

## Pro Se Amicus Curiae Arguments

### **NOTE**

As a layperson with no legal credentials, I file this amicus as pro se, representing only myself as an interested party. Just as named appellants Slone and Merrithew are disabled, I, too, as a Proposition K medallion holder may one day become similarly situated. I am president of an industry group known as the San Francisco taxicab Medallion Holders Association (MHA). Its predecessor group was called Permitholders and Drivers Association (PDA).

Any of the approximately 150 MHA dues-paying members --- or the additional 850 or so other K medallion holders --- might become disabled at any point. Ours is a particularly dangerous occupation, known to have very high rates of homicides and assaults against taxi drivers. Exposure is very high relative to the possibility of major injury or disability resultant from high-speed vehicular crashes. Job-related disability is not uncommon for long-term taxi drivers, whose spinal cords and internal organs take a pounding over time. Given that K medallions were obtained upon a sworn pledge of intention to drive full-time, I pray the Court allow disabled

medallion holders be allowed simply to operate their permits whenever disabled from driving.

## **SUMMARY**

Two arguments follow. One is submitted *arguendo*, that principles of equity and detrimental reliance require grand-fathering aspects, in the event the Ninth Circuit affirms the finding by the District Court that the Taxi Commission's essential eligibility requirement (EER, hereafter) established in year 2002 and refined four years later via Resolution 2006-28, is in fact legal and valid. The second argument is that the City and County of San Francisco (CCSF), through actions taken by its Taxi Commission and City Attorney's Office, has created policy which violates the Americans with Disabilities Act (ADA) by misinterpreting the plain language of Proposition K, and also by having made a series of miscodifications of its taxi law into the Municipal Police Code (MPC), which, in effect, puts K and the MPC at odds with one another. For ready reference, brief quotes taken from the eight documents attached as an addendum are circled in red ink.

## **ARGUMENTS**

FIRST ARGUMENT (ARGUENDO): DETRIMENTAL RELIANCE AND  
EQUITY PRINCIPLES REQUIRE GRAND-FATHERING IN THE  
EVENT THE NINTH CIRCUIT AFFIRMS THE DISTRICT COURT'S  
RULING

Generally, principles of fairness require that new rules and interpretations be applied prospectively --- going forward --- not retroactively upon persons who have made major commitments and decisions predicated upon prior rules and interpretations. I quit my job as a San Francisco taxicab driver in 1976 to accept a position as a USDA personnel manager in Phoenix, Arizona. In 1978, I transferred with promotion to be a personnel and safety program manager with USDA in Berkeley, California.

In 1983, I became disenchanted with my occupation, deciding to drive taxi once again in San Francisco, with the intention of mulling over the issue of what my new career path might be. I then became aware that taxi law had changed during my absence, with medallions now being issued free of charge, except for nominal processing fees. I read the law, which requires applicants to pledge an oath of intention to drive full-time. There is a

nominal fee required to apply for a medallion. The requisite sworn pledge is part of the application form itself.

I signed onto the medallion applicant waiting list, drove full-time for 13-plus years, and received a medallion in 1997. I have driven full-time ever since.

I enjoy serving, and mingling with, the public as a taxi driver, but I chose driving as my career only with the understanding that I would be allowed to operate my medallion as a permitted business in the event I became disabled from driving at some future point, so long as any analysis of my sworn pledge would reveal its truthfulness. For two ensuing decades, I observed how the typically older K medallion holders who became unable to drive were in fact allowed to retain their medallions, which thereby provided *de facto* pension income. In the event the Ninth Circuit affirms the District Court ruling, I assert that principles of equity and detrimental reliance must constrain implementation of the relatively new EER (“continuous driving”) prospectively. Otherwise, retroactive application of the EER will constitute manifest injustice and cause irreparable harm.

Because the Taxi Commission’s Resolution # 2006-28 is the first document which explicitly describes the perimeters of who is considered a “continuous driver,” I submit that the cut-off date for grand-fathering be set

accordingly. This argument becomes moot, however, should you properly reverse the District Court and find that disabled medallion holders are subject to full ADA protection that allows medallion retention so long as the permitted business itself operates continuously in public service.

SECOND ARGUMENT: ADA REQUIRES THAT THE EER OF  
“CONTINUOUS DRIVING” BE ELIMINATED. THE DISTRICT COURT  
ERRED IN ITS ANALYSIS THAT THE EER IS LEGAL AND VALID,  
AND ITS RULING MUST BE REVERSED

**(1) The District Court used incorrect ballot materials in performing its litmus test analysis required by ADA case law to determine the validity and legality of the designated EER in question.**

In lay terms, an EER is a program element so vital to the program’s purpose that ADA principles may be waived. For example, “extreme physical fitness” is a legal and valid EER for the position of a firefighter, who must race up stairways during fires. As such, a wheelchair person is disallowed from applying, specifically due to being disabled. However, applying the same EER to a disabled applicant for a Public Information

Officer position --- wherein the applicant is eminently qualified and the job duties are sedentary in nature --- is illegal under ADA.

Likely, the brief being submitted by the plaintiffs' / appellants' attorneys will cite ample ADA Federal case law precedent. *Fry v. Saenz* is a year 2002 State Court decision. Its quintessential finding is stated on page five:

“A program eligibility requirement which could discriminate against the disabled may be deemed essential only if the program’s purposes could not be achieved without the requirement.”

*Fry* and similar Federal rulings suggest analysis of designated EER’s based upon such factors as the actual language of the law under review and how its purposes may have been articulated or advertised. The District Court properly performed its required analysis --- sort of a litmus test for the EER’s validity and legality --- by examining information from the year 1978 Voters Pamphlet. However, the District Court did not utilize the correct voters pamphlet document as a reference standard in performing its review.

Whereas attorneys for the plaintiffs / appellants had submitted the 1978 neutral analysis by the Ballot Simplification Committee (Document # 1 in the Addendum), the District Court opted instead to use the document

submitted by CCSF; namely, a paid argument in favor of Proposition K (Document # 2). Document # 3, taken from the Department of Elections website and bearing the title “Ballot Simplification Committee,” describes the highly professional makeup of the committee, its diversity, and the stringent qualifications for its members. The initial sentence reads,

“San Francisco’s Ballot Simplification Committee plays a vital role in informing the voters about local ballot measures.”

Document # 1, which should have been chosen as the reference document for analyzing the EER, states the purposes of Proposition K explicitly:

**“A YES VOTE MEANS:** If you vote yes, you do not want taxicab medallions to be sold on the open market and you want to phase out ownership by companies.”

Nothing in the stated purposes above can justify a conclusion that “continuous driving” by medallion holders is the proper EER for Proposition K. Had the District Court properly selected the Ballot Simplification Committee analysis as its reference document for review, it would have been

compelled to rule that the currently designated EER --- “continuous driving” --- is invalid and illegal under ADA.

The District Court utilized Document # 2 instead, which bears this disclaimer:

“Arguments printed on this page are the opinions of the authors and have not been checked for accuracy by an official agency.”

Given the major respect that readers of ballot pamphlet materials undoubtedly afford to the highly-respected work of the Ballot Simplification Committee, as opposed to a disclaimed, paid political argument, the District Court erred in choosing to utilize the pamphlet document submitted by CCSF, rather than the submission by the plaintiffs / appellants. The Ninth Circuit Court need rule the current EER as in violation of ADA.

Even so, the District Court misconstrues the paid argument that it did analyze. The purposes of Proposition K as stated are to allow for “Free enterprise principles and non-transferable taxicab permits.” It further reads,

“When unused, the permits would return to the Police (now, Taxi) Commission where new permits would be issued to people who actually want to drive a taxicab.”

Firstly, the permits of disabled medallion holders that remain in continuous operation serving the public are not “unused,” so it is faulty interpretation to rule that the paid ad suggests such permits would need be returned. Secondly, the District Court apparently bases its ruling by assuming a direct nexus between a person’s being disabled and his or her desire to actually drive a taxi, yet it fails to explain how or why there might be such a connection.

**(2) Miscodification of Proposition K into the MPC cannot allow CCSF later to bootstrap its arguments by quoting the MPC as law.**

Ordinances 562-88 and 111-04 in various sections expand the driver pledge from Proposition K, section 2(b), into something it is not --- an eternal requirement of mandatory compliance sans any consideration of mitigating circumstances. For example, Ordinance 562-88, in MPC section 1090(a)(i), mandates revocation whenever “The permittee ceased to be a full-time driver.” This is miscodification.

In the hypothetical case of a female taxi driver who has driven full-time for 25 years and is rear-ended and paralyzed on her initial work shift as a medallion holder, CCSF cannot be allowed to revoke the medallion in short

order by virtue of its miscodified MPC. The Proposition K requirement for full-time driving is the applicant's oath of intention. Absent regulatory development of reasonable, criteria-based policy, truthfulness of intent must be measured and determined on a case-by-case basis. In the provided example, it is irrefutable that the medallion holder was entirely truthful in her oath. CCSF cannot be allowed to amend Proposition K by legerdemain tactics. Sworn intention equates to itself, not to mandatory compliance. The District Court errs on page 6 of its ruling in concluding that,

“The pledge requires that the applicant will comply with his or her declared intent.”

On the contrary, **pledges** --- by virtue of their own nature --- require that standards of compliance measurement include the consideration of mitigating circumstances. Conversely, the same is not true of **mandatory compliance requirements**. The two terms are profoundly separate and distinct. The Ninth Circuit should regard all MPC sections wherein the pledge has been transubstantiated into an endless requirement of mandatory compliance as miscodification and erroneous interpretation of Proposition K language.

Similarly, MPC section 1081(f) (ii), which pertains to driving responsibilities, repeats the same miscodification, and additionally errs --- as noted in subsequent argument --- by cross-referencing MPC section 1096(c), which subsection limits variances to continuous operation requirements, rather than personal driving responsibilities.

**(3) The allowable continuous operation variance of “10 / 90 days” is totally unrelated to the issue of medallion holder driving responsibilities.**

The District Court, as did the Appellate Court in the prior litigation (PDA, et al v. CCSF, et al), erred in ruling that the “10 / 90” provision applies not only to continuous operation of the taxicab business operation, but also by presumed extension to medallion holder driving responsibilities. Attached Document # 4 reveals that the 10 / 90-day operational discontinuance variance provision is contained in the year 1976 MPC and that the San Francisco Supervisors actually approved it in 1970. As no driving responsibilities were required of medallion holders prior to 1978’s Proposition K, necessarily the language in the earlier code applies solely to the business itself being in continuous operation. Proposition K’s author

appropriated the language, nearly verbatim, into section four of K, where it belongs, but omitted it from section two, where it does not fit. CCSF cannot be allowed to subsequently assert that the language somehow implicitly belongs in section two, and to set policy as though the language were actually there --- given that it is not --- presumably in order to satisfy its own current ideological bent.

On page two of its ruling, the District Court misinterprets the law in adopting the quoted conclusion that,

“At the time of its passage, the only authority for modification of the Proposition’s driving requirement was the 90-day hardship waiver provided in the text of the Proposition and codified in the Police Code. S.F. Admin. Code Appx. 6 subs. 4 (a); S.F. Police Code subs. 1096 (c); Gillespie Decl. at ... 6.”

Although the legal opinion offered by taxicab driver Gillespie is egregiously incorrect, the District Court, remarkably, assumes its correctness. The referenced sections --- Proposition K, section 4(a) and MPC 1096 (c) --- clearly apply only to **operational** variances, not to any aspects of vehicular **driving** responsibilities. Similarly, CCSF illegally amends

Proposition K by creating MPC section 1081(f), so as to require full-time driving evermore. Subsection 1081(f)(ii) cross-references the 90-day operational variance limitation and dictates its applicability also as setting a strict limitation on variance allowable to “the driving requirement.” This illegality by CCSF need be corrected.

Later in the same paragraph on page two of its ruling, the District Court states that,

“A permit holder who abandons his business for 10 consecutive days may have his permit revoked, but can get permission to ‘suspend operation pursuant to such permit’ for up to 90 days each calendar year ‘in the case of sickness, death, or similar hardship.’ *Id.* After the passage of the Americans with Disabilities Act, 42 U.S.C. subs. 12132 (“ADA”), further short-term exemptions were enacted including the 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. (Defendants’ Request, Ex. N, Resolution No. 2008-28.)”

In the above passage, the District Court exhibits its massive and profound misunderstanding of the situation. Sentence one correctly denotes the 10 / 90 language as applicable to an operational variance. Inexplicably, sentence two flip-flops and assigns the language instead as pertaining to “the driving requirement.” It is unclear as to how, and bizarre that, CCSF has persuaded the District Court that “continuous operation” of a taxicab business and “the driving requirement” are synonymous terms. What CCSF is being allowed to do is to use the two markedly different terms interchangeably as a basis for claiming that Proposition K contains strict limitations on how much driving reduction a (disabled) medallion holder is allowed prior to revocation, which in turn associates a degree of credibility --- which otherwise does not exist -- with its bogus EER.

“Continuous Driving” does not exist as a term in Proposition K. Yet, it is the designated EER. The example of “death” in the hardship variance provision language quoted above necessarily refers to the death of a person whose involvement is integral to the operation of the permit, not to any 90-day variance to “the driving requirement” that may be afforded to a dead medallion holder, who obviously will never return to driving, and whose death, in any event, by law reverts the medallion back to the City for re-

issuance to another waiting list applicant. The District Court ruling is legally incorrect, it violates ADA, and so the Ninth Circuit Court need reverse it.

**(4) The District Court erred in failing to understand the material differences between operating a taxicab business and driving a taxicab.**

On page seven of its ruling, the District Court makes factual errors of interpretation in opining that,

“... there is no question that the plain language of the Ordinance requires the holders of the permit to operate their taxicab full-time. 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.”

The District Court fails to understand the various regulatory compliance requirements faced by a medallion holder. Here is a partial list:

liability insurance -- worker’s compensation insurance -- vehicle purchase -- maintenance and repair of vehicles -- purchase of a spare vehicle -- off-street parking -- payment of various fees -- fax machine -- lost and found operation -- interaction with Police Taxi Detail and Taxi Commission -- hiring, screening, training, and disciplining taxi drivers -- shift-scheduling -- securing a color scheme -- radio dispatch service -- providing 24 / 7 taxi service -- participation in paratransit program -- 24 / 7 telephone contact availability -- records maintenance, including six years of waybill storage for every driver -- assorted required periodic reports.

Document # 5 is the newspaper account of a horrific accident. I know the full details of the accident and assert that pressure due to the bogus EER was a major causal factor, yet that is impossible to prove. I assert further that the District Court’s categorization of medallion holder responsibilities as

“peripheral tasks” is a gross misrepresentation. Aside from the horror involved, the accident resulted in a pay-out of approximately \$14,000,000. Responsibility for liability insurance is just one item from the list above, and it is by no means “peripheral” in nature. It also illustrates why CCSF, which asserts its ownership of the medallions, fails to exercise its presumed prerogative to municipalize the industry, or otherwise be the agent responsible for fulfilling all regulatory requirements while actually running the taxicab industry operation.

The District Court’s assertion that “operate” and “drive” are basically synonymous is incorrect. Again, CCSF cannot be allowed to equate operation with driving --- and to assume that associated regulatory standards are identical, thereby assigning operational variance limitations also as “driving requirement” limitations --- so as ultimately to justify its EER which institutionalizes discrimination against disabled medallion holders.

Document # 6 describes the ADA-compliant system articulated by the Taxi Commission resultant from an edict by the City’s Board of Appeals (BOA) --- as discussed in earlier Plaintiffs’ briefs --- after the BOA had overturned three revocations by the Taxicab Commission of disabled medallion holders. The Taxi Commission had acknowledged that the revocations were processed **because** the individuals were disabled and

therefore could not comply with the EER or MPC standards requiring full-time driving.

Document # 7 reveals the malfeasant policy that was implemented by a subsequent Taxi Commission executive director, Ms. Machen, who hired her housemate of 15 years, Mr. Bettencourt, and assigned him to be in-house ADA coordinator. Without the knowledge or consent of any of the taxi commissioners, Ms. Machen elected not to implement the previously announced ADA-compliant system that was to have Public Health Director, Dr. Mitch Katz, rule on ADA-accommodation requests. Instead, Machen allowed Bettencourt, who has no medical training or qualifications, nevertheless to make medical determinations based upon documents provided by physicians for review on behalf of their medallion holder clients who were applying for ADA-accommodations from driving requirements. In the enclosed document, Bettencourt assigns an apparently legally-blind medallion holder a 50% reduction in his “driving requirement.”

Whereas it is not necessarily the Ninth Circuit Court’s responsibility to root out malfeasant policy, ensure public safety, or protect taxi companies from financial ruin, it is within the Court’s purview to rule upon the legality of the designated EER, which if properly decided, may well cause the major problems described above to cease.

**(5) Other documents also indicate that the EER is bogus.**

(a) In document # 8, on page two, the City Attorney steers the Taxi Commission towards its ultimate decision to promulgate an arbitrary and capricious EER that institutionalizes discrimination against disabled medallion holders by suggesting that,

“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.”

Notably, this document was not in circulation initially, but rather was treated as a confidential attorney-client communication. It was released two or three years ago in response to a formal Sunshine Ordinance request for internal communication documents related to disability in our industry that was submitted by medallion holder Anne McVeigh.

The deviousness of the City attorney is apparent near the bottom of page one, wherein three dots are inserted to indicate missing language, which in

this instance is the single word “to,” which, were it present, would render the syntax ungrammatical, causing the reader to need access to the first clause of the law subsection that is being quoted. Whereas the City attorney makes it appear that the language applies to a **mandatory compliance requirement**, in fact the initial clause --- which is not provided in advising the taxi commissioners --- specifies that the language instead describes a **sworn pledge of intention**.

Finally, the advice letter also proves that full-time driving was not an EER at the time it was written.

(b) MPC section 1081.5 allows healthy key personnel in taxi companies greater reductions in driving requirements than those afforded to disabled medallion holders in the EER as refined via Resolution 2006-28. Arguably, this further weakens the position that the EER is valid or even necessary or important.

(c) In both Proposition K and the relevant MPC sections, it is clear that issuance of new medallions under the Public Convenience and Necessity (PC&N) process is based upon citizenry service needs. The Court may find it instructive to consider the broader PC&N purpose as context for

determining the validity of “continuous driving” as an EER. There is no indication that forcing disabled or partially-disabled medallion holders to drive full-time improves public service. To the contrary, having more taxi shifts assigned to able-bodied drivers logically will improve service.

## **CONCLUSION**

Were the Ninth Circuit Court to affirm the District Court ruling, Proposition K permits issued prior to Resolution 2006-28 should be grandfathered into the prior, presumptive EER of “Continuous Operation,” which is the actual title of section four of K. However, for the aforementioned reasons, the Court must reverse the District Court ruling.

Around the globe, ADA is a beacon for the USA, shining its light upon our society’s widely-recognized spirit of compassion. A major tenet and purpose of ADA is to provide disabled persons with dignity and job-related income wherever possible. The instant case fits like a glove. Career driver-permittees, who swear the intention to drive but who subsequently are unintentionally disabled from performing the physical labor of driving a taxicab, can nonetheless continue to keep their permitted business in

continuous operation to serve the public, which also happens to be the stated requirement in the law.

I pray the District Court ruling be reversed.

-----

Carl Macmurdo, SF medallion holder # 906,  
submitted as pro se amicus curiae

-----

Date

