . . [T]he Department identifies no essential purpose of CalWORKs incompatible with paying benefits to otherwise qualified children whose disabilities may keep them from completing high school by age 19. It does not rewrite the statute to refuse effect to an inessential condition which unlawfully discriminates against the disabled.

Fry v. *Saenz, supra* at 269.

According to the law review article by Professor Kerri Lynn Stone which was discussed at some length in appellants' opening brief (AOB 46), *Jones* v. *Monroe, supra*, 341 F.3d 474, is a "poster child" decision exhibiting the consequences of the assertedly inadequate guidance afforded lower courts by the Supreme Court's opinion in *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, *supra*. As Professor Stone stated in her article *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 (2007):

> In *Jones*, the plaintiff, who was afflicted with multiple sclerosis, brought suit under Title II of the ADA after the City refused to modify its one hour parking program to afford her a free all-day parking spot adjacent to her place of employment.
>
> The majority began its analysis by defining what the City offered to the public - free short-term parking for those who wished to engage in business in the downtown business district - and its goal, noting that "the short-term, one-hour nature of the benefit is designed to help downtown businesses by making parking spaces in close proximity to them more readily available."

> The court noted that the plaintiff "has equal access to free downtown parking. She does not have free downtown parking accessible to any destination she selects or, unfortunately, her workplace." Thus, the essence of the benefit at issue, the court said, was "free downtown parking at specific locations[,] ... not free downtown parking that is accessible to wherever a citizen, disabled or non-disabled, chooses to go or work."
>
> The dissent, on the other hand, disagreed that the plaintiff's abstract ability to park in a long-term spot signified that she had "the "meaningful access' that the ADA requires." Rather, for the plaintiff to avail herself of the parking program, she required "access to the locations which non-disabled individuals can access from these parking lots," which meant that she had "the right to the benefit of meaningful access to those locations that - but for her disability - would be accessible to her through [the] parking program." The dissent made special note that it was "not conflating this benefit with free downtown parking. Rather, the majority's attempt to separate the two is artificial. Parking is only meaningful insofar as it provides individuals with access to their destinations."
>
> Perhaps, indeed, as a result of *Martin*'s constantly-shifting focus as to what its query was about, the *Jones* majority and the dissent disagreed as to: (1) the "essence" of the benefit offered by the city; (2) what amounted to equal participation in the good provided; and (3) how to properly characterize the nature of Jones's request. These disagreements all evinced the court's inability to wrap its thinking around the query before it; an inability to focus that was likely spawned by *Martin*.

Stone, *Symposium: The Politics of Deference and Inclusion*, *op. cit.*, at 1259-1260.

B. Applicability of the "fundamental alteration" defense to discriminatory policies

The discussion in appellants' opening brief (AOB 34-35) recognizing the well-established limitation on application of the "fundamental alteration" test to cases involving policies which do not *facially discriminate* against the disabled relates to this conundrum. *Townsend* v. *Quasim*, 328 F.3d 511, 518-519 (9th Cir.

2003) ["[S]uch a broad reading of fundamental alteration regulation would render the protection against isolation of the disabled substanceless."]; see also *Alexander* v. *Choate*, *supra*, 469 U.S. at 301, fn. 21 [joining in the government's observation that "[a]ntidiscrimination legislation can obviously be emptied of meaning if every discriminatory policy is 'collapsed' into one's definition of what is the relevant benefit"]. Appellees' characterization of this as a new argument which this court need not consider[7] ignores its relevance to the problem confronted by courts as they attempt 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.

Stone, *op. cit.*, *Symposium: The Politics of Deference and Inclusion*, 58 Hastings L.J. at 1263.

[7] As a matter of discretion, in most circumstances, a federal appellate court will not consider an issue not passed upon below. *In re Howell*, 731 F.2d 624, 627 (9th Cir. 1984), *citing Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976). Exceptions are made if the issue is purely one of law and the pertinent record has been fully developed, when there are significant questions of general impact or when injustice might otherwise result. *Ibid*. Since the district court considered the record developed enough to grant appellees summary judgment, it would appear all three of these exceptions apply to the instant appeal.

C. Eligibility criteria that screen out the disabled are invalid unless "necessary"

In their Opening Brief, appellants referred to 28 C.F.R. §35.130(b)(8)'s regulatory prohibition of "eligibility criteria that screen out or tend to screen out an individual with a disability" unless "shown to be necessary for the provision of the . . . program" (AOB 38). This provision cannot be blithely dismissed, as the appellees contend, by characterizing it as "a new argument." Clearly, it was made in response to appellees' claim in the district court that "[i]t makes no sense to say that driving is not a central requirement of the City's program when the City's application process is *deliberately designed to screen out persons who cannot drive at the outset*." [EOR 57] (Emphasis added.)

Indeed, despite appellees' protestations to the contrary (AAB 34), their boast that the medallion screening process is "designed" to exclude the disabled certainly sounds like an admission that the taxi permit program contains an "able-bodied" eligibility requirement! While some disabled persons may be able to drive the minimum number of hours, and some non-disabled persons may be otherwise ineligible, the driving requirement will undoubtedly "screen out" the disabled applicants to whom it is applied.

For that reason, the driving requirement is analytically indistinguishable from the federal district court decision cited in appellants' opening brief – which the appellees chose to ignore in their Answering Brief -- which invalidated an

amendment of South Dakota's constitution whose effect was to "prevent 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." *South Dakota Farm Bureau, Inc*. v. *Hazeltine*, 202 F.Supp. 2d 1020, 1042 (D.S.D. 2002), *affirmed on another ground*, 340 F.3d 583 (8th Cir. 2003).

In any event, appellees' argument about the supposed incoherency of demanding a professional commitment in the taxi industry but declining to forcibly retire a permit holder who finds himself or herself unable to meet the minimum driving hours' requirement due to disability is a *non sequitur*. As appellants pointed out in their opening brief, a distinction has been recognized in the ADA case law between denying reasonable accommodation to an applicant to a program as opposed to "a handicapped individual who has already been admitted to a program and . . . requests 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). Moreover, as has already been demonstrated in the discussion in this reply brief of the voters' intent in passing Proposition K, a perfectly coherent pragmatic judgment may underlie a choice to select and prefer applicants for permits who exhibit a *willingness* to commit themselves to full-time driving even while recognizing that some of them years

later will be rendered unable to continue with their good intentions due to disability; logically, one may value the voluntary career choice without making the driving requirement an absolute *sine qua non*.

Finally, then, appellees are reduced to arguing that, despite their effective admission that they use the full-time driving requirement to screen out permittees, they are immunized from liability for doing so since "necessary" means the same thing as "essential," and it is "essential" that taxi medallions be restricted to the able-bodied drivers capable of full-time driving. But the requisite showing of "necess[ity]" has to be more than this sort of *ipse dixit.* A review of *Pottgen, supra,* 40 F.3d at 930, and other cases relied upon by appellees in their Answering Brief (AAB 36-37) as demonstrating sufficient showings of "necess[ity]" reveals that what they have in common is fact patterns wherein courts traditionally accord special deference to administrative agencies, such as determinations of safety issues (see *Pottgen, supra; Bauer* v. *Muscular Distrophy Assn., Inc.* 427 F.3d 1326, 1332 (10 th Cir. 2005)) or professional competency training (see *Jacobsen* v. *Tillman*, 17 F.Supp.2d 1018, 1025 (D. Minn. 1998)).

III. APPELLEES' SHORT-TERM RELIEF POLICY CANNOT BE DEEMED REASONABLE AS A MATTER OF LAW ABSENT A FULLY DEVELOPED FACTUAL RECORD SHOWING IT TO BE EFFECTIVE IN LIGHT OF THE NATURE OF INDIVIDUAL DISABILITIES

Appellants complained in their opening brief (AOB 48-50) that the district court's grant of summary judgment to the City and the Taxi Commission amounted to a determination as a matter of law of the unreasonableness of any accommodation of a permittee's disability beyond the limits prescribed in Taxi Commission Resolution 2006-28 -- which appellees admit is designed to "help medallion holders who need[] time to recover from *a short-term medical problem*, such as a heart attack or broken shoulder, so that they c[an] heal and return to driving full-time" (AAB 11). (Emphasis added.) This is demonstrably inconsistent with the principle that, under the ADA, the "reasonable[ness]" of an accommodation depends on "a fully developed record" which allows the court to "determine whether any of these proposed modifications is 'effective[] . . . in light of the nature of the disability in question.'" *Heather K.* v. *City of Mallard*, 946 F. Supp. 1373, 1389 (N.D. Iowa 1996), *quoting Staron* v. *McDonald's Corp*., 51 F.3d 353, 356 (2d Cir. 1995).

Once again, appellees claim that this is a new argument made for the first time on appeal (AAB 37). Once again, they are wrong. This is evident from a comparison of the argument in appellants' opening brief and that made in their

reply brief filed in the district court [EOR 41-42].[8] For that matter, this manifest defect in the appellees' accommodation regulations was outlined in detail in paragraphs 11 and 15 in the appellants' complaint. [EOR 334-335][9]

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[8] The following argument was made in the district court:

> In Resolution 2006-28, the Taxi Commission adopted two "accommodations" for permit holders. Disabled permit holders could receive either a 120-day maximum leave per year with a three year consecutive cap or up to a full year exemption once in every five years for a catastrophic recoverable illness.
>
> First, these accommodations are not based on any known rational foundation. Deposition of Paul Gillespie, p. 97, lines 22-25; p. 98, lines 1-10. No reason is given for the Taxi Commission's choice of 120 days, instead of say, 182 days, or one year in five, instead of say one year in seven. The 120-day standard appears to be related to a similar exemption for key employees under MPC §1081.5(a). However, the key employee exemption is not limited and applies annually as long as the permit holder remains a key employee. There is no explanation of why a key employee permit holder, who is not subject to federal protection, is treated more favorably than a disabled permit holder, who is entitled to federal protection.
>
> Second, these accommodations do not comply with Defendant's "duty to make itself aware of the nature of the [permit holder's] disability; to explore alternatives for accommodating the [permit holder]; and to exercise professional judgment in deciding whether the modifications under consideration would give the [permit holder] the opportunity to complete the program without fundamentally or substantially modifying … standards." *Wong* [v. *Regents of U.C. California*, 192 F.3d 807,] 818 [(9th Cir. 1999)] (applying the standard to students in an academic program). What if a disabled permit holder's disability required greater than a 120-day leave? The ADA requires public entities to accommodate individual's disabilities, not to set artificial standards with no rational basis.

[EOR 41-42]

[9] Paragraph 11 of the complaint alleges:

> Plaintiffs' requested accommodation under the ADA is to modify or waive the enforcement of San Francisco Police Code ("Police Code") Section 1081(f) "Full-Time Driving Requirement" and Section 1090(a)(i) "Revocation of Permit" based solely on each

Appellees repeatedly insist that appellants are demanding a "waiver" or "complete waiver" of the "full-time driving" requirement (AAB 14, 18, 33, 37, 39). As the foregoing references to the record make clear, what appellants have demanded is a meaningful ADA policy which makes some reasonable accommodation(s) for longstanding and ongoing disabilities in addition to the arbitrarily limited "short-term relief" afforded by the current ADA application provisions -- which amount to an insult added to injury. The accommodations afforded disabled medallion holders should have some reasonable relation to the medical conditions they document and hold out some hope, at least, of being "effective." Appellees had and have the burden of showing that they cannot substantially accomplish the identified purposes of the taxi permit program if they

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> Plaintiff's disability and only during the period of each Plaintiff's disability, subject to annual review, while concurrently requiring each Plaintiff to comply with all other sections of the Police Code, including the "continuous operation" requirement of arranging for the daily operation of his taxicab under Police Code Section 1096(a).
>
> Paragraph 15 continues:
>
> Defendants have acted on grounds generally applicable to the class in that they have adopted a policy of refusing to make accommodations to the "full-time driving requirement" to disabled taxicab permit/medallion holders, and instead have adopted a policy for temporary illnesses, which by exclusion, effectively sanctions all taxicab permit/medallion holders with disabilities other than temporary illness that prevent or substantially limit their ability to drive their taxicabs personally.

allow accommodations for permittees in the form of mitigation of the minimum hours requirement for more realistic durations.[10]

Absent a full and complete evidentiary record, which was glaringly absent in the district court, there was no evidentiary basis upon which decisions as to the adequacy and sufficiency of any and all accommodations could be made as a matter of law. For that reason alone, the judgment entered against the appellants must be reversed and the matter remanded for further consideration in light of the governing law discussed in detail in both appellants' Opening Brief and in this reply.

IV. CONCLUSION

The District Court's summary judgment in favor of defendants and appellees and against plaintiffs and appellants needs to be reversed. Instead, the appellants (and similarly situated permit holders) should be entitled under the ADA to individualized assessments of the effects of granting them appropriate waivers and

[10] Although appellant Slone's lung disease appears to be permanently disabling, he recognizes that any exemption or waiver of the full-time driving requirement would depend on renewed showings that the disability still endured and that his permit was not otherwise subject to revocation for failure to comply with Proposition K's "continuous operation" requirement or other "good cause."

exemptions – an assessment unconstrained by the limitations embodied in the so-called ADA application protocols enacted by appellees in Taxi Commission Resolution 2006-28.

DATED: February 18, 2009

Respectfully Submitted,

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 Reply Brief of Appellants William Slone and Michael Merrithew is double-spaced and was printed in proportionately-spaced 14-point CG Times type. It contains 6,256 words (inclusive of footnotes, but exclusive of tables and this Certificate). In preparing this certificate, I relied on the word count generated by MS Word 2002.

Executed on February 18, 2009 at San Francisco, California.

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Philip S. Ward